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1 Federal Litigation Guide Preface

Preface

The optimum method for an attorney to learn the art of federal litigation or improve on his or her existing skills would be to have the benefit of the years of experience of seasoned federal litigators. While substantive law problems are ready subjects for scholarly research, the practical "how to's" of federal trial practice are not as easy to come by. Most aspiring or practicing trial lawyers gain their practical knowledge through the rough school of trial and error. But the "error" portion of the trial and error system is often a painful process for attorney and client alike, especially in the high-stakes field of federal litigation.

The goal of the *Federal Litigation Guide*is to provide all who are or would be litigating in the federal courts with the "voice of experience" of top federal litigators. The focus of the set is not the presentation of the law governing federal practice-that is the province of *Moore's Federal Practice*.The focus of the *Federal Litigation Guide*is guidance on the practical, strategic aspects of federal court litigation-*how*to proceed throughout the litigation and *how*to use the rules and statutes governing federal practice to your best advantage.

As any litigator knows, there are many means to a given end. The choice of the right course, and the correct utilization of the available options, often makes the crucial difference in bringing a lawsuit to a satisfactory conclusion. To choose the right course you must understand the options open to you and the advantages and disadvantages of each. Knowing the law is only the first step; you must know how best to *use*the law in any given circumstance.

To accomplish its goal most effectively, the *Federal Litigation Guide*is organized to parallel the usual course of federal court litigation. Volume One covers pre-trial aspects of federal litigation, including pleadings, motion practice, and provisional remedies. Volume Two discusses discovery in the federal courts, including depositions, interrogatories, production and management of documents, and requests to admit. Volume Three covers all aspects of the trial itself from initial planning and preparation to closing argument, jury deliberation, and verdict. Volume Four covers post-trial considerations, including judgments, post-trial motions, relief from judgment, and appeals. Coverage of settlements is also included in Volume Four.

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What's New

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Scope

HIGHLIGHTS

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Recent Case Law Developments.
The publication has been updated with recent case law developments.
Expanded Coverage.
The publication has been expanded to include coverage of the Equal Access to Justice Act.
Amendments to Fed. R. Civ. P. (effective 12/1/10).
The publication has been updated to include new amendments to *Fed. R. Civ. P. 8*, *26*, and *56* (effective 12/1/10).

FEDERAL RULES AMENDMENTS (effective 12/1/10)

Rule 8(c)(1). Under amended Rule 8(c)(1), discharge in bankruptcy is no longer an enumerated affirmative defense which must be included in a responsive pleading.

Rule 26(a)(2)(B). Rule 26(a)(2)(B) is amended to specify that expert disclosure is only required regarding "facts or data" considered by the expert witness, instead of "data or other information" under the previous version of the Rule.

Rule 26(a)(2)(C). For those expert witnesses who do not need to provide an expert report, the party (not the expert witness) must disclose the subject matter of the expected expert testimony and a summary of the expected facts and opinions.

Rules 26(b)(4)(B)&(C). The work-product protections of Rule 26(b)(3)(A)&(B) are expanded to limit discovery of drafts of expert disclosure statements or reports and, with three exceptions, of communications between expert witnesses and counsel regardless of form (oral, written, electronic, or otherwise). The exceptions are for those parts of the attorney-expert communications regarding compensation, identifying facts or data considered by the expert in forming the opinions, and identifying assumptions relied on by the expert in forming the opinions.

Rule 56. Rule 56 is revised to improve the procedures for presenting and deciding summary judgment motions, and to make the procedures more consistent with those already used in many courts. The procedural changes do not affect the standard for granting summary judgment. Subsections of the Rule have been renumbered, and new sections have been added for clarification purposes.

Amendment to Civil Form 52 - Report of Parties' Planning Meeting (effective 12/1/10). The form has been amended to include in the discovery plan the handling of electronically stored information.

Case Law The publication has been updated with recent case law developments, including several new Supreme Court decisions.

Corporate Principal Place of Business. The Supreme Court held that for purposes of federal diversity jurisdiction, a corporation's principal place of business is where its "high level officers direct, control, and coordinate the corporation's activities." *Hertz Corp. v. Friend, __ U.S. __, 130 S. Ct. 1181, 175 L. Ed. 2d 1029 (2010)* (See *§ 1.32[3]*.)

Attorney's Fees and Lodestar Adjustments. The Supreme Court held that the calculation of an attorney's fee based on the lodestar method may be increased due to superior performance, but only in extraordinary circumstances. Enhancements should not be awarded without specific evidence that the lodestar fee would not have been adequate to attract competent counsel. The Court set forth specific factors to consider with regard to enhancements. *Perdue v. Kenny A., __ U.S. __, 130 S. Ct. 1662, 176 L. Ed. 2d 494 (2010)* (See *§ 47.74*.)

Class Action Certification. The Court held that the federal class action rule, Civil Procedure Rule 23, trumped a New York law prohibiting class actions that seek to recover statutory penalties or minimal recoveries. *Shady Grove Orthopedic Assocs. v. Allstate Ins. Corp., __ U.S. __, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010)* . (See *§ 42.30*.)

Class Arbitration Requires Arbitration Agreement Specifically Providing for Class Arbitration. The Supreme Court held that the Federal Arbitration Act (FAA) prohibits arbitrators from imposing class arbitration on parties unless an arbitration agreement specifically provides for it. *Stolt-Nielsen S.A. v. AnimalFeeds International Corp., __ U.S. __, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010)*. (See *§ 42.230*.)

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§ 1.104 Leave of Court Not Required If Third-Party Complaint Is Served Within 14 Days After Serving Answer

§ 1.105 Asserting Additional Claims Against Third-Party Defendant

§ 1.106 Asserting Claims Against Original Plaintiff
[1] Third-Party Defendant May Assert Claims Against Plaintiff
[2] Claims Must Be Transactionally Related to Main Claim
[3] Deadline for Bringing Claim Against Original Plaintiff
[4] Joining Additional Claims Against Original Plaintiff
[5] Response by Plaintiff
[6] Court Must Have Subject Matter Jurisdiction Over Claim Asserted Against Original Plaintiff

§ 1.107 Impleading New Parties

§§ 1.108 through 1.119 [Reserved]

§ 1.120 Amending Once as a Matter of Course

§ 1.121 Moving for Leave to Amend

§ 1.122 Amendment Freely Permitted

§ 1.123 Effect of Amendment

§ 1.124 Responding to Amended Pleading

§ 1.125 Supplemental Pleadings Focus on New Events

§ 1.126 Supplementation Requires Leave of Court

§ 1.127 Adding Omitted Counterclaim by Amending Pleading

§§ 1.128 through 1.139 [Reserved]

§ 1.140 Understanding Misjoinder and Non-Joinder
[1] Non-Joinder
[2] Misjoinder
[3] Dropping Parties to Cure Lack of Diversity
[4] Relationship Between Rule 21 and Rule 25

§ 1.141 Moving to Add Party
[1] Determining Grounds for Adding Party
[2] Moving to Amend Complaint
[3] Deadline for Adding Party
[4] Notice and Service of Motion to Add Party
[5] Order Adding Party Must Be on Just Terms

§ 1.142 Opposing Motion to Add Party

§ 1.143 Moving to Drop Party
[1] Grounds for Motion to Drop Party
[2] Avoiding Prejudice
[3] No Deadline for Motion to Drop Party
[4] Court May Dismiss Party but Not Action
[5] Effect of Dropping Party

§ 1.144 Severing Claim to Cure Misjoinder
[1] Grounds for Severing Claim
[2] Court's Discretion
[3] Effect of Severance

§ 1.145 Substituting Parties
[1] Scope of Rule 25 Substitution
[2] Rule 21 as Alternative to Rule 25 Substitution
[3] Procedure for Substitution on Death of Party
[3.--1] Determination of Whether Claim Survives is a Function of Substantive Law
[3.--2] Deadline for Filing Motion to Substitute Based on Death of Party
[3.--3] Substitution on Death of Party Is Discretionary
[3.--4] Serving and Filing Suggestion of Death

§ 1.146 Substitution for Incompetent Party

§ 1.147 Substitution on Assignment of Interest

§ 1.148 Effect of Substitution

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CHAPTER 1 Pleadings *

1-1 Federal Litigation Guide Scope

Scope

SCOPE

This chapter examines pleadings in the federal court. After a brief look at whether the federal forum should be selected when a choice exists, the following topics are covered:

- **Understanding personal jurisdiction requirements**
- **Pleading Subject Matter Jurisdiction**
- **Drafting and serving the summons and complaint**
- **Demanding a jury**
- **Removing a state court case to federal court**
- **Responding to the complaint, including cross-claims and counterclaims**
- **Impleader (third-party practice)**
- **Amending and supplementing pleadings**
- **Adding, dropping, and substituting parties**

For expanded coverage of the topics covered in this chapter, ***see*** the following chapters of Moore's Federal Practice, (Matthew Bender 3d ed.):

- Ch. 4, ***Summons***
- Ch. 8, ***General Rules of Pleading***
- Ch. 12, ***Defenses and Objections--When and How Presented--By Pleading or Motion--Motion for Judgment on Pleadings***

- Ch. 14, ***Third-Party Practice***
- Ch. 15, ***Amended and Supplemental Pleadings***
- Ch. 25, ***Substitution of Parties***
- Ch. 38, ***Jury Trial of Right***
- Ch. 107, ***Removal***
- Ch. 108, ***Territorial Jurisdiction: Jurisdiction Over Persons and Property***

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CHAPTER 1 Pleadings *
A. Understanding Federal Procedural Framework

1-1 Federal Litigation Guide § 1.01

§ 1.01 The Judicial Code

Title 28 of the United States Code, commonly known as "the Judicial Code," governs judicial procedure in federal courts, as well as the organization of the judiciary. Additionally, the Judicial Code addresses federal jurisdiction and venue. n1 A surprising amount of detail is contained in the Judicial Code; it should be consulted even on subjects contained in the Federal Rules of Civil Procedure.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureJurisdictionGeneral OverviewCivil ProcedureVenueGeneral OverviewConstitutional LawThe JudiciaryJurisdictionGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1 et seq.*

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CHAPTER 1 Pleadings *
A. Understanding Federal Procedural Framework

1-1 Federal Litigation Guide § 1.02

§ 1.02 Federal Rules of Civil Procedure and Federal Rules of Evidence

The Federal Rules of Civil Procedure apply in all suits of a civil nature brought in federal court absent a direct expression by Congress of contrary intent. n1 Requirements imposed by the Federal Rules must be followed throughout the litigation of each case pending in federal court. n2 The Federal Rules of Civil Procedure are designed "to secure the just, speedy, and inexpensive determination of every action and proceeding." n3

The Federal Rules of Evidence govern the admissibility and use of evidence in federal district courts. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewEvidenceGeneral OverviewEvidenceProcedural ConsiderationsRulings on Evidence

FOOTNOTES:
(n1)Footnote 1. *In re Davis, 194 F.3d 570, 577-579 (5th Cir. 1999)* .

(n2)Footnote 2. *Fed. R. Civ. P. 1 et seq.*; *see also 28 U.S.C. § 2072* (Rules Enabling Act).

(n3)Footnote 3. *Fed. R. Civ. P. 1.*

(n4)Footnote 4. Fed. R. Evid. 1 et seq.

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CHAPTER 1 Pleadings *
A. Understanding Federal Procedural Framework

1-1 Federal Litigation Guide § 1.03

§ 1.03 Local District Court Rules, Standing Orders, and Individual Judge's Rules

Local district court rules may govern practice in a manner consistent with the Federal Rules of Civil Procedure. n1

Local district court rules govern many aspects of federal practice including pleadings, form and format of filings, discovery, motion practice, pretrial conferences, settlement, arbitration, and trial procedure. The practitioner must be alert for changes to local rules, although most districts provide notice and comment period for proposed changes.

Likewise, district courts and individual judges may promulgate general orders and standing orders regulating court administration, practice, and procedure, provided the orders are not inconsistent with the Federal Rules of Civil Procedure, federal statutes, and the district court's local rules. n2 Any standing orders and rules of the judge assigned to a case should be obtained from court staff at the outset of litigation. Individual judge's rules may contain idiosyncratic preferences as to formatting papers and other minutiae, and should not be overlooked.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureJusticiabilityStandingGeneral OverviewCivil ProcedurePleading & PracticeGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedurePretrial MattersGeneral OverviewGovernmentsCourtsRule Application & Interpretation

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 2071*; *Fed. R. Civ. P. 83*; *see also Frazier v. Heebe, 482 U.S. 641, 107 S. Ct. 2607, 96 L. Ed. 2d 557 (1987)* .

(n2)Footnote 2. *Fed. R. Civ. P. 83(b).*

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CHAPTER 1 Pleadings *
A. Understanding Federal Procedural Framework

1-1 Federal Litigation Guide § 1.04

§ 1.04 Structure of Federal Court System: Federal Courts Constitutionally Mandated and Congressionally Created

Article III of the United States Constitution explicitly authorized the creation of the United States Supreme Court, giving Congress the authority to structure a system of "inferior courts." Congress accordingly created a federal court system consisting of the following:

- **District Courts.** The United States District Courts are trial courts of original jurisdiction. There is at least one district court in each state of the United States.

- **Courts of Appeals.** The United States Courts of Appeals, also known as the circuit courts, review the decisions of federal district courts. Each of the 13 circuit courts reviews cases from the district level within the circuit.

The United States Supreme Court reviews decisions of the circuit courts, as well as decisions of state courts that turn on issues of federal law. n1

Congress also exercised its constitutional authority under Article I to create a system of specialized "legislative" courts, such as the tax courts. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawCongressional Duties & PowersGeneral OverviewConstitutional LawThe JudiciaryGeneral OverviewConstitutional LawThe JudiciaryCongressional LimitsConstitutional LawThe JudiciaryJurisdictionGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *U.S. Const. Art III, § 1*; *28 U.S.C. §§ 1291*, *1292*, *1330*; *see, e.g., Northern Pipeline Co. v. Marathon Pipeline Co., 458 U.S. 50, 87 (1982)* .

(n2)Footnote 2. *U.S. Const., Art. I, § 8, cl. 18*; *see, e.g., Freytag v. Commissioner, 501 U.S. 868, 889, 111 S. Ct. 2631, 115 L. Ed. 2d 764 (1991)* (tax courts).

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CHAPTER 1 Pleadings *
A. Understanding Federal Procedural Framework

1-1 Federal Litigation Guide § 1.05

§ 1.05 Jurisdiction of Federal and State Trial Courts

[1] Federal Courts and State Courts Share Jurisdiction Over Most Claims Arising Under Federal Law

With certain exceptions, both federal and state courts may hear claims arising under federal law, although state law jurisdiction over federal claims may be limited by Congress. n1

[2] Federal District Courts Are Courts of Limited Jurisdiction

[2.--1] Federal Question Jurisdiction and Diversity Jurisdiction

Federal district courts have original, but not exclusive, jurisdiction over most cases arising under the Constitution and federal laws and treaties. n2 Additionally, federal district courts have original, but not exclusive, jurisdiction over cases arising under state law that involve citizens of different states, or citizens of the United States and those of foreign states, as long as the amount in controversy exceeds $75,000, exclusive of costs and interest. n3

[2.--2] Supplemental Jurisdiction

When a district court has proper jurisdiction over a civil action, it also has supplemental jurisdiction over all other claims that are so related to claims in the original action that they form part of the same case or controversy. n4

Once it is determined that a supplemental claim is related to the claim within the court's original jurisdiction such that they form the same case or controversy, supplemental jurisdiction over the related claim is mandatory. The court has some discretion to decline to hear a claim over which there is supplemental jurisdiction, if the claim falls within one of circumstances enumerated in *28 U.S.C. § 1367(c)*. n5

The supplemental jurisdiction statute grants supplemental jurisdiction over all claims transactionally related to the claim originally invoking federal court jurisdiction. In diversity of citizenship cases, however, the statute imposes severe limitations on *plaintiffs*' ability to use supplemental jurisdiction. n6

Supplemental jurisdiction in diversity cases is unavailable in three situations: n7

- Supplemental jurisdiction does not apply to claims asserted *by plaintiffs* joined under Rule 19

(necessary parties)

- Supplemental jurisdiction does not apply to claims asserted *by absentees* seeking to intervene as plaintiffs under Rule 24

- Supplemental jurisdiction does not apply to claims asserted *by plaintiffs* against parties joined under Rule 14 (third-party practice or impleader), Rule 19 (necessary parties), Rule 20 (proper parties), or Rule 24 (intervention)

[3] State Courts May Not Hear Cases Over Which Federal Courts Have Exclusive Jurisdiction

Congress has reserved to the federal courts exclusive original jurisdiction over certain types of claims, such as those arising under the Bankruptcy Code. State courts lack jurisdiction to hear matters falling within this exclusive jurisdictional grant. n8

[4] Federal District Courts Lack Jurisdiction Over Certain State Law Claims

Federal district courts lack jurisdiction to hear cases arising under state law which do not meet the statutory diversity of citizenship and amount in controversy requirements. Federal district courts may elect not to exercise supplemental jurisdiction over certain types of related state law claims, such as those that raise novel or complex issues of state law, or that predominate over the federally based claim. n9

Federal district courts typically do not hear certain types of state-based claims, even if they technically meet the requirements of diversity jurisdiction. Examples of these are family law matters and probate cases. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawThe JudiciaryJurisdictionGeneral OverviewConstitutional LawThe JudiciaryJurisdictionDiversityConstitutional LawThe JudiciaryJurisdictionExclusive JurisdictionConstitutional LawThe JudiciaryJurisdictionFederal QuestionsConstitutional LawThe JudiciaryJurisdictionSupplemental Jurisdiction

FOOTNOTES:
(n1)Footnote 1. *Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981)* .

(n2)Footnote 2. *28 U.S.C. § 1331*.

(n3)Footnote 3. *28 U.S.C. § 1332*.

(n4)Footnote 4. *See 28 U.S.C. § 1367(a)*; *Cicio v. Does, 321 F.3d 83, 97 (2d Cir. 2003)* .

(n5)Footnote 5. *See United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966)* .

(n6)Footnote 6. *See 28 U.S.C. § 1367(b)*.

(n7)Footnote 7. *See 28 U.S.C. § 1367(b)*.

(n8)Footnote 8. *28 U.S.C. § 1334(a)*; *see 11 U.S.C. § 101 et seq*.

(n9)Footnote 9. *28 U.S.C. § 1367(c)*.

(n10)Footnote 10. *Ankenbrandt v. Richards, 504 U.S. 689, 704 (1992)* (domestic relations); *Markham v. Allen,*

326 U.S. 490, 494 (1946) , *aff'd in part, rev'd in part, sub nom. Clark v. Allen, 331 U.S. 503 (1947)* (probate).

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CHAPTER 1 Pleadings *
A. Understanding Federal Procedural Framework

1-1 Federal Litigation Guide § 1.06

§ 1.06 Pleadings Allowed in Federal Court

Only the following pleadings are permitted in federal court: n1

- Complaint
- Cross complaint
- Answer to a counterclaim designated as a counterclaim
- Answer to a cross-claim
- Third-party complaint
- Answer to a third-party complaint
- If the court orders one, a reply to an answer

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 7(a).*

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A. Understanding Federal Procedural Framework

1-1 Federal Litigation Guide §§ 1.07 through 1.09

[Reserved]

§§ 1.07[Reserved]

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CHAPTER 1 Pleadings *
B. Choosing Appropriate Forum When Federal and State Courts Share Concurrent Jurisdiction

1-1 Federal Litigation Guide § 1.10

§ 1.10 Practical and Procedural Differences

Assuming the state and federal trial courts share concurrent jurisdiction over a party's claim, there are important differences in the practical and procedural approaches of each forum that make it vital for the practitioner to assess which is more appropriate for the particular case.

Some of the factors to be considered are listed and discussed briefly in §§ 1.11-1.16. The list is not exhaustive, and counsel seeking to make an informed decision about choice of forum should consult each forum's rules of court, practices, and procedures.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawThe JudiciaryJurisdictionGeneral OverviewConstitutional LawThe JudiciaryJurisdictionConcurrent JurisdictionConstitutional LawRelations Among GovernmentsGeneral Overview

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CHAPTER 1 Pleadings *
B. Choosing Appropriate Forum When Federal and State Courts Share Concurrent Jurisdiction

1-1 Federal Litigation Guide § 1.11

§ 1.11 Statute of Limitations

A federal district court sitting in a diversity action applies the relevant state statute of limitations. n1 On the other hand, when exercising its federal question jurisdiction, a district court will utilize the limitations period pertaining to the applicable federal statute, if there is one. n2 If the federal substantive law does not have an applicable limitations period, the federal court may use the state law of limitations governing an analogous cause of action. n3

When an action arising under federal law is before a state court, the *supremacy clause of the United States Constitution* obligates the state court to enforce and apply federal substantive law, including applicable statutes of limitation. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsGeneral OverviewConstitutional LawThe JudiciaryJurisdictionGeneral OverviewConstitutional LawThe JudiciaryJurisdictionDiversityConstitutional LawSupremacy ClauseGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Guaranty Trust Co. v. York, 326 U.S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945)* (*following Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 11 Ohio Op. 246 (1938))* ; *Torre v. Brickey, 278 F.3d 917, 919-920 (9th Cir. 2002)* ; *Larsen v. Mayo Med. Ctr, 218 F.3d 863, 867 (8th Cir. 2000)* .

(n2)Footnote 2. *Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 11 Ohio Op. 246 (1938)* .

(n3)Footnote 3. *Board of Regents v. Tomanio, 446 U.S. 478, 483, 100 S. Ct. 1790, 64 L. Ed. 2d 440 (1980)* .

(n4)Footnote 4. *U.S. Const. Art. VI, cl.2.*

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CHAPTER 1 Pleadings *
B. Choosing Appropriate Forum When Federal and State Courts Share Concurrent Jurisdiction

1-1 Federal Litigation Guide § 1.12

§ 1.12 Federal and State Forums Generally Share Territorial Limits on Personal Jurisdiction

Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsConstitutional LimitsCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsLong-Arm JurisdictionCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsMinimum ContactsCivil ProcedureFederal & State InterrelationshipsGeneral OverviewConstitutional LawThe JudiciaryJurisdictionGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 4(k)(1)(A).*

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CHAPTER 1 Pleadings *
B. Choosing Appropriate Forum When Federal and State Courts Share Concurrent Jurisdiction

1-1 Federal Litigation Guide § 1.13

§ 1.13 Pleading Requirements May Vary in Federal and State Forums

Under the Federal Rules, the party seeking relief is permitted to make a short and plain statement of the claim showing that the party is entitled to relief. n1

The Federal Rules require a pleader to raise any compulsory counterclaims that the party has at the time of serving the pleading against any opposing party. If a party fails to assert a claim that was compulsory in a prior federal or state court action that reached final judgment, the claim will be barred in a subsequent federal court action based on the same transaction or occurrence. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsGeneral OverviewCivil ProcedurePleading & PracticeGeneral OverviewConstitutional LawThe JudiciaryJurisdictionGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 8(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 13(a).*

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CHAPTER 1 Pleadings *
B. Choosing Appropriate Forum When Federal and State Courts Share Concurrent Jurisdiction

1-1 Federal Litigation Guide § 1.14

§ 1.14 Federal Rules Require Mandatory Disclosure

Except in categories of cases specifically exempt, Rule 26(a) requires litigants to disclose certain types of information to opposing parties at specified stages of the pretrial process. The three basic categories of Rule 26(a) disclosure are: n1

- **Rule 26(a)(1) "initial" disclosures:** Basic information about persons with knowledge, documents that may be used in support of claims or defenses, damages claims, and insurance, all of which is to be shared with other parties very early in the pretrial period

- **Rule 26(a)(2) "expert" disclosures:** Information about and from retained expert witnesses, which is to be shared further into the pretrial period

- **Rule 26(a)(3) "pretrial" disclosures:** Information about evidence that the parties contemplate using at trial, which is to be disclosed near the end of the pretrial period

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresConstitutional LawThe JudiciaryJurisdictionGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(a)(1)-(3).*

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CHAPTER 1 Pleadings *
B. Choosing Appropriate Forum When Federal and State Courts Share Concurrent Jurisdiction

1-1 Federal Litigation Guide § 1.15

§ 1.15 Role of Judges May Vary in Federal and State Forums

In the federal courts, one judge is typically assigned to a case from commencement to final disposition. In many state courts, on the other hand, law and motion judges hear preliminary motions, and trial judges are not assigned until fairly close to the trial date.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewConstitutional LawThe JudiciaryJurisdictionGeneral Overview

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CHAPTER 1 Pleadings *
B. Choosing Appropriate Forum When Federal and State Courts Share Concurrent Jurisdiction

1-1 Federal Litigation Guide § 1.16

§ 1.16 Interlocutory Appeals

Generally, in the federal courts, only final orders may be appealed, although some interlocutory orders are also appealable. Appeals of interlocutory orders generally may only be pursued when a final judgment has been rendered in the case. n1 For discussion of appellate jurisdiction in the federal court system, including nonfinal decisions deemed final for appellate purposes, and appealable interlocutory orders, see Moore's Federal Practice (3d ed.), Ch. 201, *Appellate Jurisdiction in the Federal System* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionInterlocutory OrdersConstitutional LawThe JudiciaryJurisdictionGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1292.*

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CHAPTER 1 Pleadings *
B. Choosing Appropriate Forum When Federal and State Courts Share Concurrent Jurisdiction

1-1 Federal Litigation Guide §§ 1.17 through 1.29

[Reserved]

§§ 1.17[Reserved]

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CHAPTER 1 Pleadings *
C. Drafting the Summons and Complaint

1-1 Federal Litigation Guide § 1.30

§ 1.30 Encouraging Liberal Joinder of Parties and Claims

Plaintiffs are granted broad discretion to determine the structure of their actions. Subject to jurisdictional constraints, plaintiffs are encouraged to bring all interested parties together in a single action. n1

Once properly joined, parties may join as many claims, legal, equitable, or maritime, as they have against a defending party. There are no procedural restrictions on the number or type of claims a party may assert in a single case. n2 Although there is no limit to the number of parties joined in an action, every party must meet certain baseline requirements, such as capacity and real party status, in order to sue or be sued. n3

The selection of parties and joinder of claims is also limited by jurisdictional requirements and other Federal Rules of Civil Procedure which permit other parties, absentees, or the court itself, to override the plaintiff's party structure. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsGeneral OverviewCivil ProcedurePartiesJoinderGeneral OverviewCivil ProcedureJoinder of Claims & RemediesGeneral OverviewCivil ProcedureJoinder of Claims & RemediesLiberal Joinder

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 20(a)(1).*

(n2)Footnote 2. *See Fed. R. Civ. P. 18(a).*

(n3)Footnote 3. *See Fed. R. Civ. P. 17.*

(n4)Footnote 4. *See, e.g., Fed. R. Civ. P. 14(a)* (permitting defendants to implead third-parties liable for contribution); *Fed. R. Civ. P. 21* (permitting the court to drop misjoined parties); *Fed. R. Civ. P. 24* (permitting absentees to intervene).

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CHAPTER 1 Pleadings *
C. Drafting the Summons and Complaint

1-1 Federal Litigation Guide § 1.31

§ 1.31 Complying With General Pleading Standards

[1] Satisfying Notice Pleading Requirements

To commence a civil action in federal district court, the plaintiff must file a complaint. n1 The complaint must contain all of the following: n2

- A caption that sets forth the name of the court, the title of the action, the names of the parties, the file number of the action, and a designation of the pleading as a complaint
- A short and plain statement of the grounds on which the court's jurisdiction is predicated
- A short and plain statement of the claim, showing that the plaintiff is entitled to relief
- A demand for judgment for the relief the plaintiff seeks
- The signature of the plaintiff's attorney or if the plaintiff is unrepresented, the signature of the plaintiff

A complaint filed in federal court must include sufficient factual matter to state a claim to relief that is plausible on its face, and all claims must be accompanied by facts which allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." n3 This "facial plausibility" cannot be supported by "mere conclusory statements" and a reviewing court is required to "draw on its experience and common sense" in its determination of plausibility. n4 A claimant may state inconsistent claims regardless of the fact that it would be impossible for the claimant to prevail on all of the claims. n4.1

All parties to a federal civil action must be properly identified in the caption of the initial pleading in which they are named. n5 In the absence of prejudice, the court will permit a party to amend most errors and omissions in the naming of parties. n6

The Federal Rules of Civil Procedure do not explicitly authorize, or absolutely prohibit, the use of fictitious names by plaintiffs or other parties asserting a claim for relief, n7 but their use is discouraged as against the public's legitimate

interest in the facts of a lawsuit, including the names of the parties. n8 However, in special circumstances the federal courts have made exceptions to the policy favoring disclosure, allowing plaintiffs to proceed anonymously to protect privacy interests or to avoid physical harm. n9 Use of a fictitious name is appropriate when the plaintiff's interest in anonymity outweighs both the public interest in disclosure and any prejudice to the opposing party. n10 In conducting this balancing test, courts must take into account whatever factors may be relevant, such as the following factors identified by the Second Circuit: n11

- Whether the litigation involves matters that are highly sensitive and of a personal nature
- Whether identification poses a risk of retaliatory physical or mental harm to the party seeking to proceed anonymously or to innocent non-parties
- Whether identification presents other harms, and the likely severity of those harms
- Whether the plaintiff is particularly vulnerable to the possible harms of disclosure
- Whether the suit is challenging the actions of the government or of private parties
- Whether the defendant is prejudiced by allowing the plaintiff to press the claims anonymously, whether the nature of any prejudice differs at any particular stage of the litigation, and whether any prejudice can be mitigated by the district court
- Whether the plaintiff's identity has thus far been kept confidential
- Whether the public's interest in the litigation is furthered by requiring the plaintiff to disclose his or her identity
- Whether, because of the purely legal nature of the issues presented or otherwise, there is an atypically weak public interest in knowing the litigants' identities
- Whether there are any alternative mechanisms for protecting the confidentiality of the plaintiff

The complaint should not include any matters that are redundant, immaterial, impertinent, or scandalous. n12 However, a court ordinarily should not dismiss a complaint merely because it contains repetitious and irrelevant matter, provided it also includes allegations sufficient to put the defendant on notice. The court should ignore the surplusage in the interest of resolving the case on the merits rather than on the basis of pleading defects. n13

Nevertheless, a complaint may be dismissed when, because of its length and inclusion of repetitious and irrelevant matter, it becomes unintelligible, provided the plaintiff has been afforded sufficient opportunity to correct the deficiencies. n14

[2] Complying With Special Pleading Requirements

The general pleading rules may be supplemented by specific requirements imposed by the Federal Rules of Civil Procedure. For example, special requirements apply to the complaint in a shareholder's derivative action. The complaint in such an action must state, among other things, that the action is not a collusive one to confer jurisdiction on the federal court. n15

Federal statutes may also impose special pleading requirements. For example, the 1995 Private Securities Litigation Reform Act (PSLRA) requires that a complaint alleging securities fraud specify each statement alleged to have been

misleading and the reasons the statement is misleading; if an allegation regarding the statement or omission is made on information and belief, the complaint must also state with particularity all the facts on which that belief is formed. n16

[3] Using Official Forms

The plaintiff may use one of the official complaint forms contained in the Appendix of Forms to the Federal Rules of Civil Procedure. n17 Use of the official forms is not mandatory, but the forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement that the rules contemplate. n18

The official forms are not widely used, in part because their number is quite limited, especially in comparison to unapproved forms available from bar associations, commercial vendors, and others. Also, the official forms are based on very simple hypothetical fact situations, and most actions filed in federal court involve more complex issues. Finally, many civil claimants in the federal district courts choose to plead more detail than is illustrated in the official forms.

[4] Avoiding Consequences of Failure to Comply With Pleading Requirements

The court clerk may not refuse to accept for filing any complaint or other paper presented for filing solely because it is not presented in the proper form as required by the Federal Rules of Civil Procedure or by local rules or practices. n19 Thus, for example, if an improperly formatted complaint is offered for filing on the last day before the statute of limitations expires, the filing will be timely.

If the complaint fails to comply with the pleading requirements, the court has the power to order a more definite statement, to strike improper material, or to dismiss the complaint. n20 However, a dismissal will usually be without prejudice, so that the plaintiff will have an opportunity to amend the complaint. n21

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticePleadingsHeightened Pleading RequirementsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsFailures to Comply

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 3.*

(n2)Footnote 2. *Fed. R. Civ. P. 8(a), 10(a), 11(a).*

(n3)Footnote 3. *See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) .*

(n4)Footnote 4. *Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 884-885 (2009)* ; *see also* al-*Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009)* (pleaded facts sufficient to state plausible claim); *Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1261-1270 (11th Cir. 2009)* (pleaded facts failed to state plausible claim).

(n5)Footnote 4.1. *See United Techs. Corp. v. Mazer, 556 F.3d 1260, 1273-1274 (11th Cir. 2009) .*

(n6)Footnote 5. *See Zocaras v. Castro, 465 F.3d 479, 483-485 (11th Cir. 2006) .*

(n7)Footnote 6. *See Yeseta v. Baima, 837 F.2d 380, 382-383 (9th Cir. 1988) .*

(n8)Footnote 7. *See Coe v. United States Dist. Ct., 676 F.2d 411, 415 (10th Cir. 1982) .*

(n9)Footnote 8. *See Doe v. Smith, 429 F.3d 706, 710 (7th Cir. 2005)* .

(n10)Footnote 9. *See Doe v. Frank, 951 F.2d 320, 324 (11th Cir. 1992)* .

(n11)Footnote 10. *See* Sealed Plaintiff v. Sealed Defendant #1, *537 F.3d 185, 189 (2d Cir. 2008)* .

(n12)Footnote 11. *See* Sealed Plaintiff v. Sealed Defendant #1, *537 F.3d 185, 189 (2d Cir. 2008)* .

(n13)Footnote 12. *Fed. R. Civ. P. 12(f)*.

(n14)Footnote 13. *Wynder v. McMahon, 360 F.3d 73, 80 (2d Cir. 2004)* (citing **Moore's**).

(n15)Footnote 14. *See United States v. Lockheed-Martin Corp., 328 F.3d 374, 378-379 (7th Cir. 2003)* (district court properly dismissed 155-page complaint, with 99 attachments, when it was "so long, so disorganized, so laden with cross-references and baffling acronyms, that they could not alert either the district judge or the defendants to the principal contested matters").

(n16)Footnote 15. *Fed. R. Civ. P. 23.1(b)(2)*.

(n17)Footnote 16. *15 U.S.C. § 77z-1(b)(1)* (1933 Act); *15 U.S.C. § 78u-4(b)(1)*; *see Novak v. Kasaks, 216 F.3d 300, 305-314 (2d Cir. 2000)* ; *see § 1.34[8][8.1]* for further discussion of pleading under the PSLRA.

(n18)Footnote 17. *Fed. R. Civ. P. 84*.

(n19)Footnote 18. *Fed. R. Civ. P. 84*.

(n20)Footnote 19. *Fed. R. Civ. P. 5(d)(4)*.

(n21)Footnote 20. *Fed. R. Civ. P. 12(e)*, *12(f)*, *41(b)*.

(n22)Footnote 21. *Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1026 (9th Cir. 1998)* ; *see Fed. R. Civ. P. 15*.

* Chapter 1 was rewritten in 2000 by Andrew E. Westley, Esq., of San Francisco, California.

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CHAPTER 1 Pleadings *
C. Drafting the Summons and Complaint

1-1 Federal Litigation Guide § 1.32

§ 1.32 Drafting Jurisdictional Allegations

[1] Alleging Subject Matter Jurisdiction

A complaint must contain a short and plain statement of the grounds on which the court's subject matter jurisdiction depends. n1 The jurisdictional statement is usually made in the first paragraph of the body of the complaint. The statement must set forth the basis for federal question jurisdiction or diversity jurisdiction. n2

More specifically, the complaint must allege the requisite factual elements underlying subject matter jurisdiction. The complaint may also refer to the appropriate jurisdictional statute. However, affirmative pleading of the precise statutory basis for subject matter jurisdiction is not required if the complaint alleges sufficient facts to establish jurisdiction. n3

Official Form 7 provides model allegations of subject matter jurisdiction, one for diversity, one for federal question, one for statutory jurisdiction, and one for admiralty or maritime jurisdiction. n4

The Supreme Court has held that a federal district court may exercise jurisdiction over a petition to compel arbitration of a state law action only where the complaint, and not the counterclaim, in the state action establishes a basis for federal jurisdiction. Where a complaint rests on state law only, a federal law counterclaim is not sufficient to vest jurisdiction in the district court. n5

[2] Pleading Federal Question Jurisdiction

A federal district court has general federal question jurisdiction over any action in which the claimant's basis for recovery, rather than a defense to a claim for relief, is grounded in federal law. n6 A general allegation of federal question jurisdiction must be borne out by the well-pleaded facts in the body of the complaint. n7

The well-pleaded complaint rule does not allow a counterclaim to serve as the basis for the district court's jurisdiction. n8

It is good practice to include a specific reference to the section of the Constitution, federal statute, or treaty that supplies the basis for recovery. n9 If federal common law is pleaded as the basis for federal question jurisdiction, a reference to the relevant case and a description of its holding seemingly would suffice. n10 However, a failure to cite the federal law on which the plaintiff's claim is based is not fatal, provided that the facts alleged in the claim for relief sufficiently

demonstrate the basis for jurisdiction. n11

If jurisdiction is founded on a special jurisdictional statute, reference to the statute should be made in the first paragraph of the pleading, and specific factual averments should be made in the body of the pleading demonstrating that the statute applies. n12

If the applicability of a federal statute turns on the existence of a particular fact, the absence of that fact impacts jurisdiction only if the fact is specifically jurisdictional rather than an element of the claim. n13

To determine whether federal-question jurisdiction exists over federal issues embedded in state-law claims, the question is whether the state-law claim necessarily raises a stated federal issue, actually disputed and substantial, which a federal forum could entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities. n14 The Supreme Court has emphasized that federal jurisdiction over a state-law claim based on the fact that federal law is a necessary element of the claim is reserved for a special and small category of cases. n15

The party pleading federal jurisdiction has the burden of showing a right to standing for each type of relief sought. n16

[3] Pleading Diversity Jurisdiction

In general, a federal district court may exercise diversity jurisdiction over a civil action if the amount in controversy exceeds $75,000, exclusive of interest and costs, and if any of the following applies: n17

- The matter in controversy is between citizens of different states
- The matter in controversy is between citizens of a state and citizens or subjects of a foreign state
- The matter in controversy is between citizens of different states, and citizens or subjects of a foreign state are additional parties
- The matter in controversy is between a foreign state as plaintiff and citizens of a state or of different states

A claim alleging jurisdiction based on diversity of citizenship must contain averments of the parties' citizenship and the amount in controversy. n18 Both the amount in controversy and citizenship of the parties must be alleged specifically, even if an express reference is made to the diversity statute. Allegations that fall short of addressing each party's citizenship and the amount in controversy are insufficient. n19

Because complete diversity of citizenship is required to establish general diversity jurisdiction, a complaint alleging general diversity jurisdiction must aver that every plaintiff is of diverse citizenship from every defendant. n20 Citizenship of the parties is determined based on the facts as they exist at the time the suit is filed. n21 An interpleader action requires only minimal diversity. Thus, a complaint in an interpleader action may establish diversity of citizenship by alleging that two or more defendants are of diverse citizenship from one another. n22

The Supreme Court held that for purposes of federal diversity jurisdiction, a corporation's principal place of business is where its "high level officers direct, control, and coordinate the corporation's activities." n22.1

[4] Pleading Minimal Diversity in Accidents Resulting in 75 or More Deaths

The district courts have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 75 people died in the accident at a discrete location, if: n23

- A defendant resides in a state and a substantial part of the accident took place in another state or location, regardless of whether that defendant is also a resident of the state where a substantial part of the accident took place

- Any two defendants reside in different states, regardless of whether such defendants are also residents of the same state or states, or

- Substantial parts of the accident took place in different states

Minimum diversity exists between adverse parties if any party is a citizen of a state and any adverse party is a citizen of another state. n24 The district court shall, however, abstain from hearing such a case where: n25

- The substantial majority of all plaintiffs are citizens of a single state of which the primary defendants are also citizens, and

- The claims asserted will be governed primarily by the laws of that state

[5] Pleading Diversity Jurisdiction in Class Action Lawsuits

Under the Class Action Fairness Act of 2005 (CAFA), and with limited exceptions, federal courts have diversity jurisdiction over class actions involving at least 100 class members with combined claims of $5 million or more, where at least one member of a class of plaintiffs is from a different state than any defendant. n26 In class actions not covered by the Act, the "complete diversity" rule requires that each named class representative must be a citizen of a different state than each defendant. n27

Where the other elements of diversity jurisdiction are present and at least one named plaintiff in the class action satisfies the amount-in-controversy requirement, *28 U.S.C. § 1367* authorizes supplemental jurisdiction over the claims of other plaintiffs which arise under the same case or controversy, even if those claims fail to satisfy the amount-in-controversy requirement. n28

For a complete discussion of diversity jurisdiction in class actions, see *§ 42.21*.

[6] Pleading Supplemental Jurisdiction

Supplemental jurisdiction allows a federal court to entertain claims over which it has no independent basis of subject matter jurisdiction, if those claims are sufficiently tied to a suit that is properly in federal court. Generally, in a civil action in which the district court has original jurisdiction, it may also exercise supplemental jurisdiction over other claims that are so related to claims within the court's original jurisdiction that they form part of the same case under Article III of the Constitution. n29

Where the other elements of diversity jurisdiction are present and at least one plaintiff in the action satisfies the amount-in-controversy requirement, Section 1367 authorizes supplemental jurisdiction over the claims of other plaintiffs in the same Article III case or controversy, even if those claims are for less than the requisite amount. n30

To establish that two claims form part of the same case under Article III for purposes of supplemental jurisdiction, the plaintiff must plead and prove facts sufficient to support a finding that the claims have a common nucleus of operative facts. n31

[7] Statement of Personal Jurisdiction or Venue Not Required

A complaint does not need to include allegations of personal jurisdiction or venue. A defense based on lack of personal jurisdiction or improper venue will be waived unless the defending party makes a timely objection by motion or in a responsive pleading. n32

Although a statement of venue is not required, most attorneys include in the complaint a statement of the grounds for venue, along with descriptions of the citizenship and residence of all parties.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionGeneral OverviewCivil ProcedureVenueIndividual DefendantsCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 8(a)(1).*

(n2)Footnote 2. *See 28 U.S.C. §§ 1331-1365.*

(n3)Footnote 3. *Brock v. Superior Care, Inc., 840 F.2d 1054, 1063-1064 (2d Cir. 1988*).

(n4)Footnote 4. *See* Fed. R. Civ. P. Appendix, Form 7.

(n5)Footnote 5. *Vaden v. Discover Bank, -- U.S. --, 129 S. Ct. 1262* ; *173 L. Ed. 2d 206, 218 (2009)* .

(n6)Footnote 6. *28 U.S.C. § 1331.*

(n7)Footnote 7. *Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 808 (1986)* ; *see* Fed. R. Civ. P. Appendix, Form 2(b).

(n8)Footnote 8. *See Vaden v. Discover Bank, ___ U.S. ___, 129 S. Ct. 1262* ; *173 L. Ed. 2d 206, 218 (2009)* ; *see also The Holmes Group, Inc. v. Vorace Air Circulation Systems, Inc., 535 U.S. 826, 831 (2002)* .

(n9)Footnote 9. *See* Fed. R. Civ. P. Appendix, Form 2(b).

(n10)Footnote 10. *See Ivy Broad. Co., v. American Tel. & Tel. Co., 391 F.2d 486, 492 (2d Cir. 1968)* .

(n11)Footnote 11. *See, e.g., Elliot v. Tilton, 62 F.3d 725, 728 (5th Cir. 1995)* .

(n12)Footnote 12. *See* Fed. R. Civ. P. Appendix, Form 2(c).

(n13)Footnote 13. *Arbaugh v. Y&H Corp., 546 U.S. 500, 515-516, 126 S. Ct. 1235, 163 L. Ed. 2d 1097, 1110 (2006)* .

(n14)Footnote 14. *Grable & Sons Metal Prods., Inc., v. Darue Eng'g & Mfg., 545 U.S. 308, 313 (2005)* .

(n15)Footnote 15. *See Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 699, 126 S. Ct. 2121, 165 L. Ed. 2d 131 (2006)* .

(n16)Footnote 16. *See Summers v. Earth Island Inst., ___ U.S. ___, 129 S. Ct. 1142, 1149, 173 L. Ed. 2d 1 (2009)*

.

(n17)Footnote 17. *28 U.S.C. § 1332(a).*

(n18)Footnote 18. *See* Fed. R. Civ. P. Appendix, Form 2(a).

(n19)Footnote 19. *Prescription Plan Serv. Corp. v. Franco, 552 F.2d 493, 498 n.6 (2d Cir. 1977)* .

(n20)Footnote 20. *See Strawbridge v. Curtiss, 2 L. Ed. 435 (1806)* .

(n21)Footnote 21. *Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567 (2004)* .

(n22)Footnote 22. *28 U.S.C. § 1335(a)*; *see State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 531 (1967)* .

(n23)Footnote 22.1. *See Hertz Corp. v. Friend, __ U.S. __, 130 S. Ct. 1181, 1184, 175 L. Ed. 2d 1029 (2010)* .

(n24)Footnote 23. *28 U.S.C. § 1369(a).*

(n25)Footnote 24. *28 U.S.C. § 1369(c).*

(n26)Footnote 25. *28 U.S.C. § 1369(b).*

(n27)Footnote 26. *See 28 U.S.C. § 1332(d)(2).*

(n28)Footnote 27. *28 U.S.C. § 1332(a)*; *see Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 365, 41 S. Ct. 338, 65 L. Ed. 673 (1921)* .

(n29)Footnote 28. *Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 125 S. Ct. 2611, 2625, 162 L. Ed. 2d 502 (2005)* .

(n30)Footnote 29. *28 U.S.C. § 1367(a).*

(n31)Footnote 30. *Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546 (2005*).

(n32)Footnote 31. *See United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)* .

(n33)Footnote 32. *Fed. R. Civ. P. 12(h)(1).*

* Chapter 1 was rewritten in 2000 by Andrew E. Westley, Esq., of San Francisco, California.

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CHAPTER 1 Pleadings *
C. Drafting the Summons and Complaint

1-1 Federal Litigation Guide § 1.33

§ 1.33 Alleging Parties' Capacity, Authority, or Legal Existence Generally Unnecessary

Except when required to show that the court has jurisdiction, a pleading need not allege: n1

- A party's capacity to sue or be sued
- A party's authority to sue or be sued in a representative capacity
- The legal existence of an organized association of persons that is made a party

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. n2

Although specific allegations are usually unnecessary, complaints often include allegations of capacity, authority, or legal existence because such allegations facilitate stating a claim in a short and plain manner as required by the Federal Rules of Civil Procedure. n3 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. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticePleadingsHeightened Pleading RequirementsCapacity & Legal ExistenceCivil ProcedurePartiesCapacity of PartiesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 9(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 9(a).*

(n3)Footnote 3. *Fed. R. Civ. P. 8(a).*

(n4)Footnote 4. *Fed. R. Civ. P. 17(d).*

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CHAPTER 1 Pleadings *
C. Drafting the Summons and Complaint

1-1 Federal Litigation Guide § 1.34

§ 1.34 Pleading Claims

[1] Drafting Short, Plain Statement of Claim

A complaint must include a short and plain statement of each claim showing that the plaintiff is entitled to relief. n1 Each averment in support of the claim must be simple, concise, and direct. n2

Ordinarily, the complaint is not required to set out in detail the facts on which the claim for relief is based. n3 However, the complaint must include sufficient factual matter to state a claim to relief that is plausible on its face, and all claims must be accompanied by facts which allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." n4 This "facial plausibility" cannot be supported by "mere conclusory statements" and a reviewing court is required to "draw on its experience and common sense" in its determination of plausibility. n5 The plausibility standard for pleading, which applies to all civil actions, does not prevent a plaintiff from pleading facts alleged upon information and belief where those facts are peculiarly within the possession and control of the defendant. n5.1 No technical form of pleading is required. n6

A party is not required to plead the specific elements of a claim. n7 The Supreme Court has held that a pro se complaint must at least show that the pleader is entitled to relief. n8

[2] Exhibit to Complaint Becomes a Part of the Pleading

If a written instrument is the subject matter of a suit, the forms accompanying the Rules suggest annexing the document as an exhibit to the pleading. n9 A written document attached to a pleading as an exhibit effectively alleges the contents of the document, because the exhibit becomes a part of the pleading for all purposes. Accordingly, statements in the exhibit may be adopted by reference in the body of the complaint. n10

Even if a written instrument is not formally attached to the complaint, the instrument may be treated as incorporated by the complaint if there is a clear and definite reference to the instrument in the complaint. n11 A written instrument not formally attached to a pleading may be offered by a defendant in support of a motion to dismiss the complaint. Thus, a plaintiff may not avoid the consequences of an entire document by quoting from it selectively in the complaint instead of attaching the document as a whole to the pleading. n12

[3] Alleging Facts on Information and Belief

After making reasonable inquiry, a plaintiff may aver facts that he or she believes to be true, but that lack evidentiary support at the time the complaint is filed. Such allegations must be specifically identified in the complaint as likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. n13

Generally, however, such averments on information and belief are allowed only if the facts that would support the allegations are within the defendant's knowledge or control. n14

[4] Presenting Alternative and Inconsistent Legal Theories

A complaint may include alternative and inconsistent legal theories of recovery on a claim. n15 With the exception of a judgment rendered by default, a final judgment must grant the relief to which a party is entitled, regardless of the relief demanded in the party's pleading. n16

[5] Negating Affirmative Defenses

The complaint is not required to allege facts to negate an anticipated affirmative defense that the defendant might assert in the answer. Such affirmative defenses are automatically taken as denied. n17 However, if the complaint pleads facts that tend to establish an affirmative defense, the complaint should allege any additional facts that negate the defense. n18

[6] Dividing Statement of Claim Into Paragraphs

A party must state its claims in numbered paragraphs, so that particular paragraphs may be referred to in other paragraphs of the complaint, and in succeeding pleadings and motions. n19 A failure to number paragraphs may be excused, however, if the complaint is comprehensible and there is no prejudice to the defendant. n20

The contents of each paragraph must be limited as far as practicable to a statement of a single set of circumstances. n21 The forms accompanying the Federal Rules of Civil Procedure provide guidance on what constitutes a single set of circumstances, including the following examples: n22

- Form 9 suggests that when pleading injuries, the varying harms to both person and business caused by a single act or series of related acts can be combined in a single paragraph. Thus, in an auto accident case, a plaintiff can plead in one paragraph all injuries resulting from the defendant's negligent operation of a motor vehicle, including physical injuries, loss of earnings or business opportunities, pain and suffering, and expenses for medical attention and hospitalization, because these injuries all arose from a single set of circumstances. n23

- Form 10 indicates that when pleading the bases for a defendant's liability, varying wrongs, even if inconsistent, can be combined by a plaintiff in a single paragraph. Thus, in an automobile accident case, a plaintiff can plead in one paragraph that a defendant drove a car "willfully or recklessly or negligently," because these actions constitute a single set of circumstances. n24

If the complaint is carefully drafted to avoid compound statements, it may force the defendant into making key admissions in the answer. If a sentence in the complaint is compound, the defendant will have an easy "out" in answering. The defendant can deny the allegation in its totality, even if only one of the compound elements is untrue. On the other hand, if the compound allegation is replaced by two simple sentences, the defendant's answer must admit or deny each allegation separately. n25 Therefore, in making allegations on critical issues, it may be useful to ensure that each element is alleged in a separate sentence or paragraph.

[7] Pleading Separate Counts

Each claim founded on a separate transaction or occurrence must be stated in a separate count, if separation facilitates the clear presentation of the matters set forth. n26 When the essence of the complaint against multiple defendants is a scheme, plan, or course of conduct, Rule 10 does not require that each claim against each defendant be stated separately merely because all the defendants may not be involved in each transaction or occurrence. n27

The objective of the requirement of separate counts is clarity in pleading; therefore, the requirement is not strictly enforced if a violation causes no uncertainty or prejudice to the defendant. Because a violation of the separate-count requirement is technical in nature, even if a complaint is dismissed, dismissal will generally be without prejudice, and an amended complaint will be allowed. n28

[8] Pleading Special Matters

[8.--1] Pleading Fraud and Mistake With Particularity

Although Rule 8 sets out the general rules of pleading, it is supplemented in certain respects by other federal rules of civil procedure. Rule 9 contains special rules for pleading fraud. n29 In all averments of fraud or mistake, the circumstances constituting the fraud or mistake must be stated with particularity. n30

The purpose of this requirement is to provide the defendant with fair notice of a plaintiff's claim and adequate information to frame a response. n30.1 However, some courts have relaxed this heightened pleading requirement in cases involving complex fraudulent schemes or those occurring over a lengthy period of time and involving thousands of billing documents. n31

The element of scienter--the defendant's intent to defraud--usually may be pleaded generally. n32 When fraud is not an essential element of a claim and the plaintiff alleges both fraudulent and non-fraudulent conduct, only the allegations of fraudulent conduct need to satisfy the heightened pleading requirements of Rule 9(b). n33 Rules 8 and 9 are not antithetical but must be read together to provide the appropriate pleading requirements in cases involving fraud or mistake. n34

The requirements of particularity may differ with the facts of each case. However, the circumstances constituting fraud usually include the following: n35

- The fraudulent statement
- An explanation of why the statement was fraudulent
- The identity of the person who made the fraudulent statement
- The time and place of the fraudulent statement
- The method by which the misrepresentation was communicated
- The resulting injury

In a securities fraud class action, the Private Securities Litigation Reform Act of 1995 specifies the circumstances that must be pleaded in the complaint. n36 To plead a "strong inference" of scienter, as required under the Private Securities Litigation Reform Act, a complaint must include allegations that give rise to an inference of fraudulent intent that is not merely plausible or reasonable, but is cogent and at least as compelling as any opposing inference of nonfraudulent intent. n37 The basic elements of a private securities fraud action-which resembles a common-law tort action for deceit

and misrepresentation, and include economic loss and "loss causation." An inflated purchase price will not by itself constitute or proximately cause the relevant economic loss needed to allege and prove "loss causation." n38

If the complaint alleges that multiple defendants engaged in fraud, the specific conduct of each defendant generally must be alleged separately. n39

Pleadings alleging fraud usually may not be based on information and belief. n40 However, allegations of fraud may be made on information and belief provided the pleadings set out the facts on which that belief is founded with sufficient particularity to satisfy Rule 9(b). n41

Allegations that fail to provide sufficient information so that the defendant can defend against the charge are not sufficient under the particularity requirements of Rule 9. n42 A complaint was sufficient to state a claim, even though it was "sprawling, confusing, and redundant," when it set out all the acts constituting fraud somewhere in the complaint and provided enough detail to enable the defendant to respond. n43 If a general averment of condition of mind is so vague or ambiguous that the defendant cannot reasonably be required to frame a responsive pleading, the court may require more detail of the plaintiff by granting the defendant's motion for a more definite statement. n44 A complaint that fails to state a claim under the PSLRA warrants dismissal, but not with prejudice unless the trial court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency. n45

[8.--2] Pleading Conditions Precedent

In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. n46 A general averment of the performance or occurrence of a condition precedent is typically quite brief and to the point. For example, in connection with a contract claim, it is sufficient to allege simply that "all conditions precedent have been performed or have occurred." n47

A denial of the performance or occurrence of conditions precedent must be made specifically and with particularity. n48 For example, in an action for breach of contract based on the defendant's failure to perform a condition precedent, the complaint must include a specific allegation of the nonperformance of the condition precedent. n49

[8.--3] Pleading Official Document or Act

In pleading an official document or official act, it is sufficient to aver that the document was issued or the act was done in compliance with law. n50 The official forms accompanying the Federal Rules of Civil Procedure illustrate the simplicity permitted in pleading official documents or acts:

- Form 18 allows a claimant in a patent infringement case to aver that "Letters Patent ... were issued to the plaintiff." n51

- Form 19 allows a claimant in a complaint for infringement of copyright to aver that the claimant "received a certificate of registration" in compliance with all laws governing copyright. n52

[8.--4] Pleading 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." n53 General allegations will usually suffice, and particularity in pleading is not required. Any further detail required may be obtained by motion for a more definite statement or through discovery. n54

[8.--5] Alleging Time and Place

For the purpose of testing the sufficiency of the complaint, averments of time and place are material and will be considered like all other averments of material matters. n55

By providing that any averments of time and place are material, this rule requires exactitude. Thus, for example, the dates and places set forth in the complaint may be used to set up a defense based on the bar of the statute of limitations and other defenses on which the date and place have a bearing. n56

The rule making averments of time and place material does not itself require that a complaint allege time and place. Whether time and place must be pleaded generally depends on the substantive law that provides the elements of the plaintiff's claim and on any other applicable pleading rules. For example, in a claim based on fraud, the circumstances constituting the fraud or mistake, including the time and place of the fraud, must be stated with particularity. n57

[8.--6] Pleading Special Damages

If the plaintiff claims any items of special damage, they must be specifically stated in the complaint. n58 In this context, "special damages" are those that, although resulting from the commission of the conduct complained of, are not the usual or necessary result of the wrong complained of. n59 For example, damages for personal injury are unusual in contract cases but normal in automobile accident cases, while lost profits are normal in contract cases and unusual in automobile accident cases. n60

[8.--7] Making Necessary Allegations in Shareholder Derivative Action

Special requirements apply to the complaint in a derivative action. A "derivative action" is one brought by one or more shareholders or members of a corporation or of an unincorporated association to enforce a right that the corporation or association could assert but has failed to assert. The action may not be maintained if it appears that the plaintiff does not adequately represent the interests of the similarly situated shareholders or members. n61

In a derivative action, in addition to the allegations necessary to establish the corporation's substantive right to relief, the complaint must include the following: n62

- An allegation that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains, or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law

- An allegation that the action is not a collusive one to confer jurisdiction on a federal court that the court would not otherwise have

- Allegations stating with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority of the corporation or association, and from the shareholders or members if necessary, and the reasons for the plaintiff's failure to obtain the action or for not making the effort

- A verification

[8.--8] Alleging Specific Facts in Support of Request for Ex Parte Temporary Restraining Order

A complaint that requests an ex parte temporary restraining order must allege specific facts sufficient to prove that the plaintiff will suffer immediate and irreparable injury, loss, or damage before the defendant can be heard in opposition to the request. n63

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticePleadingsHeightened Pleading RequirementsGeneral OverviewCivil ProcedurePleading & PracticePleadingsHeightened Pleading RequirementsFraud ClaimsCivil ProcedurePleading & PracticePleadingsHeightened Pleading RequirementsMistakeCivil ProcedurePleading & PracticePleadingsHeightened Pleading RequirementsSpecial DamagesCivil ProcedurePleading & PracticePleadingsRule Application & Interpretation

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 8(a)*; *see also Wynder v. McMahon, 360 F.3d 73, 79-80 (2d Cir. 2004)* ; *Bass v. E.I. DuPont de Nemours & Co., 324 F.3d 761, 764-766 (4th Cir. 2003)* ; *Magluta v. Samples, 256 F.3d 1282, 1283 (11th Cir. 2001)* .

(n2)Footnote 2. *Fed. R. Civ. P. 8(d)(1).*

(n3)Footnote 3. *Pelman v. McDonald's Corp., 396 F.3d 508, 511-512 (2d Cir. 2005)* ; *In re Tower Air, Inc., 416 F.3d 229, 236-238 (3d Cir. 2005)* .

(n4)Footnote 4. *See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* .

(n5)Footnote 5. *Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 884-885 (2009)* ; *see also* al-*Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009)* (pleaded facts sufficient to state plausible claim); *Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1261-1270 (11th Cir. 2009)* (pleaded facts failed to state plausible claim).

(n6)Footnote 5.1. *See Arista Records, LLC v. Doe 3, 2010 U.S. App. LEXIS 8879, *27 (2d. Cir. Apr. 29, 2010)* .

(n7)Footnote 6. *Fed. R. Civ. P. 8(d)(1).*

(n8)Footnote 7. *See Leibowitz v. Cornell Univ., 445 F.3d 586, 591-592 (2d Cir. 2006) see also*; *Doe v. Smith, 429 F.3d 706, 707-710 (7th Cir. 2005)* .

(n9)Footnote 8. *See Erickson v. Pardus, 551 U.S. 89, 127 S. Ct. 2197, 167 L. Ed. 2d 1081, 1086 (2007)* (per curiam).

(n10)Footnote 9. *See* Fed. R. Civ. P. Appendix, Forms 3, 4, 12.

(n11)Footnote 10. *Fed. R. Civ. P. 10(c).*

(n12)Footnote 11. *See B.V. Optische Industrie De Oude Delft v. Hologic, Inc., 909 F. Supp. 162, 167 (S.D.N.Y. 1995*).

(n13)Footnote 12. *I. Meyer Pincus & Assocs. v. Oppenheimer & Co., 936 F.2d 759, 762 (2d Cir. 1991)* .

(n14)Footnote 13. *Fed. R. Civ. P. 11(b)(3).*

(n15)Footnote 14. *Boykin v. KeyCorp, 521 F.3d 202, 215 (2d Cir. 2008)* .

(n16)Footnote 15. *Fed. R. Civ. P. 8(d)(2)(3)*, *Fed. R. Civ. P. 18(a).*

(n17)Footnote 16. *See Fed. R. Civ. P. 54(c).*

(n18)Footnote 17. *See Fed. R. Civ. P. 8(b)(6).*

(n19)Footnote 18. *See Tregenza v. Great Am. Communications Co., 12 F.3d 717, 718 (7th Cir. 1993)* .

(n20)Footnote 19. *Fed. R. Civ. P. 10(b), (c).*

(n21)Footnote 20. *See Phillips v. Girdich, 408 F.3d 124, 127-130 (2d Cir. 2005)* .

(n22)Footnote 21. *Fed. R. Civ. P. 10(b).*

(n23)Footnote 22. *See Fed. R. Civ. P. 84.*

(n24)Footnote 23. *See* Fed. R. Civ. P. Appendix, Form 9; *see also* Fed. R. Civ. P. Appendix, Forms 14 and 15.

(n25)Footnote 24. *See* Fed. R. Civ. P. Appendix, Form 10.

(n26)Footnote 25. *See Fed. R. Civ. P. 8(b).*

(n27)Footnote 26. *Fed. R. Civ. P. 10(b).*

(n28)Footnote 27. *Thomas v. Luzerne County Correctional Facility, 310 F. Supp. 2d 718, 721 (M.D. Pa. 2004)* .

(n29)Footnote 28. *See, e.g., Vance v. American Soc'y of Composers, 13 F.R.D. 109, 113 (S.D.N.Y. 1952)* .

(n30)Footnote 29. *Fed. R. Civ. P. 9.*

(n31)Footnote 30. *Fed. R. Civ. P. 9(b).*

(n32)Footnote 30.1. *See United States ex rel. Bledsoe v. Community Health Sys., Inc., 501 F.3d 493, 503 (6th Cir. 2007)* .

(n33)Footnote 31. *See United States ex rel. Tiesinga v. Dianon Sys., 231 F.R.D. 122, 123-124 (D. Conn. 2005)* .

(n34)Footnote 32. *Fed. R. Civ. P. 9(b).*

(n35)Footnote 33. *See Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103-1105 (9th Cir. 2003)* ; *Madison River Mgmt. Co. v. Business Mgmt. Software Corp., 351 F. Supp. 2d 436, (M.D.N.C. 2005)* (court held that Rule 9(b) particularity requirement for fraud also applies to allegations of negligent misrepresentation).

(n36)Footnote 34. *United States v. Martin-Baker Aircraft Co., Ltd., 389 F.3d 1251, 1256 (D.C. Cir. 2004)* .

(n37)Footnote 35. *See Boykin United States ex rel. Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 226 (1st Cir. 2004)* ; *see also In re Rockefeller Ctr. Props. Secs. Litig., 311 F.3d 198, 217 (3d Cir. 2003)* .

(n38)Footnote 36. *15 U.S.C. § 77z-1(b)* (1933 Act); *15 U.S.C. § 78u-4(b)*; *see Livid Holdings Ltd. v. Salomon Smith Barney, Inc., 403 F.3d 1050, 1057-1058 (9th Cir. 2005*) (complaint must state facts giving rise to strong inference of scienter); *see also In re Cabletron Sys., Inc., 311 F.3d 11, 28-33 (1st Cir. 200* 3).

(n39)Footnote 37. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 127 S. Ct. 2499, 2510, 168 L. Ed. 2d 179 (2007)* ; *see also Central Laborers' Pension Fund v. Integrated Elec. Servs., 497 F.3d 546 (5th Cir. 2007)* .

(n40)Footnote 38. *Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336, 346 (2005*).

(n41)Footnote 39. *DiVittorio v. Equidyne Extractive Indus., Inc., 822 F.2d 1242, 1247 (2d Cir. 198* 7).

(n42)Footnote 40. *Inn Chu Trading Co. v. Sara Lee Corp., 810 F. Supp. 501, 507 & n.13 (S.D.N.Y. 1992)* .

(n43)Footnote 41. *United States ex rel. Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 226-231 (1st Cir. 2004)* .

(n44)Footnote 42. *United States v. Martin-Baker Aircraft Co., Ltd., 389 F.3d 1251, 1256-1259 (D.C. Cir. 2004*).

(n45)Footnote 43. *Fidelity Nat'l Title Ins. Co. v. Intercounty Nat'l Title Ins. Co., 412 F.3d 745, 748-750 (7th Cir. 2005)* .

(n46)Footnote 44. *See Fed. R. Civ. P. 12(e).*

(n47)Footnote 45. *See Belizan v. Hershon, 434 F.3d 579, 583-584 (D.C. Cir. 2006)* .

(n48)Footnote 46. *Fed. R. Civ. P. 9(c).*

(n49)Footnote 47. *Fed. R. Civ. P. 9(c).*

(n50)Footnote 48. *Fed. R. Civ. P. 9(c).*

(n51)Footnote 49. *See Kamen v. American Tel. & Tel. Co., 791 F.2d 1006, 1015-1016 n.1 (2d Cir. 1986*) (citing **Moore's**).

(n52)Footnote 50. *Fed. R. Civ. P. 9(d).*

(n53)Footnote 51. Fed. R. Civ. P. Appendix, Form 18.

(n54)Footnote 52. Fed. R. Civ. P. Appendix, Form 19.

(n55)Footnote 53. *Fed. R. Civ. P. 9(e).*

(n56)Footnote 54. *Sherwood v. United States, 112 F.2d 587, 593 (2d Cir. 1940)* .

(n57)Footnote 55. *Fed. R. Civ. P. 9(f).*

(n58)Footnote 56. *Bleecker v. Drury, 3 F.R.D. 325, 326 (W.D.N.Y. 1944).*

(n59)Footnote 57. *Fed. R. Civ. P. 9(b).*

(n60)Footnote 58. *Fed. R. Civ. P. 9(g).*

(n61)Footnote 59. *See, e.g., PdP Parfums de Paris, S.A. v. International Designer Fragrances, Inc., 901 F. Supp. 581, 585 (E.D.N.Y. 1995)* .

(n62)Footnote 60. *See Avitia v. Metropolitan Club, Inc., 49 F.3d 1219, 1226 (7th Cir. 1995)* .

(n63)Footnote 61. *Fed. R. Civ. P. 23.1(a).*

(n64)Footnote 62. *Fed. R. Civ. P. 23.1(b).*

(n65)Footnote 63. *Fed. R. Civ. P. 65(b).*

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CHAPTER 1 Pleadings *
C. Drafting the Summons and Complaint

1-1 Federal Litigation Guide § 1.35

§ 1.35 Joining Claims

[1] Procedural Rules Encourage Liberal Joinder of Multiple Claims and Remedies

A plaintiff may join, either as independent or as alternate claims, as many claims as the plaintiff has against any defendant. n1

[2] Joining Contingent Claim to Principal Claim

The plaintiff may join principal and contingent claims in a single complaint, even though technically the contingent claim does not accrue until resolution of the principal claim. For example, a plaintiff may sue a debtor to recover a money judgment, and in the same complaint the plaintiff may join a claim against a third party to whom the debtor has conveyed property, asserting that the conveyance is in fraud of creditors. n2

[3] Joinder of Claims is Permissive, Not Compulsory

The joinder of claims is permissive, not compulsory. n3 Accordingly, the plaintiff is not required to assert, all in the same action, all claims against the defendant.

However, the doctrine of claim preclusion, or res judicata, may effectively require a plaintiff to assert all transactionally related claims in a single case. The doctrine of claim preclusion generally precludes a plaintiff from suing the same defendant twice on the same transaction or event. Therefore, a plaintiff must be careful to join all transactionally related claims in a single case. n4

[4] Determining Whether Joinder Is Prevented by Lack of Subject Matter Jurisdiction or Improper Venue

Neither the claim-joinder rule nor any of the other Federal Rules of Civil Procedure can expand the jurisdiction of federal courts. n5 Therefore, although the procedural rules permit unrestricted joinder of claims as a matter of pleading, the court must have a basis of subject matter jurisdiction for each joined claim. n6

[5] Claim Joinder Is Permitted Only for Properly Joined Parties

The claim-joinder rule does not permit the joinder of claims against persons who have not properly been brought into

the case under the various party joinder provisions. n7

For example, one of the party joinder provisions allows parties to be joined in the same case if the claims by or against them arise from the same transaction, and give rise to at least one common question of law or fact. n8

If the parties have been properly joined in a case, the claim-joinder rule then operates to allow the assertion of all claims between any such properly joined parties. n9

[6] Amending Complaint to Join Claims Against Third Party Impleaded by Defendant

After the original complaint is filed, a defendant may assert an "impleader" claim against a third party, essentially seeking indemnity or contribution concerning the plaintiff's claim. n10

If the defendant asserts such a third-party claim, the claim-joinder rule will permit the original plaintiff to join any claims he or she has against the properly impleaded third-party defendant, regardless of transactional relatedness to the underlying dispute. n11

[7] Segregating Joined Claims

The district judge has discretion to order separate trials of claims or issues that have been properly joined in the same complaint. n12 Unlike severance of a claim that has been asserted against a misjoined party, an order of separate trials does not result in the filing of separate cases. Instead, it simply leads to separate factual inquiry of claims or issues in the context of a single, properly joined case. n13

If a claim is asserted against a party that cannot be joined in the case under the party joinder provisions, the court may dismiss the misjoined party without dismissing the remainder of the action. Alternatively, the court may order that the claim against the misjoined party be severed from the case and pursued in a separate action. n14

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedureJoinder of Claims & RemediesGeneral OverviewCivil ProcedureJoinder of Claims & RemediesClaimsCivil ProcedureJoinder of Claims & RemediesLiberal Joinder

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 18(a)*; *see § 1.30*.

(n2)Footnote 2. *Fed. R. Civ. P. 18(b)*.

(n3)Footnote 3. *Fed. R. Civ. P. 18(a)*.

(n4)Footnote 4. *Lytle v. Household Mfg., Inc., 494 U.S. 545, 552 (1990)*.

(n5)Footnote 5. *Fed. R. Civ. P. 82*.

(n6)Footnote 6. *See Fed. R. Civ. P. 18(a)*; *see also United Mine Workers v. Gibbs, 383 U.S. 715, 725 n.13, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)* .

(n7)Footnote 7. *See Fed. R. Civ. P. 18(a); see also Fed. R. Civ. P. 13(h), 14, 19, 20, 22, 24*.

(n8)Footnote 8. *See Fed. R. Civ. P. 20*.

(n9)Footnote 9. *See Fed. R. Civ. P. 18(a).*

(n10)Footnote 10. *See Fed. R. Civ. P. 14(a)(1).*

(n11)Footnote 11. *Fed. R. Civ. P. 18(a).*

(n12)Footnote 12. *See Fed. R. Civ. P. 20(b), 42(b).*

(n13)Footnote 13. *See Fed. R. Civ. P. 20(b), 21.*

(n14)Footnote 14. *Fed. R. Civ. P. 21.*

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CHAPTER 1 Pleadings *
C. Drafting the Summons and Complaint

1-1 Federal Litigation Guide § 1.36

§ 1.36 Drafting Prayer for Relief

A complaint must contain a demand for judgment for the relief the plaintiff seeks. Relief in the alternative or of several different types may be demanded. n1

The demand for judgment may be stated in general terms. For example, a single sum of money may be the requested relief sought for an act of negligence resulting in physical injury, pain of body and mind, and loss of business. n2 Although each item of special damages must be specifically stated in the body of the complaint, the demand for judgment does not have to distinguish between general damages and special damages. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticePleadingsHeightened Pleading RequirementsGeneral OverviewCivil ProcedurePleading & PracticePleadingsHeightened Pleading RequirementsSpecial Damages

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 8(a).*

(n2)Footnote 2. *See, e.g.,* Fed. R. Civ. P. Appendix, Form 9.

(n3)Footnote 3. *See* Fed. R. Civ. P. Appendix, Forms 9, 14; *see also Fed. R. Civ. P. 9(g).*

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CHAPTER 1 Pleadings *
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1-1 Federal Litigation Guide § 1.37

§ 1.37 Signing Complaint

[1] Complaint Must Be Signed

A complaint or other paper presented to a federal district court in connection with any civil action must be signed. n1 Along with the signature, the complaint must include the signer's address, e-mail address, and telephone number. n2

An unsigned complaint must be stricken if the omission is not corrected promptly after the attorney or party has been informed of the omission. n3 Only the original complaint must be signed; copies served on attorneys for other parties need not be signed.

If the plaintiff is represented by counsel, the complaint must be signed by at least one attorney of record. The signature must be in the attorney's individual name. n4 If the plaintiff is not represented by counsel and appears pro se, the complaint must be signed by the plaintiff. n5

A typed or rubber-stamped name is not sufficient to meet the signing requirements of Rule 11. n5.1

[2] Determining Consequences of Signing Complaint

If a party is represented by counsel, the complaint must be signed by at least one attorney of record. n5.2

An attorney or unrepresented party who signs a complaint or other paper certifies, to the best of his or her knowledge, information, and belief, formed after reasonable inquiry, all of the following matters: n6

- The paper is not being presented for an improper purpose
- The paper's legal contentions are warranted by existing law, or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law n7
- The paper's factual contentions have, or, if specifically so identified, likely will have, evidentiary support after a reasonable opportunity for further investigation or discovery

Signing or otherwise presenting a complaint or other paper in violation of the implicit certifications may result in the

imposition of sanctions. n8

Improper purposes for filing a complaint include the following: n9

- Harassment of an opposing party
- Delay
- Needless increase in litigation costs

Forum shopping is not an improper purpose for filing a complaint in federal court, if a ground for federal jurisdiction arguably exists. n10

For a claim presented in a complaint to be deemed frivolous, it must be clear that there is no chance of success. However, a claim need not ultimately prevail in order to be nonfrivolous. n11 In determining whether a complaint is frivolous, courts are to resolve ambiguities in favor of the plaintiff. n12

[3] Making Reasonable Inquiry Before Signing

Attorneys and unrepresented parties have an affirmative duty to make a reasonable investigation of the facts and the law before signing a complaint or other pleading. n13 The reasonableness of an attorney's or unrepresented party's investigation of the facts and the law is measured by an objective standard, based on the circumstances of the case. n14

An attorney may rely on objectively reasonable representations of his or her client. n15 Reliance on information received from other sources may not be reasonable if the attorney has an opportunity to verify the information independently. n16 A failure to make a reasonable investigation prior to signing the complaint may result in the imposition of sanctions. n17 However, an attorney may not be sanctioned for failing to conduct a reasonable inquiry if the complaint turns out to be well-founded. n18

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticePleadingsRule Application & InterpretationCivil ProcedureCounselGeneral OverviewLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 11(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 11(a).*

(n3)Footnote 3. *Fed. R. Civ. P. 11(a).*

(n4)Footnote 4. *Fed. R. Civ. P. 11(a).*

(n5)Footnote 5. *Fed. R. Civ. P. 11(a).*

(n6)Footnote 5.1. *See Becker v. Montgomery, 532 U.S. 754, 764, 121 S. Ct. 1801, 149 L. Ed. 2d 983 (2001)* (typed name not sufficient); *see also Jenkins v. Sladkus, 226 F.R.D. 206, 206-207 (S.D.N.Y. 2005)* (stamped name not sufficient).

(n7)Footnote 5.2. *Fed. R. Civ. P. 11(a)*; *see also Duran v. Carris, 238 F.3d 1268, 1271-1273 (10th Cir. 2001)* .

(n8)Footnote 6. *Fed. R. Civ. P. 11(b).*

(n9)Footnote 7. *See Knipe v. Skinner, 19 F.3d 72, 75 (2d Cir. 1994)* .

(n10)Footnote 8. *Fed. R. Civ. P. 11(c).*

(n11)Footnote 9. *Fed. R. Civ. P. 11(b)(1).*

(n12)Footnote 10. *See Sussman v. Bank of Israel, 56 F.3d 450, 457 (2d Cir. 1995).*

(n13)Footnote 11. *See Pierce v. F.R. Tripler & Co., 955 F.2d 820, 830 (2d Cir. 1992).*

(n14)Footnote 12. *Oliveri v. Thompson, 803 F.2d 1265, 1275 (2d Cir. 1986).*

(n15)Footnote 13. *Fed. R. Civ. P. 11(b).*

(n16)Footnote 14. *Fed. R. Civ. P. 11(b).*

(n17)Footnote 15. *Hadges v. Yonkers Racing Corp., 48 F.3d 1320, 1323, 1329-1330 (2d Cir. 1995)* .

(n18)Footnote 16. *See Fed. R. Civ. P. 11(b).*

(n19)Footnote 17. *Fed. R. Civ. P. 11(c).*

(n20)Footnote 18. *See Calloway v. Marvel Entertainment Group, 854 F.2d 1452, 1470 (2d Cir. 1988).*

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CHAPTER 1 Pleadings *
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1-1 Federal Litigation Guide § 1.38

§ 1.38 Verifying Complaint

Except as otherwise specifically provided by rule or statute, the complaint does not need to be verified or accompanied by affidavit. n1 Verification is specifically required in the following cases:

- A complaint in a shareholders' derivative action n2
- A complaint that requests an ex parte temporary restraining order n3
- A complaint in admiralty stating a quasi-in-rem or in-rem claim n4

If a verification or affidavit is submitted with a complaint, it must be signed in accordance with the rule governing signatures on pleadings. The signature denotes the same implicit representations to the court concerning the basis and purpose of the document as does a signature on a pleading. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 11(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 23.1*(b).

(n3)Footnote 3. *Fed. R. Civ. P. 65(b).*

(n4)Footnote 4. *See* Fed. R. Civ. P., Supplemental Rules for Certain Admiralty and Maritime Claims, Rules B, C.

(n5)Footnote 5. *Fed. R. Civ. P. 11(a), (b).*

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CHAPTER 1 Pleadings *
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1-1 Federal Litigation Guide § 1.39

§ 1.39 Demanding Jury

[1] Preserving Right to Jury Trial

The complaint may include a demand for a jury trial of any issue triable of right by a jury. A demand for a jury trial on any such issue may also be served and filed by any party by not later than 14 days after the service of the last pleading directed to the issue. n1 The failure to demand a jury trial constitutes a waiver of trial by jury, although in such a case the court has discretion to try any issue with an advisory jury. n2

[2] Endorsing Jury Demand on Face of Complaint

A demand for a trial by jury may be endorsed on the complaint. n3 The preferred method of endorsing the demand on the complaint to place a notation such as "Jury Demanded," on the face of the complaint. However, a jury demand made on the last page of a pleading has also been deemed sufficient to place the opposing party on notice that a jury trial has been requested. n4

[3] Checking Box on Civil Cover Sheet Is Usually Insufficient

Checking the "Yes" box on the civil cover sheet next to "Jury Demand" generally does not constitute a valid demand for jury trial. The cover sheet typically will not accompany pleadings served on litigants, and therefore would not give opposing parties notice of the jury demand. However, if the cover sheet containing the jury trial notation is served with the summons and complaint, it may be deemed sufficient. n5

[4] Specifying Issues for Jury Trial

In the jury demand, the plaintiff may specify the issues for trial by jury. n6

If the plaintiff has demanded trial by jury for only some of the issues, any other party will have the right to demand a jury trial of any other or all of the issues of fact in the action. n7 If the plaintiff's jury demand does not specify any issues, the plaintiff will be deemed to have demanded trial by jury for all the issues so triable. n8

A plaintiff's jury demand that does not specify particular issues generally covers all issues raised in subsequent pleadings affecting the plaintiff. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureTrialsJury TrialsRight to Jury Trial

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 38(b).*

(n2)Footnote 2. *Fed. R. Civ. P. 38(d), 39(c).*

(n3)Footnote 3. *Fed. R. Civ. P. 38(b).*

(n4)Footnote 4. *See, e.g., Gargiulo v. Delsole, 769 F.2d 77, 78-79 (2d Cir. 1985)* (citing **Moore's**).

(n5)Footnote 5. *See Favors v. Coughlin, 877 F.2d 219, 220 (2d Cir. 1989).*

(n6)Footnote 6. *Fed. R. Civ. P. 38(c).*

(n7)Footnote 7. *Fed. R. Civ. P. 38(c).*

(n8)Footnote 8. *Fed. R. Civ. P. 38(c).*

(n9)Footnote 9. *YJR Enters., Inc. v. Twin County Grocers, Inc., 709 F. Supp. 499, 501 (S.D.N.Y. 1989).*

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CHAPTER 1 Pleadings *
C. Drafting the Summons and Complaint

1-1 Federal Litigation Guide § 1.40

§ 1.40 Preparing Summons

A summons must: n1

- Name the court and the parties
- Be directed to the defendant
- State the name and address of the plaintiff's attorney or--if unrepresented--of the plaintiff
- State the time within which the defendant must appear and defend
- 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
- Be signed by the clerk
- Bear the court's seal

The court may permit a summons to be amended. n2 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. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsContent & FormCivil ProcedurePleading & PracticeService of ProcessSummonsIssuance

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 4(a)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 4(a)(2).*

(n3)Footnote 3. *Fed. R. Civ. P. 4(b).*

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CHAPTER 1 Pleadings *
C. Drafting the Summons and Complaint

1-1 Federal Litigation Guide § 1.41

§ 1.41 Preparing Civil Cover Sheet or Information Form

Local rules may require the plaintiff to complete and submit a Civil Cover Sheet or Information Form when the complaint is submitted for filing. The sheet or form is usually available from the court clerk. The sheet or form typically seeks information for the benefit of the clerk and court in administering the court's caseload, and it is not ordinarily served on opposing parties.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsContent & FormGovernmentsCourtsClerks of Court

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CHAPTER 1 Pleadings *
C. Drafting the Summons and Complaint

1-1 Federal Litigation Guide § 1.42

§ 1.42 Preparing Corporate Disclosure Statement

[1] Determining Who Must File Disclosure Statement

To enable judges to make informed decisions concerning possible disqualification based on financial interest, all nongovernmental corporate parties must file two copies of a statement that either: n1

- Identifies any parent corporation and any publicly held corporation that owns 10 percent or more of its stock
- Indicates that there is not a parent corporation nor any publicly held corporation that owns 10 percent or more of its stock

[2] Filing Disclosure Statement

A corporate party must: n2

- File the disclosure statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court
- Promptly file a supplemental statement if any required information changes

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsRule Application & Interpretation

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 7.1(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 7.1(b).*

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CHAPTER 1 Pleadings *
C. Drafting the Summons and Complaint

1-1 Federal Litigation Guide § 1.43

§ 1.43 Preparing and Filing Notice of Constitutional Challenge to a Statute

A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal or state statute must promptly file a notice of constitutional question stating the question and identifying the paper that raises it, if either of the following is true: n1

- 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 n2

- 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 n3

Although Rule 5.1 does not so state, the party's obligation to "file" the notice of a constitutional challenge to a statute means that the party must comply with all the obligations of Rule 5(d). In other words, the notice must be tendered to the clerk or filed by electronic means established by court rules. n4 The filing must take place within a reasonable time after service and must be accompanied by a certificate of service. n5 In addition, the filing party is required to serve the notice and paper on the Attorney General of the United States if a federal statute is challenged, or on the state attorney general if a state statute is challenged, either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose. n6

No source provides further guidance on the content of the notice. Because the rule requires only a "notice," however, it is highly unlikely that the party giving notice has any obligation to do more than give a cursory summary of the nature of the challenge and point to the paper in which the challenge is raised (which must accompany the notice when it is served on the relevant attorney general). n7 The party raising the challenge need not fully brief the constitutional question merely to assist an attorney general in deciding whether to intervene.

The court must, under *28 U.S.C. § 2403*, certify to the Attorney General of the United States that there is a constitutional challenge to a federal statute, or certify to the state attorney general that there is a constitutional challenge to a state statute. n8

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. n9

The court may extend the 60-period on its own or on motion. One occasion for extension may arise if the court certifies a challenge under § 2403 after a party files a notice of constitutional question. The court may not enter a final judgment holding the federal or state statute unconstitutional until after the 60-day time period to intervene set out in Rule 5.1 has expired. n10 The rule limits only a final judgment of unconstitutionality during the 60-day period. All other procedures are unaffected by the notice or certification of the constitutional challenge and the potential intervention of the appropriate attorney general. Among other matters that may occur during the 60-day period are the following:

- Pretrial activities, which may continue without interruption n11
- Grants of injunctive or other interlocutory relief n12
- Entry of a final judgment or order rejecting the constitutional challenge to the statute n13

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. n14

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 5.1(a)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 5.1(a)(1)(A).*

(n3)Footnote 3. *Fed. R. Civ. P. 5.1(a)(1)(B).*

(n4)Footnote 4. *Fed. R. Civ. P. 5(e).*

(n5)Footnote 5. *Fed. R. Civ. P. 5(d).*

(n6)Footnote 6. *Fed. R. Civ. P. 5.1(a)(2).*

(n7)Footnote 7. *Fed. R. Civ. P. 5.1(a)(2).*

(n8)Footnote 8. *Fed. R. Civ. P. 5.1(b).*

(n9)Footnote 9. *Fed. R. Civ. P. 5.1(c).*

(n10)Footnote 10. *Fed. R. Civ. P. 5.1(c).*

(n11)Footnote 11. *Fed. R. Civ. P. 5.1* Committee Note 2006.

(n12)Footnote 12. *Fed. R. Civ. P. 5.1* Committee Note 2006.

(n13)Footnote 13. *Fed. R. Civ. P. 5.1(c).*

(n14)Footnote 14. *Fed. R. Civ. P. 5.1(d).*

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1-1 Federal Litigation Guide § 1.44

§ 1.44 Understanding Privacy Protection For Filings Made with the Court

[1] Redacting Private Information

Rule 5.2 was adopted in compliance with the E-Government Act of 2002. n1 This Act requires, among other things, that federal courts make all electronic filings available online, through each court's website. Any paper filings that are scanned into electronic form must be made available to the same extent as any original electronic filings. Electronic filing is becoming the normal mode for filing papers in federal district courts. District courts may adopt, and more and more district courts have adopted, local rules requiring parties to file electronically. n2 Thus, courts must deal with the consequences of having its files available to the public over the internet.

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, 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: n3

- The last four digits of the social-security number and taxpayer-identification number
- The year of the individual's birth
- The minor's initials
- The last four digits of the financial-account number

The redaction requirement does not apply to the following: n4

- A financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding
- The record of an administrative or agency proceeding
- The official record of a state-court proceeding

- The record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed

- A filing covered by Rule 5.2(c) (social security appeals and immigration cases) or Rule 5.2(d) (unredacted filing under seal)

- A pro se filing in an action brought under *28 U.S.C. §§ 2241*, *2254*, or *2255*

While the term "redacted" is used, the rule is intended to govern a filing that is prepared with abbreviated identifying information in the first instance, as well as a filing in which the information is edited after its preparation. n5 The responsibility to prepare or redact filings so that they include only the allowed information rests with counsel and the party or nonparty making the filing. The clerk is not required to review documents filed with the court for compliance with the rule. n6 Further, the advisory committee note indicates that attorneys should consult with their clients as to what personal information is to be included in a document filed with the court. The attorney should make the client aware that any personal information not protected by sealing or redaction will be made available over the internet. n7

[2] Limiting Remote Access to Electronic Files in 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: n8

- The parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record

- Any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to the docket maintained by the court, and an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record

[3] 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. n9

[4] Seeking Protective Order to Limit Access to Private Information

For good cause, the court may require redaction of additional information. n10 The court may also limit or prohibit a nonparty's remote electronic access to a document filed with the court. n11

[5] Filing Unredacted Copy 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. n12

[6] Filing a Reference List of Redacted Information

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. n13

[7] Waiving Protections Under Rule 5.2

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. n14

[8] Seeking More or Less Protection Than Specified in Rule

Rule 5.2 requires the redaction of certain information "unless the court orders otherwise." n15 Accordingly, the court retains authority under the rule to require that information, otherwise subject to redaction, be included in a filing. Alternatively, the rule allows the court, for good cause, to issue protective orders that either: n16

- Require redaction of additional information that would not otherwise need to be redacted
- Limit or prohibit remote electronic access by nonparties to a document filed with the court

While Rule 5.2 provides for the public filing of certain information, such the last four digits of an account number, it does not create a presumption that even this information cannot be protected in an appropriate case. The advisory committee note indicates that it may be necessary in some cases to prevent remote access to any part of an identifying number, or to protect information not referred to in Rule 5.2, such as a driver's license number or alien registration number. n17

The court may also order that records be sealed in an appropriate case. Rule 5.2 neither prevents the sealing of records nor affects the limitations on sealing that are otherwise applicable to the court. n18

[9] Failing to Redact Private Information

Although Rule 5.2 requires that parties omit or redact certain information from their filings with the court, it is silent as to the consequences of a failure to do so. It is clear that a court may instruct the clerk to delete the offending material. n19 Moreover, if the party fails to redact information in bad faith or to harass, sanctions may be in order. In an egregious case, the failure to comply with Rule 5.2 and with the Courts orders may warrant contempt. n20

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 5.2*, Committee Note (2007).

(n2)Footnote 2. *Fed. R. Civ. P. 5(d)(3)*; See, e.g., Local Rule, D. Me., L.R. 5(c) ("Unless exempt or otherwise ordered by the Court, papers shall be filed and served electronically as required by the court's Administrative Procedures Governing the Filing and Service by Electronic Means"); Local Rules, E.D. Cal., L.R. 5-133 ("Unless excused by the court or by the electronic filing procedures set forth in these Rules, attorneys shall file all documents electronically pursuant to those Rules."); Local Rules, D. Ore., L.R. 5.1(a) ("All documents filed with the Court by a Registered User shall be in accordance with the Electronic Filing Procedures set forth in these local rules.").] Scanning the decreasing number of paper filings still being made into electronic form is common practice in the district courts. [1.03: *Fed. R. Civ. P. 5.2*, Committee Note (2007).] ("the number of filings that remain in paper form is sure to diminish over time. Most districts scan paper filings into the electronic case file, where they become available to the public in the same way as documents initially filed in electronic form.").

(n3)Footnote 3. *Fed. R. Civ. P. 5.2(a)(1)-(4)*.

(n4)Footnote 4. *Fed. R. Civ. P. 5.2(b)(1)-(6)*.

(n5)Footnote 5. *Fed. R. Civ. P. 5.2*, Committee Note (2007).

(n6)Footnote 6. *Fed. R. Civ. P. 5.2*, Committee Note (2007).

(n7)Footnote 7. *Fed. R. Civ. P. 5.2*, Committee Note (2007).

(n8)Footnote 8. *Fed. R. Civ. P. 5.2(c)(1), (c)(2).*

(n9)Footnote 9. *Fed. R. Civ. P. 5.2(d).*

(n10)Footnote 10. *Fed. R. Civ. P. 5.2(e)(1).*

(n11)Footnote 11. *Fed. R. Civ. P. 5.2(e)(2).*

(n12)Footnote 12. *Fed. R. Civ. P. 5.2(f).*

(n13)Footnote 13. *Fed. R. Civ. P. 5.2(g).*

(n14)Footnote 14. *Fed. R. Civ. P. 5.2(h).*

(n15)Footnote 15. *Fed. R. Civ. P. 5.2(a).*

(n16)Footnote 16. *Fed. R. Civ. P. 5.2(e).*

(n17)Footnote 17. *Fed. R. Civ. P. 5.2*, Committee Note (2007).

(n18)Footnote 18. *Fed. R. Civ. P. 5.2*, Committee Note (2007).

(n19)Footnote 19. *See Luster v. City of Lebanon, 2007 U.S. Dist. LEXIS 813, at *2 (S.D. Ill. Jan. 8, 2007)* .

(n20)Footnote 20. *See Luster v. City of Lebanon, 2007 U.S. Dist. LEXIS 813, at *56 (S.D. Ill. Jan. 8, 2007)* .

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CHAPTER 1 Pleadings *
C. Drafting the Summons and Complaint

1-1 Federal Litigation Guide §§ 1.45 through 1.49

[Reserved]

§§ 1.45[Reserved]

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CHAPTER 1 Pleadings *
D. Understanding Personal Jurisdiction Requirements

1-1 Federal Litigation Guide § 1.50

§ 1.50 Due Process Requires Minimum Contacts and Service of Process

In general, district courts may exercise personal jurisdiction to the same extent as the courts of the state in which the district court is located. n1 Before a defendant may be subjected to a court's jurisdiction, due process requires both of the following: n2

- The defendant must have "minimum contacts" with the state
- The defendant must be served with process in accordance with statutory requirements

For further discussion of minimum contacts requirements for specific jurisdiction, *see § 1.56*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsConstitutional LimitsCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsMinimum ContactsCivil ProcedurePleading & PracticeService of ProcessGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 101, 108 S. Ct. 404, 98 L. Ed. 2d 415 (1987)* ; *see also Claus v. Mize, 317 F.3d 725, 727-729 (7th Cir. 2003)* .

(n2)Footnote 2. *See International Shoe Co. v. Washington, 326 U.S. 310, 311, 66 S. Ct. 154, 90 L. Ed. 95 (1945)* ; *see also World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-292, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)* .

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CHAPTER 1 Pleadings *
D. Understanding Personal Jurisdiction Requirements

1-1 Federal Litigation Guide § 1.51

§ 1.51 Rule 4 Governs Service of Process

Service of a summons is a means of obtaining personal jurisdiction by a court over a defendant, n1 with the goal of providing the defendant with notice that an action has commenced. n2 Rule 4 governs service of process. n3 A summons must be served with a copy of the complaint. n4 The plaintiff is responsible for having the summons and complaint served and must furnish the necessary copies to the person who makes service. n5 Service may be made by any person who is at least 18 years old and not a party to the action. n6 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. n7

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 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. n8 In the alternative, a person may be served by doing any of the following: n9

- Delivering a copy of the summons and of the complaint to the individual personally
- 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
- Delivering a copy of each to an agent authorized by appointment or by law to receive service of process

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsContent & FormCivil ProcedurePleading & PracticeService of ProcessSummonsIssuance

FOOTNOTES:
(n1)Footnote 1. *Cory v. Aztec Steel Bldg., Inc., 468 F.3d 1226, 1229 (10th Cir. 2006)* (citing **Moore's**).

(n2)Footnote 2. *Oklahoma Radio Assocs. v. FDIC, 969 F.2d 940, 943 (10th Cir. 1992)* .

(n3)Footnote 3. *See Fed. R. Civ. P. 4.*

(n4)Footnote 4. *Fed. R. Civ. P. 4(c)(1).*

(n5)Footnote 5. *Fed. R. Civ. P. 4(c)(1).*

(n6)Footnote 6. *Fed. R. Civ. P. 4(c)(2).*

(n7)Footnote 7. *Fed. R. Civ. P. 4(c)(3).*

(n8)Footnote 8. *Fed. R. Civ. P. 4(e)(1).*

(n9)Footnote 9. *Fed. R. Civ. P. 4(e)(2).*

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CHAPTER 1 Pleadings *
D. Understanding Personal Jurisdiction Requirements

1-1 Federal Litigation Guide § 1.52

§ 1.52 Obtaining Issuance of Summons by Court Clerk

At or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is in proper form, the clerk will sign, seal, and issue it to the plaintiff for service on the defendant. n1 The summons must be issued by the clerk, and is defective if signed by the plaintiff or the plaintiff's attorney. n2

Although the summons may be presented to the clerk for issuance after the complaint has been filed, the summons and complaint must be served contemporaneously. One of the reasons why the plaintiff may wish to file the complaint prior to issuance of the summons is to comply with the statute of limitations.

In any action involving multiple defendants, a separate summons must be issued for each defendant named in the action. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessSummonsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsContent & FormCivil ProcedurePleading & PracticeService of ProcessSummonsIssuanceGovernmentsCourtsClerks of Court

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 4(b).*

(n2)Footnote 2. *Kramer v. Scientific Control Corp., 365 F. Supp. 780, 788 (E.D. Pa. 1973)* .

(n3)Footnote 3. *Fed. R. Civ. P. 4(b).*

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CHAPTER 1 Pleadings *
D. Understanding Personal Jurisdiction Requirements

1-1 Federal Litigation Guide § 1.53

§ 1.53 Service of Process Generally Must Be Effected Within 120 Days After Filing Complaint

If service of process is not properly made on the defendant within 120 days of the filing of the complaint, the court must, upon motion or on its own initiative after notice to the plaintiff, either dismiss the action without prejudice as to that defendant, or direct that service must be effected within a specified time. n1 If an amended complaint that adds additional defendants is filed, service on the new defendants begins to run from the date of filing the amended complaint. n2

The court must extend the 120-day deadline for serving process if the party effecting the untimely service demonstrates good cause for the failure to timely serve. n3 Although the court *must* extend the 120-day deadline for serving process if good cause is shown, the court has discretion to extend the deadline even absent a showing of good cause. n4 Relief may be warranted if the statute of limitations would bar refiling the action, if the defendant is evading service, or if the defendant conceals a defect in service. n5

The 120-day service of process deadline does not apply to service on a defendant in a foreign country. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessAmended & Supplemental Service

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 4(m)*; *see also Thompson v. Maldonado, 309 F.3d 107, 110 (2d Cir. 2002)* .

(n2)Footnote 2. *See McGuckin v. United States, 918 F.2d 811, 813 (9th Cir. 1990)* .

(n3)Footnote 3. *Fed. R. Civ. P. 4(m)*; *see also In re Sheehan, 253 F.3d 507, 512 (9th Cir. 2001)* ; *Hatfill v. Foster, 372 F. Supp. 2d 725, 737-739 (S.D.N.Y. 2005)*.

(n4)Footnote 4. *See Henderson v. United States, 517 U.S. 654, 663 n.10, 116 S. Ct. 1638, 134 L. Ed. 2d 880 (1996)* ; *Horenkamp v. Van Winkle & Co., Inc., 402 F.3d 1129, 1131-1133 (11th Cir. 2005)* ; *Hoffman v. Balt. Police*

Dep't, 379 F. Supp. 2d 778, 785-787 (D. Md. 2005).

(n5)Footnote 5. *See Fed. R. Civ. P. 4(m)* Committee Note (1993); *see also Mann v. American Airlines, 324 F.3d 1088, 1090-1091 (9th Cir. 2003)* (deadline extended based on statute of limitations).

(n6)Footnote 6. *Fed. R. Civ. P. 4(m)*; *Nylok Corp. v. Fastener World Inc., 396 F.3d 805, 806-807 (7th Cir. 2005)* .

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1-1 Federal Litigation Guide § 1.54

§ 1.54 Waiving Service of Process

[1] Notifying Defendant of Commencement of Action, and Requesting Waiver of Service

In order to initiate the waiver of service option under the Federal Rules of Civil Procedure, the plaintiff must notify the defendant that an action has been commenced, and request the defendant to waive service of process. The notice and request for waiver must be delivered in writing. n1 Two waivers of service are not required when the same defendant is sued in two capacities. n2

To be effective, the waiver must be signed and returned to the plaintiff. In the absence of an executed waiver, a defendant's actual knowledge of the lawsuit resulting from receipt of the request for waiver does not establish the court's personal jurisdiction over the defendant. n3

[2] Waiver of Service of Process Does Not Constitute Waiver of Court's Jurisdiction Over Defendant

By waiving service of process, a defendant does not waive any objection to the venue of the court, or to personal jurisdiction. The only issues precluded by execution of a waiver are those involving the sufficiency of the summons, or the sufficiency of service. n4

[3] Waiver of Service Provisions Apply to Individuals, Corporations, Partnerships, and Associations

The waiver of service provisions of Rule 4(d) apply only to individuals, corporations, and associations that are subject to service under Rules 4(e), (f), or (h). n5 This includes the following: n6

- Individuals within a judicial district of the United States
- Individuals in a foreign country
- Domestic or foreign corporations
- Partnerships or unincorporated associations

The waiver option does *not* apply to service on the following: n7

- Minors or incompetent persons (service governed by Rule 4(g))
- United States, its agencies, corporations, or officers (service governed by Rule 4(i))
- Foreign, state, or local governments (service governed by Rule 4(j)) n8

[4] Imposing Costs on Defendant for Failing to Execute Waiver of Service

A defendant subject to the waiver provisions of Rule 4(d) who has received notice of the action and a request for waiver of service has an affirmative duty to avoid unnecessary costs involved with serving process. If the defendant fails to execute the request for waiver of service, the costs incurred in effecting service will be imposed on that defendant, unless good cause for the failure is shown. n9

Only those costs arising after the expiration of the time to return the waiver may be imposed on the defendant. If the plaintiff proceeds with formal service before the defendant's deadline to return the executed waiver, those costs cannot be imposed on the defendant. Costs include all costs incurred in effecting service, as well as the costs, including reasonable attorney's fees, of any motion required to collect the costs of service. n10 The costs incurred for service are imposed on the defendant even if the defendant is the "prevailing party" entitled to costs under Rule 54. n11

[5] Defendant's Time to Respond to Waiver Request Does Not Toll 120-Day Period Plaintiff Allowed for Service

The period of time given to a defendant to respond to the plaintiff's waiver request does not toll the 120-day period within which the plaintiff must serve the defendant after commencing the action. If the defendant does not return an executed waiver, the plaintiff must serve the defendant within the remaining time. A court may in its discretion grant the plaintiff additional time within which to serve the defendant if the date by which the defendant is obligated to return the waiver is later than the end of the 120-day period. n12 The 120-day time limit for service is not applicable to foreign defendants. n13

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessAmended & Supplemental ServiceCivil ProcedurePleading & PracticeService of ProcessWaiversGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessWaiversCosts of ServiceCivil ProcedurePleading & PracticeService of ProcessWaiversRequests

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 4(d)(1)(A).*

(n2)Footnote 2. *Chapman v. New York State Div. for Youth, 227 F.R.D. 175, 180-181 (N.D.N.Y. 2005).*

(n3)Footnote 3. *See Cambridge Holdings Group, Inc. v. Federal Ins. Co., 489 F.3d 1356, 1362 (D.C. Cir. 2007) .*

(n4)Footnote 4. *Fed. R. Civ. P. 4(d)(5)*; *see Fed. R. Civ. P. 12(b)(4), (5).*

(n5)Footnote 5. *Fed. R. Civ. P. 4(d)(1).*

(n6)Footnote 6. *Fed. R. Civ. P. 4.*

(n7)Footnote 7. *Fed. R. Civ. P. 4(d)(1).*

(n8)Footnote 8. *Nylok Corp. v. Fastener World Inc., 396 F.3d 805, 806-807 (7th Cir. 2005)* .

(n9)Footnote 9. *Fed. R. Civ. P. 4(d)(2)*; *see Maranto v. Dillard Nat'l Bank, 230 F.R.D. 478, 478-479 (W.D. La. 2005)*.

(n10)Footnote 10. *Fed. R. Civ. P. 4(d)(2)*.

(n11)Footnote 11. *Estate of Darulis v. Garate, 401 F.3d 1060, 1063-1064 (9th Cir. 2005)*.

(n12)Footnote 12. *See Fed. R. Civ. P. 4(m)*.

(n13)Footnote 13. *See Nylok Corp. v. Fastener World, Inc., 396 F.3d 805, 806-807 (7th Cir. 2005)* .

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CHAPTER 1 Pleadings *
D. Understanding Personal Jurisdiction Requirements

1-1 Federal Litigation Guide § 1.55

§ 1.55 Filing Proof of Service

If the defendant waives service of process, the plaintiff is not required to file proof of service. n1 In all other cases, if service of process was made by a person other than a United States marshal or deputy marshal, an affidavit attesting to service must be filed with the court. n2

A paper is filed by delivering it to either: n3

- The clerk
- 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

If service of process was effected outside of the United States pursuant to a treaty or convention, proof of service must be made in accordance with the requirements of the treaty or convention. n4 If service of process was effected outside of the United States other than pursuant to a treaty or convention, proof of service must include a receipt signed by the addressee, or other evidence of delivery acceptable to the court. n5

Failure to file proof of service does not affect the validity of the service, provided the service was properly effected. n6 The court may permit a proof of service to be amended. n7

After the plaintiff files the proof of service, a defendant refuting the validity of service bears the burden of proof to overcome prima facie evidence of proper service. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessProofGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessProofAmendmentsCivil ProcedurePleading & PracticeService of ProcessProofCertificates

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 4(d)(4).*

(n2)Footnote 2. *Fed. R. Civ. P. 4(l)*(1).

(n3)Footnote 3. *Fed. R. Civ. P. 5(d)(2).*

(n4)Footnote 4. *Fed. R. Civ. P. 4(l)*(2)(A).

(n5)Footnote 5. *Fed. R. Civ. P. 4(l)*(2)(B).

(n6)Footnote 6. *Fed. R. Civ. P. 4(l)*(3).

(n7)Footnote 7. *Fed. R. Civ. P. 4(l)*(3).

(n8)Footnote 8. *See Trustees of Local Union No. 727 Pension Fund v. Perfect Parking, Inc., 126 F.R.D. 48, 52 (N.D. Ill. 1989)* .

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CHAPTER 1 Pleadings *
D. Understanding Personal Jurisdiction Requirements

1-1 Federal Litigation Guide § 1.56

§ 1.56 Determining Whether Defendant Has Minimum Contacts for Specific Jurisdiction

[1] General and Specific Jurisdiction Distinguished

General jurisdiction refers to jurisdiction to adjudicate claims that do not arise from the defendant's contacts with the forum state. n1

Thus, if a defendant is amenable to general jurisdiction in a state, the state may exercise jurisdiction over the defendant based on any claim, including claims unrelated to the defendant's contacts with the state. General jurisdiction ordinarily exists only when the defendant's forum connections are continuous, systematic, and substantial.

By contrast, specific jurisdiction refers to jurisdiction to adjudicate claims arising from the defendant's contacts with the forum state. n2

If a defendant is not amenable to general jurisdiction in a state, the state may exercise jurisdiction over the defendant only for claims that arise out of the defendant's forum contacts. Specific jurisdiction may be available when the defendant has few contacts, or even a single contact, with the forum state, if the claim arises directly from the contacts. A typical example is the exercise of specific jurisdiction over a nonresident defendant who has committed a tort within the state. n3

[2] Cause of Action Must Arise Out of Defendant's Activities Within Forum State

If a nonresident defendant's contacts with the forum state are not substantial, continuous, and systematic enough to support general jurisdiction, a defendant may still be subject to specific jurisdiction for claims arising from or related to its activities within the state.

Specific jurisdiction requires a showing by the plaintiff of each of the following: n4

- The nonresident defendant has purposefully established significant (*i.e.*, not random, fortuitous or attenuated) contact with the forum state; and

- The plaintiff's cause of action arises out of or is related to the defendant's forum contacts

If the plaintiff can make that showing, the defendant will have the burden of showing, from the balance of interest factors, that the state's exercise of specific jurisdiction would be unfair. n5

[3] Considering the Contacts Leading to and Surrounding Cause of Action

The proper focus in the specific jurisdiction analysis is on those contacts leading up to and surrounding the accrual of the cause of action. Later events are not considered. This focus is required by three key themes of specific jurisdiction analysis: n6

- Fair notice to the defendant
- Purposeful availment by the defendant
- A relationship between the forum-based activity and the cause of action

[4] Evaluating the Purposeful Availment Requirement

In addition to the requirement that the cause of action derive from the contact with the forum state, it must also be shown that the contact is properly attributable to the defendant. It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. n7

Intentionally causing an effect in the forum state constitutes purposeful availment. n8

[5] Evaluating Fairness Requirement

Once the plaintiff has shown that the defendant has purposefully established minimum contacts within the forum state giving rise to the lawsuit, it remains necessary to consider whether the balance of competing interests and the nature and quality of the defendant's purposeful contacts would make it fair play and substantial justice to subject the defendant to jurisdiction there. n9

Once the plaintiff establishes purposeful contact by the defendant, the burden of proving that the exercise of jurisdiction would be *unfair* shifts to the defendant. n10

The Supreme Court has identified five factors to consider to evaluate fairness: n11

- The burden on the defendant
- The forum state's interest in adjudicating the dispute
- The plaintiff's interest in obtaining convenience and effective relief
- The interstate judicial systems' interest in obtaining the most efficient resolution of controversies
- The shared interest of the several states in furthering fundamental substantive policies

[6] Applying Jurisdictional Analysis to Internet Contacts

The likelihood that personal jurisdiction can be constitutionally exercised based on internet contacts is directly proportionate to the nature and quality of commercial activity that an entity conducts over the internet. n12 This sliding scale is consistent with well developed personal jurisdiction principles. At one end of the spectrum are situations where

a defendant clearly does business over the internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the internet, personal jurisdiction is proper. n13

At the opposite end are situations where a defendant has simply posted information on a website which is accessible to users in foreign jurisdictions. A passive website that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive websites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the website. n14

Generally courts have ruled that availability in the forum state of a mere passive website, which functions as a kind of advertisement or source of information about a defendant and its products, is not a sufficient basis for specific personal jurisdiction. This type of website is not seen as establishing purposeful availment in the forum state. n15

Personal jurisdiction may be proper when the internet connections go beyond a mere passive website and indicate that the defendant intentionally directed activity toward the forum state. n16 Interactive websites, which allow the user to exchange information with the website (such as by allowing the user to order products directly over the internet), have been found to be a basis for jurisdiction. n17 However, the *potential* for interactivity with forum residents should not, by itself, be a basis for jurisdiction. The court must examine the circumstances to determine whether there is deliberate action aimed at the forum, such as transactions between the defendant and residents of the forum. n18 The Ninth Circuit found that the sale of a single item on an eBay internet auction website was not a substantial contact that would support specific personal jurisdiction over the seller. n19

FOOTNOTES:

(n1)Footnote 1. *See Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.9, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984)* .

(n2)Footnote 2. *See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 n.15, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)* .

(n3)Footnote 3. *See McGee v. International Life Ins. Co., 355 U.S. 220, 223, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957)* .

(n4)Footnote 4. *See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 486, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)* .

(n5)Footnote 5. *See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 483, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)* .

(n6)Footnote 6. *See Harlow v. Children's Hosp., 432 F.3d 50, 60-64 (1st Cir. 2005)* .

(n7)Footnote 7. *See Hanson v. Denckla, 357 U.S. 235, 254, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958)* ; *see also Hannon v. Beard, 524 F.3d 275, 284 (1st Cir. 2008)* .

(n8)Footnote 8. *See Calder v. Jones, 465 U.S. 783, 790, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984)* .

(n9)Footnote 9. *See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)* .

(n10)Footnote 10. *See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)* .

(n11)Footnote 11. *See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)* .

(n12)Footnote 12. *Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)* ; *see also Lakin v. Prudential Secs., 348 F.3d 704, 711 (8th Cir. 2003) see also ALS Scan, Inc., v. Digital Serv. Consultants, Inc., 293 F.3d 707, 712-714 (4th Cir. 2002)* ; *see also Neogen Corp. v. Neo Gen Screening, Inc., 282 F.3d 883, 890 (6th Cir. 2002)* .

(n13)Footnote 13. *Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)* .

(n14)Footnote 14. *See Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)* .

(n15)Footnote 15. *See Jennings v. AC Hydraulic A/S, 383 F.3d 546, 549-550 (7th Cir. 2004)* .

(n16)Footnote 16. *See ALS Scan, Inc., v. Digital Serv. Consultants, Inc., 293 F.3d 707, 712-714 (4th Cir. 2002)* .

(n17)Footnote 17. *See Bridgeport Music, Inc. v. Still N the Water Publg, 327 F.3d 472, 484 (6th Cir. 2003)* .

(n18)Footnote 18. *See Jackson v. California Newspapers Pship, 406 F. Supp. 2d 893, 895-898 (N.D. Ill. 2005)* .

(n19)Footnote 19. *See Boschetto v. Hansing, 539 F.3d 1011 (9th Cir. 2008)* .

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CHAPTER 1 Pleadings *
D. Understanding Personal Jurisdiction Requirements

1-1 Federal Litigation Guide §§ 1.57 through 1.59

[Reserved]

§§ 1.57[Reserved]

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CHAPTER 1 Pleadings *
E. Removing a State Court Case to Federal Court

1-1 Federal Litigation Guide § 1.60

§ 1.60 Understanding Removal

Certain federal statutes permit defendants to remove an action originally brought in state court to the federal district court for the district and division in which the state action is pending. A defendant may invoke federal removal jurisdiction only if the case originally could have been brought in federal court. Removal is usually done through the general removal statute, which provides for removal on the basis of federal question and diversity jurisdiction. n1

The general removal statute sets forth the following restrictions on removal: n2

- Only a civil action brought in a state court may be removed
- The civil action must be one of which the district courts of the United States have original jurisdiction
- Only a defendant may remove
- The action must be removed to the federal district court for the district and division within which the action is pending

Special removal statutes also provide for removal under certain circumstances. n3 The removal procedure changes the forum in which the case will be tried. n4 Thus, unlike a transfer of a case from one federal district court to another district court within the federal court system, the removal statutes allow a case to be taken from a state forum system to the federal system. n5

The removal statutes provide defendants with an opportunity similar to that a plaintiff exercises-- to choose to have a federal forum adjudicate the claim, so long as federal subject matter exists. n6 Removal jurisdiction for federal question cases was designed to ensure that the tribunal better informed on questions of federal law will adjudicate the matter. n7 In diversity cases, removal jurisdiction was designed to protect nonresident defendants from any perceived prejudice or preference of the state court regarding the resident plaintiffs. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureRemovalGeneral OverviewCivil ProcedureRemovalBasisGeneral OverviewCivil ProcedureRemovalBasisFederal Questions

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1441.*

(n2)Footnote 2. *28 U.S.C. § 1441(a).*

(n3)Footnote 3. *See 28 U.S.C. §§ 1441-1445.*

(n4)Footnote 4. *Dahiya v. Talmidge Int'l, Ltd., 371 F.3d 207, 212 (5th Cir. 2004) .*

(n5)Footnote 5. *Sierminski v. Transouth Fin. Corp., 216 F.3d 945, 947 (11th Cir. 2000) .*

(n6)Footnote 6. *Dunlap v. G&L Holding Group, Inc., 381 F.3d 1285, 1289 (11th Cir. 2004) .*

(n7)Footnote 7. *Chronologic Simulation, Inc. v. Sanguinetti, 892 F. Supp. 318, 321 (D. Mass. 1995) .*

(n8)Footnote 8. *China Basin Properties, Ltd. v. Allendale Mut. Ins. Co., 818 F. Supp. 1301, 1304 (N.D. Cal. 1992)*
.

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CHAPTER 1 Pleadings *
E. Removing a State Court Case to Federal Court

1-1 Federal Litigation Guide § 1.61

§ 1.61 Distinguishing Removal in Federal Question and Diversity Cases

A federal question action is removable without regard to the citizenship or residence of the parties. n1 If a federal question action is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed. The district court may then determine all issues in the action, or in its discretion, may remand all matters in which state law predominates. n2

To determine whether federal-question jurisdiction exists over federal issues embedded in state-law claims, the question is whether the state-law claim necessarily raises a stated federal issue, actually disputed and substantial, which a federal forum could entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities. n3

A diversity action is removable only if both of the following requirements are met: n4

- There is complete diversity between the parties
- None of the parties in interest properly joined and served as defendants is a citizen of the state where the action is pending

Accordingly, defendants may remove an action on the basis of diversity of citizenship if there is complete diversity between all named plaintiffs and all named defendants, and no defendant is a citizen of the forum state. n5 It is not incumbent on the named defendants to negate the existence of a potential unnamed defendant whose presence in the action would destroy diversity. n6

Class actions governed by the Class Action Fairness Act may be removed even when there is not complete diversity between the parties and without regard to whether any defendant is a citizen of the state in which the action is brought. n7 For a complete discussion of removal of actions under the Class Action Fairness Act, *see* Ch. 42, *Class Actions*.

Because removal invokes federal jurisdiction, the defending party must establish federal jurisdiction over the suit currently in state court; federal courts, therefore, must resolve close cases against removal. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalGeneral OverviewCivil ProcedureRemovalBasisGeneral OverviewCivil ProcedureRemovalBasisDiversity of CitizenshipCivil ProcedureRemovalBasisFederal Questions

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1441(b).*

(n2)Footnote 2. *28 U.S.C. § 1441(c).*

(n3)Footnote 3. *Grable & Sons Metal Prods., Inc., v. Darue Eng'g & Mfg., 545 U.S. 308, 313, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005)* (quiet title claim warranted removal because the owner's claim was premised on the Internal Revenue Service's failure to give adequate notice as defined by federal law).

(n4)Footnote 4. *28 U.S.C. § 1441(b).*

(n5)Footnote 5. *See Lincoln Prop. Co. v. Roche, 546 U.S. 81, 126 S. Ct. 606, 613, 163 L. Ed. 2d 415 (2005)* .

(n6)Footnote 6. *See Lincoln Prop. Co. v. Roche, 546 U.S. 81, 126 S. Ct. 606, 613, 163 L. Ed. 2d 415 (2005)* .

(n7)Footnote 7. *28 U.S.C. § 1453(b).*

(n8)Footnote 8. *Dixon v. Coburg Dairy, Inc., 369 F.3d 811, 816 (4th Cir. 2004)* .

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CHAPTER 1 Pleadings *
E. Removing a State Court Case to Federal Court

1-1 Federal Litigation Guide § 1.62

§ 1.62 Waiving Right to Remove

A defendant waives the right to remove an action to federal court by failing to file the removal notice within the statutory time limits. n1

Likewise, a defendant may waive the right to remove a case from state to federal court by contract in a forum selection clause. Forum selection clauses are generally enforced unless found to be unjust or unreasonable, or unless they are obtained by fraud or overreaching. n2 The waiver must be clear and unequivocal, n3 and must contain obligatory language that mandates a particular forum as the exclusive forum for the resolution of any dispute between the parties. n4 However, a waiver of removal rights need not include particular words such as "waiver of right of removal." n5

Finally, a defendant may waive the right to remove an action to federal court by taking actions in the state court that clearly and unequivocally manifest submission to the state court's jurisdiction, including the following: n6

- Participating in state court proceedings when it is not required, such as filing a permissive counterclaim n7
- Moving in state court to compel arbitration n8
- Filing a motion to dismiss the state court complaint n9

The following have been found to not constitute a waiver of the right to remove:

- Filing a pleading raising a defense that might be conclusive on the merits n10
- Opposing a motion for a temporary restraining order n11
- Failing to remove a previous voluntarily-dismissed state action based on the same claim n12

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureRemovalGeneral OverviewCivil ProcedureRemovalBasisGeneral OverviewCivil ProcedureRemovalWaivers

FOOTNOTES:

(n1)Footnote 1. *See 28 U.S.C. § 1446(b).*

(n2)Footnote 2. *The M/S Bremen v. Zapata Off-shore Co., 407 U.S. 1, 15-16, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972) .*

(n3)Footnote 3. *See Dixon v. TSE Int'l Inc., 330 F.3d 396, 397 (5th Cir. 2003) .*

(n4)Footnote 4. *See Excell, Inc. v. Sterling Boiler & Mech., Inc., 106 F.3d 318, 320-321 (10th Cir. 1997) .*

(n5)Footnote 5. *See Waters v. Browning-Ferris Indus., Inc., 252 F.3d 796, 797-798 (5th Cir. 2001) .*

(n6)Footnote 6. *Resolution Trust Corp. v. Bayside Developers, 43 F.3d 1230, 1240 (9th Cir. 1994) .*

(n7)Footnote 7. *Isaacs v. Group Health, Inc., 668 F. Supp. 306, 308-309 (S.D.N.Y. 1987) .*

(n8)Footnote 8. *McKinnon v. Doctor's Assoc., Inc., 769 F. Supp. 216, 220 (E.D. Mich. 1991) .*

(n9)Footnote 9. *Hill v. Citicorp, 804 F. Supp. 514, 516-517 (S.D.N.Y. 1992) .*

(n10)Footnote 10. *Haun v. Retail Credit Co., 420 F. Supp. 859, 864 (W.D. Pa. 1976) .*

(n11)Footnote 11. *Rothner v. City of Chicago, 879 F.2d 1402, 1418-1419 (7th Cir. 1989) .*

(n12)Footnote 12. *Baker v. Firestone Tire & Rubber Co., 537 F. Supp. 244, 247 (S.D. Fla. 1982) .*

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CHAPTER 1 Pleadings *
E. Removing a State Court Case to Federal Court

1-1 Federal Litigation Guide § 1.63

§ 1.63 Obtaining Consent of All Defendants in Notice of Removal

All defendants must consent to removal, and the consent must be noted in the notice of removal. n1 The failure of one defendant to join in the notice precludes removal. n2 The joining requirement is satisfied when a defendant who does not join in the initial notice of removal files a written consent to removal within the statutory time for filing the notice of removal. n3

Defendants served after a case has been removed may either accept the removal or make a motion for remand. n4

The following types of defendants do not need to join in the notice of removal:

- **Unserved defendants.** Any defendant that was not served with state court process need not join in the notice of removal. n5

- **Nominal parties.** Nominal or formal parties, being neither necessary nor indispensable, are not required to join in the notice. n6

In any case, the notice of removal should expressly indicate why one or more defendants have not joined in the removal notice. n7

Class actions governed by the Class Action Fairness Act (CAFA) may be removed by any defendant without the consent of the other defendants. n8 For a complete discussion of removal of actions under the Class Action Fairness Act, *see* Ch. 42, *Class Actions*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalGeneral OverviewCivil ProcedureRemovalProceedingsNoticesCivil ProcedureRemovalProceedingsUnanimityCivil ProcedureRemovalWaivers

FOOTNOTES:
(n1)Footnote 1. *See Harper v. AutoAlliance Int'l, Inc., 392 F.3d 195, 200-202 (6th Cir. 2004)* .

(n2)Footnote 2. *28 U.S.C. § 1446(b)*.

(n3)Footnote 3. *See Roe v. O'Donohue, 38 F.3d 298, 301 (7th Cir. 1994)* .

(n4)Footnote 4. *28 U.S.C. § 1448*.

(n5)Footnote 5. *Salveson v. Western States Bankcard Ass'n, 731 F.2d 1423, 1429 (9th Cir. 1984)* .

(n6)Footnote 6. *See Hewitt v. City of Stanton, 798 F.2d 1230, 1232-1233 (9th Cir. 1986)* .

(n7)Footnote 7. *P.P. Farmers' Elevator Co. v. Farmers Elevator Mut. Ins. Co., 395 F.2d 546, 548 (7th Cir. 1968)* (citing **Moore's**).

(n8)Footnote 8. *28 U.S.C. § 1453(b)*.

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CHAPTER 1 Pleadings *
E. Removing a State Court Case to Federal Court

1-1 Federal Litigation Guide § 1.64

§ 1.64 Removing to Correct Federal District Court

A defendant seeking to remove an action from state court must file a notice of removal in the federal district court for the district and division within which the state action is pending. n1 Venue principles applying to actions originally filed in the federal courts have no applicability to removed actions, and it is irrelevant that venue would not have been proper under the general venue statute in the district to which a case is properly removed. n2

Once an action has been removed to federal court, however, the action may be transferred to another district under the venue statutes. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalGeneral OverviewCivil ProcedureRemovalProceedingsNoticesCivil ProcedureVenueGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1446(a).*

(n2)Footnote 2. *28 U.S.C. § 1391.*

(n3)Footnote 3. *See, e.g., Mortensen v. Wheel Horse Prods., Inc., 772 F. Supp. 85, 89-91 (N.D.N.Y. 1991) .*

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CHAPTER 1 Pleadings *
E. Removing a State Court Case to Federal Court

1-1 Federal Litigation Guide § 1.65

§ 1.65 Drafting Notice of Removal

[1] Contents of Notice

The notice of removal must contain a short and plain statement of the grounds for removal. n1 The defendant must indicate plainly that the requirements for federal jurisdiction are satisfied on the basis of one or more of the following:

- Federal question jurisdiction
- Diversity jurisdiction
- Jurisdiction based on special removal statutes

In a case removed on the basis of federal question jurisdiction, the removal notice must allege that the case arises under federal law, and identify the statutory basis for the claim. n2 In a case removed on the basis of diversity of citizenship, the removal notice must allege complete diversity of citizenship at the time the case was filed in state court and at the time of removal. The notice must also allege facts showing that the amount in controversy requirement is met. n3 If nondiverse state court defendants are voluntarily dismissed or abandoned before the filing of the removal notice, the notice only needs to allege diversity as of the filing of the removal notice, and must explain why diversity is not being alleged at the time of the filing of the complaint. n4

[2] Signing Pursuant to Rule 11 Required

The notice of removal must be signed pursuant to Rule 11. n5 Rule 11 authorizes the imposition of sanctions if papers are filed containing statements that are not well-grounded in fact and warranted by law. n6

[3] Joining of All Served Defendants Required

All defendants served with summons in an action must consent to the removal. n7 All consenting defendants need not actually sign the initial notice of removal if those defendants who have not signed the notice of removal subsequently file, within the time provided for filing the notice of removal, their own written statement stating that they agree to the removal. n8 However, a mere statement by the initial removing defendant that the other parties consent to, or do not object to, the removal does not satisfy this requirement. n9 However, a defendant with an independent right of removal,

such as a federal agency or officer, may remove the entire case without the consent of other defendants. n10 Nominal defendants, persons against whom no real relief is sought, need not join in the petition. n10.1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalGeneral OverviewCivil ProcedureRemovalBasisCases Involving Federal OfficersCivil ProcedureRemovalBasisDiversity of CitizenshipCivil ProcedureRemovalBasisFederal QuestionsCivil ProcedureRemovalProceedingsNoticesCivil ProcedureRemovalProceedingsUnanimity

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1446(a)*; *see Fed. R. Civ. P. 8(a).*

(n2)Footnote 2. *Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir. 1995).*

(n3)Footnote 3. *See Leonard v. Enterprise Rent a Car, 279 F.3d 967, 972-973 (11th Cir. 2002) .*

(n4)Footnote 4. *See Adams v. Lederle Labs., 569 F. Supp. 234, 243 (W.D. Mo. 1983).*

(n5)Footnote 5. *28 U.S.C. § 1446(a); see Fed. R. Civ. P. 11.*

(n6)Footnote 6. *Fed. R. Civ. P. 11.*

(n7)Footnote 7. *See Hanrick v. Hanrick, 153 U.S. 192 (1894).*

(n8)Footnote 8. *See Miami Herald Publ'g Co. v. Ferre, 606 F. Supp. 122, 124 (S.D. Fla. 1984)* ; *Albonetti v. GAF Corp. Chem. Group, 520 F. Supp. 825, 828 (S.D. Tex. 1981).*

(n9)Footnote 9. *See Roe v. O'Donohue, 38 F.3d 298, 301 (7th Cir. 1994).*

(n10)Footnote 10. *See, e.g., 28 U.S.C. § 1442(a)(1).*

(n11)Footnote 10.1. *See Thorn v. Amalgamated Transit Union, 305 F.3d 826, 833 (8th Cir. 2002) .*

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CHAPTER 1 Pleadings *
E. Removing a State Court Case to Federal Court

1-1 Federal Litigation Guide § 1.66

§ 1.66 Filing Notice of Removal and State Court Papers

[1] Deadline for Filing Notice of Removal

The defendant must file a notice of removal within 30 days after the earlier of the following: n1

- The date when the defendant receives, through service or otherwise, a copy of the initial pleading setting forth the claim for relief on which the action or proceeding is based (if that initial pleading shows the basis for removal)

- The date on which the defendant receives a copy of a pleading, motion, or order from which it first may be ascertained that the case has become removable, but, in a diversity case, in no event more than one year after the original complaint was filed

[2] Filing Notice of Removal in Proper Federal District Court

The notice of removal must be filed in the federal district court in the district and for the division in which the state court action is pending. n2 The notice of removal must be filed with a copy of all state court process, pleadings, and orders served on the removing defendant in the action. n3

Promptly after filing a notice of removal, the defendant or defendants must give separate written notice of the filing to all adverse parties and must file a copy of each notice with the clerk of the state court where the case was filed. n4

Removal is effected once the copy of notice served on adverse parties has been filed with the court. Once the case is removed, the state court may not proceed unless and until the case is remanded. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalGeneral OverviewCivil ProcedureRemovalBasisGeneral OverviewCivil ProcedureRemovalElementsGeneral OverviewCivil ProcedureRemovalProceedingsNoticesCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

FOOTNOTES:

(n1)Footnote 1. *28 U.S.C. § 1446(b).*

(n2)Footnote 2. *28 U.S.C. § 1446(a)*; *see Fed. R. Civ. P. 8(a).*

(n3)Footnote 3. *28 U.S.C. § 1446(a).*

(n4)Footnote 4. *28 U.S.C. § 1446(d).*

(n5)Footnote 5. *28 U.S.C. § 1446(d).*

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1-1 Federal Litigation Guide § 1.67

§ 1.67 Renewed Jury Demand Usually Not Required

Under the Federal Rules, if either party demanded a jury trial in accordance with state law prior to the removal, that demand need not be repeated in federal court after removal. If the case was removed from a state court that does not require an express demand for a jury, no demand need be made after removal unless the district court requests it. n1 Federal courts will indulge every reasonable presumption against waiver of the jury trial right. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalGeneral OverviewCivil ProcedureRemovalBasisGeneral OverviewCivil ProcedureRemovalProceedingsNotices

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 81(c).*

(n2)Footnote 2. *See Lutz v. Glendale Union High Sch., 403 F.3d 1061, 1064-1065 (9th Cir. 2005) .*

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1-1 Federal Litigation Guide § 1.68

§ 1.68 All State Court Proceedings Occurring Prior to Removal Remain in Effect Upon Removal

The federal removal statute provides that all state court injunctions and orders, and other state court proceedings occurring prior to removal remain in effect upon removal, until dissolved or modified by the district court. Likewise, all bonds, undertakings, or security given by any party prior to removal of the action from state court to federal court will remain valid and effectual, notwithstanding the removal. n1

A temporary restraining order granted by the state court prior to removal is extended automatically upon removal, until dissolved or modified by the district court. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalGeneral OverviewCivil ProcedureRemovalBasisGeneral OverviewCivil ProcedureRemovalProceedingsNotices

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1450.*

(n2)Footnote 2. *Morning Tel. v. Powers, 450 F.2d 97 (2d Cir. 1971) .*

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E. Removing a State Court Case to Federal Court

1-1 Federal Litigation Guide § 1.69

§ 1.69 Remanding Case

[1] Forcing Remand by Joining Non-Diverse Party

If, after removal, the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action. n1

[2] Moving for Remand

An action that has been removed to federal court may be remanded sua sponte by the court, or on motion by any of the parties. n2 Remand may be had on either statutory grounds or nonstatutory grounds. Statutory grounds for remand are: n3

- Lack of subject matter jurisdiction
- Procedurally defective removal

Nonstatutory grounds for remand include:

- Abstention; n4 and
- Interpretation of a forum selection clause n5

A federal court may not remand a removed case over which the court would otherwise have jurisdiction solely because of a crowded court docket. n6

After dismissing all federal claims, a district court may decline to exercise supplemental jurisdiction over remaining state-law claims and remand the case on that basis. Such remand is entirely within the court's discretion. n6.1

[3] Deadline for Motion Seeking Remand

A motion for remand based on lack of subject matter jurisdiction may be made at any time by either the court or any of the parties. n7 In diversity cases, the crucial time for a jurisdiction determination is at the time of removal. n7.1

A motion for remand based on procedural defects must be made within 30 days of the filing of the notice of removal or the right to object to removal is waived. n8 The 30-day period runs from the day the notice was filed, not from the day plaintiff was served with the notice, and is not extended if the notice is served by mail. n9

[4] Moving for Costs and Attorney's Fees Following Remand

Counsel who has succeeded in remanding a case to state court may move for attorney's fees, costs (including filing fees, process service fees and similar fees), and any actual expenses incurred as a result of the removal. Awards of these amounts are a matter of the district court's discretion. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureRemovalPostremoval RemandsJurisdictional DefectsCivil ProcedureRemovalPostremoval RemandsProcedural DefectsCivil ProcedureRemovalWaivers

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1447(e).*

(n2)Footnote 2. *See 28 U.S.C. § 1447(c).*

(n3)Footnote 3. *28 U.S.C. § 1447(c).*

(n4)Footnote 4. *See Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716-719, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996) .*

(n5)Footnote 5. *See Travelers Ins. Co. v. Keeling, 996 F.2d 1485, 1488 n.2 (2d Cir. 1993) .*

(n6)Footnote 6. *Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 342 (1976).*

(n7)Footnote 6.1. *Carlsbad Technology, Inc. v. HIF Bio, Inc., -- U.S. --, 129 S. Ct. 1862, 173 L. Ed. 2d 843, 849 (2009).*

(n8)Footnote 7. *See 28 U.S.C. § 1447(c).*

(n9)Footnote 7.1. *Campbell v. Stone Ins., Inc., 509 F.3d 665, 669 (5th Cir. 2007).*

(n10)Footnote 8. *28 U.S.C. § 1447(c).*

(n11)Footnote 9. *28 U.S.C. § 1447(c).*

(n12)Footnote 10. *28 U.S.C. § 1447(c).*

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E. Removing a State Court Case to Federal Court

1-1 Federal Litigation Guide §§ 1.70 through 1.79

[Reserved]

§§ 1.70[Reserved]

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CHAPTER 1 Pleadings *
F. Responding to the Complaint
1. Deadlines for Responding; Denials and Affirmative Defenses

1-1 Federal Litigation Guide § 1.80

§ 1.80 Deadline for Responding to the Complaint

[1] General Rule: 21 Days to Respond to Complaint

As a general rule, a party must respond within 21 days after being served with a complaint, counterclaim, or cross-claim. n1

The 21-day rule applies as follows:

- **Answer to complaint.** A defendant must serve an answer or motion to dismiss within 21 days after being served with the summons and complaint. n2 Unless the court orders otherwise, an answer to an amended complaint must be made within the time remaining to respond to the original complaint or within 14 days after service of the amended complaint, whichever is later. n3

- **Answer to cross-claim.** A cross-defendant served with a pleading stating a cross-claim must serve an answer or motion to dismiss within 21 days after being served with the pleading containing the cross-claim. n4

- **Answer to counterclaim.** The plaintiff must answer or move to dismiss a counterclaim asserted in the answer within 21 days after service of the answer. n5

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. n6

For complete discussion of pre-answer motions pursuant to Rule 12, *see* Ch. 3, *Rule 12 Motions*.

[2] Computing 21-Day Period

The 21-day period for responding begins to run the day after service of the pleading to which the response is directed. Saturdays, Sundays, and legal holidays are counted as part of the 21-day period. However, if the last day of the 21-day period is a Saturday, Sunday, or legal holiday, the period is extended and ends on the first day that is not a Saturday, Sunday, or legal holiday. n7

A party served with a pleading by any of the following methods has three additional days to respond to the pleading: n8

- Service by mail
- Service to the clerk of the court based on no known address
- Electronic or other means of delivery consented to in writing

Legal holiday means: n9

- 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
- Any day declared a holiday by the President or Congress
- For periods that are measured after an event, any holiday declared a holiday by the state where the district court is located

[3] United States, Foreign States, and Political Subdivisions Must Respond Within 60 Days

The United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity, must respond to a complaint, cross-claim, or counterclaim within 60 days after the U.S. Attorney is served with the pleading asserting the claim. n10

An officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States must serve a response to the complaint, cross-claim, or counterclaim within 60 days after service on the officer or employee, or service on the U.S. Attorney, whichever is later. n11

Likewise, if the defendant is a foreign state or a political subdivision, agency or instrumentality of a foreign state, the defendant must serve an answer or other responsive pleading to the complaint within 60 days after service is made. n12

[4] Deadline for Responsive Pleading Extended If Service of Process Is Waived

The time period for responding is extended if the defendant timely waives service of process at the plaintiff's request. n13 If service of process was waived, the defendant must respond to the complaint within one of the following time limits: n14

- 60 days from the date the request for waiver was sent, if the request was sent within the United States
- 90 days from the date the request for waiver was sent, if the request was sent to a foreign country

[5] Responding After Serving Pre-Answer Motion

Defendants, including counter-defendants and cross-defendants, may raise certain defenses and objections by motion before responding to a pleading. A defendant may make any or all of the following motions before serving an answer:

- Motion to dismiss n15
- Motion for more definite statement n16
- Motion to strike n17

As a general rule, if the defendant serves one of the above Rule 12 pre-answer motions, the defendant need not serve an answer until 14 days after receiving notice of the court's action. n18

The 14-day time period applicable when a motion is filed under Rule 12 has been held not to apply when a motion is filed under a different rule, such as Rule 56, which governs motions for summary judgment. n19

[6] Responding to Amended or Supplemental Pleading

If a party amends its pleading pursuant to Rule 15, the other party must serve a response within the time remaining for responding to the original pleading, or within 14 days of service of the amendment, whichever period is longer. n20

If the court permits a party to serve a supplemental pleading, it may order the adverse party to respond within a specified period of time. n21

[7] Obtaining Extension of Time to File Pleading or Motion

A party may request that the court enlarge the time period for filing a pleading, a motion, or a response to a motion. A request for enlargement may be made before or after the time period has expired. The court has discretion to grant such a request "for cause shown." n22

If the time period has already expired, the request must be made by motion. If the time period has not expired, the request may be made with or without motion or notice. Thus, the requesting party does not have to file a formal motion for enlargement. The prudent course, however, is always to file a motion when requesting an enlargement. n23 Counsel must check the individual judge's rules on extensions.

If the time period has already expired, the court will extend the time period only if the party can establish excusable neglect. n24

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedurePleading & PracticeService of ProcessTime LimitationsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 12(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 12(a)(1)(A).*

(n3)Footnote 3. *Fed. R. Civ. P. 15(a)(3).*

(n4)Footnote 4. *Fed. R. Civ. P. 12(a)(1)(B).*

(n5)Footnote 5. *Fed. R. Civ. P. 12(a)(1)(B).*

(n6)Footnote 6. *Fed. R. Civ. P. 12(a)(1)(C).*

(n7)Footnote 7. *Fed. R. Civ. P. 6(a).*

(n8)Footnote 8. *Fed. R. Civ. P. 6(d).*

(n9)Footnote 9. *Fed. R. Civ. P. 6(a)(6).*

(n10)Footnote 10. *Fed. R. Civ. P. 12(a)(2).*

(n11)Footnote 11. *Fed. R. Civ. P. 12(a)(3)*; *see also Fed. R. Civ. P. 4(i)(2).*

(n12)Footnote 12. *28 U.S.C. § 1608(d).*

(n13)Footnote 13. *See Fed. R. Civ. P. 4(d).*

(n14)Footnote 14. *Fed. R. Civ. P. 12(a)(1)(A)(ii).*

(n15)Footnote 15. *See Fed. R. Civ. P. 12(b).*

(n16)Footnote 16. *See Fed. R. Civ. P. 12(e).*

(n17)Footnote 17. *See Fed. R. Civ. P. 12(f).*

(n18)Footnote 18. *Fed. R. Civ. P. 12(a)(4).*

(n19)Footnote 19. *See, e.g., Hathaway v. Coughlin, 841 F.2d 48, 50 n.1 (2d Cir. 1988).*

(n20)Footnote 20. *Fed. R. Civ. P. 15(a)(3).*

(n21)Footnote 21. *Fed. R. Civ. P. 15(d).*

(n22)Footnote 22. *Fed. R. Civ. P. 6(b)(1).*

(n23)Footnote 23. *See Fed. R. Civ. P. 6(b).*

(n24)Footnote 24. *Fed. R. Civ. P. 6(b)*; *see Dimmitt v. Ockenfels, 407 F.3d 21, 23-24 (1st Cir. 2005)* .

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CHAPTER 1 Pleadings *
F. Responding to the Complaint
1. Deadlines for Responding; Denials and Affirmative Defenses

1-1 Federal Litigation Guide § 1.81

§ 1.81 Some Defenses and Objections Are Waived If Not Raised in Responsive Pleading

The defenses of lack of personal jurisdiction, improper venue, insufficiency of process, or insufficiency of service of process are waived: n1

- If omitted from a pre-answer Rule 12 motion
- If it is neither made by motion nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course

The following defenses and objections are so fundamental that they are not waived if omitted from a Rule 12(b) motion or from a responsive pleading: n2

- Lack of subject matter jurisdiction
- Failure to state a claim on which relief can be granted
- Failure to join an indispensable party
- Failure to state a legal defense to a claim

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureVenueGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedurePleading & PracticePleadingsAnswers

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 12(h)(1).*

(n2)Footnote 2. *See Fed. R. Civ. P. 12(h)(2), (h)(3).*

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CHAPTER 1 Pleadings *
F. Responding to the Complaint
1. Deadlines for Responding; Denials and Affirmative Defenses

1-1 Federal Litigation Guide § 1.82

§ 1.82 Raising Defenses and Denials

A defending party must state in short and plain terms its responses to each claim asserted in the complaint, and must admit or deny each averment. If the defendant lacks sufficient information or knowledge to form a belief as to the truth of a statement, the defendant must so state; this has the effect of a denial. n1 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. n2

The following defenses can be raised either by motion or responsive pleading: n3

- Lack of subject matter jurisdiction
- Lack of personal jurisdiction
- Improper venue
- Insufficient process
- Insufficient service of process
- Failure to state a claim on which relief can be granted
- Failure to join an indispensable party under Rule 19

For complete discussion of pre-answer motions pursuant to Rule 12, *see* Ch. 3, *Rule 12 Motions*. If a Rule 12 motion is filed, all of the applicable foregoing grounds for dismissal must be included or are waived.

Failure to deny an averment in a pleading to which a responsive pleading is required, other than those as to the amount of damages, is deemed an admission. n4 An admission in an answer is binding on the defendant.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureVenueGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedurePleading & PracticePleadingsAnswers

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 8(b)(5).*

(n2)Footnote 2. *Fed. R. Civ. P. 8(b)(4).*

(n3)Footnote 3. *Fed. R. Civ. P. 12(b).*

(n4)Footnote 4. *Fed. R. Civ. P. 8(b)(6).*

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1. Deadlines for Responding; Denials and Affirmative Defenses

1-1 Federal Litigation Guide § 1.83

§ 1.83 Pleading Affirmative Defenses

An affirmative defense, if accepted by the court, will defeat an otherwise legitimate claim for relief. In a responsive pleading, generally the answer, the defendant must set forth affirmatively the following defenses and any other matter constituting an avoidance or affirmative defense: n1

- Accord and satisfaction
- Arbitration and award
- Assumption of risk
- Contributory negligence
- Duress
- Estoppel
- Failure of consideration
- Fraud
- Illegality
- Injury by fellow servant
- Laches
- License
- Payment

- Release
- Res judicata
- Statute of frauds
- Statute of limitations n2
- Waiver n3

Failure to raise the affirmative defense may result in waiver. n4 The effect of waiver is that evidence relating solely to the defense may not be admitted at trial, at a summary judgment hearing, or at any similar proceeding. n5 A motion for summary judgment may not be granted based on an affirmative defense which a party has failed to plead. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedurePleading & PracticePleadingsAnswersGovernmentsLegislationStatutes of LimitationsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 8(c).*

(n2)Footnote 2. *See Youren v. Tintic Sch. Dist., 343 F.3d 1296, 1302-1303 (10th Cir. 2003) .*

(n3)Footnote 3. *Western World Ins. Co. v. Stack Oil, Inc., 922 F.2d 118, 121-122 (2d Cir. 1990) .*

(n4)Footnote 4. *S. Wallace Edwards & Sons, Inc. v. Cincinnati Ins. Co., 353 F.3d 367, 372-373 (4th Cir. 2003) .*

(n5)Footnote 5. *Saks v. Franklin Covey Co., 316 F.3d 337, 350-351 (2d Cir. 2003) .*

(n6)Footnote 6. *See Jones v. District of Columbia Dep't of Corrs., 429 F.3d 276, 278-280 (D.C. Cir. 2005) .*

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CHAPTER 1 Pleadings *
F. Responding to the Complaint
1. Deadlines for Responding; Denials and Affirmative Defenses

1-1 Federal Litigation Guide § 1.84

§ 1.84 Filing Corporate Disclosure Statement

[1] Determining Who Must File Disclosure Statement

To enable judges to make informed decisions concerning possible disqualification based on financial interest, all nongovernmental corporate parties must file two copies of a statement that either: n1

- Identifies any parent corporation and any publicly held corporation that owns 10 percent or more of its stock
- Indicates that there is not a parent corporation nor any publicly held corporation that owns 10 percent or more of its stock

[2] Filing Disclosure Statement

A corporate party must: n2

- File the Rule 7.1 statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court
- Promptly file a supplemental statement if any required information changes

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsRule Application & InterpretationCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsFinancial Interests

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 7.1(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 7.1(b).*

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CHAPTER 1 Pleadings *
F. Responding to the Complaint
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1-1 Federal Litigation Guide §§ 1.85 through 1.89

[Reserved]

§§ 1.85[Reserved]

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CHAPTER 1 Pleadings *
F. Responding to the Complaint
2. Counterclaims, Cross-Claims, and Replies

1-1 Federal Litigation Guide § 1.90

§ 1.90 Asserting Counterclaims

[1] Counterclaims Must State Affirmative Claim for Relief

Counterclaims are affirmative claims for relief asserted by a defending party against the plaintiff or other opposing party. Counterclaims may either arise from the same transaction or occurrence as, or exist independently of, the subject matter of the original pleader's underlying claim. n1 Counterclaims should be distinguished from affirmative defenses, which challenge the plaintiff's legal right to bring an action but do not permit the pleader to recover damages or other relief. n2 A counterclaim may request injunctive relief if it meets the requirements for pleading an injunction. n2.1 Similarly, a counterclaim may demand declaratory relief if it meets the requirements for pleading the existence of a case or controversy between the parties. n2.2

[2] Distinguishing Between Compulsory and Permissive Counterclaims

A defending party must plead as a counterclaim any claim that, at the time of its service, the pleader has against an opposing party if the claim: n2.3

- Arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and
- Does not require adding another party over whom the court cannot acquire jurisdiction

The defendant must plead any compulsory counterclaims that the party has at the time of serving the pleading against any opposing party or will lose to right to raise the claim in a later action. A counterclaim is compulsory if a "logical relationship" exists between the claim and the counterclaim. n3

If the claim does not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim, it is a permissive counterclaim. Claims that do not meet the test for compulsory counterclaims are permissive counterclaims. n4

[3] General Rule: Compulsory Counterclaims Must Be Pleaded or Waived

If a party fails to assert a claim that was compulsory in a prior federal or state court action that reached final judgment, the claim will be barred. While the claim will not be barred unless a final judgment was reached in the previous action, counsel should be aware that any final judgment, including a default judgment, triggers the prohibition. n5

[4] Exceptions to General "Use or Lose" Rule

[4.--1] Exception: Counterclaim is Subject of Another Pending Action

The defendant is not required to raise a counterclaim arising from the same transaction or occurrence as the main action when it is the subject of another prior action that was pending before the federal action now asserted. This exception to the compulsory counterclaims rule is elective; a claimant may, but is not required to, file the counterclaim in the second action. The counterclaimant may elect to continue to prosecute the claim in the first-filed action. n6 However, the first action to reach final judgment generally will be dispositive and binding as to transactionally related issues in the still pending action. n7 There is, therefore, a risk to be assessed to allow two or more actions to pend simultaneously, when the same facts are involved.

[4.--2] Exception: Court Lacks Jurisdiction to Render Personal Judgment on Claim

Likewise, a defendant is not required to plead a compulsory counterclaim when the opposing party has sued using attachment or other process so that the federal court obtains only in rem or quasi in rem jurisdiction and does not have jurisdiction to render a personal judgment on the claim. n8 However, if the defendant appears in the action, and asserts any compulsory or permissive counterclaims against the plaintiff in an action over which the court has only in rem or quasi in rem jurisdiction, that defendant must plead all compulsory counterclaims against that opposing party. n9

[4.--3] Exception: Presence of Third Parties Required

Finally, a pleader is not required to assert a compulsory counterclaim which requires for its adjudication the presence of third parties over whom the court is unable to obtain jurisdiction. Although a counterclaimant may name parties needed to obtain complete relief on a compulsory counterclaim, the claim will not be considered compulsory if the court is unable to obtain personal jurisdiction over the additional defendants. n10

[4.--4] Exception: No Final Judgment Reached in Prior Action

A claim that should have been asserted as a compulsory counterclaim in a previous action will not be barred in a subsequent action if no final judgment was rendered in the first suit. n11

[4.--5] Exception: No Responsive Pleading Filed in Prior Action

A claim that should have been asserted as a compulsory counterclaim in a previous action will not be barred in a subsequent action if a responsive pleading was not required to be, or was not actually served in the first suit. A motion to dismiss is not a responsive pleading. n12

[5] After Acquired or Unripe Counterclaims Not Compulsory

A party need only "state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party." Counterclaims that did not accrue or mature until after service of the responsive pleading, even if transactionally related, are not compulsory in the action. n13

[6] Permissive Counterclaims Allowed in Later Action If Not Pleaded

A defendant may, but is not required to, bring any permissive counterclaims against the plaintiff or other opposing party

in one action. The party may alternatively choose to bring any or all permissive claims in an independent action. n14

[7] Counterclaims Not Limited to Recoupment or Damages

Counterclaims may state independent and affirmative claims for relief, and are not limited to seeking relief that diminishes or defeats the opposing claim. A counterclaim does not have to seek the same type of relief as that of the opposing party's claim. n15 A counterclaim may seek injunctive relief, although the main claim is for damages only. n16 Likewise, a counterclaim may seek declaratory relief, although the main claim is for damages only. n17

[8] Asserting Counterclaims in Responsive Pleading

The defendant or other pleader asserting counterclaims must raise them in a responsive pleading: either the answer or a reply to an opposing party's counterclaims. n18

[9] Counterclaims Should Be Clearly Designated

Counterclaims should be clearly designated as such in the pleading. If they are not, the opposing party will not be obligated to file a reply in response. n19 As with claims stated in the complaint, counterclaims should be clearly pleaded and contain a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment. They should comply with all other applicable pleading standards, such as form and certification requirements. n20

[10] Counterclaims May Be Inconsistent With Affirmative Defenses

A pleader may state counterclaims that are inconsistent with affirmative defenses raised in the same pleading. n21 It is wise to state that the allegations are alternative.

[11] Deadline for Asserting Counterclaims

Unless a different time is prescribed by statute, a defendant must serve an answer containing any counterclaims within 21 days after being served with the summons and complaint. If the counterclaims are contained in the reply, it must be served within 21 days after service of the answer, or if a reply was ordered by the court, within 21 days after service of the order unless the court directs otherwise. n22

If the defendant timely waived service of summons under Rule 4(d), the defendant has 60 days after the date when the request for waiver was sent in which to serve the answer. n23

If the defendant is the United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity, the defendant has 60 days after service of the pleading upon the U.S. Attorney in which to serve the answer or the reply. n24 An officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States must serve an answer containing any counterclaims within 60 days after service of the complaint on the officer or employee, or service on the U.S. Attorney, whichever is later. n25

[12] Determining Whether to Join Additional Counterclaims

The counterclaimant must join as many compulsory counterclaims as the claimant has against any opposing party. n26 The pleader may also join numerous permissive counterclaims, subject to the rules governing joinder of claims. n27

[13] Pleading Jurisdiction Over Counterclaims

[13.--1] Supplemental Jurisdiction Over Compulsory Counterclaims

Parties pleading compulsory counterclaims that do not form an independent federal jurisdiction, should allege that they fall within the supplemental jurisdiction of the district court, which has jurisdiction over claims that "form part of the same case or controversy" as the main claim over which the district court has original jurisdiction. Claimants do not have to allege an independent basis of subject-matter jurisdiction. The court has discretion to decline supplemental jurisdiction under listed circumstances. n28

Parties pleading counterclaims in a case in which the original basis of jurisdiction is diversity of citizenship may also invoke the supplemental jurisdiction of the district court, if their claims "form part of the same case or controversy" as the primary claim. While the jurisdictional statute does not permit plaintiffs to assert claims against certain third or joined parties if their joinder would destroy diversity, the prohibition does not apply to defendants raising counterclaims. The court has discretion to decline supplemental jurisdiction under listed circumstances. n29

Unless it falls within the supplemental jurisdiction of the court, a counterclaim in an action based on diversity must satisfy the jurisdictional amount. n30

[13.--2] Alleging Independent Basis of Subject Matter Jurisdiction Over Permissive Counterclaims

Parties pleading permissive counterclaims will have to allege an independent basis of subject matter jurisdiction, since, by definition, these claims are unlikely to form part of the same case or controversy as the primary claim over which the district court has original jurisdiction. However, claims for setoff, which defeat or reduce the opposing party's claim, and do not seek affirmative relief, are generally excepted from the requirement that permissive counterclaims require an independent basis for jurisdiction. n31 However, the Seventh Circuit has determined that the supplemental jurisdiction statute governs whether the court may hear a claim for setoff that lacks an independent jurisdictional basis. n32

[13.--3] Personal Jurisdiction

A plaintiff who has submitted to the personal jurisdiction of the court by bringing suit has also submitted to the court's jurisdiction for purposes of any counterclaims brought by the defendant. n33

[14] Preserving Omitted Counterclaims Though Amendment

A party may amend its pleading once as a matter of course within: n34

- 21 days after serving it, or
- 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

Rule 15(a) provides, as to any amendment of a pleading, that the court "should freely give leave when justice so requires". n35

[15] Pleading Counterclaims Maturing or Acquired After Pleading

A pleader may, with permission of the court in a supplemental pleading, raise a counterclaim that matured or was acquired by the pleader after service of the responsive pleading. Factors the court will consider include whether: n36

- Claim will create inconvenience and confusion in the litigation process
- Pleader has unduly delayed in filing the claim

- Pleader offers a reasonable explanation for failure to earlier assert it or move to assert it
- Claim arises from the same transaction or occurrence as the main claim

[16] Determining Parties to Counterclaims

[16.--1] Asserting Claims Against Third Parties

A counterclaim may only be pleaded against an opposing party. n36.1 Opposing parties include third-party plaintiffs and the third-party defendants they have joined. For example, if an original defendant/third-party plaintiff impleads a third-party defendant under Rule 14, that third-party defendant must file any compulsory counterclaims, and may file any permissive counterclaim it has against the third-party plaintiff. n37

It is important to distinguish when a party may be joined under Rule 13(h), governing joinder of additional parties, and when a party may be brought in under the Rule 14 third-party practice provision. In order to bring a third-party complaint the requirements of Rule 14 must be satisfied. Rule 13(h) does not apply to third-party claims, but to counterclaims already existing before the court to which additional parties may be joined for the granting of complete relief. n38

[16.--2] Determining Whether to Join Additional Parties Under Rule 13(h)

A pleader may join parties required for the granting of complete relief in the determination of a counterclaim if jurisdiction of the parties can be obtained and their joinder will not deprive the court of jurisdiction over the action. n39 Additional persons may only be joined for adjudication of a claim that is already before the court against an existing party in the action. n40 The counterclaimant seeking to join additional parties should allege that the court has statutory supplemental jurisdiction over them. However, in order to join additional parties to counterclaims, the court must obtain personal jurisdiction over them. n41

When bringing in additional parties under Rule 13(h), a pleader must comply with the service and summons requirements set forth in Rules 4 and 5. Any new party to a counterclaim must be personally served. n42

[17] Pleader Does Not Waive Rule 12(b) Defenses by Filing Compulsory Counterclaims

A pleader does not waive Rule 12(b) defenses by asserting compulsory counter- claims. However, counsel should be sure to comply with Rule 12 strictures regarding consolidation, timing and preservation of defenses. n43

However, a pleader risks waiving Rule 12(b) defenses by asserting permissive counterclaims. n44

[18] Filing Jury Demand of Counterclaims

If the defendant seeks a jury trial of counterclaims in the action, a specific demand should be filed. While a general demand may include compulsory counterclaims, a demand by plaintiff for trial of all issues does not necessarily encompass counterclaims. n45

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCounterclaimsCompulsory CounterclaimsCivil ProcedurePleading &

PracticePleadingsCounterclaimsPermissive CounterclaimsCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 13(a), (b).*

(n2)Footnote 2. *Fed. R. Civ. P. 13(a).*

(n3)Footnote 2.1. *See Baker by Thomas v. GMC, 522 U.S. 222, 226, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998) .*

(n4)Footnote 2.2. *Iowa Prot. & Advocacy Servs. v. Tanager, Inc., 427 F.3d 541, 543 (8th Cir. 2007) .*

(n5)Footnote 2.3. *Fed. R. Civ. P. 13(a)(1).*

(n6)Footnote 3. *Moore v. New York Cotton Exch., 270 U.S. 593, 609-610 (1926).*

(n7)Footnote 4. *Fed. R. Civ. P. 13(b); Baker v. Gold Seal Liquors, Inc., 417 U.S. 467, 469 (1974) ; Jones v. Ford Motor Credit Co., 358 F.3d 205, 209-210 (2d Cir. 2004).*

(n8)Footnote 5. *Fed. R. Civ. P. 13(a)(1); Baker v. Gold Seal Liquors, Inc., 417 U.S. 467, 469 (1974).*

(n9)Footnote 6. *Fed. R. Civ. P. 13(a)(2)(A); Southern Constr. Co. v. Pickard, 371 U.S. 57, 61 (1962) .*

(n10)Footnote 7. *See In re PCH Assoc., 949 F.2d 585, 594 (2d Cir. 1991).*

(n11)Footnote 8. *Fed. R. Civ. P. 13(a)(2)(B).*

(n12)Footnote 9. *Fed. R. Civ. P. 13(a)(2)(B).*

(n13)Footnote 10. *Fed. R. Civ. P. 13(a), (h).*

(n14)Footnote 11. *See Adam v. Jacobs, 950 F.2d 89, 93 (2d Cir. 1991).*

(n15)Footnote 12. *In re Integrated Resources v. Integrated Resources Equity Corp., 851 F. Supp. 556, 570 (S.D.N.Y. 1994) .*

(n16)Footnote 13. *Fed. R. Civ. P. 13(a).*

(n17)Footnote 14. *Fed. R. Civ. P. 13(b); Baker v. Gold Seal Liquors, Inc., 417 U.S. 467, 469 (1974).*

(n18)Footnote 15. *Fed. R. Civ. P. 13(c).*

(n19)Footnote 16. *Baker by Thomas v. GMC, 522 U.S. 222, 226, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998) .*

(n20)Footnote 17. *Iowa Prot. & Advocacy Servs. v. Tanager, Inc., 427 F.3d 541, 543 (8th Cir. 2007) .*

(n21)Footnote 18. *Fed. R. Civ. P. 7(a).*

(n22)Footnote 19. *Fed. R. Civ. P. 7(a); see Reiter v. Cooper, 507 U.S. 258, 263, 113 S. Ct. 1213, 122 L. Ed. 2d 604 (1993) .*

(n23)Footnote 20. *Fed. R. Civ. P. 8(a)(3), 9, 10, 11(a).*

(n24)Footnote 21. *Fed. R. Civ. P. 8(d)(3).*

(n25)Footnote 22. *Fed. R. Civ. P. 12(a)(1)(A)(i), (a)(1)(C).*

(n26)Footnote 23. *Fed. R. Civ. P. 12(a)(1)(A)(ii).*

(n27)Footnote 24. *Fed. R. Civ. P. 12(a)(2).*

(n28)Footnote 25. *Fed. R. Civ. P. 12(a)(3).*

(n29)Footnote 26. *Fed. R. Civ. P. 13(a)(1).*

(n30)Footnote 27. *Fed. R. Civ. P. 13(b), 18(a).*

(n31)Footnote 28. *28 U.S.C. § 1367.*

(n32)Footnote 29. *28 U.S.C. § 1367.*

(n33)Footnote 30. *28 U.S.C. § 1367(a).*

(n34)Footnote 31. *United States ex rel. D'Agostino Excavators, Inc. v. Heyward-Robinson Co, 430 F.2d 1077, 1080-1081 (2d Cir. 1970) .*

(n35)Footnote 32. *See Lefkovitz v. Wagner, 395 F.3d 773, 781-782 (7th Cir. 2005) .*

(n36)Footnote 33. *See Adam v. Saenger, 303 U.S. 59, 67-68 (1938) .*

(n37)Footnote 34. *Fed. R. Civ. P. 15(a)(1).*

(n38)Footnote 35. *Fed. R. Civ. P. 15(a)(2).*

(n39)Footnote 36. *Fed. R. Civ. P. 13(e).*

(n40)Footnote 36.1. *Fed. R. Civ. P. 13(a), (b); see also Transamerica Occidental Life Ins. Co. v. Aviation Office of Am., Inc., 292 F.3d 384, 389-393 (3d Cir. 2002) .*

(n41)Footnote 37. *Fed. R. Civ. P. 13(a), 14.*

(n42)Footnote 38. *Fed. R. Civ. P. 13(h), 14.*

(n43)Footnote 39. *Fed. R. Civ. P. 19, 20.*

(n44)Footnote 40. *Fed. R. Civ. P. 13(h).*

(n45)Footnote 41. *28 U.S.C. § 1367(a).*

(n46)Footnote 42. *Fed. R. Civ. P. 4, 5.*

(n47)Footnote 43. *Fed. R. Civ. P. 12(g), (h).*

(n48)Footnote 44. *See In re Arbitration Between Intercarbon Bermuda, Ltd. v. Caltex Trading & Transp. Corp., 146 F.R.D. 64, 70 (S.D.N.Y. 1993) .*

(n49)Footnote 45. *Fed. R. Civ. P. 38.*

* Chapter 1 was rewritten in 2000 by Andrew E. Westley, Esq., of San Francisco, California.

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CHAPTER 1 Pleadings *
F. Responding to the Complaint
2. Counterclaims, Cross-Claims, and Replies

1-1 Federal Litigation Guide § 1.91

§ 1.91 Asserting Cross-Claims

[1] Cross-Claims Must State Affirmative Claim for Relief Against Co-Party

Cross-claims state an affirmative claim for relief by a party against a co-party, usually a co-defendant. n1

A pleader may state as a cross-claim any claim by one party against a co-party arising out of the same transaction or occurrence that is the subject matter of the original action or of a counterclaim. Courts conduct three inquiries to determine whether a cross-claim arose out of the same transaction or occurrence: n2

- Whether the issues of fact and law raised in the complaint and cross-claim are largely the same
- Whether substantially the same evidence will support or refute the complaint as well as the cross-claim
- Whether there is any logical relationship between the complaint and the cross-claim

A pleader may also state as a cross-claim any claim by one party against a co-party relating to any property that is the subject matter of the original action. n3

A cross-claim is a permissive claim, and if the pleader chooses not to raise it in the original action it will not be barred in a subsequent independent action. n4 However, as cross-claims arise from the same transaction and occurrence as the primary claim, if other collateral estoppel elements are met, the first judgment may be binding as to transactionally related issues in any subsequent action. n5

[2] Cross-Claims Should Comply With Pleading Standards

As with claims stated in the complaint, cross-claims should be clearly pleaded and contain a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment. They should comply with all other applicable pleading standards, such as form and certification requirements. n6

[3] Determining Parties to Cross-Claims

[3.--1] Asserting Cross-Claims Against Co-Party

Cross-claims, by definition, may be pleaded only against co-parties. A co-party has been described as any party that is not an opposing party, but must be an already existing party in the action. n7

[3.--2] Asserting Cross-Claims Against Third-Parties

It is important to distinguish when a party may be joined under Rule 13(h), governing joinder of additional parties and when a party may be brought in under the Rule 14 third-party practice provision. In order to bring a third-party complaint the requirements of Rule 14 must be satisfied. Rule 13(h) does not apply to third-party claims, but to cross-claims already existing before the court to which additional parties may be joined for the granting of complete relief. n8

[3.--3] Determining Whether to Join Additional Parties Under Rule 13(h)

A pleader may join parties required for the granting of complete relief in the determination of a cross-claim if jurisdiction of the parties can be obtained and their joinder will not deprive the court of jurisdiction over the action. n9 Additional persons may only be joined for adjudication of a claim that is already before the court against an existing party in the action. n10

The cross-claimant seeking to join additional parties should allege that the court has statutory supplemental jurisdiction over them. However, in order to join additional parties to cross-claims, the court must obtain personal jurisdiction over them. n11

When bringing in additional parties under Rule 13(h), a pleader must comply with the service and summons requirements set forth in Rules 4 and 5. Any new party to a cross-claim must be personally served. n12

[4] Deadline for Asserting Cross-Claims

Unless a different time is prescribed by statute, a defendant must serve an answer containing any cross-claims within 21 days after being served with the summons and complaint. If the cross-claims are contained in the reply, the reply must be served within 21 days after service of the answer, or if a reply was ordered by the court, within 21 days after service of the order unless the court directs otherwise. n13

The cross-claimant must comply with the service requirements for pleadings set forth in Rule 5. n14

If the defendant timely waived service of summons under Rule 4(d), the defendant has 60 days after the date when the request for waiver was sent in which to serve the answer. n15

If the defendant is the United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity, the defendant has 60 days after service of the pleading upon the U.S. Attorney in which to serve the answer or the reply. n16 An officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States has 60 days after service of the complaint on the officer or employee or service on the U.S. Attorney, whichever is later, to serve the answer or the reply. n17

[5] Alleging Jurisdiction

Parties pleading cross-claims in a case in which the original basis of jurisdiction is federal question should allege that the cross-claims fall within the supplemental jurisdiction of the district court, which has jurisdiction over claims that "form part of the same case or controversy" as the primary claim over which the district court has original jurisdiction.

Claimants then do not have to allege an independent basis of subject-matter jurisdiction. n18

Parties pleading cross-claims in a case in which the original basis of jurisdiction is diversity of citizenship may also invoke the supplemental jurisdiction of the district court, if their claims "form part of the same case or controversy" as the primary claim. While the jurisdictional statute does not permit plaintiffs to assert claims against certain third or joined parties if their joinder would destroy diversity, the prohibition does not apply to defendants raising cross-claims. n19

[6] Pleading Cross-Claims Through Amendment

A defendant may amend the answer once without leave of court to include an omitted cross-claim within 21 days after the answer was served. The defendant may move the court to amend the answer to include cross-claims if the requirements of Rule 15(a) are met. n20 The defendant may, with permission of the court in a supplemental pleading, include a later acquired cross-claim under Rule 15(d). n21

[7] Determining Whether to Join Additional Cross-Claims (Rule 18(a))

The cross-claimant may join numerous cross-claims, subject to the rules governing joinder of claims, against any co-party. n22

[8] Filing Jury Demand of Cross-Claims

A specific demand is required for a jury trial of cross-claims. n23

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCross-ClaimsPermissive Cross-ClaimsCivil ProcedurePleading & PracticePleadingsCross-ClaimsTransactional Requirement

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 13(g).*

(n2)Footnote 2. *See Wheeling Downs Race Track & Gaming Ctr. v. Kovach, 226 F.R.D. 259, 261-262 (N.D. W. Va. 2004) .*

(n3)Footnote 3. *Fed. R. Civ. P. 13(g).*

(n4)Footnote 4. *Fed. R. Civ. P. 13(g).*

(n5)Footnote 5. *In re PCH Assoc., 949 F.2d 585, 594 (2d Cir. 1991) .*

(n6)Footnote 6. *Fed. R. Civ. P. 8(a)(3), 9, 10, 11(a).*

(n7)Footnote 7. *Fed. R. Civ. P.13(g).*

(n8)Footnote 8. *Fed. R. Civ. P. 13(h), 14.*

(n9)Footnote 9. *Fed. R. Civ. P. 19, 20.*

(n10)Footnote 10. *Fed. R. Civ. P. 13(h).*

(n11)Footnote 11. *28 U.S.C. § 1367(a).*

(n12)Footnote 12. *Fed. R. Civ. P. 4, 5.*

(n13)Footnote 13. *Fed. R. Civ. P. 12(a)(1)(A)(i), (a)(1)(C).*

(n14)Footnote 14. *Fed. R. Civ. P. 5.*

(n15)Footnote 15. *Fed. R. Civ. P. 12(a)(1)(A)(ii).*

(n16)Footnote 16. *Fed. R. Civ. P. 12(a)(2).*

(n17)Footnote 17. *Fed. R. Civ. P. 12(a)(3).*

(n18)Footnote 18. *28 U.S.C. § 1367.*

(n19)Footnote 19. *28 U.S.C. § 1367.*

(n20)Footnote 20. *Fed. R. Civ. P. 15(a).*

(n21)Footnote 21. *Fed. R. Civ. P. 15(d).*

(n22)Footnote 22. *Fed. R. Civ. P. 13(g), 18(a).*

(n23)Footnote 23. *Fed. R. Civ. P. 38.*

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CHAPTER 1 Pleadings *
F. Responding to the Complaint
2. Counterclaims, Cross-Claims, and Replies

1-1 Federal Litigation Guide § 1.92

§ 1.92 Filing Answer or Reply to Counterclaim or Cross-Claim

[1] Answering Counterclaim or Cross-Claim

A party may file an answer to a cross-claim or a counterclaim denominated as such. n1

Answers to counterclaims and cross-claims are governed by the same rules as answers to complaints. For discussion of raising defenses, denials, and objections, *see* §§ 1.81-1.83.

[2] Failing to Answer or Reply to Counterclaim

If a pleader fails to answer or otherwise reply to a counterclaim denominated as such, it will be considered an admission of the averments within the counterclaim other than those involving damages. n2 The adverse party may seek and obtain a default judgment against a party for failing to file an answer or reply to designated counterclaims. n3

[3] Deadline for Serving Answer or Reply to Counterclaims

A plaintiff must serve an answer or reply to a counterclaim in within 21 days after service of the answer containing the counterclaim. n4 A party served by any of the following methods with a pleading containing counterclaims has three additional days to reply: n5

- Service by mail
- Service to the clerk of the court based on no known address
- Electronic or other means of delivery consented to in writing

Compliance with the service requirements for pleadings set forth in Rule 5 is required. The reply must be served to the attorney for all represented parties, and directly on any party without counsel. n6 Service may be made by delivery, by mail, or by electronic or other means consented to under Rule 5(b)(2)(D). n7 If the party has no known address, the reply may be served by leaving it with the clerk of the court. n8 The reply must be filed with the court within a reasonable time after service. n9

If the reply was ordered by the court, the party must serve a reply within 21 days after service of the order unless the court directs otherwise. n10

If the party is the United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity, the defendant has 60 days after service of the pleading upon the U.S. Attorney in which to serve the reply. n11 An officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States has 60 days after service of the pleading on the officer or employee or service on the U.S. Attorney, whichever is later, to serve the reply. n12

[4] Raising Rule 12(b) Defenses to Counterclaims

A plaintiff or other counter-defendant may challenge the sufficiency of a counterclaim by moving under Rule 12(b) in the same way a defendant may challenge the plaintiff's claims. Counsel should be sure to comply with Rule 12 strictures regarding consolidation, timing and preservation of defenses. n13

[5] Answer May Assert Additional Claims

The body of the answer may itself contain affirmative claims for relief, such as counterclaims, cross-claims, or third-party claims. n14

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsRule Application & Interpretation

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 7(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 8(b)(6).*

(n3)Footnote 3. *Fed. R. Civ. P. 55(a).*

(n4)Footnote 4. *Fed. R. Civ. P. 12(a)(1)(B).*

(n5)Footnote 5. *Fed. R. Civ. P. 6(d).*

(n6)Footnote 6. *Fed. R. Civ. P. 5(b)(1).*

(n7)Footnote 7. *Fed. R. Civ. P. 5(b)(2)(A), (B), (C), (E), (F).*

(n8)Footnote 8. *Fed. R. Civ. P. 5(b)(2)(D).*

(n9)Footnote 9. *Fed. R. Civ. P. 5.*

(n10)Footnote 10. *Fed. R. Civ. P. 12(a)(1)(C).*

(n11)Footnote 11. *Fed. R. Civ. P. 12(a)(2).*

(n12)Footnote 12. *Fed. R. Civ. P. 12(a)(3).*

(n13)Footnote 13. *Fed. R. Civ. P. 12(b), (g), (h).*

(n14)Footnote 14. *Fed. R. Civ. P. 7(a), 13(a), (b), (g), 14.*

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CHAPTER 1 Pleadings *
F. Responding to the Complaint
2. Counterclaims, Cross-Claims, and Replies

1-1 Federal Litigation Guide §§ 1.93 through 1.99

[Reserved]

§§ 1.93[Reserved]

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CHAPTER 1 Pleadings *
G. Impleader

1-1 Federal Litigation Guide § 1.100

§ 1.100 Impleader Permits Defendant to Bring in Third-Parties

Although the plaintiff generally has control over the parties in the case, impleader gives the defendant a voice in the composition of the action. Impleader is a remedy for a defendant who believes that a third party is liable to the defendant for the plaintiff's claims. n1

The impleader rule requires that the third-party defendant's liability be derivative of or secondary to that of the third-party plaintiff (*i.e.*, the defendant in the main action). Thus, the third-party defendant's liability must be dependent upon the outcome of the main claim or the third-party defendant must be potentially secondarily liable as a contributor to the third-party plaintiff. In other words, in order to implead a third party, the third-party plaintiff must show that if he or she is found liable to the original plaintiff, then the third-party defendant will be liable to the third-party plaintiff. n2

However, once a party has asserted a proper impleader claim, it may join any other claim, whether or not transactionally related, through the permissive claim joinder rule. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsImpleaderCivil ProcedurePleading & PracticePleadingsRule Application & InterpretationCivil ProcedureJoinder of Claims & RemediesGeneral OverviewCivil ProcedureJoinder of Claims & RemediesClaims

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 14*; *McNeil v. Nissan Motor Co., Ltd., 365 F. Supp. 2d 206, 213-214 (D.N.H. 2005)* .

(n2)Footnote 2. *Fed. R. Civ. P. 14(a)(1)*.

(n3)Footnote 3. *Fed. R. Civ. P. 18(a)*.

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CHAPTER 1 Pleadings *
G. Impleader

1-1 Federal Litigation Guide § 1.101

§ 1.101 Relationship Between Impleader and Other Joinder Procedures

[1] Permissive and Compulsory Joinder Rules

Generally, the federal rules allow the plaintiff, rather than the defendant, discretion to determine the parties. Under the permissive joinder rule, persons may be joined in an action as plaintiffs if their claims are transactionally related and share any common question of law or fact. Similarly, the plaintiff or plaintiffs may join as defendants any persons against whom they assert any claims in which the right to relief arises from the same transaction and in which there will arise any question of law or fact common to all defendants. n1

A defendant may require the joinder of a party under the compulsory joinder rule. This rule requires the joinder of "necessary" parties; that is, parties that are needed for just adjudication of the claims. n2

[2] Joinder Under Counterclaim and Cross-Claim Rule

A defendant may assert counterclaims against the plaintiff and cross-claims against other defendants joined by the plaintiff. If so, the defendant acts as a plaintiff and may join other persons who were not originally joined by the plaintiff if the joinder satisfies the permissive or compulsory joinder rules. n3

Joinder in these circumstances is based on a transactional relationship between the claim against the new party and the counterclaim or cross-claim. Impleader, by contrast, is based on the derivative liability of the new party for the plaintiff's original claim. n4

[3] Interpleader

Under the interpleader rule or interpleader statutes, a person acting as a plaintiff may join two or more parties and require them to interplead when their claims are such that the plaintiff is or may be exposed to multiple liability. In this situation the nominal plaintiff, who initiates the action, may either take the part of a neutral stakeholder or may dispute liability. n5

A defendant in an existing suit who is exposed to multiple liability may obtain interpleader by way of cross-claim or counterclaim. The defendant is entitled to join the additional party or parties required for interpleader under the joinder provision of the counterclaim and cross-claim rule. n6

[4] Intervention

Intervention is a procedure by which a person may, under appropriate circumstances, join in an action even though the party has not been joined by the plaintiff, defendant, or other party under any joinder rules. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsImpleaderCivil ProcedurePleading & PracticePleadingsRule Application & InterpretationCivil ProcedurePartiesJoinderCompulsory JoinderCivil ProcedurePartiesJoinderPermissive JoinderCivil ProcedureJoinder of Claims & RemediesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 20.*

(n2)Footnote 2. *See Fed. R. Civ. P. 19.*

(n3)Footnote 3. *See Fed. R. Civ. P. 13, 19, 20.*

(n4)Footnote 4. *Fed. R. Civ. P. 13, 14.*

(n5)Footnote 5. *Fed. R. Civ. P. 22.*

(n6)Footnote 6. *Fed. R. Civ. P. 22*; *see also Fed. R. Civ. P. 13(h).*

(n7)Footnote 7. *See Fed. R. Civ. P. 24.*

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CHAPTER 1 Pleadings *
G. Impleader

1-1 Federal Litigation Guide § 1.102

§ 1.102 Impleader Is Permissive, Not Compulsory

Since impleader is not mandatory, counsel should analyze the situation carefully before bringing a third-party claim. n1

If a defending party fails to implead a third party, or if the court refuses to allow the impleader, the defending party may assert its claims against the third party in a later action. In this situation, the third party would not be bound by any findings from the original case, since it was not a party to that action. On the other hand, the third party might be able to assert collateral estoppel against the party bringing the claim in the later suit. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsImpleaderCivil ProcedurePleading & PracticePleadingsRule Application & InterpretationCivil ProcedureJoinder of Claims & RemediesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 14(a).*

(n2)Footnote 2. *See Fed. R. Civ. P. 14(a)*; *Richards v. Jefferson County, Ala., 517 U.S. 793, 797, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996) .*

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1-1 Federal Litigation Guide § 1.103

§ 1.103 Only Defending Parties May Implead

Any "defending party" may assert an impleader claim as a third-party defendant. The term "defending party" includes not only the named defendant but also any party against whom a claim is asserted. The rule expressly allows a third-party defendant who has been impleaded to implead additional parties. n1

When a claim has been asserted against a plaintiff, the plaintiff may implead a third party under circumstances that would allow any defendant to do so. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsImpleaderCivil ProcedurePleading & PracticePleadingsRule Application & Interpretation

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 14(a)(5).*

(n2)Footnote 2. *Fed. R. Civ. P. 14(b).*

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1-1 Federal Litigation Guide § 1.104

§ 1.104 Leave of Court Not Required If Third-Party Complaint Is Served Within 14 Days After Serving Answer

The third-party plaintiff does not need to obtain leave of court to implead a third-party defendant if the third-party plaintiff files the third-party complaint not later than 14 days after serving the original answer. n1 The filing of an amended complaint that substantially adopts the allegations of the first complaint does not afford a new opportunity to implead without leave of court. n2

If leave of court to implead is required, notice of the motion must be served on all parties to the action. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsImpleaderCivil ProcedurePleading & PracticePleadingsRule Application & InterpretationCivil ProcedurePleading & PracticePleadingsSupplemental PleadingsCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 14(a)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 14(a); United Nat'l Ins. Corp. v. Jefferson Downs Corp., 220 F.R.D. 456, 457-458 (M.D. La. 2003).*

(n3)Footnote 3. *Fed. R. Civ. P. 14(a)(1); see also Fed. R. Civ. P. 5.*

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1-1 Federal Litigation Guide § 1.105

§ 1.105 Asserting Additional Claims Against Third-Party Defendant

The impleader rule allows joinder of a third party only if the claim against the third party is based on derivative liability. However, once a third-party plaintiff properly impleads a third-party defendant, the third-party plaintiff, under the permissive claim joinder rule, may then assert any other claims he or she has against the third-party defendant, irrespective of whether they are transactionally related. The additional claims are proper only if the impleader is proper. n1

Any claim brought under the permissive claim joinder rule will need to satisfy a basis of federal subject matter jurisdiction. Moreover, the court has great discretion to order severance or separate trials of separate claims. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsImpleaderCivil ProcedurePleading & PracticePleadingsRule Application & InterpretationCivil ProcedurePleading & PracticePleadingsSupplemental PleadingsCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePartiesJoinderPermissive Joinder

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 14(a)* (impleader), *Fed. R. Civ. P. 18(a)* (joinder of claims).

(n2)Footnote 2. *See Fed. R. Civ. P. 21*, *42(b)*.

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CHAPTER 1 Pleadings *
G. Impleader

1-1 Federal Litigation Guide § 1.106

§ 1.106 Asserting Claims Against Original Plaintiff

[1] Third-Party Defendant May Assert Claims Against Plaintiff

The impleader rule allows the third-party defendant, after being impleaded, to assert any transactionally related claims against the original plaintiff. Such claims are permissive, and not mandatory. Failing to assert the claims does not prejudice the third-party defendant's ability to pursue the claims in a separate proceeding. n1

Claims by the third-party defendant against the original plaintiff, as permitted by the impleader rule, are not considered to be either counterclaims or cross-claims. Because no affirmative claim between the third-party defendant and the original plaintiff is raised by the impleader, they are not opposing parties. Nor are they co-parties. Consequently, claims of this type are not governed by the requirements of Rule 13, the counterclaim and cross-claim rule. n2

[2] Claims Must Be Transactionally Related to Main Claim

The claims against the plaintiff are proper under the impleader rule only if they arise out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff who brought about the impleader. Unrelated claims may not be joined under this rule. n3

[3] Deadline for Bringing Claim Against Original Plaintiff

Rule 14 is silent as to when a claim by the third-party defendant against the original plaintiff should be asserted, or whether leave of court is required. Accordingly, it seems clear that the third-party defendant should be able to assert the claim without seeking court permission. The court should guard against the prejudice that might be caused by the third-party defendant's delay in asserting the claim. Thus, it should grant a motion to strike or order a separate trial in appropriate circumstances. n4

[4] Joining Additional Claims Against Original Plaintiff

The impleader rule allows the third-party defendant to bring only transactionally related claims against the plaintiff. However, once the third-party defendant does assert a proper claim against the plaintiff under the impleader rule, the third-party defendant may use the unlimited claim joinder rule to join any additional claims against the plaintiff, irrespective of whether the claims are transactionally related. n5

[5] Response by Plaintiff

Once the third-party defendant asserts a claim against the original plaintiff, the two become "opposing parties" under the counterclaim rule. The plaintiff therefore must assert any transactionally related claims against the third-party defendant as compulsory counterclaims, and may assert any unrelated claims against the third-party defendant as permissive counterclaims. n6

[6] Court Must Have Subject Matter Jurisdiction Over Claim Asserted Against Original Plaintiff

The impleader rule prescribes the procedural circumstances in which certain claims may be asserted. However, the Rules do not extend the jurisdiction of the federal courts. Thus, any claim brought under the impleader rule must satisfy federal subject matter jurisdiction requirements. n7

A district court has supplemental jurisdiction if the claim is so related to the main claim (over which the court has original jurisdiction) that it forms "part of the same case or controversy" under the jurisdictional grant of Article III of the United States Constitution. Because the claim by the third-party defendant against the original plaintiff may be brought only if it is transactionally related to the main claim, the two claims are necessarily related in such a manner that supplemental jurisdiction exists. n8

In diversity cases, the courts cannot exercise supplemental jurisdiction over claims by *plaintiffs* against persons made parties under certain joinder rules, including the impleader rule, if this would defeat the complete diversity requirement of the diversity jurisdiction statute. Since the third-party defendant is not considered a plaintiff, this provision does not prevent supplemental jurisdiction over the claim by the third-party defendant against the original plaintiff, even though the two may not be diverse in citizenship. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCounterclaimsCompulsory CounterclaimsCivil ProcedurePleading & PracticePleadingsCounterclaimsPermissive CounterclaimsCivil ProcedurePleading & PracticePleadingsImpleaderCivil ProcedurePleading & PracticePleadingsRule Application & InterpretationCivil ProcedurePleading & PracticePleadingsSupplemental PleadingsCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 14(a)(2)(d).*

(n2)Footnote 2. *See Caterpillar, Inc. v. Lewis, 519 U.S. 61, 67 (1996)* (quoting **Moore's**).

(n3)Footnote 3. *Fed. R. Civ. P. 14(a).*

(n4)Footnote 4. *Fed. R. Civ. P. 12(f), 42(b).*

(n5)Footnote 5. *Fed. R. Civ. P. 18(a).*

(n6)Footnote 6. *Fed. R. Civ. P. 13(a), (b).*

(n7)Footnote 7. *Fed. R. Civ. P. 82.*

(n8)Footnote 8. *See 28 U.S.C. § 1367(a).*

(n9)Footnote 9. *See 28 U.S.C. § 1367(b).*

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CHAPTER 1 Pleadings *
G. Impleader

1-1 Federal Litigation Guide § 1.107

§ 1.107 Impleading New Parties

The third-party defendant, once impleaded, is entitled to implead additional parties under the impleader rule. Impleader claims of this type are sometimes referred to as "fourth-party" claims. n1

FOOTNOTES:
(n1)Footnote 1. *See, e.g., Interstate Power Co. v. Kansas City Power & Light Co., 992 F.2d 804, 806 (8th Cir. 1993)* .

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1-1 Federal Litigation Guide §§ 1.108 through 1.119

[Reserved]

§§ 1.108[Reserved]

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CHAPTER 1 Pleadings *
H. Amending and Supplementing Pleadings

1-1 Federal Litigation Guide § 1.120

§ 1.120 Amending Once as a Matter of Course

A party may amend its pleading once as a matter of course within:

- 21 days after serving it n1

- 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 n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticePleadingsRule Application & InterpretationCivil ProcedurePleading & PracticePleadingsSupplemental PleadingsCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 15(a)(1)(A).*

(n2)Footnote 2. *Fed. R. Civ. P. 15(a)(1)(B).*

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CHAPTER 1 Pleadings *
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1-1 Federal Litigation Guide § 1.121

§ 1.121 Moving for Leave to Amend

Leave of court to amend is required if either: n1

- The party seeking to amend has already amended once as of right
- The time period to amend has elapsed

Although leave of court to amend a pleading will be freely given when justice so requires, local rules may require a party seeking leave to amend to file a written motion. Some courts may therefore deny oral requests to amend a pleading, even when such a request is made on the record. n2 Accordingly, parties should consult local rules before requesting leave to amend pleadings. A motion for leave to amend a pleading should be stated with particularity, n3 and should also include a copy of the proposed pleading. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticePleadingsSupplemental Pleadings

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 15(a).*

(n2)Footnote 2. *See Belizan v. Hershon, 434 F.3d 579, 582 (D.C. Cir. 2006) .*

(n3)Footnote 3. *See Evans v. Pearson Enters., Inc., 434 F.3d 839, 853-854 (6th Cir. 2006) .*

(n4)Footnote 4. *See Gaskin v. Pennsylvania, 231 F.R.D. 195, 196 n.1 (E.D. Penn. 2005) .*

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CHAPTER 1 Pleadings *
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1-1 Federal Litigation Guide § 1.122

§ 1.122 Amendment Freely Permitted

Leave to amend will be freely given when justice so requires. n1 There is a preference that amendments be permitted. n2 Refusal to grant leave to amend without reason is an abuse of discretion, unless an obviously correct reason for denying leave appears from the record. n3

A district court must possess a substantial reason to deny a request for leave to amend. However, the decision is entrusted to the sound discretion of the district court. In the Fifth Circuit, the court examines five considerations: n4

- Undue delay
- Bad faith or dilatory motive
- Repeated failure to cure deficiencies by previous amendments
- Undue prejudice to the opposing party
- Futility of the amendment.

Absent any of these factors, leave should be freely given. Courts will consider the legal sufficiency of the proposed amended pleading in determining whether to grant the motion to amend. n5

A potential conflict may arise between Rules 15 and 16. Rule 15 requires a court to freely grant leave to amend, and "mere delay" is not sufficient reason to deny leave. Rule 16, on the other hand, allows the court to set time limits for amendments and other pretrial matters. n6 Under this rule, the scheduling order may not be modified except on a showing of "good cause." A number of circuits have considered this issue in ruling that the Rule 16 "good cause" standard, rather than the more lenient Rule 15 standard, governs a motion to amend filed after the deadline a district court has set for amending the pleadings. n7

Courts considering motions to amend made late in the litigation process should consider the prejudicial effect that granting the motion would have on the defendant. n8 After final judgment, a plaintiff may not file an amended complaint unless the judgment is set aside or vacated under Rules 59(e) or 60(b). Courts have generally refused to allow

a postjudgment amendment when the moving party had an opportunity to seek the amendment before entry of judgment, but waited until after judgment before requesting leave. n9

The "clearly erroneous" standard is generally applied in an appeal challenging a denial of a motion for leave of court to amend. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticePleadingsSupplemental PleadingsCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 15(a)(2).*

(n2)Footnote 2. *See Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)* ; *California Pub. Employees' Ret. Sys. v. Chubb Corp., 394 F.3d 126, 163-166 (3d Cir. 2004)* (district court did not abuse its discretion in denying leave to amend in a securities fraud case in which the plaintiffs had been given ample opportunity to amend and had not brought forth facts sufficient to meet the pleading standards of the PSLRA).

(n3)Footnote 3. *See Lone Star Ladies Inv. Club v. Schlotzsky's, Inc., 238 F.3d 363, 367-368 (5th Cir. 2001)* .

(n4)Footnote 4. *See Smith v. EMC Corp., 393 F.3d 590, 595-596 (5th Cir. 2004)* .

(n5)Footnote 5. *See Brereton v. Bountiful City Corp., 434 F.3d 1213, 1219 (10th Cir. 2006)* .

(n6)Footnote 6. *Fed. R.Civ. P. 16.*

(n7)Footnote 7. *See S&W Enters., LLC v. South Trust Bank, N.A., 315 F.3d 533, 535-537 (5th Cir. 2003)* ; *O'Connell v. Hyatt Hotels, 357 F.3d 152, 154 (1st Cir. 2004)* ; *Leary v. Daeschner, 349 F.3d 888, 905-909 (6th Cir. 2003)* ; *Rent-A-Center, Inc. v. 47 Mamaroneck Ave. Corp., 215 F.R.D. 100, 104 (S.D.N.Y. 2003)* .

(n8)Footnote 8. *See Austin v. Mariner Health Care, Inc., 226 F.R.D. 548 (N.D. Miss. 2005)* .

(n9)Footnote 9. *See Benzon v. Morgan Stanley Distribs., Inc., 420 F.3d 598, 612-614 (6th Cir. 2005)* ; *see also The Tool Box, Inc. v. Ogden City Corp., 419 F.3d 1084, 1087-1088 (10th Cir. 2005)* .

(n10)Footnote 10. *See Fielding v. Tollaksen, 510 F.3d 175, 178 (2d Cir. 2007)* .

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CHAPTER 1 Pleadings *
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1-1 Federal Litigation Guide § 1.123

§ 1.123 Effect of Amendment

An amended pleading generally supersedes the original and renders it of no legal effect. n1

Amendments to pleadings may revive the right to a jury trial. Specifically, the right to a jury trial is waived if the demand is not made within 14 days of service of the last pleading related to that issue. n2 Amendments to the pleadings will revive the right to a jury trial if the amendments involve new issues or change the original issue.

Rule 15 allows a party to amend despite the running of an applicable state statute of limitations when parties are sufficiently on notice of the facts and claims that gave rise to the proposed amendment. n3 It is implicit in the rule that in order to amend, a party must have a pleading on file. n4 However, an amendment generally relates back to the original pleading filed in the current matter in federal court. n5 The rationale of allowing an amendment to relate back is that once a party is notified of litigation involving a specific factual occurrence, the party has received all the notice and protection that the statute of limitations requires. n6 An amendment naming a new party relates back to the original complaint when the new party had adequate notice of the action and should have known that it would have been named in the complaint but for a mistake--whether the mistake was a mere misnomer or was based on lack of knowledge of the true identity of the defendant. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticePleadingsAmended PleadingsRelation BackCivil ProcedurePleading & PracticePleadingsSupplemental Pleadings

FOOTNOTES:
(n1)Footnote 1. *See, e.g., International Controls Corp. v. Vesco, 556 F.2d 665, 668 (2d Cir. 1977) , cert. denied, 434 U.S. 1014 (1978) .*

(n2)Footnote 2. *Fed. R. Civ. P. 38(b).*

(n3)Footnote 3. *Fed. R. Civ. P. 15(c)*; *see also Kansa Rein. v. Congressional Mortgage Corp., 20 F.3d 1362, 1366 (5th Cir. 1994) .*

(n4)Footnote 4. *See Kansa Rein. v. Congressional Mortgage Corp., 20 F.3d 1362, 1367-1368 (5th Cir. 1994)* .

(n5)Footnote 5. *See Lucchesi v. Experian Info. Solutions, Inc., 226 F.R.D. 172, 174-175 (S.D.N.Y. 2005)* .

(n6)Footnote 6. *See Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 150 n.3, 104 S. Ct. 1723, 80 L. Ed. 2d 196 (1984)* .

(n7)Footnote 7. *See Arthur v. Maersk, Inc., 434 F.3d 196, 207-209 (3d Cir. 2006)* .

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1-1 Federal Litigation Guide § 1.124

§ 1.124 Responding to Amended Pleading

Unless the court orders otherwise, a party must respond to an amended pleading either within the time remaining for response to the original pleading, or within 14 days after service of the amended pleading, whichever is the longer time period. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsRelation BackCivil ProcedurePleading & PracticePleadingsSupplemental Pleadings

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 15(a)(3).*

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1-1 Federal Litigation Guide § 1.125

§ 1.125 Supplemental Pleadings Focus on New Events

A pleading may be supplemented to include transactions, occurrences, or events that happened after the original pleading in the action has been filed and served. n1 Under Rule 15(d), a party may supplement its complaint even though the original pleading is defective in its statement of a claim for relief. n2 Supplementing differs from amending in that the focus is on subsequent events related to the original pleading. n3

Supplementary pleadings are permissive, not compulsory. n4 Accordingly, a plaintiff who elects not to file a supplemental pleading to assert claims that arise during the pendency of a lawsuit is not barred by res judicata from pursuing those claims in a later action. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsRule Application & InterpretationCivil ProcedurePleading & PracticePleadingsSupplemental PleadingsCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes Judicata

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 15(d)*; *see also Alabama v. United States Army Corps of Eng'rs, 382 F. Supp. 2d 1301, 1329-1331 (N.D. Ala. 2005)* .

(n2)Footnote 2. *Franks v. Ross, 313 F.3d 184, 198-199 (4th Cir. 2002)* .

(n3)Footnote 3. *See Owens Illinois, Inc. v. Lake Shore Land Co., 610 F.2d 1185, 1188 (3d Cir. 1979)* .

(n4)Footnote 4. *See Fed. R. Civ. P. 15(d).*

(n5)Footnote 5. *Fed. R. Civ. P. 15(d).*

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CHAPTER 1 Pleadings *
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1-1 Federal Litigation Guide § 1.126

§ 1.126 Supplementation Requires Leave of Court

A party seeking to file a supplemented pleading must obtain leave of court. n1 Although not expressly mandated by the Rules, it has been held that the amended pleading requirement that leave of court be freely granted also applies to supplemental pleadings. n2

The court may allow a party to file a supplemental pleading at any stage in the lawsuit. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticePleadingsRule Application & InterpretationCivil ProcedurePleading & PracticePleadingsSupplemental Pleadings

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 15(d).*

(n2)Footnote 2. *D. C. Precision, Inc. v. United States Gov't, 73 F. Supp. 2d 338, 342 (S.D.N.Y. 1999) .*

(n3)Footnote 3. *Novak v. National Broad. Co., 724 F. Supp. 141, 145 (S.D.N.Y. 1989) .*

* Chapter 1 was rewritten in 2000 by Andrew E. Westley, Esq., of San Francisco, California.

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CHAPTER 1 Pleadings *
H. Amending and Supplementing Pleadings

1-1 Federal Litigation Guide § 1.127

§ 1.127 Adding Omitted Counterclaim by Amending Pleading

A party may amend an answer to add an omitted counterclaim in the manner prescribed by Rule 15. n1 Under Rule 15, a party may amend its answer once as a matter of course. The deadline for amending as a matter of course depends on whether the answer already contains a counterclaim. If the answer to be amended contains no counterclaim, and the proposed amendment seeks to add an omitted counterclaim, a party may amend its answer as a matter of court within 21 days after serving it. n2 If the answer already contains at least one counterclaim, and the party seeks to add an additional counterclaim, the answer may be a pleading "to which a responsive pleading is required." This would mean that the party may amend its answer as a matter of course within 21 days after service of a responsive pleading to the existing counterclaim, or within 21 days after service of a Rule 12 motion attacking the existing counterclaim, whichever 21-day period concludes first. n3 After the time for an amendment as a matter of course has expired, a party still may amend its answer to add an omitted counterclaim, but only with leave of court or the written consent of the opposing party. n4

When leave of court is required for an amendment, the court should freely grant leave "when justice so requires. n5 The court should favor granting leave to amend absent a showing of undue delay, bad faith, or prejudice to the opposing party. n6 The fact that an omitted counterclaim is compulsory increases the desirability of an amendment, because the omitted claim would otherwise be barred in a subsequent action if not allowed in the present action. n7 On the other hand, a court may deny a motion to amend if the counterclaim is meritless and the amendment would prove futile. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticePleadingsRule Application & InterpretationCivil ProcedurePleading & PracticePleadingsSupplemental Pleadings

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 15.*

(n2)Footnote 2. *Fed. R. Civ. P. 15(a)(1)(A).*

(n3)Footnote 3. *Fed. R. Civ. P. 15(a)(1)(B).*

(n4)Footnote 4. *Fed. R. Civ. P. 15(a)(2).*

(n5)Footnote 5. *Fed. R. Civ. P. 15(a)(2).*

(n6)Footnote 6. *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 392 n.10, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993) .*

(n7)Footnote 7. *Salomon S.A. v. Alpina Sports Corp., 737 F. Supp. 720, 721-722 (D.N.H. 1990)* (citing **Moore's**).

(n8)Footnote 8. *Frank M. McDermott, Ltd. v. Moretz, 898 F.2d 418, 420-421 (4th Cir. 1990)* (citing **Moore's**).

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CHAPTER 1 Pleadings *
H. Amending and Supplementing Pleadings

1-1 Federal Litigation Guide §§ 1.128 through 1.139

[Reserved]

§§ 1.128[Reserved]

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CHAPTER 1 Pleadings *
I. Adding, Dropping, and Substituting Parties

1-1 Federal Litigation Guide § 1.140

§ 1.140 Understanding Misjoinder and Non-Joinder

[1] Non-Joinder

Non-joinder generally results from a failure to join a "necessary party" whose presence in the lawsuit is required under the compulsory joinder doctrine. n1 The plaintiff's failure to join a necessary party may be cured under Rule 21, which provides that parties may be added by order of the court on motion of any party, or sua sponte, at any stage of the proceedings, "on such terms as are just". n2

[2] Misjoinder

The Federal Rules of Civil Procedure do not define *misjoinder*. Several district courts have stated that parties are misjoined if the claims asserted against them do not arise out of the same transaction or occurrence, or do not present some common question of law and fact. For example:

- Corporation and its officers were improperly joined in civil rights action against subsidiary n3
- Claims alleging systematic gender discrimination by individuals in employer's management group were not misjoined n4
- Parties were not misjoined when fraud/conversion claims arose from the same transaction and presented common issues n5

Misjoinder may also result from the plaintiff's mistake in naming the wrong party or violating a statutory ban on joinder. n6

Rule 21 provides for dropping parties to cure misjoinder. Parties may be dropped by order of the court on motion of any party, or sua sponte, at any stage of the proceedings, "on such terms as are just." n7 Rule 21 also provides for *severance* of parties as a cure for misjoinder. n8 Likewise, Rule 21 authorizes severance of any *claim*, even without a finding of improper joinder, when there are sufficient other reasons for ordering a severance. n9 Rule 21 severance creates separate, independent suits. n10

Dismissal of an action can not be grounded merely on misjoinder. n11

[3] Dropping Parties to Cure Lack of Diversity

Rule 21 may be used to cure lack of diversity of citizenship jurisdiction. n12 When deciding whether simply to eliminate non-diverse parties to a suit rather than dismiss the entire proceeding under Rule 12(b), the court must determine whether the action may "in equity and good conscience" proceed without the nonjoined parties. n13

[4] Relationship Between Rule 21 and Rule 25

Although Rule 25 provides for substitution in limited circumstances, parties may be substituted under Rule 21 in the discretion of the court in situations not covered by Rule 25. n14

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsSupplemental PleadingsCivil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderCompulsory JoinderCivil ProcedurePartiesJoinderMisjoinder

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 19.*

(n2)Footnote 2. *Fed. R. Civ. P. 21.*

(n3)Footnote 3. *Glendora v. Malone, 917 F. Supp. 224, 227 (S.D.N.Y. 1996) .*

(n4)Footnote 4. *Henderson v. AT&T Corp., 918 F. Supp. 1059, 1061 (S.D. Tex. 1996) .*

(n5)Footnote 5. *Winner's Circle of Las Vegas, Inc. v. AMI Franchising, Inc., 916 F. Supp. 1024, 1029 (D. Nev. 1996) .*

(n6)Footnote 6. *See, e.g., 28 U.S.C. § 1346.*

(n7)Footnote 7. *Fed. R. Civ. P. 21.*

(n8)Footnote 8. *Fed. R. Civ. P. 21.*

(n9)Footnote 9. *Wyndham Assocs. v. Bintliff, 398 F.2d 614, 618 (2d Cir. 1968) .*

(n10)Footnote 10. *Wyndham Assocs. v. Bintliff, 398 F.2d 614, 618 (2d Cir. 1968) .*

(n11)Footnote 11. *Fed. R. Civ. P. 21.*

(n12)Footnote 12. *Newman-Green, Inc v. Alfonzo-Larrain, 490 U.S. 826, 828 (1989) .*

(n13)Footnote 13. *Jaser v. New York Property Ins., 815 F.2d 240, 242 (2d Cir. 1987) .*

(n14)Footnote 14. *Hackner v. Guaranty Trust Co., 117 F.2d 95, 98 (2d Cir. 1941) .*

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CHAPTER 1 Pleadings *
I. Adding, Dropping, and Substituting Parties

1-1 Federal Litigation Guide § 1.141

§ 1.141 Moving to Add Party

[1] Determining Grounds for Adding Party

The most common grounds for adding a party are the necessary party requirements found in the compulsory joinder rule. "Necessary parties" are: n1

- Absentees needed to grant complete relief to existing parties to the action
- Persons needed to assure that the court's judgment as a practical matter does not impair or impede that absentee's ability to protect its interest in later litigation
- Absentees who have an interest in the litigation such that their nonjoinder would leave an existing party exposed to substantial risk of multiple liability or inconsistent obligations n2
- Absentees who would be merely proper parties in the action are not subject to compulsory joinder. The plaintiff may name proper parties, or a defendant may seek to join proper parties, but their presence is not required. n3

[2] Moving to Amend Complaint

Parties may be added by order of the court pursuant to Rule 21 on motion of any party or on the court's own initiative at any stage of the action, and on such terms as are just. n4 Rule 15, governing amendments to the pleadings, may provide an additional basis for adding parties. n5

In either case, the proposed amendment should be attached to the motion to amend stating the names of the new party and the jurisdictional facts applicable.

[3] Deadline for Adding Party

A motion to add a party can be made at any stage of the action. n6

[4] Notice and Service of Motion to Add Party

There is no requirement in the Rules to provide notice to the proposed new parties of the motion to add those new parties.

[5] Order Adding Party Must Be on Just Terms

Orders adding proper parties must be made on "such terms as are just". n7 In determining just terms, the court will consider whether an order under Rule 21 would prejudice any party. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderCompulsory JoinderCivil ProcedurePartiesJoinderPermissive Joinder

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 19(a)*(1).

(n2)Footnote 2. *Citizen Potawatomi Nation v. Norton, 248 F.3d 993, 997-999 (10th Cir. 2001)* .

(n3)Footnote 3. *See Fed. R. Civ. P. 20.*

(n4)Footnote 4. *Fed. R. Civ. P. 21.*

(n5)Footnote 5. *See Askir v. Boutros-Ghali 933 F. Supp 368, 370 (S.D.N.Y. 1996) citing In re Joint E. & S. Dists. Asbestos Litig., 124 F.R.D. 538 (E.D.N.Y. 1989) , aff'd 899 F.2d 1281 (2d Cir. 1990)* .

(n6)Footnote 6. *Fed. R. Civ. P. 21.*

(n7)Footnote 7. *Fed. R. Civ. P. 21.*

(n8)Footnote 8. *Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 838 (1989)* .

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CHAPTER 1 Pleadings *
I. Adding, Dropping, and Substituting Parties

1-1 Federal Litigation Guide § 1.142

§ 1.142 Opposing Motion to Add Party

Opposition to adding a party may be based on prejudice to the other parties. n1 Finally, a party's delay in seeking relief may be a basis for denying the motion. Late joinder is disfavored because it can create discovery problems. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsRule Application & InterpretationCivil ProcedurePleading & PracticePleadingsSupplemental PleadingsCivil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesJoinderGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Newman-Green, Inc., v. Alfonzo-Larrain, 490 U.S. 826, 838, 109 S. Ct. 2218, 104 L. Ed. 2d 893* , *reh'g denied, 492 U.S. 932 (1989)* . Also, parties may not be added to preserve an action that has become moot. *See, e.g., Fox v. Board of Trustees 148 F.R.D. 474, 484-485 (N.D.N.Y. 1993)* , *aff'd, 42 F.3d 135 (2d Cir. 1994)* , *cert. denied, 515 U.S. 1169 (1995)* .

(n2)Footnote 2. *Giorgio Morandi, Inc. v. Textport Corp., 761 F. Supp. 12, 14 (S.D.N.Y. 1991)* .

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CHAPTER 1 Pleadings *
I. Adding, Dropping, and Substituting Parties

1-1 Federal Litigation Guide § 1.143

§ 1.143 Moving to Drop Party

[1] Grounds for Motion to Drop Party

Parties may be dropped by order of the court, on motion of any party or on the court's own initiative, at any stage of the action, and on such terms as are just. n1 The most common example of misjoinder occurs when a plaintiff structures the case in violation of permissive party joinder prerequisites. Parties are misjoined if the claims asserted against them do not arise out of the same transaction or occurrence, or do not present some common question of law or fact. n2

Rule 21 may also be used to drop a properly joined party for the purpose of maintaining diversity of citizenship jurisdiction. n3

[2] Avoiding Prejudice

In exercising its discretion under Rule 21, the court must consider principles offundamental fairness and judicial efficiency. n4 As part of this inquiry, the court should consider whether an order under Rule 21 would prejudice any party. n5

[3] No Deadline for Motion to Drop Party

Parties may be dropped at any stage of the action. n6 A dispensable nondiverse party may be dropped even after judgment has been rendered. n7

[4] Court May Dismiss Party but Not Action

Orders dropping parties must be made on such terms as are just. n8 The district court has great discretion in determining whether to drop parties. n9

Although misjoinder is not grounds for dismissal of an entire action, n10 the court may rely on Rule 21 to dismiss parties that have no connection to the claims asserted. n11

[5] Effect of Dropping Party

Dismissal of a misjoined party under Rule 21 is without prejudice; a claim by or against such a party may be refiled as a separate suit. n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsSupplemental PleadingsCivil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderMisjoinderCivil ProcedurePartiesJoinderPermissive Joinder

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 21.*

(n2)Footnote 2. *Glendora v. Malone, 917 F. Supp. 224, 227 (S.D.N.Y. 1996)* ; *see also In re High Fructose Corn Syrup Antitrust Litig., 361 F.3d 439, 441 (7th Cir. 2004)* .

(n3)Footnote 3. *Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 832-833 (1989)* .

(n4)Footnote 4. *See German v. Federal Home Loan Mortg. Corp., 896 F. Supp. 1385, 1400 (S.D.N.Y. 1995)* .

(n5)Footnote 5. *Newman-Green, Inc., v. Alfonzo-Larrain, 490 U.S. 826, 838 (1989)* .

(n6)Footnote 6. *Fed. R. Civ. P. 21.*

(n7)Footnote 7. *Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 832 (1989)* .

(n8)Footnote 8. *Fed. R. Civ. P. 21.*

(n9)Footnote 9. *New York v. Hendrickson Bros., Inc., 840 F.2d 1065, 1082 (2d Cir. 1988)* ; *see also Glendora v. Malone, 917 F. Supp. 224, 227 (S.D.N.Y. 1996)* .

(n10)Footnote 10. *Fed. R. Civ. P. 21.*

(n11)Footnote 11. *Glendora v. Malone, 917 F. Supp. 224, 227-228 (S.D.N.Y. 1996)* .

(n12)Footnote 12. *Michaels Bldg. Co. v. Ameritrust Co., 848 F.2d 674, 682 (6th Cir. 1988)* .

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CHAPTER 1 Pleadings *
I. Adding, Dropping, and Substituting Parties

1-1 Federal Litigation Guide § 1.144

§ 1.144 Severing Claim to Cure Misjoinder

[1] Grounds for Severing Claim

Rule 21 provides for severance as a cure for misjoinder of parties. n1 However, severance is not limited to misjoinder. Rule 21 authorizes the severance of any claim when there are sufficient other reasons for ordering a severance. n2

A motion to sever a claim against a party may be made by any party. n3

[2] Court's Discretion

The question of whether to enter a severance order is committed to the sound discretion of the district court. n4 In deciding whether severance is appropriate, courts generally consider the following factors: n5

- Whether the issues sought to be tried separately are significantly different from one another
- Whether the separable issues require the testimony of different witnesses and different documentary proof
- Whether the party opposing the severance will be prejudiced if it is granted
- Whether the party requesting the severance will be prejudiced if it is not granted

[3] Effect of Severance

Severance under Rule 21 results in separate actions, and the severed claim proceeds as a discrete, independent suit. It and the original case result in their own separate final judgments from which appeals may be taken. n6 If a severed claim is one of multiple claims asserted by a single plaintiff against a single defendant, both parties are involved in two separate actions. n7 A claim or counterclaim properly severed from another by virtue of Rule 21 "may be ... proceeded with separately". n8

By contrast, an order of separate trials does not result in the filing of separate cases. It leads to two or more separate factual inquiries in the context of a single, properly joined case. No matter how many separate trials the court may

order, they remain part of a single case. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderMisjoinder

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 21.*

(n2)Footnote 2. *Wyndham Assocs. v. Bintliff, 398 F.2d 614, 618 (2d Cir. 1968) .*

(n3)Footnote 3. *Fed. R. Civ. P. 21.*

(n4)Footnote 4. *New York v. Hendrickson Bros., Inc., 840 F.2d 1065, 1082 (2d Cir. 1988) .*

(n5)Footnote 5. *German v. Federal Home Loan Mortg. Corp., 896 F. Supp. 1385, 1400 (S.D.N.Y. 1995) .*

(n6)Footnote 6. *United States v. O'Neil, 709 F.2d 361, 368 (5th Cir. 1983) .*

(n7)Footnote 7. *Henderson v. AT&T Corp., 918 F. Supp. 1059, 1062 (S.D. Tex. 1996) .*

(n8)Footnote 8. *Spencer, White & Prentis Inc. v. Pfizer Inc., 498 F.2d 358, 361 (2d Cir. 1974) .*

(n9)Footnote 9. *United States v. O'Neil, 709 F.2d 361, 368 (5th Cir. 1983).*

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CHAPTER 1 Pleadings *
I. Adding, Dropping, and Substituting Parties

1-1 Federal Litigation Guide § 1.145

§ 1.145 Substituting Parties

[1] Scope of Rule 25 Substitution

Rule 25 provides for the substitution of parties under the following circumstances: n1

- Death of a party.
- Incompetency of a party
- Transfer of a party's interest
- Death or separation from office of a public official who is a party

[2] Rule 21 as Alternative to Rule 25 Substitution

Rule 25 provides for substitution only in particular circumstances. n2 Parties may, however, be added under Rule 21 in the discretion of the court in situations not covered by Rule 25. n3

[3] Procedure for Substitution on Death of Party

[3.--1] Determination of Whether Claim Survives is a Function of Substantive Law

If a party dies and the claim is not extinguished by the death, the court may order substitution of the proper parties. n4 The determination of whether a claim survives is a function of substantive law and is unaffected by Rule 25(a). n5

Federal courts will apply state law to decide whether a state law claim survives the death of a party. To determine the substantive rights involved in or as a condition to substitution in a nonfederal case, the district court must look to state law and apply the appropriate survival statute of the state in which the federal court sits. n6

In the absence of a specific federal statutory directive, the question of survival of a federal claim is determined under federal common law. The general rule under federal common law is that an action survives the death of a party if it is remedial and not penal in nature. n7

[3.--2] Deadline for Filing Motion to Substitute Based on Death of Party

Rule 25(a) establishes a time limit for the motion to substitute based not upon the time of the death, but rather based on service of a statement noting the death. n8 If the suggestion is not made of record, there is no strict time limit for the motion.

Substitution of a party for a deceased party may be accomplished by the following procedure: n9

- The motion for substitution may be made by any party or by the successors or representatives of the deceased party
- The motion must be made not later than 90 days after service of a statement noting the death
- If the motion to substitute is not timely made, the action must be dismissed as to the deceased party

In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death must be suggested upon the record and the action must proceed in favor of or against the surviving parties. n10

[3.--3] Substitution on Death of Party Is Discretionary

Substitution on the death of a party is discretionary. n11 A motion to substitute made within the prescribed time will ordinarily be granted, but under the permissive language of the rule, it may be denied by the court if made long after the death--as can occur if the suggestion of death is not made or is delayed--and circumstances have arisen rendering it unfair to allow substitution. n12

[3.--4] Serving and Filing Suggestion of Death

Rule 25(a)(1) contains no restriction on who may file the statement of the fact of death. There is **no** requirement that the statement of the fact of death must be filed by a party or a formal or appointed representative of the decedent. n13

The suggestion of death must be personally served on a representative who has been appointed for the estate of the deceased party. n14

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesSubstitutionsGeneral OverviewCivil ProcedurePartiesSubstitutionsDeath of PartyCivil ProcedurePartiesSubstitutionsIncompetencyCivil ProcedurePartiesSubstitutionsMotions for Substitution

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 25.*

(n2)Footnote 2. *See* [1], *above.*

(n3)Footnote 3. *Hackner v. Guaranty Trust Co., 117 F.2d 95, 98 (2d Cir. 1941) .*

(n4)Footnote 4. *Fed. R. Civ. P. 25(a)(1).*

(n5)Footnote 5. *Saylor v. Bastedo, 623 F.2d 230, 238 (2d Cir. 1980)* (citing **Moore's**).

(n6)Footnote 6. *Knauer v. Johns-Manville Corp., 638 F. Supp. 1369, 1387 (D. Md. 1986)* (citing **Moore's**); *see Barrett v. United States, 689 F.2d 324, 331 (2d Cir. 1982)* .

(n7)Footnote 7. *International Cablevision, Inc. v. Sykes, 172 F.R.D. 63, 67 (W.D.N.Y. 1997)* (citing **Moore's**).

(n8)Footnote 8. *Fed. R. Civ. P. 25(a)(1).*

(n9)Footnote 9. *Fed. R. Civ. P. 25(a)(1).*

(n10)Footnote 10. *Fed. R. Civ. P. 25(a)(2).*

(n11)Footnote 11. *Fed. R. Civ. P. 25(a)(1).*

(n12)Footnote 12. *Fed. R. Civ. P. 25(a)* advisory committee note (1963).

(n13)Footnote 13. *See Fed. R. Civ. P. 25(a)(1)*; *Unicorn Tales, Inc. v. Banerjee, 138 F.3d 467, 469 (2d Cir. 1998)* .

(n14)Footnote 14. *Barlow v. Ground, 39 F.3d 231, 234 (9th Cir. 1994).*

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CHAPTER 1 Pleadings *
I. Adding, Dropping, and Substituting Parties

1-1 Federal Litigation Guide § 1.146

§ 1.146 Substitution for Incompetent Party

If a party becomes incompetent, the court may allow the action to be continued by or against the party's representative. n1 The rule does not define incompetency or provide for a determination of competency. State law determines incompetency and the procedure for appointment of a representative.

Rule 25(b) is discretionary, and the court can deny the motion to substitute for a good reason. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesSubstitutionsGeneral OverviewCivil ProcedurePartiesSubstitutionsIncompetencyCivil ProcedurePartiesSubstitutionsMotions for Substitution

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 25(b).*

(n2)Footnote 2. *Fed. R. Civ. P. 25(b).*

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CHAPTER 1 Pleadings *
I. Adding, Dropping, and Substituting Parties

1-1 Federal Litigation Guide § 1.147

§ 1.147 Substitution on Assignment of Interest

In case of any assignment of interest by a party, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. n1

Courts have applied the term *transfer of interest* broadly to cover transfers of assets. The types of transfers of interests embraced by the rule include a corporate acquisition, change in ownership of a financial instrument, or a receiver or trustee in bankruptcy succeeding to the assets and liabilities of the debtor. n2

Rule 25(c) only applies to pending litigation. n3 The transfer must take place after the commencement of the action; transfers before the action is filed must be dealt with through amendment. n4

Rule 25(c) does not provide a deadline for filing a motion to substitute on transfer. n5 Thus, a Rule 25(c) motion may be made at any time. n6 However, the discretion vested in the court under Rule 25(c) allows denial of an untimely motion.

The court has the following three alternatives on a motion to substitute based on a transfer of interest: n7

- Keep the original party
- Substitute the transferee
- Join the transferee and keep the original party

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePartiesSubstitutionsGeneral OverviewCivil ProcedurePartiesSubstitutionsMotions for SubstitutionCivil ProcedurePartiesSubstitutionsTransfers of Interests

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 25(c).*

(n2)Footnote 2. *Herrera v. Singh, 118 F. Supp. 2d 1120, 1122-1123 (E.D. Wash. 2000)* ; *see Trombino v. Transit Casualty Co., 110 F.R.D. 139, 147 (D.R.I. 1986)* .

(n3)Footnote 3. *Horphag Research Ltd. v. Consac Indus., Inc., 116 F.3d 1450, 1453 (Fed. Cir. 1997)* (citing **Moore's**).

(n4)Footnote 4. *Unison Realty Corp. v. RKO Theatres, Inc., 35 F.R.D. 232, 233 (S.D.N.Y. 1964)* .

(n5)Footnote 5. *General Battery Corp. v. Globe-Union, Inc., 100 F.R.D. 258, 261 (D. Del. 1982)* .

(n6)Footnote 6. *See Air Line Pilots Ass'n Int'l v. Texas Int'l Airlines, Inc., 567 F. Supp. 78, 81 (S.D. Tex. 1983)* .

(n7)Footnote 7. *Fed. R. Civ. P. 25(c).*

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CHAPTER 1 Pleadings *
I. Adding, Dropping, and Substituting Parties

1-1 Federal Litigation Guide § 1.148

§ 1.148 Effect of Substitution

Substitution or joinder under Rule 25(c) has no effect on subject matter jurisdiction. Even if substitution destroys complete diversity of citizenship, the court retains subject matter jurisdiction as long as proper jurisdiction was previously established by the original parties. n1 Likewise, a Rule 25(c) substitution does not effect venue or personal jurisdiction. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureVenueGeneral OverviewCivil ProcedurePartiesSubstitutionsGeneral OverviewCivil ProcedurePartiesSubstitutionsMotions for SubstitutionCivil ProcedurePartiesSubstitutionsTransfers of Interests

FOOTNOTES:
(n1)Footnote 1. *Freeport-McMoRan Inc. v. K N Energy, Inc., 498 U.S. 426, 428-429, 111 S. Ct. 858, 112 L. Ed. 2d 951 (1991)* .

(n2)Footnote 2. *Minnesota Mining & Mfg. Co. v. Eco-Chem, Inc., 757 F.2d 1256, 1264 (Fed. Cir. 1985)* .

* Chapter 1 was rewritten in 2000 by Andrew E. Westley, Esq., of San Francisco, California.

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CHAPTER 2 The Mechanics of Motion Practice

1-2 Federal Litigation Guide 2.syn

§ 2.syn Synopsis to Chapter 2: The Mechanics of Motion Practice

§ 2.01 Use of Motions
[1] Request for Court Order
[2] Types of Pretrial Motions
[3] Frivolous Motions May Result in Sanctions

§ 2.02 Federal Rules Governing Motion Practice

§ 2.03 Importance of Local District Court Rules Governing Motion Practice

§ 2.04 Importance of Rules and Procedures of Assigned Judge

§ 2.05 When to Seek Particular Relief
[1] Nature of Relief Requested Determines Timing
[2] Waiver of Right to Make Motion
[3] Complying With Motion Deadlines in Scheduling Orders

§ 2.06 Determining Hearing Officer for a Particular Motion

§§ 2.07. through 2.09 [Reserved]

§ 2.10 Distinguishing Oral Motion From Oral Argument on Written Motion

§ 2.11 Availability of Oral Motion

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§ 2.20 Considerations in Determining Whether to File Motion

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[1] Obtaining Court Approval of Stipulation
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[2.--2] Computing Advance Notice Period
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[3.--1] Consider Pre-Motion Conference If Prompt or Immediate Court Intervention Is Necessary
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§§ 2.54 through 2.59 [Reserved]

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§ 2.67 Delivering Courtesy Copies to Assigned Judge

§ 2.68 Redacting Private Information

§§ 2.69 through 2.79 [Reserved]

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§ 2.81 Papers Required in Opposition to Motion

§ 2.82 Deadline for Serving and Filing Opposition Papers
[1] Federal Rules Deadline for Serving Opposition Papers
[2] Extension of Deadline for Serving and Filing Opposition Papers

§ 2.83 Proof of Service Required

§ 2.84 Failure to Submit Opposition Papers

§ 2.85 Format of Opposition Papers

§§ 2.86 through 2.89 [Reserved]

§ 2.90 Cross-Motion and Counter-Motion Defined

§ 2.91 No Governing Federal Rules Regarding Cross-Motions and Counter-Motions

§ 2.92 Combining Opposition and Cross-Motion or Counter-Motion

§ 2.93 Serving and Filing Cross-Motions and Counter-Motions

§ 2.94 Seeking Enlargement of Time Within Which to Respond to Cross-Motion or Counter-Motion

§§ 2.95 through 2.99 [Reserved]

§ 2.100 No Governing Federal Rules Regarding Reply Papers

§ 2.101 Practice Tip: Proper Function of Reply Papers

§§ 2.102 through 2.109 [Reserved]

§ 2.110 Local District Court Rules and Rules and Procedures of Assigned Judge Govern Oral Argument

§ 2.111 Practice Tip: Benefits of Oral Argument

§§ 2.112 through 2.119 [Reserved]

§ 2.120 Prevailing Party May Be Required to Settle Order

§ 2.121 Practice Tip: Contents of Proposed Order

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CHAPTER 2 The Mechanics of Motion Practice

1-2 Federal Litigation Guide Scope

Scope

SCOPE

This chapter discusses the mechanics of motion practice. Local district court rules, as well as the rules and procedures of the assigned judge, govern many aspects of motion practice, and those rules and procedures should be consulted in conjunction with this chapter.

The chapter covers the following topics:

- **Determining whether to file a motion**
- **Using stipulations in lieu of motions**
- **Governing procedural law of anserfederal motion practice**
- **Oral motions**
- **Papers required in support of and in opposition to motions, including memoranda of law and affidavits or affidavit substitutes**
- **Scheduling the motion return date, and expediting the return date**
- **Obtaining ex parte relief**
- **Motions to enlarge (extend) time**
- **Serving and filing motion papers**
- **Opposing the motion and replying to opposition papers**
- **Filing cross-motions or counter-motions**
- **Oral argument of motions**

- **Settling orders**

For expanded coverage of motion practice in general, *see* Moore's Federal Practice,, Ch. 5, *Service and Filing of Pleadings and Other Papers* , and Ch. 7, *Pleadings Allowed; Form of Motions* (Matthew Bender 3d ed.).

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CHAPTER 2 The Mechanics of Motion Practice
A. Use of Motions; Governing Procedural Law of Federal Motion Practice

1-2 Federal Litigation Guide § 2.01

§ 2.01 Use of Motions

[1] Request for Court Order

A motion is a request to the court for an order. All motions must be in writing unlessmade during a recorded hearing or trial. n1 Related to motions are applications, petitions, and orders to show cause; the purpose of each is to bring a matter to the court's attention for decision.

Pretrial motions may be used to test the strengths and weaknesses of a case, to narrow issues before trial, or to resolve cases without the need for trial. When used effectively, pretrial motions reduce litigation costs and time expenditures.

[2] Types of Pretrial Motions

Some motions are specifically identified in the Federal Rules of Civil Procedure. The Rules do not limit the variety of motions that may be made, and parties may file a motion as to any matter requiring a ruling or order from the court.

Motions should be titled to reflect the order sought. For example, if a party is about to destroy relevant evidence, a motion designated "Motion for Order to Preserve Evidence" would be appropriate.

[3] Frivolous Motions May Result in Sanctions

Although a party may bring a series of motions to control the focus and pace of the case, federal district judges have little patience for frivolous motions, or motions designed to delay or harass. n2 In fact, many local district court rules contain specific warnings against bringing such motions, under penalty of sanctions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsRule Application & InterpretationCivil ProcedureSanctionsGeneral OverviewCivil ProcedureSanctionsBaseless FilingsGeneral OverviewCivil ProcedureSanctionsBaseless FilingsBad Faith MotionsGovernmentsCourtsRule Application & Interpretation

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 7(b)(1).*

(n2)Footnote 2. *See Fed. R. Civ. P. 11.*

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CHAPTER 2 The Mechanics of Motion Practice
A. Use of Motions; Governing Procedural Law of Federal Motion Practice

1-2 Federal Litigation Guide § 2.02

§ 2.02 Federal Rules Governing Motion Practice

The Federal Rules of Civil Procedure set forth general parameters regarding motions. The applicable Rules are the following:

- **Rule 5; Serving and filing motions.** Rule 5 sets forth the manner in which motions must be served and filed with the court [*see §§ 2.60 -2.66*]

- **Rule 6; Timing of service of motions.** Rule 6 requires that motions be served at least 14 days before the hearing date [*see § 2.32[2]*]

- **Rule 7(b); Form of motions.** Rule 7(b) requires that motions must state with particularity the grounds for the motion, and must set forth the relief sought [*see § 2.32[1], [5]*]

- **Rule 10; Form of motions.** Rule 10 contains format requirements for pleadings; those requirements apply to motions [*see §§ 2.40 -2.43*]

- **Rule 11; Signing Motions.** Rule 7(b)(3) provides that written motions must be signed in accordance with Rule 11 [*see § 2.43*]

In addition, specific types of motions may be impacted by the particular Federal Rule or statute governing the relief requested.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureSummary JudgmentHearingsGeneral Overview

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CHAPTER 2 The Mechanics of Motion Practice
A. Use of Motions; Governing Procedural Law of Federal Motion Practice

1-2 Federal Litigation Guide § 2.03

§ 2.03 Importance of Local District Court Rules Governing Motion Practice

Local district court rules generally control the details of motion practice, including the following:

- Notice requirements
- Timing of opposition and reply papers
- Papers required or permitted to be submitted in support of or in opposition to the motion (including reply papers), and the form of those papers
- Formatting requirements for motion papers
- Service and filing requirements
- Meet and confer requirements

A table of applicable local district court rules of the United States District Courts is included in the Appendix to this chapter for reference purposes. These rules are regularly amended, and the practitioner should consult the current version of the applicable local district court rules.

In addition, local district court rules may govern specific types of motions. For example, many districts have special local district court rules governing:

- Discovery motions
- Summary judgment
- Class action certification
- Preliminary injunctions and temporary restraining orders

- Motions to dismiss for failure to prosecute
- Motions to amend
- Motions to vacate default
- Motions to consolidate

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureSummary JudgmentOppositionGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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CHAPTER 2 The Mechanics of Motion Practice
A. Use of Motions; Governing Procedural Law of Federal Motion Practice

1-2 Federal Litigation Guide § 2.04

§ 2.04 Importance of Rules and Procedures of Assigned Judge

Federal judges may establish their own practical rules and procedures, provided those rules and procedures are consistent with federal law, including the Federal Rules of Civil Procedure, and local district court rules. n1

Judges' individual rules and procedures, frequently referred to as standing orders, often contain provisions governing motion practice, including:

- Pre-motion conference requirements
- Procedures for obtaining ex parte orders
- Availability and manner of requesting oral argument
- Times and days of week for motion calendars
- Courtesy copies
- Page limitations

Individual rules and procedures vary from one judge to another. It is essential toconsult the rules and procedures of the assigned judge prior to drafting any motion.

Idiosyncratic individual judges' rules have proliferated. District judges have sometimes adopted complex requirements that differ, sometimes slightly, from other judges' requirements on the same subject.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial Conferences

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 83.*

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1-2 Federal Litigation Guide § 2.05

§ 2.05 When to Seek Particular Relief

[1] Nature of Relief Requested Determines Timing

The timing of motions generally is driven by the strategy and demands of each particular case. Some motions generally are brought during the early stages of the litigation. For example, challenges to jurisdiction must be raised in the first responsive pleading. n1 Motions involving parties n2 or the sufficiency of the pleadings are generally raised early in litigation as well. n3

Other motions are more likely to be brought as the litigation progresses, such as:

- Motions to compel discovery n4
- Motions for protective orders n5
- Motions for partial summary judgment n6
- Motions to file and serve third-party complaints n7

Other motions are more likely to be brought as the time for trial nears, such as:

- Motions for summary judgment n8
- Motions to exclude evidence
- Motions to sever matters for trial n9

Still other motions are made during or after trial. These include:

- Motions for judgment as a matter of law n10
- Motions for relief from judgment n11

[2] Waiver of Right to Make Motion

Some motions must be made at specific times, and failure to do so results in waiver. For example:

- A motion to dismiss for lack of personal jurisdiction must be consolidated with any other Rule 12 motion, or the objection to personal jurisdiction is waived n12

- A Rule 60(b)(3) motion for relief from a judgment on the ground of fraud must be made within one year of entry of judgment n13

- A complaint may be amended once as of right within 21 days after serving it, or if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after a motion under Rule 12(b), (e), or (f). To amend after that, a motion for leave to amend is required n14

- Third parties may be impleaded as of right until the fourteenth day after the answer is served; after that, leave of court to file a third party complaint must be sought by motion n15

[3] Complying With Motion Deadlines in Scheduling Orders

Except in categories of actions exempted by local district court rule, the judge is obligated to enter a scheduling order which, amongst other things, limits the time to file motions. This aspect of the scheduling order is intended to set time limits "for interposing various motions that otherwise might be used as stalling techniques." n16

Although it is not entirely clear what types of motions are intended to be covered by this provision, Rule 16 orders may be used to schedule any motions that seem appropriate to the court and the parties at that time. Certainly, counsel should not attend a scheduling conference without being prepared to discuss a timetable for motions. Likewise, at any status conference which may be held throughout the course of a case, the court might ask the parties to identify any motions that are contemplated, and to propose a timetable for such motions. n17

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePretrial MattersConferencesCase ManagementCriminal Law & ProcedureTrialsMotions for Severance

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 12(b)(1).*

(n2)Footnote 2. *E.g., Fed. R. Civ. P. 14, 19, 21.*

(n3)Footnote 3. *E.g., Fed. R. Civ. P. 9(b), 12(b)(6).*

(n4)Footnote 4. *Fed. R. Civ. P. 26-37.*

(n5)Footnote 5. *Fed. R. Civ. P. 26.*

(n6)Footnote 6. *Fed. R. Civ. P. 56.*

(n7)Footnote 7. *Fed. R. Civ. P. 14.*

(n8)Footnote 8. *Fed. R. Civ. P. 56.*

(n9)Footnote 9. *Fed. R. Civ. P. 42.*

(n10)Footnote 10. *Fed. R. Civ. P. 50.*

(n11)Footnote 11. *Fed. R. Civ. P. 60.*

(n12)Footnote 12. *Fed. R. Civ. P. 12(g), (h).*

(n13)Footnote 13. *Fed. R. Civ. P. 60(b)(3).*

(n14)Footnote 14. *Fed. R. Civ. P. 15(a).*

(n15)Footnote 15. *Fed. R. Civ. P. 14(a)(1).*

(n16)Footnote 16. *Fed. R. Civ. P. 16(b)* advisory committee's note (1983).

(n17)Footnote 17. *See Fed. R. Civ. P. 16(c).*

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CHAPTER 2 The Mechanics of Motion Practice
A. Use of Motions; Governing Procedural Law of Federal Motion Practice

1-2 Federal Litigation Guide § 2.06

§ 2.06 Determining Hearing Officer for a Particular Motion

Motions are heard either by a judge or a magistrate judge. n1 In deciding whether to file a particular motion, it is important to consider the inclinations of the judge or magistrate judge hearing the motion. For example, some judges or magistrate judges may be inclined to permit liberal discovery, and will therefore be more likely to grant motions to compel. Likewise, some judges or magistrate judges may be more likely than others to grant Rule 23 class certification.

In some districts, it is not possible to determine which judge or magistrate judge will be hearing a particular motion. Some districts have an assigned judge system, where a specific judge is assigned to the case when it is filed, and the assigned judge handlesall matters other than those specifically referred to a magistrate judge. Other districts have a master calendar system, where motions are heard by a judge sitting in "law and motion" at any given time, and cases are not assigned to a particular judge until trial. The particular system followed in the district could impact the moving party's strategy.

For example, in a district that utilizes the assigned judge system, a party may decide to file a motion knowing that it will be denied, but hoping at least to educate the judge. That strategy is useless in a district that uses the master calendar system, because the judge hearing the motion may never again have any contact with the case.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersMagistratesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See 28 U.S.C. § 636* (empowering magistrate judges to hear motions).

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CHAPTER 2 The Mechanics of Motion Practice
A. Use of Motions; Governing Procedural Law of Federal Motion Practice

1-2 Federal Litigation Guide §§ 2.07. through 2.09

[Reserved]

§§ 2.07.[Reserved]

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CHAPTER 2 The Mechanics of Motion Practice
B. Oral Motions

1-2 Federal Litigation Guide § 2.10

§ 2.10 Distinguishing Oral Motion From Oral Argument on Written Motion

An oral motion is one which does not have to be supported by any writing. An example of an oral motion is a motion at trial to exclude evidence.

An oral *motion* is not the same as oral *argument,* which may be available in connection with a written motion.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePretrial MattersMotions in LimineExclusion of Evidence

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CHAPTER 2 The Mechanics of Motion Practice
B. Oral Motions

1-2 Federal Litigation Guide § 2.11

§ 2.11 Availability of Oral Motion

Motions generally must be made in writing, unless made during a hearing or trial that is officially recorded. n1

Examples of motions that may be made orally include motions to exclude evidence, motions for judgment as a matter of law, and motions for mistrial.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsRule Application & InterpretationCivil ProcedureTrialsMotions for Mistrial

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 7(b)(1).*

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CHAPTER 2 The Mechanics of Motion Practice
B. Oral Motions

1-2 Federal Litigation Guide §§ 2.12 through 2.19

[Reserved]

§§ 2.12[Reserved]

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CHAPTER 2 The Mechanics of Motion Practice
C. Preparing Moving Papers
1 Preliminary Considerations

1-2 Federal Litigation Guide § 2.20

§ 2.20 Considerations in Determining Whether to File Motion

Before a motion is filed, the party seeking relief should consider the following:

- The comparative benefit of success on the motion to the damage caused by loss on the motion
- The probability of success on the motion, weighed in tandem wiwth the other listed considerations
- Can the relief sought be obtained by stipulation rather than by motion?
- Have other motions been filed, and if so, will numerous motions create an unfavorable impression with the judge?
- What are the likely financial costs of bringing the motion?
- Are there any pre-motion procedures (*i.e.*, meet and confer requirements) required by the Federal Rules, local district court rules, or rules of the assigned judge that must be followed prior to filing the motion?

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CHAPTER 2 The Mechanics of Motion Practice
C. Preparing Moving Papers
1 Preliminary Considerations

1-2 Federal Litigation Guide § 2.21

§ 2.21 Stipulating in Lieu of Filing Motion

[1] Obtaining Court Approval of Stipulation

Unless otherwise provided by local district court rule, or by the rules and procedures of the assigned judge, stipulations require court approval. Counsel should not assume that the court will "rubber stamp" all stipulations.

Counsel should consult the local district court rules, as well as the rules and procedures of the assigned judge, to determine how a stipulation must be presented to the court for approval. The following are among the methods used in district courts:

- **Noticed motion.** This method is cumbersome, and often cannot be effected in time to accomplish the desired end

- **Motion without notice.** Some districts provide a regularly scheduled time to present stipulations without notice

- **Unopposed motion.** Some districts require that stipulations be presented in the form of an "unopposed motion," together with a proposed order, signed as approved by all counsel

- **Letter.** In some districts, the parties may send a letter to the judge, clerk, or secretary enclosing a stipulation and requesting that it be ordered and filed, with conformed copy returned to the sender

- **Filing a copy in chambers or with the clerk.** In some districts, the stipulation is delivered to the court, either directly to the assigned judge's chambers or to the central clerk's office

[2] Matters Typically Resolved by Stipulation

Orders routinely sought by stipulation include:

- Postponing a hearing date

- Granting an extension of time within which to respond to a motion or discovery requests
- Extending time to plead
- Discontinuing an action

For discussion of court approval of stipulations, see [1], *above*.

[3] Sample Forms of Stipulation

Short Form of Stipulation

IN THE UNITED STATES DISTRICT COURT
..... District of .....

_____

(Title of Action)	)	Civil No. Stipulation And Order

_____

Plaintiff John Jones and defendant Richard Roe, by and through their respective attorneys, hereby stipulate and agree that plaintiff's time for responding to "Defendant's First Set of Interrogatories to Plaintiff" shall be extended to March 30, 2008. There has been one prior extension of time (totaling 30 days) granted.

(date)
_____

_____

Attorneys for _____

(date)
_____

_____

Attorneys for _____

SO ORDERED.
Dated: _____

_____

United States District Court Judge

Long Form of Stipulation

UNITED STATES DISTRICT COURT
..... District of .....

_____

)

(Title of Action)) Civil No. Stipulation And Order
)

_____

This stipulation is made in light of the following facts:

1. Plaintiffs have served their First Amended Complaint on 31 defendants in this action.

2. Some defendants are answering the complaint while others are moving to dismiss the complaint on various grounds.

3. Defendants may have multiple grounds upon which to assert cross-claims against one another.

4. The court by its order filed July 11, 2007 requires that motions to challenge the joint and several liability alleged by plaintiffs be brought on or before October 11, 2007.

5. A holding by the court that defendants are not jointly and severally liable will moot many potential cross-claims.

6. The undersigned defendants (hereinafter referred to as "these defendants") desire to further the orderly and efficient pleading of cross-claims, if such are necessary.

ACCORDINGLY, IT IS HEREBY STIPULATED, by and between these defendants, by and through their respective attorneys that none of these defendants shall file a cross-claim against any other of these defendants before notice of the court's action in respect to motions regarding the alleged joint and several liability of defendants.

IT IS FURTHER STIPULATED that if responses by defendants to the complaint, as amended, are due 21 or more days following such notice, none of these defendants shall file a cross-claim against any other of these defendants unless at least 15 days written notice of intent to file cross-claims shall have been served on all of these defendants by any of these defendants.

IT IS SO STIPULATED.

Dated: _____

_____

Attorneys for _____

Dated: _____

_____

Attorneys for _____

IT IS SO ORDERED.

_____
(date)

_____
Judge

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedurePretrial MattersConferencesPretrial Orders

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CHAPTER 2 The Mechanics of Motion Practice
C. Preparing Moving Papers
1 Preliminary Considerations

1-2 Federal Litigation Guide § 2.22

§ 2.22 Complying With Pre-Motion Procedures

Before filing a motion, the party seeking relief must comply with any preliminary procedures required by the Federal Rules, local district court rules, or rules and procedures of the assigned judge.

For example, before filing a motion for an order compelling disclosure or discovery, the movant must in good faith confer or attempt to confer with the party not making the disclosure in an effort to secure the disclosure without court action. n1 Likewise, local district court rules sometimes mandate preliminary motion procedures. Forexample, in the S.D.N.Y. & E.D.N.Y., if the attorneys cannot agree on a resolution of a non-dispositive pretrial dispute, they must notify the court either by telephone conference or by letter not exceeding three pages in length outlining the nature of the dispute and attaching relevant materials. Within three days of receiving such a letter, any opposing party may submit a responsive letter not exceeding three pages attaching relevant materials. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMotions to CompelCivil ProcedurePretrial MattersConferencesPretrial Orders

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 37(a)(2)(A).*

(n2)Footnote 2. S.D.N.Y. & E.D.N.Y., L.R. 37.3(c).

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CHAPTER 2 The Mechanics of Motion Practice
C. Preparing Moving Papers
1 Preliminary Considerations

1-2 Federal Litigation Guide § 2.23

§ 2.23 Papers Required in Support of Motion

The Federal Rules require notice of the hearing on the motion to be provided to all parties, but otherwise do not specify the papers required in support of a motion. Consult the local district court rules for the papers required to be submitted in support of and in opposition to a motion.

A party's moving papers generally must consist of the following:

- Notice of motion [*see §§ 2.30 -2.32*]
- Supporting affidavits or affidavit substitutes [*see § 2.35*]
- Supporting memorandum of law [*see § 2.34*]
- Supporting evidence attached to the moving papers as exhibits [*see § 2.36*]

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CHAPTER 2 The Mechanics of Motion Practice
C. Preparing Moving Papers
1 Preliminary Considerations

1-2 Federal Litigation Guide § 2.24

§ 2.24 Preparing and Filing Notice of Constitutional Challenge to a Statute

A party that files a written motion drawing into question the constitutionality of a federal or state statute must promptly file a notice of constitutional question stating the question and identifying the motion that raises it, if either of the following is true: n1

- 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 n2

- 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 n3

In addition, the filing party is required to serve the notice and paper on the Attorney General of the United States if a federal statute is challenged, or on the state attorney general if a state statute is challenged, either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose. n4

The court must, under *28 U.S.C. § 2403*, certify to the Attorney General of the United States that there is a constitutional challenge to a federal statute, or certify to the state attorney general that there is a constitutional challenge to a state statute. n5

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. n6

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. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral

OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial Orders

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 5.1(a)(1)*

(n2)Footnote 2. *Fed. R. Civ. P. 5.1(a)(1)(A)*

(n3)Footnote 3. *Fed. R. Civ. P. 5.1(a)(1)(B)*

(n4)Footnote 4. *Fed. R. Civ. P. 5.1(a)(2).*

(n5)Footnote 5. *Fed. R. Civ. P. 5.1(b).*

(n6)Footnote 6. *Fed. R. Civ. P. 5.1(c).*

(n7)Footnote 7. *Fed. R. Civ. P. 5.1(d).*

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CHAPTER 2 The Mechanics of Motion Practice
C. Preparing Moving Papers
1 Preliminary Considerations

1-2 Federal Litigation Guide §§ 2.25 through 2.29

[Reserved]

§§ 2.25[Reserved]

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CHAPTER 2 The Mechanics of Motion Practice
C. Preparing Moving Papers
2. Preparing Notice of Motion, Memorandum of Law, and Supporting Affidavits

1-2 Federal Litigation Guide § 2.30

§ 2.30 Purpose of Notice of Motion

The purpose of a notice of motion is to provide notice to the court and the parties of:

- Relief sought [*see § 2.32[1]*]
- Date and time when the motion will be heard, often referred to as the *return date* of the motion [*see § 2.32[2]*]
- Where the motion will be heard
- The statute or rule, if any, on which the motion is predicated [*see § 2.32[5]*]
- The papers which are submitted in support of the motion [*see § 2.32[4]*]

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1-2 Federal Litigation Guide § 2.31

§ 2.31 Combining Motion and Notice of Motion

The motion and notice of motion are oftencombined in one paper. This form is utilized in many districts.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticePleadingsRule Application & InterpretationCivil ProcedurePretrial MattersConferencesPretrial Orders

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1-2 Federal Litigation Guide § 2.32

§ 2.32 Drafting Notice of Motion

[1] Specifying Relief Sought in Notice of Motion

A notice of motion must set forth the relief or order sought. n1

The relief requested should be tailored to the facts of the motion, and should not be stated too broadly, or the movant will risk denial of the motion. The papers submitted in support of the motion must justify the relief.

[2] Scheduling Motion Return Date

[2.--1] Federal Rules Require Minimum of 14 Days' Advance Notice

A written motion, other than one heard ex parte [*see § 2.33*], must be served no laterthan 14 days prior to the hearing date, unless a different period is fixed by the Federal Rules or by order of the court. n2

Consult the rules and procedures of the assigned judge for any additional notice requirements.

[2.--2] Computing Advance Notice Period

Notice requirements for motions are computed as follows: n3

- Exclude the day of the event that triggers the period (i.e. the day of service of motion and notice of motion)
- Count every other day, including intermediate Saturdays, Sundays, and legal holidays
- 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

If a motion deadline is stated in hours: n4

- Begin counting immediately on the occurrence of the event that triggers the period
- Count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays
- 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

Unless the court orders otherwise, if the clerk's office is inaccessible: n5

- 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
- 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.

If the motion is served by any of the following methods, three additional days' advance notice of the return date must be provided to the responding party: n6

- Service by mail
- Service to the clerk of the court based on no known address
- Electronic or other means of delivery consented to in writing

Rule 6 governs the computation of deadlines based on the passage of a fixed number of days and, therefore, has no application to situations in which the court has established a specific calendar day as a deadline. n7

Unless a different time is set by a statute, local rule, or court order, the last day ends: n8

- For electronic filing, at midnight in the court's time zone
- For filing by other means, when the clerk's office is scheduled to close

[2.--3] Consulting Rules and Procedures of Assigned Judge Before Scheduling Return Date

The rules and procedures of the assigned judge generally govern the procedure for placing the motion on the judge's calendar. Some judges require a pre-motion conference before a motion may even be filed. Other judges hear motions on the same day and time once each week, and do not require permission before serving and filing the motion. Other judges require the moving party to telephone chambers to schedule the motion.

[2.--4] Adjourning the Motion

Local district court rules, or the rules and procedures of the assigned judge, generally govern the procedure for adjourning (also referred to as "continuing") motion hearings. Stipulations, requests for adjournments, and ex parte applications are each used in various districts to continue hearing dates.

[3] Expediting Motion Return Date

[3.--1] Consider Pre-Motion Conference If Prompt or Immediate Court Intervention Is Necessary

If prompt or immediate court intervention is necessary, the practice has evolved of using the pre-motion conference that

many district judges require, as a substitute for the motion itself. Counsel write the court, generally on the pretext of needing an immediate pre-motion conference, setting forth the relief needed, and the arguments and facts in support. Because the request is for a conference to be held as soon as possible, the letter induces opposing counsel to promptly respond with the facts and arguments in opposition. The district court thus has, sometimes in the space of one day, the entire picture necessary for decision. Many district judges will then schedule a prompt pre-motion conference at which they will hear all counsel and render a decision, formally or informally. Sometimes the decision will be communicated by telephone, without conference, expediting the procedure even further. Thus, as a formal matter, a decision has been rendered, but no motion made.

Disputes arising during the course of depositions can sometimes be expedited by a telephone call to the district or magistrate judge's chambers, with a decision being made on the telephone.

The willingness of the court to participate in any variation of these informal procedures should be ascertained, if at all possible, in advance of such issues arising.

[3.--2] Court May Shorten Advance Notice Otherwise Required

The court may shorten the advance notice otherwise required for a motion. Under appropriate circumstances, a motion to shorten advance notice may be made on ex parte application. For discussion of ex parte motions, *see § 2.33*. n9

An ex parte application for an order shortening time may be appropriate when immediate relief is necessary, and there is no time for a noticed motion, even if heard on an expedited basis.

The affidavit in support of the application should state why the order to shorten time is necessary, and should emphasize the merits of the underlying motion. Local district court rules and the rules and procedures of the assigned judge generally govern applications for orders shortening time. The party filing the application for order shortening time generally must notice opposing counsel of the application, and must describe in declaration form all efforts made to obtain opposing counsel's consent to the order shortening time.

It is good practice to submit the underlying motion papers with the application for an order shortening time. It demonstrates to the judge that there will be no delay with respect to hearing the underlying motion.

[4] Listing Papers Submitted in Support of Motion

The notice of motion should list the papers which are submitted in support of the motion. The list should include the title and date of the supporting paper (*i.e.*, "This motion is supported by the affidavit of John Doe, sworn to [*date*], as well as a memorandum of law dated [*date*]").

[5] Specifying Grounds on Which Motion Is Predicated

A written motion must state with particularity the grounds on which the motion is made. n10

[6] Request for Oral Argument If Required by Rules and Procedures of Assigned Judge

It is imperative that counsel be familiar with the rules and procedures of the assigned judge. Many judges will not permit oral argument of a motion unless requested either in the notice of motion or in the opposing papers.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral

OverviewCivil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsRule Application & Interpretation

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 7(b)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 6(c).*

(n3)Footnote 3. *Fed. R. Civ. P. 6(a)(1).*

(n4)Footnote 4. *Fed. R. Civ. P. 6(a)(2).*

(n5)Footnote 5. *Fed. R. Civ. P. 6(a)(3).*

(n6)Footnote 6. *Fed. R. Civ. P. 6(d).*

(n7)Footnote 7. *See Violette v. P.A. Days, Inc., 427 F.3d 1015, 1017-1019 (6th Cir. 2005)* .

(n8)Footnote 8. *Fed. R. Civ. P. 6(a)(4).*

(n9)Footnote 9. *Fed. R. Civ. P. 6(c).*

(n10)Footnote 10. *Fed. R. Civ. P. 7(b)(1).*

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1-2 Federal Litigation Guide § 2.33

§ 2.33 Seeking Ex Parte Relief

It is sometimes necessary to apply to the court for immediate relief, without the full briefing and hearing schedule provided for ordinary motions. In those instances, a motion may be made ex parte. Examples of orders that might be sought by ex parte motion include:

- Temporary restraining orders, pending the hearing of a motion for preliminary injunctive relief n1
- Orders extending time to plead or to respond to discovery when the deadline is near

Consult the local district court rules, as well as the rules and procedures of the assigned judge, regarding ex parte motions.

Ex parte practice occurs on an expedited basis with varying degrees of participation by the responding party. In some districts, the local district court rules contemplate true one-sided practice where the moving party may appear in court with little or no notice to the opponent. However, local district court rules often require a good faith effort to advise opposing counsel of the date, time, and substance of the proposed ex parte application.

An application for ex parte relief typically includes the application, a memorandum of law, supporting affidavits or declarations, and a proposed form of order. Papers in support of the application should place particular focus on the reasons justifying immediate relief.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 65(b).*

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1-2 Federal Litigation Guide § 2.34

§ 2.34 Preparing Memorandum of Law

The Federal Rules do not require the filing of a memorandum of law, but local district court rules typically do. A memorandum of law generally includes:

- **Statement of issues presented.** When the issues in a motion are particularly complex, it may be useful to include with the statement of issues a concise summary of the arguments.

- **Statement of facts.** Depending on the complexity of the issues and how familiar the court is with the case, this portion of the memorandum may be more or less detailed. Facts should be stated accurately and used to persuade the court to rule in the moving party's favor.

- **Legal arguments applying controlling law to facts.** This portion of the memorandum should state the controlling law, including adverse authority, and explain how the law applies to the facts of the case. The argument should rely on statutory law, legislative history as appropriate, and decisions of the United States Supreme Court, as well as the circuit court of appeal and the district court in which the case lies. The argument may also cite cases on point from other circuits or unpublished opinions, though these may not be as persuasive. In diversity cases, the decisions of the courts of appeal of the forum state may also be cited. Legal analogies and public policy arguments may also be useful, especially on issues of first impression.

- **Table of contents and table of authorities.** Local district court rules dictate whether a table of contents and table of authorities are required. Even whennot mandatory, such tables are generally useful and may assist the court in analyzing the arguments.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaGovernmentsCourtsRule Application & Interpretation

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1-2 Federal Litigation Guide § 2.35

§ 2.35 Preparing Supporting Affidavits or Affidavit Substitutes

[1] Purpose of Supporting Affidavits

Affidavits (or affidavit substitutes) in support of a motion should set forth the evidence demonstrating the need for the relief sought, and together with a supporting memorandum of law, often serve as the sole basis for the court's ruling. n1

Supporting affidavits should address each of the factors for the relief sought, and should be as detailed and credible as possible. Every affidavit should explain the basis for the affiant's knowledge, and should give sufficient personal information to make the affiant credible as a person. It is helpful to present the information to the court in the same fashion as if the affiant were testifying on the witness stand. But, be as concise as the facts permit, as the papers may be read hurriedly. They should be well organized, with headings and indices that will assist the court in understanding the facts justifying the relief. All relevant documents should be submitted as exhibits; exhibit tabs should be used to assist the judge in reading the papers.

[2] Affidavit Substitutes (Declarations and Verifications)

In lieu of an affidavit, a motion may be supported by an unsworn declaration, certificate, verification, or statement, subscribed as true under penalty of perjury, and dated. Affidavit substitutes may be easier to prepare and obtain because they do not require notarization.

A motion may be supported by an unsworn declaration subscribed as true under penalty of perjury, and dated. n2 The following is the form prescribed by *28 U.S.C. § 1746*:

Preparing Supporting Affidavits or Affidavit Substitutes

I, [*name of deponent*], declare as follows:

[*state the relevant facts in separate numbered paragraph*] I declare under penalty of perjury that the foregoing is true and correct. n3 Executed on [*date*].

_____

Signature

Good practice suggests that the following subscription be used so that there is no question with respect to where and when the declaration was executed:

I declare under penalty of perjury that the foregoing is true and correct. This declaration is executed in [*city, state*] on [*date*].

_____

Signature

[3] Affidavits May Not Be Served Separately From Motion

If a motion is supported by affidavits or affidavit substitutes [*see* [1], [2], *above*], the affidavits or substitutes must be served together with the motion. n4

[4] Affidavit Requirements

Affidavits must: n5

- Be made on personal knowledge
- Set forth facts admissible in evidence
- Show that the affiant is competent to testify to the matters stated therein

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureSummary JudgmentSupporting MaterialsAffidavitsEvidenceTestimonyLay WitnessesPersonal Knowledge

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 78.*

(n2)Footnote 2. *28 U.S.C. § 1746.*

(n3)Footnote 3. This form if declaration is for use with declarations executed within the United States, its territories, possessions or commonwealths. If the declaration is executed outside the United States, this sentence must read: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct."

(n4)Footnote 4. *Fed. R. Civ. P. 6(c)(2).*

(n5)Footnote 5. *See, e.g., Fed. R. Civ. P. 56(c)(4).*

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1-2 Federal Litigation Guide § 2.36

§ 2.36 Submitting Evidence in Support of Motion

[1] Documentary Evidence in Support of Motion

Documentary evidence may be submitted in support of a motion, provided the documents are authenticated by an affidavit or affidavit substitute of an individual having first hand knowledge of the documents. The affidavit or affidavit substitute establishes the competence of the maker, and authenticates the documents. n1 The document should be attached as an exhibit to the authenticating affidavit or affidavit substitute, and should be clearly labeled with an exhibit tab.

Documents attached as exhibits may include the following:

- **Deposition transcripts.** Deposition testimony is admissible under the rules of evidence, and may be used against any party who was present or represented at the taking of the deposition or had reasonable notice, in accordance with the provisions of Rule 32(a)

- **Transcripts from other proceedings.** In addition to deposition testimony, there may be transcripts of other proceedings, such as a prior trial, earlier hearings or administrative proceedings, that support a motion

- **Discovery responses.** Responses to both interrogatories and requests for admission may be used to support a motion. An admission may be more usefulthan a response to an interrogatory because under Rule 36(b), admissions are conclusively established unless the court on motion permits withdrawal or amendment, whereas responses to interrogatories may be supplemented or changed by the answering party during the course of litigation

- **Stipulations.** A stipulation may eliminate factual disputes either for purposes of the motion or for all purposes during the litigation

- **Concessions.** Concessions and admissions made by the opponent in briefs and other papers filed with the court may be used to support a motion

[2] Judicial Notice of Evidentiary Facts

Judicially noticed facts may be used in support of a motion. The court is required to take judicial notice if so requested by a party, and the party supplies the court with the necessary information. Judicial notice may be taken of the following: n2

- Facts generally known within the territorial jurisdiction of the trial court
- Facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned

Facts with respect to which judicial notice may be taken include facts established by prior orders of the court, and facts contained in court records. Such prior orders and records may be introduced as exhibits attached to supporting affidavits or declarations.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureDiscoveryMethodsAdmissionsResponsesEvidenceDocumentary EvidenceWritingsGeneral OverviewEvidenceJudicial NoticeAdjudicative FactsFacts Generally KnownEvidenceProcedural ConsiderationsPreliminary QuestionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Evid. 104, 1001 et seq.* .

(n2)Footnote 2. *Fed. R. Evid. 201.*

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1-2 Federal Litigation Guide §§ 2.37 through 2.39

[Reserved]

§§ 2.37[Reserved]

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CHAPTER 2 The Mechanics of Motion Practice
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3 Format of Motion Papers

1-2 Federal Litigation Guide § 2.40

§ 2.40 Motion Papers Must Be Properly Formatted

All motion papers must be formatted in the same manner as a pleading. The motion papers, like any pleading, must contain a caption, setting forth: n1

- Name of the court
- Title of the action (which may be abbreviated to state the name of the first party on each side, with an appropriate indication of other parties)
- File number
- Designation as to nature of the motion

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePleading & PracticePleadingsRule Application & Interpretation

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 7(b)(2), 10(a).*

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3 Format of Motion Papers

1-2 Federal Litigation Guide § 2.41

§ 2.41 Sample Motion Forms Promulgated Under Federal Rules

The following forms of motion are contained in the Appendix of Forms to the Federal Rules, and are sufficient under the Rules: n1

- Motion to dismiss under Rule 12(b) [*see* Fed. R. Civ. P., App. of Forms, Form 19]
- Motion to bring in a third party defendant [*see* Fed. R. Civ. P., App. of Forms, Form 22-B]
- Motions to intervene as a defendant under Rule 24 [*see* Fed. R. Civ. P., App. of Forms, Form 23]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePartiesInterventionGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 84.*

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3 Format of Motion Papers

1-2 Federal Litigation Guide § 2.42

§ 2.42 Clerk May Not Reject Improperly Formatted Papers

The clerk may not reject papers solely because they are not presented in proper form as required by the Federal Rules or local district court rules or practices. n1 This rule is intended to avoid exposing litigants to the hazards of time bars.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting Memoranda

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 5(d)(4).*

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CHAPTER 2 The Mechanics of Motion Practice
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3 Format of Motion Papers

1-2 Federal Litigation Guide § 2.43

§ 2.43 Motion Papers Must Contain Signature, Address, E-mail Address, and Telephone Number

Written motions must be signed in accordance with the requirements of Rule 11, which provides as follows: n1

- Every written motion and other paper must be signed by at least one attorney of record in the attorney's individual name, or by the moving party personally if not represented by an attorney, and must include the signer's address, e-mail address, and telephone number

- Every motion or other signed paper presented to the court certifies that the motion is not made for an improper purpose, and that it has a basis in law and in fact

- A violation of Rule 11 by the responsible attorney or party is sanctionable

Motion papers not properly signed will be stricken unless remedied as soon as called to the attention of counsel or the pro se litigant. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePleading & PracticePleadingsRule Application & InterpretationLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 11.*

(n2)Footnote 2. *Fed. R. Civ. P. 11(a).*

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CHAPTER 2 The Mechanics of Motion Practice
C. Preparing Moving Papers
3 Format of Motion Papers

1-2 Federal Litigation Guide §§ 2.44 through 2.49

[Reserved]

§§ 2.44[Reserved]

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CHAPTER 2 The Mechanics of Motion Practice
C. Preparing Moving Papers
4. Motions to Extend Time

1-2 Federal Litigation Guide § 2.50

§ 2.50 Seeking Additional Time to Act

A request to extend time may be used when a party requires additional time to act beyond the period of time fixed by the Federal Rules, court order, local district court rule, or notice of motion. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensions

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 6(b).*

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CHAPTER 2 The Mechanics of Motion Practice
C. Preparing Moving Papers
4. Motions to Extend Time

1-2 Federal Litigation Guide § 2.51

§ 2.51 Extending Time Improper as to Certain Specified Motions

Courts may not extend the time to make the following motions: n1

- Motions for judgment as a matter of law under Rule 50(b)
- Motions to amend or expand the court's findings under Rule 52(b)
- Motions for new trial under Rule 59(b), (d)
- Motions to alter or amend judgments under Rule 59(e)
- Motions for relief from judgment under Rule 60(b)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 6(b).*

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CHAPTER 2 The Mechanics of Motion Practice
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4. Motions to Extend Time

1-2 Federal Litigation Guide § 2.52

§ 2.52 Request Made Prior to Expiration of Time Period

If a request to extend time is available [*see § 2.51*], and is made prior to the expiration of the period originally prescribed or as extended by previous order, the court may grant the request without motion or notice. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensions

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 6(b)(1)(A).*

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CHAPTER 2 The Mechanics of Motion Practice
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4. Motions to Extend Time

1-2 Federal Litigation Guide § 2.53

§ 2.53 Request Made After Expiration of Time Period

A request to extend time made after the expiration of the specified period must be made by motion, and may be granted in the court's discretion if the failure to act was the result of excusable neglect. n1

Excusable neglect generally requires a showing of good faith, as well as a reasonable basis for missing the deadline. n2 A claim of unfamiliarity with the rules and procedures in federal court does not establish "excusable neglect." n2.1

A finding of excusable neglect may be more likely if the opposing party is not prejudiced by the delay. n3

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 6(b)(1)(B)*; *see also Smith v. District of Columbia, 430 F.3d 450, 456-457 (D.C. Cir. 2005)* .

(n2)Footnote 2. *See, e.g., Maine v. United States Dep't of Interior, 124 F. Supp. 2d 728, 734-735 (D. Me. 2001)* .

(n3)Footnote 2.1. *Dimmitt v. Ockenfels, 407 F.3d 21, 23-24 (1st Cir. 2005)* .

(n4)Footnote 3. *Al-Jundi v. Rockefeller, 88 F.R.D. 244, 247 (W.D.N.Y. 1980)* .

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CHAPTER 2 The Mechanics of Motion Practice
C. Preparing Moving Papers
4. Motions to Extend Time

1-2 Federal Litigation Guide §§ 2.54 through 2.59

[Reserved]

§§ 2.54[Reserved]

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CHAPTER 2 The Mechanics of Motion Practice
D. Serving and Filing Motion Papers

1-2 Federal Litigation Guide § 2.60

§ 2.60 All Parties, Except Defaulting Parties, Must Be Served With Motion Papers

All written motions, except motions to be heard ex parte, must be served on all parties to the action. Parties in default for failing to appear need not be served with motion papers. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault Judgments

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 5(a)(2).*

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CHAPTER 2 The Mechanics of Motion Practice
D. Serving and Filing Motion Papers

1-2 Federal Litigation Guide § 2.61

§ 2.61 Serving Motion Papers on Attorney of Represented Party

Service of motion papers must be made on the attorney of a represented party, unless direct service upon the party is ordered by the court. Service must be made directly on all parties not represented by counsel. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedureCounselGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 5(b)(1).*

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CHAPTER 2 The Mechanics of Motion Practice
D. Serving and Filing Motion Papers

1-2 Federal Litigation Guide § 2.62

§ 2.62 Manner of Serving Motion Papers

Service of motion papers is made by any of the following methods: n1

- Hand delivering a copy to the person being served n2
- Leaving a copy at the person's office with a clerk or other person in charge n3
- If there is no one in charge, leaving a copy in a conspicuous place in the office n4
- If the office is closed or there is no office, leaving a copy at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there n5
- Mailing a copy to the last known address of the person served n6
- Leaving a copy with the clerk of the court if the person served has no known address n7
- Delivering a copy by any other means, including electronically, as consented to in writing by the person being served n8
- Delivering a copy through the court's transmission service with written consent of the person being served, and pursuant to local rule authorizing such service n9

Service by mail is complete on mailing. n10 Service by electronic means is complete on transmission, and service by other consented means under Rule 5(b)(2)(D) is complete when the person making service delivers the copy to the agency designated to make delivery. n11 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. n12

If service is made by any of the following methods, the time to respond is extended by three days: n13

- Service by mail

- Service to the clerk of the court based on no known address
- Electronic or other means of delivery consented to in writing

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 5(b)(2).*

(n2)Footnote 2. *Fed. R. Civ. P. 5(b)(2)(A).*

(n3)Footnote 3. *Fed. R. Civ. P. 5(b)(2)(B)(i).*

(n4)Footnote 4. *Fed. R. Civ. P. 5(b)(2)(B)(i).*

(n5)Footnote 5. *Fed. R. Civ. P. 5(b)(2)(B)(ii).*

(n6)Footnote 6. *Fed. R. Civ. P. 5(b)(2)(C).*

(n7)Footnote 7. *Fed. R. Civ. P. 5(b)(2)(D).*

(n8)Footnote 8. *Fed. R. Civ. P. 5(b)(2)(E).*

(n9)Footnote 9. *Fed. R. Civ. P. 5(b)(2)(F).*

(n10)Footnote 10. *Fed. R. Civ. P. 5(b)(2)(C).*

(n11)Footnote 11. *Fed. R. Civ. P. 5(b)(2)F.*

(n12)Footnote 12. *Fed. R. Civ. P. 5(b)(2)(E).*

(n13)Footnote 13. *Fed. R. Civ. P. 6(d).*

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CHAPTER 2 The Mechanics of Motion Practice
D. Serving and Filing Motion Papers

1-2 Federal Litigation Guide § 2.63

§ 2.63 Deadline for Filing Motion Papers

Motion papers must be filed "within a reasonable time after service." n1 Local district court rules typically specify the deadline for filing motion papers.

Some district judges require all motion papers to be held by counsel and not filed until counsel have completed service of all motion papers. District judges are attempting to avoid the beginning of countdown of days lapsed before motion decisions. Apparently, the statistic gathering done by the Federal Judicial Conference commences with the initial filing of a motion, rather than the date of argument or submission. Again, individual judge's rules must be consulted. There is room for argument that these individual judge's rules violate Rule 5(d), or could do so in connection with a particular motion. While interesting, that issue will be meaningless to parties and their attorneys. It is difficult to visualize an attorney violating an individual judge's rule, informing the judge that the rule is in violation of law.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedureJudicial OfficersGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 5(d)(1)*; *see also Palmquist v. Conseco Med. Ins. Co., 128 F. Supp. 2d 618, 622-623 (D.S.D. 2000)* .

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CHAPTER 2 The Mechanics of Motion Practice
D. Serving and Filing Motion Papers

1-2 Federal Litigation Guide § 2.64

§ 2.64 Filing Deemed Complete Only When Motion Papers Received by Clerk of Court

A paper is filed by delivering it to either: n1

- The clerk
- 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

A motion submitted for filing may not be rejected by the clerk merely because it is not in proper form. n1.1 Failure to sign a certificate of service is considered to be a matter of form, at least when service is actually made. n1.2The mailing of papers addressed to the clerk's office does not constitute filing under Rule 5. The Federal Rules, unlike some state court rules, do not authorize filing to be accomplished by deposit of papers in the mail. Accordingly, papers deposited in the mail to the clerk on the filing deadline date are not timely filed. n2

In addition, a court may by local rule permit 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. n3 A local rule may require filing by electronic means only if reasonable exceptions are allowed. n4 A paper filed by electronic means in compliance with a local rule constitutes a written paper. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewGovernmentsCourtsClerks of CourtGovernmentsCourtsCourt Records

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 5(d)(2).*

(n2)Footnote 1.1. *Fed. R. Civ. P. 5(d)(4).*

(n3)Footnote 1.2. *See Wilson v. Lowe's Home Ctr., Inc., 401 F. Supp. 2d 186, 189 (D. Conn. 2005) .*

(n4)Footnote 2. *Raymond v. Ameritech Corp. 442 F.3d 600, 604-605 (7th Cir. 2006).*

(n5)Footnote 3. *Fed. R. Civ. P. 5(d)(3).*

(n6)Footnote 4. *Fed. R. Civ. P. 5(d)(3).*

(n7)Footnote 5. *Fed. R. Civ. P. 5(d)(3).*

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CHAPTER 2 The Mechanics of Motion Practice
D. Serving and Filing Motion Papers

1-2 Federal Litigation Guide § 2.65

§ 2.65 Proof of Service Required

After the motion papers have been served [*see §§ 2.60 -2.62*], they must be filed with the clerk of the court, together with proof of service. n1 The principal importance of the proof of service is to provide the court with clear evidence that service has been accomplished. n2

Proof of service generally will be in the form of a declaration or affidavit of service, or an acknowledgment of service from the party.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticeService of ProcessProofGeneral OverviewGovernmentsCourtsClerks of Court

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 5(d)(1).*

(n2)Footnote 2. *See Russell v. City of Milwaukee, 338 F.3d 662, 665-667 (7th Cir. 2003) .*

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CHAPTER 2 The Mechanics of Motion Practice
D. Serving and Filing Motion Papers

1-2 Federal Litigation Guide § 2.66

§ 2.66 Content of Proof of Service

The proof of service should include the following information:

- Description of papers served
- Date, time, and place of service
- Person or entity served
- Manner of service
- Name and signature of person who served papers

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CHAPTER 2 The Mechanics of Motion Practice
D. Serving and Filing Motion Papers

1-2 Federal Litigation Guide § 2.67

§ 2.67 Delivering Courtesy Copies to Assigned Judge

The rules and procedures of the assigned judge should be consulted regarding courtesy copies. Some judges require courtesy copies, while others will not accept them.

If the judge does not forbid the delivery of courtesy copies, those copies should be filed with the clerk and contemporaneously delivered to chambers. Counsel should want the court to have the opportunity to understand their positions at the earliest time, and in advance of argument.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticeService of ProcessProofGeneral OverviewCivil ProcedureJudicial OfficersGeneral Overview

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1-2 Federal Litigation Guide § 2.68

§ 2.68 Redacting Private Information

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: n1

- The last four digits of the social-security number and taxpayer-identification number
- The year of the individual's birth
- The minor's initials
- The last four digits of the financial-account number

The redaction requirement does not apply to the follow: n2

- A financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding
- The record of an administrative or agency proceeding
- The official record of a state-court proceeding
- The record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed
- A filing covered by Rule 5.2(c) (social security appeals and immigration cases) or Rule 5.2(d) (unredacted filing under seal)
- A pro se filing in an action brought under *28 U.S.C. §§ 2241, 2254, or 2255*

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. n3 For good cause, the court may require redaction of additional information. n4 The court may also limit or prohibit a nonparty's remote electronic access to a document filed with the court. n5 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. n6 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. n7 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. n8

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 5.2(a)(1)-(4).*

(n2)Footnote 2. *Fed. R. Civ. P. 5.2(b)(1)-(6).*

(n3)Footnote 3. *Fed. R. Civ. P. 5.2(d).*

(n4)Footnote 4. *Fed. R. Civ. P. 5.2(e)(1).*

(n5)Footnote 5. *Fed. R. Civ. P. 5.2(e)(2).*

(n6)Footnote 6. *Fed. R. Civ. P. 5.2(f).*

(n7)Footnote 7. *Fed. R. Civ. P. 5.2(g).*

(n8)Footnote 8. *Fed. R. Civ. P. 5.2(h).*

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CHAPTER 2 The Mechanics of Motion Practice
D. Serving and Filing Motion Papers

1-2 Federal Litigation Guide §§ 2.69 through 2.79

[Reserved]

§§ 2.69[Reserved]

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CHAPTER 2 The Mechanics of Motion Practice
E. Opposing the Motion

1-2 Federal Litigation Guide § 2.80

§ 2.80 Determining Whether to Oppose Motion

If motion papers pose a strong argument, it may be prudent to endeavor to negotiate a stipulated disposition of the matter. Otherwise, the following grounds for opposition should be considered:

- **Procedural deficiency.** Has the moving party complied with all procedural requirements, including proper notice?

- **Inadmissible, inadequate, or incompetent evidence.** Is the motion based on inadmissible, inadequate, or incompetent evidence?

- **Inaccurate statement of the law.** Has the moving party accurately stated the law?

- **Opposition on the merits.** Has the moving party accurately characterized the facts? Are there additional facts that may substantiate the opposition? Has the moving party accurately applied the law to the facts?

Local district court rules sometimes provide that if a party does not intend to oppose the motion, a statement of non-opposition must be filed with the court, or the motion may be granted on default. Even if not required by local district court rule, it is good practice to file a statement of non-opposition. It will save the court the trouble of hunting through the file to find a nonexistent brief in opposition.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsEvidenceProcedural ConsiderationsGeneral Overview

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CHAPTER 2 The Mechanics of Motion Practice
E. Opposing the Motion

1-2 Federal Litigation Guide § 2.81

§ 2.81 Papers Required in Opposition to Motion

Consult the local district court rules, as well as the rules and procedures of the assigned judge, regarding papers required in opposition to a motion.

Generally, a party's opposition papers should consist of affidavits (or affidavit substitutes) and a memorandum of law.

It is not necessary to refute *everything* said in the moving party's memorandum of law. Some statements and arguments may be true, and it may enhance credibility to acknowledge them. Other statements may be simply irrelevant and not worth addressing in the opposing papers.

Sometimes parties have fundamentally different views of the premise underlying the case. In that situation, it makes little sense to refute each of the moving party's arguments. If the basic dispute is with the moving party's premise, that should be the focus of the opposition.

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CHAPTER 2 The Mechanics of Motion Practice
E. Opposing the Motion

1-2 Federal Litigation Guide § 2.82

§ 2.82 Deadline for Serving and Filing Opposition Papers

[1] Federal Rules Deadline for Serving Opposition Papers

Papers in opposition to a motion must be served at least 7 days before hearing, unless the court permits them to be served at some other time. n1

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. n2

[2] Extension of Deadline for Serving and Filing Opposition Papers

The deadline for serving and filing opposition papers may be extended by court order. n3

If the moving party refuses to stipulate to an extension, an ex parte application maybe made to the court. Consult the local district court rules, as well as the rules and procedures of the assigned judge, regarding ex parte applications.

Every application for an extension of time within which to file opposing papers should explain to the court precisely why more time than usual is required to oppose the motion. Factors which may be relevant include the following:

- Unusually complex or numerous issues
- Lengthy briefs
- The need for additional discovery on the relevant issues
- The need for additional time to consult or coordinate efforts with clients or with co-counsel (particularly in a complex, multi-party case)
- Unavailability of counsel during the briefing period or on the hearing date

According to Rule 6(b)(1), a request for enlargement after the time period has elapsed must be made by motion. The motion must be made in writing, pursuant to Rule 7(b)(1), unless it is made during a hearing or trial. n4 Before the court

will grant a request for enlargement made after the time period has expired, the moving party must show cause and prove that the failure to act was the result of "excusable neglect." n5

For complete discussion of extensions of time within which to act, *see §§ 2.50 -2.53*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensions

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 6(c)(2)*.

(n2)Footnote 2. *Fed. R. Civ. P. 59(c)*.

(n3)Footnote 3. *E.g., Nestle Co. v. Chester's Market, Inc., 571 F. Supp. 763, 769 (D. Conn 1983)* , *rev'd on other grounds, 756 F. 2d 280 (2d Cir. 1985)* .

(n4)Footnote 4. *Fed. R. Civ. P. 7(b)(1)*.

(n5)Footnote 5. *Fed. R. Civ. P. 6(b)(1)(B)*; *see also Dimmitt v. Ockenfels, 407 F.3d 21, 23-24 (1st Cir. 2005)* .

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CHAPTER 2 The Mechanics of Motion Practice
E. Opposing the Motion

1-2 Federal Litigation Guide § 2.83

§ 2.83 Proof of Service Required

Opposition papers must be filed with the clerk of the court, together with proof of service. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticeService of ProcessProofGeneral OverviewGovernmentsCourtsClerks of Court

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 5(d).*

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CHAPTER 2 The Mechanics of Motion Practice
E. Opposing the Motion

1-2 Federal Litigation Guide § 2.84

§ 2.84 Failure to Submit Opposition Papers

Failure to submit opposition papers may result in the court granting the motion on default. n1

FOOTNOTES:
(n1)Footnote 1. *See, e.g., General Brands, Inc. v. Steamship Gulf Spirit, No. 90 Civ. 7179, 1991 U.S. Dist. Lexis 125 at *2 (S.D.N.Y. 1990)* .

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CHAPTER 2 The Mechanics of Motion Practice
E. Opposing the Motion

1-2 Federal Litigation Guide § 2.85

§ 2.85 Format of Opposition Papers

The same basic format requirements for moving papers apply to opposition papers. For discussion of those format requirements, *see §§ 2.40 -2.43*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime Limitations

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CHAPTER 2 The Mechanics of Motion Practice
E. Opposing the Motion

1-2 Federal Litigation Guide §§ 2.86 through 2.89

[Reserved]

§§ 2.86[Reserved]

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CHAPTER 2 The Mechanics of Motion Practice
F. Filing Cross-Motions or Counter-Motions

1-2 Federal Litigation Guide § 2.90

§ 2.90 Cross-Motion and Counter-Motion Defined

The terms *cross-motion* and *counter-motion* are interchangeable. A cross-motion or counter-motion is a motion filed in response to a different motion, and which seeks a separate order regarding issues introduced in the original motion.

For example, in response to a motion for a protective order pursuant to Rule 26(c), the opposing party may elect to file a cross-motion or counter-motion for an order compelling disclosure or discovery pursuant to Rule 37.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureDiscoveryMotions to Compel

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CHAPTER 2 The Mechanics of Motion Practice
F. Filing Cross-Motions or Counter-Motions

1-2 Federal Litigation Guide § 2.91

§ 2.91 No Governing Federal Rules Regarding Cross-Motions and Counter-Motions

The Federal Rules do not specifically address cross-motions or counter-motions. As a technical matter, a cross-motion or counter-motion is just another independent motion. Consult the local district court rules as well as the rules and procedures of the assigned judge to determine whether cross-motions and counter-motions are permitted.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaGovernmentsCourtsRule Application & Interpretation

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CHAPTER 2 The Mechanics of Motion Practice
F. Filing Cross-Motions or Counter-Motions

1-2 Federal Litigation Guide § 2.92

§ 2.92 Combining Opposition and Cross-Motion or Counter-Motion

If a cross-motion or counter-motion is permitted to be filed, the cross-motion or counter-motion may also serve as opposition to the original motion provided the papers clearly state their dual purpose.

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CHAPTER 2 The Mechanics of Motion Practice
F. Filing Cross-Motions or Counter-Motions

1-2 Federal Litigation Guide § 2.93

§ 2.93 Serving and Filing Cross-Motions and Counter-Motions

If a cross-motion or counter-motion is permitted to be filed, the cross-motion or counter-motion should be served and filed prior to the deadline for filing opposition papers.

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CHAPTER 2 The Mechanics of Motion Practice
F. Filing Cross-Motions or Counter-Motions

1-2 Federal Litigation Guide § 2.94

§ 2.94 Seeking Enlargement of Time Within Which to Respond to Cross-Motion or Counter-Motion

If opposition to a cross-motion or counter-motion cannot reasonably be made within the time otherwise required, the original moving party should seek an enlargement of time. For discussion of seeking enlargements of time, *see §§ 2.50 -2.53*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensions

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CHAPTER 2 The Mechanics of Motion Practice
F. Filing Cross-Motions or Counter-Motions

1-2 Federal Litigation Guide §§ 2.95 through 2.99

[Reserved]

§§ 2.95[Reserved]

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CHAPTER 2 The Mechanics of Motion Practice
G. Replying to Opposition Papers

1-2 Federal Litigation Guide § 2.100

§ 2.100 No Governing Federal Rules Regarding Reply Papers

The Federal Rules do not address reply papers. Consult the local district court rules as well as the rules and procedures of the assigned judge to determine whether reply papers are permitted.

Nonetheless, reply papers are common. If the motion opponent seeks more time than the minimum within which to oppose the motion, typically the motion proponent bargains for a schedule that includes time for service of reply papers.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsGovernmentsCourtsRule Application & Interpretation

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CHAPTER 2 The Mechanics of Motion Practice
G. Replying to Opposition Papers

1-2 Federal Litigation Guide § 2.101

§ 2.101 Practice Tip: Proper Function of Reply Papers

Some courts believe that reply papers should be viewed as the exception and not the rule. "Clearly, nothing but delay, unnecessary work, and unwarranted expense can result from the routine filing of reply and, inevitably, sur-reply papers which do nothing more than restate in a different form or with additional detail material set forth in the moving and opposing papers". n1

Consult the rules and procedures of the assigned judge to determine whether reply papers will be accepted. Many judges permit reply papers only in limited situations. For example, the judge may limit submission of reply papers to: n2

- Situations in which a party demonstrates to the court that papers to which it seeks to file a reply raise new issues which are material to the disposition of the question before the court

- Situations in which the court determines sua sponte that it wishes further briefing of an issue, and orders the submission of additional papers

Notwithstanding the antipathy of some courts to reply papers, reply papers are the norm. Moreover, for the motion proponent, reply papers represent an opportunity that should not be lightly foregone. It is the rare motion proponent who can anticipate every argument made by the opponent. The method by which the opponent presents opposition typically sharpens the issue, making a reply that deals with the sharpened issue a necessity. The fact that there is a body of law as to which side opens and closes to a jury demonstrates that there is an advantage to having the first and last word on any issue. About the only times that a motion proponent should not submit a reply is when the opposing papers are so weak on their face that no reply is useful, or when a good set of reply papers cannot be written. It is the rare court that will ignore reply papers, even if it would rather not have received them. If leave must be sought to file a reply, the request for leave should itself reflect the reply points counsel would make.

A reply should be very concise and persuasive, dealing only with the matters that warrant reply, and avoiding redundancy. Otherwise, a reply can be counter-productive. Replies should focus on the following:

- Significant misstatements or mischaracterizations of fact or law in the opposition papers

- Rehabilitation of cases that have been distinguished in opposition papers

- Distinguishing new authorities cited in opposition papers

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureJudicial OfficersGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *United States v. International Business Machines Corp., 66 F.R.D. 383, 384 (S.D.N.Y. 1975)* .

(n2)Footnote 2. *United States v. International Business Machines Corp., 66 F.R.D. 383, 384 (S.D.N.Y. 1975)* .

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CHAPTER 2 The Mechanics of Motion Practice
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1-2 Federal Litigation Guide §§ 2.102 through 2.109

[Reserved]

§§ 2.102[Reserved]

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CHAPTER 2 The Mechanics of Motion Practice
H. Oral Argument of Motions

1-2 Federal Litigation Guide § 2.110

§ 2.110 Local District Court Rules and Rules and Procedures of Assigned Judge Govern Oral Argument

There are no governing Federal Rules regarding oral argument of motions. Instead, local district court rules and the rules and procedures of the assigned judge generally govern oral argument. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureJudicial OfficersGeneral OverviewGovernmentsCourtsRule Application & Interpretation

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 78.*

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CHAPTER 2 The Mechanics of Motion Practice
H. Oral Argument of Motions

1-2 Federal Litigation Guide § 2.111

§ 2.111 Practice Tip: Benefits of Oral Argument

Consult the rules and procedures of the assigned judge regarding oral argument of motions [*see* Table of Local Rules, Appendix Part I].

Notwithstanding any contrary local district court rules, most judges will routinely hear argument, and most attorneys will want to argue. Even if the attorney's view is that the client has won the motion on the papers, it is questionable whether argument should be foregone. While motions may be won or lost on the papers in an ultimate sense, argument at least affords the platform for the judge's questions that may reflect the court's misunderstanding of some fact or position. Additionally, argument may cause a more careful rereading of the papers. Many attorneys fear that submitting without argument reflects a disinterest in the outcome.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureJudicial OfficersGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial Orders

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CHAPTER 2 The Mechanics of Motion Practice
H. Oral Argument of Motions

1-2 Federal Litigation Guide §§ 2.112 through 2.119

[Reserved]

§§ 2.112[Reserved]

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CHAPTER 2 The Mechanics of Motion Practice
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1-2 Federal Litigation Guide § 2.120

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Local district court rules or the rules and procedures of the assigned judge may require the *moving party* to submit a proposed order when filing the moving papers. Other rules or procedures may require the *prevailing party* to prepare a proposed order in accordance with the court's ruling. The prevailing party may be required to meet with opposing counsel to reach an agreement regarding the wording of the proposed order. Still other rules or procedures may specifically provide that counsel is not to submit a proposed order at all, but that the court will prepare its own order.

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CHAPTER 2 The Mechanics of Motion Practice
I. Settling Orders

1-2 Federal Litigation Guide § 2.121

§ 2.121 Practice Tip: Contents of Proposed Order

The Federal Rules are silent as to the required contents of an order. In the absence of any local district court rule, the order should include the following:

- Case caption, including case number
- Title of order
- Recitation of papers considered in connection with motion (for appellate purposes)
- Factual findings, if required
- Statement of specific relief granted
- Name and signature of judge

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Appendix 2: Appendix to Chapter 2

1-2 Federal Litigation Guide Appendix 2:.syn

§ 2.syn Synopsis to Appendix 2: Appendix to Chapter 2

TABLE OF LOCAL RULES

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CHAPTER 3 Rule 12 Motions

1-3 Federal Litigation Guide 3.syn

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[5] Submission of Extrinsic Evidence; Conversion to Summary Judgment Motion

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CHAPTER 3 Rule 12 Motions

1-3 Federal Litigation Guide Scope

Scope

SCOPE

When presented with a complaint, a defendant must examine the allegations to determine whether to respond to the pleading by filing an answer, or by making a Rule 12 pre-answer motion. Rule 12(b) sets forth seven defenses that may be raised by pre-answer motion practice: (1) subject matter jurisdiction; (2) personal jurisdiction; (3) improper venue; (4) insufficiency of process; (5) insufficiency of 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.

Whether to make a pre-answer motion does not depend on whether a defense exists. Counsel may choose to answer a complaint rather than make a Rule 12 motion because of expense, or because counsel wants to move quickly for summary judgment. Few defenses give rise to a successful motion to dismiss the complaint: incontestable documentary evidence supporting the defense is one of the exceptions.

Where the plaintiff is required to plead with specificity pursuant to Rule 9(b)'s requirement of detail where fraud or mistake are elements of the cause of action, a motion to dismiss may be useful. The Private Securities Law Reform Act of 1995 (*15 U.S.C. § 78u-4*), when added to the Rule 9(b) requirements, puts a very heavy pleading burden on federal securities law plaintiffs, making a dismissal motion particularly useful.

Rule 12(b) motions are nonetheless common. Counsel must, however, be familiar with the individual judge's rules, since many judges require a pre-motion conference. Other Rule 12 motions include motions for judgment on the pleadings (Rule 12(c)), motions for a more definite statement (Rule 12(e)) and motions to strike (Rule 12(f)). These motions are far less common than Rule 12(b) motions.

This chapter discusses how to raise defenses and objections in pre-answer motions pursuant to Rule 12. Also included are:

- **The timetable for serving responses to pleadings**
- **Each defense and objection available pursuant to Rule 12**
- **The procedure for raising those defenses or objections**

The chapter includes the following sample forms:

- **Motion to dismiss for lack of subject matter jurisdiction, with alternative language for lack of personal jurisdiction, improper venue, and failure to state a claim**

- **Motion for judgment on the pleadings**

For expanded coverage of Rule 12 motions, *see* Moore's Federal Practice, Ch. 12, *Defenses and Objections--When and How Presented--By Pleading or Motion--Motion for Judgment on Pleadings* (Matthew Bender 3d ed.).

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CHAPTER 3 Rule 12 Motions
A. Considering Responsive Options

1-3 Federal Litigation Guide § 3.01

§ 3.01 Moving to Dismiss Before Answering

A party may raise the following defenses in a motion to dismiss, before serving the responsive pleading: n1

- Lack of subject matter jurisdiction [*see §§ 3.50 -3.55*]
- Lack of personal jurisdiction [*see §§ 3.60 -3.66*]
- Improper venue [*see §§ 3.80 -3.84*]
- Insufficient process [*see §§ 3.110*]
- Insufficient service of process [*see §§ 3.111 -3.113*]
- Failure to state a claim on which relief can be granted [*see §§ 3.90 -3.98*]
- Failure to join an indispensable party pursuant to Rule 19 [*see §§ 3.120 -3.122*]

A party is not *required* to make a pre-answer Rule 12 motion, but may instead assert any or all of the above defenses in a responsive pleading. However, a party who makes a pre-answer Rule 12 motion must assert any available Rule 12 defenses and objections in the motion. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureVenueGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePartiesJoinderIndispensable Parties

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 12(b).*

(n2)Footnote 2. *Fed. R. Civ. P. 12(g).*

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CHAPTER 3 Rule 12 Motions
A. Considering Responsive Options

1-3 Federal Litigation Guide § 3.02

§ 3.02 Moving to Narrow and Clarify Issues

Rule 12 provides for two pre-answer motions aimed at clarifying the pleadings:

- **Motion for more definite statement.** A party may move for a more definite statement to clarify a pleading that is so vague and ambiguous that the party cannot reasonably be expected to frame a responsive pleading. n1 Rule 12(e) motions are rarely granted. n2

- **Motion to strike.** A party may move to strike redundant, immaterial, impertinent, or scandalous material, or insufficient defenses from an adverse party's pleading. n3 Motions to strike are generally not favored. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDefects of FormCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeImmaterial MattersCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeRedundant MattersCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeScandalous Matters

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 12(e)*; *see § 3.140*.

(n2)Footnote 2. *See In re Hanford Nuclear Reservation Litig., 780 F. Supp. 1551, 1583 (E.D. Wash. 1991)* .

(n3)Footnote 3. *Fed. R. Civ. P. 12(f)*; *see § 3.150*.

(n4)Footnote 4. *Resolution Trust Corp. v. Vanderweele, 833 F. Supp. 1383, 1387 (N.D. Ind. 1993)* .

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CHAPTER 3 Rule 12 Motions
A. Considering Responsive Options

1-3 Federal Litigation Guide § 3.03

§ 3.03 Answering the Claim

If the defending party does not file a Rule 12(b) pre-answer motion to dismiss theclaim for relief n1 (whether a claim, counterclaim, cross-claim, or third-party claim), or a motion to clarify the complaint, n2 then the defending party must file an answer stating in short and plain terms its responses to each claim asserted, and must admit or deny each averment. n3

Generally the defendant's strategy will involve a combination of Rule 12(b) motions filed before the answer, and denials and affirmative defenses set forth in the answer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswers

FOOTNOTES:
(n1)Footnote 1. *See § 3.01.*

(n2)Footnote 2. *See § 3.02.*

(n3)Footnote 3. *Fed. R. Civ. P. 8(b).*

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CHAPTER 3 Rule 12 Motions
A. Considering Responsive Options

1-3 Federal Litigation Guide § 3.04

§ 3.04 Moving for Judgment on the Pleadings

A party may move for judgment on the pleadings after the pleadings are closed. n1 Although Rule 12(c) rule does not specify a deadline for filing a motion for judgment on the pleadings, the motion may not delay the trial. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedurePretrial JudgmentsJudgment on the Pleadings

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 12(c).*

(n2)Footnote 2. *Fed. R. Civ. P. 12(c).*

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CHAPTER 3 Rule 12 Motions
A. Considering Responsive Options

1-3 Federal Litigation Guide § 3.05

§ 3.05 Understanding Relationship Between Rule 12 and Other Rules

[1] Relationship Between Rule 12 and Rules 4 and 4.1: Summons and Service of Process

Rule 4 prescribes the procedures for preparing, issuing, and serving process in the form of a summons. n1 Rule 4.1 covers service of process by means other than a summons. n2 When those procedures have not been adequately followed, Rules 12(b)(4) and 12(b)(5) provide a vehicle for challenging the sufficiency of either the process or service of the process. n3

[2] Relationship Between Rule 12 and Rule 6: Computing Time

Rule 6 interacts with the Rule 12(a) specifications of the time periods that apply to serving answers and motions. Rules 6(a) and 6(b) respectively set out the provisions for computing and enlarging those periods, while Rule 6(e), often called the "mail rule" allows for more time when service is through the mail. Rule 6 must therefore be taken into account in calculating the time in which to answer. n4

[3] Relationship Between Rule 12 and Rule 7: Pleadings Allowed; Form of Motions

Rule 7 specifies the types of pleadings permitted and describes the form motions should take. n5

Rule 12 interacts with Rule 7 in the following ways:

- When all of the pleadings allowed under Rule 7(a) that will be filed in the action have been filed, the pleadings are "closed." Rule 12(c) allows for a motion for judgment on the pleadings after the pleadings close. n6

- Rule 12(h)(2) allows certain defenses and objections to be made in any pleading included in Rule 7(a) without incurring the risk of waiving those defenses or objections. n7

- A Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted replaces the demurrer abolished by Rule 7(c). n8

- The requirements for motions pursuant to Rule 7(b) apply to Rule 12 motions.

[4] Relationship Between Rule 12 and Rule 8: General Rules of Pleading

Rule 8 gives the pleader guidance in framing claims for relief and defenses, which generally should be by "notice pleading." n9 Sufficiency of the pleading, or inclusion of matters that go beyond providing notice, has a great bearing on the following matters:

- Whether to grant a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) n10
- Whether to order the plaintiff to file a more definite statement pursuant to Rule 12(e) n11
- Whether material is redundant, immaterial, or impertinent, and should be stricken pursuant to Rule 12(f) n12

[5] Relationship Between Rule 12 and Rule 9: Pleading Special Matters

Rule 9 imposes additional requirements for pleading certain matters. n13 For example,although notice pleading discourages inclusion of detailed factual allegations, the circumstances surrounding allegations of fraud must be pleaded specifically pursuant to Rule 9(b). n14

This requirement for specificity will affect the rulings on a motion for a more definite statement, a motion to strike, or a motion to dismiss for failure to state a claim. n15

[6] Relationship Between Rule 12 and Rule 10: Form of Pleadings

Rule 10(c) provides that any written instrument that is an exhibit to a pleading is a part of the pleading for all purposes. n16 Rule 10(c) controls the determination of whether a matter is considered part of a pleading or outside the pleading.

Whether the court considers matters outside the pleadings affects the procedures for disposing of the following Rule 12 motions:

- Motions to dismiss for lack of subject matter jurisdiction [*see §§ 3.50 -3.55*]
- Motions to dismiss for lack of personal jurisdiction [*see §§ 3.60 -3.66*]
- Motions to dismiss for failure to state a claim [*see §§ 3.90 -3.98*]
- Motions for judgment on the pleadings

[7] Relationship Between Rule 12 and Rule 13: Counterclaim and Cross-Claim

Rule 12 specifies the time periods for answering counterclaims and cross-claims. n17 Rule 13 provides the procedures for pleading counterclaims and cross-claims. n18

Whether and when a counterclaim and its reply, or a cross-claim and its answer, are filed affects when the pleadings close. Motions to dismiss filed after the pleadings close, known as motions for judgment on the pleadings, are governed by Rule 12(c). n19

[8] Relationship Between Rule 12 and Rule 15: Amended and Supplemental Pleadings

Rule 15 allows a party to amend its pleading once as a matter of course within 21 days of serving it. n20 Any such amendment affects the time to answer prescribed in Rule 12(a). n21

Many defects raised by Rule 12 motions to dismiss can be cured by amending the pleading. Rule 15(a) expressly directs that the "court should freely give leave when justice so requires."

[9] Relationship Between Rule 12 and Rule 19: Joinder of Persons Needed for Just Adjudication

Rule 19 specifies when a party is considered indispensable to the litigation. n22 Rule 12(b)(7) allows a motion to dismiss for failing to join a party pursuant to Rule 19. n23

[10] Relationship Between Rule 12 and Rule 54: Judgments; Costs

In a case involving multiple claims and multiple parties, the court may dismiss fewer than all claims and parties involved in response to a Rule 12 motion. n24 Rule 54(b) provides that a partial dismissal is not a final appealable order, unless the court does both of the following:

- Directs the entry of final judgment as to the dismissed claims or parties
- Expressly determines that there is no just reason for delaying entry of the final judgment until adjudication of the remaining claims and parties

[11] Relationship Between Rule 12 and Rule 56: Summary Judgment

Rule 56 governs the procedure for summary judgment. n25 If the court considers matters outside the pleadings on a Rule 12(b)(6) motion to dismiss for failure to state a claim, or a Rule 12(c) motion for judgment on the pleadings, the motion must be converted to a motion for summary judgment. n26

If a Rule 12 motion is converted to a motion for summary judgment, the court must comply with the provisions of Rule 56, such as affording the parties an opportunity to present all material made pertinent to the motion by Rule 56.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedurePleading & PracticePleadingsHeightened Pleading RequirementsGeneral OverviewCivil ProcedurePleading & PracticePleadingsRule Application & InterpretationCivil ProcedurePartiesJoinderGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsFailures to State ClaimsCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 4.*

(n2)Footnote 2. *See Fed. R. Civ. P. 4.1.*

(n3)Footnote 3. *See Fed. R. Civ. P. 12(b)(4), (5)*; *see also* §§ *3.110*, *3.111*.

(n4)Footnote 4. *See Fed. R. Civ. P. 6.*

(n5)Footnote 5. *See* Fed. R. Civ. P. 7.

(n6)Footnote 6. *See Fed. R. Civ. P. 12(c)*; *see also* § 3.240.

(n7)Footnote 7. *See Fed. R. Civ. P. 12(h)(2)*; *see also § 3.22*.

(n8)Footnote 8. *See Fed. R. Civ. P. 12(b)(6)*; *see also § 3.90*.

(n9)Footnote 9. *See Fed. R. Civ. P. 8*.

(n10)Footnote 10. *See § 3.93*.

(n11)Footnote 11. *See* § 3.144.

(n12)Footnote 12. *See* § 3.156.

(n13)Footnote 13. *See Fed. R. Civ. P. 9*.

(n14)Footnote 14. *See § 3.95* (moving to dismiss claim involving fraud or mistake).

(n15)Footnote 15. *See* §§ 3.144, 3.156, *3.93*.

(n16)Footnote 16. *See Fed. R. Civ. P. 10*.

(n17)Footnote 17. *See Fed. R. Civ. P. 12(a)*.

(n18)Footnote 18. *See Fed. R. Civ. P. 13*.

(n19)Footnote 19. *See* § 3.240.

(n20)Footnote 20. *See Fed. R. Civ. P. 15(a)(1)(A)*.

(n21)Footnote 21. *See § 3.12[7]*.

(n22)Footnote 22. *See Fed. R. Civ. P. 19*.

(n23)Footnote 23. *See § 3.120*.

(n24)Footnote 24. *See Fed. R. Civ. P. 54(b)*.

(n25)Footnote 25. *See Fed. R. Civ. P. 56*.

(n26)Footnote 26. *See §§ 3.96,* 3.243.

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CHAPTER 3 Rule 12 Motions
A. Considering Responsive Options

1-3 Federal Litigation Guide § 3.06

§ 3.06 Filing Corporate Disclosure Statement with First Pleading or Motion

To enable judges to make informed decisions concerning possible disqualification based on financial interest, all nongovernmental corporate parties must file two copies of a statement that either: n1

- Identifies any parent corporation and any publicly held corporation that owns 10 percent or more of its stock

- Indicates that there is not a parent corporation nor any publicly held corporation that owns 10 percent or more of its stock

The statement must be filed with the corporate party's first appearance, pleading, petition, motion, response, or other request addressed to the court. n2 Corporate parties must file a supplemental statement updating any changes in the disclosure information. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsRule Application & InterpretationCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsFinancial Interests

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 7.1(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 7.1(b).*

(n3)Footnote 3. *Fed. R. Civ. P. 7.1(b).*

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CHAPTER 3 Rule 12 Motions
A. Considering Responsive Options

1-3 Federal Litigation Guide §§ 3.07 through 3.09

[Reserved]

§§ 3.07[Reserved]

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CHAPTER 3 Rule 12 Motions
B. Timing of Responsive Pleadings

1-3 Federal Litigation Guide § 3.10

§ 3.10 Time for Presenting Pre-Answer Motions

A defendant may make any or all of the following motions *before* serving an answer:

- Motion to dismiss n1
- Motion for more definite statement n2
- Motion to strike any insufficient defense, or any redundant, immaterial, impertinent, or scandalous matter n3

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 12(b).*

(n2)Footnote 2. *See Fed. R. Civ. P. 12(e).*

(n3)Footnote 3. *See Fed. R. Civ. P. 12(f).*

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CHAPTER 3 Rule 12 Motions
B. Timing of Responsive Pleadings

1-3 Federal Litigation Guide § 3.11

§ 3.11 General Rule: 21 Days to Answer

[1] Serving Responsive Pleading Within 21 Days

As a general rule, a party must serve a responsive pleading within 21 days after being served with a complaint, counterclaim, or cross-claim. n1

The 21-day rule applies as follows:

- **Answer to complaint.** A defendant must serve an answer within 21 days after being served with the summons and complaint. n2 Unless the court orders otherwise, an answer to an amended complaint must be made within the time remaining to respond to the original complaint or within 14 days after service of the amended complaint, whichever is later. n3

- **Answer to cross-claim.** A cross-defendant served with a pleading stating a cross-claim must serve an answer within 21 days after being served with the pleading containing the cross-claim. n4

- **Reply to counterclaim.** The plaintiff must reply to a counterclaim asserted in the answer within 21 days after service of the answer. n4.1

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. n5

[2] Computing 21-Day Period

The 21-day period for responding begins to run the day after service of the pleading. Saturdays, Sundays, and legal holidays are counted as part of the 21-day period. n6 However, if the last day of the 21-day period is a Saturday, Sunday, or legal holiday, the period is extended, and expires on the first day that is not a Saturday, Sunday, or legal holiday. n6.1

[3] Responding to Pleading Served by Mail

If a pleading was served by mail, the time period for responding to that pleading is extended by three days. n7

For example, if an answer containing a counterclaim is served by mail, the plaintiff must serve its reply to the counterclaim within 24 days after the answer was served. Service by mail is complete upon mailing. n8

[4] Responding to Pleading Served Electronically

If a pleading was served electronically or by any other means based on written consent under Rule 5(b)(2)(D), the time period to respond to the pleading is extended by three days. n9

[5] Responding to Pleading Served to Court Clerk

If a pleading was served to the clerk of the court based on no known address, the time period to respond to the pleading is extended by three days. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsAnswers

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 12(a); see* [2], *below*. (calculating 20-day period).

(n2)Footnote 2. *Fed. R. Civ. P. 12(a)(1)*.

(n3)Footnote 3. *Fed. R. Civ. P. 15(a)(3)*.

(n4)Footnote 4. *Fed. R. Civ. P. 12(a)(1)(B)*.

(n5)Footnote 4.1. *Fed. R. Civ. P. 12(a)(1)(B)*.

(n6)Footnote 5. *Fed. R. Civ. P. 12(a)(1)(C)*.

(n7)Footnote 6. *Fed. R. Civ. P. 6(a)(1)*.

(n8)Footnote 6.1. *Fed. R. Civ. P. 6(a)(1)*.

(n9)Footnote 7. *See Fed. R. Civ. P. 6(d)*.

(n10)Footnote 8. *See Fed. R. Civ. P. 5(2)(c)*.

(n11)Footnote 9. *Fed. R. Civ. P. 6(d)*.

(n12)Footnote 10. *Fed. R. Civ. P. 6(d)*.

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CHAPTER 3 Rule 12 Motions
B. Timing of Responsive Pleadings

1-3 Federal Litigation Guide § 3.12

§ 3.12 Determining Applicable Exceptions to 21-Day Rule

[1] Determining If Statute Provides Different Time Limit

A federal statute may prescribe its own time limit for responding. If the claim was brought under such a statute, the responsive pleading must be served within the time limit prescribed by the statute, rather than the 21-day time limit prescribed by Rule 12. n1

[2] United States Defendant: 60-Day Response Period

The United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity, must respond to a complaint, cross-claim, or counterclaim within 60 days after service is made on the United States attorney. n2

An officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States has 60 days after service of the pleading on the officer or employee or service on the U.S. Attorney, whichever is later, to respond to a complaint, cross-claim, or counterclaim. n2.1

[3] Foreign State Defendant: 60-Day Response Period

If the defendant is a foreign state or a political subdivision, agency or instrumentality of a foreign state, the defendant must serve an answer or other responsive pleading to the complaint within 60 days after service is made. n3

[4] Response Period Extended If Service of Process Waived

The time period for responding is extended if the defendant timely waives service of process at the plaintiff's request. n4

If service of process was waived, the defendant must respond to the complaint within one of the following time limits: n5

- 60 days from the date the request for waiver was sent, if the request was sent within the United States

- 90 days from the date the request for waiver was sent, if the request was sent to a foreign country

[5] Responding After Serving Pre-Answer Motion

Filing a Rule 12 motion to dismiss, strike, or for a more definite statement before responding to a claim, cross-claim, or counterclaim alters the time period for filing a responsive pleading. n6

With respect to a motion to dismiss or strike, if the court denies the motion or postpones its disposition until the trial, the responsive pleading must be served within 14 days after notice of the court's action. n7 With respect to a motion for a more definite statement, the responsive pleading must be served within 14 days after the service of the more definite statement. n8

The response time is computed as follows: n9

- Exclude the day the order is entered
- Count every other day, including intermediate Saturdays, Sundays, and legal holidays
- 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

[6] Responding to Supplemental Pleading

If the court permits a party to serve a supplemental pleading, it may order the adverse party to respond within a specified period of time. n10

Local rules may permit the time for answering to be set in the pretrial conference or case management plan.

[7] Responding to Amended Pleading

If a party amends its pleading pursuant to Rule 15, the opposing party must serve a response within the time remaining for responding to the original pleading, or within 14 days of service of the amendment, whichever period is longer. n11

Local rules may permit the time for answering to be set in the pretrial conference or case management plan.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticeService of ProcessTime LimitationsExtensionsCivil ProcedureDismissalsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 12(a)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 12(a)(2).*

(n3)Footnote 2.1. *Fed. R. Civ. P. 12(a)(3).*

(n4)Footnote 3. *28 U.S.C. § 1608(d).*

(n5)Footnote 4. *See Fed. R. Civ. P. 4(d).*

(n6)Footnote 5. *Fed. R. Civ. P. 12(a)(1)(A)(ii).*

(n7)Footnote 6. *See § 3.13.*

(n8)Footnote 7. *Fed. R. Civ. P. 12(a)(4)(A).*

(n9)Footnote 8. *Fed. R. Civ. P. 12(a)(4)(B).*

(n10)Footnote 9. *Fed. R. Civ. P. 6(a)(1).*

(n11)Footnote 10. *Fed. R. Civ. P. 15(d)*; *see* Ch. 1, *Pleadings.*

(n12)Footnote 11. *Fed. R. Civ. P. 15(a)(3)*; *see General Mills, Inc. v. Kraft Foods Global, Inc., 487 F.3d 1368, 1376 (Fed. Cir. 2007)* .

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CHAPTER 3 Rule 12 Motions
B. Timing of Responsive Pleadings

1-3 Federal Litigation Guide § 3.13

§ 3.13 Obtaining Extension of Time to File Pleading or Motion

[1] Requesting Extension of Time Period

A party may request that the court extend the time period for filing a pleading, a motion, or a response to a motion. A request for an extension of time may be made before or after the time period has expired. The court has discretion to grant such a request "for cause shown." n1

If the time period has already expired, the request must be made by motion. If the time period has not expired, the request may be made with or without motion or notice. Thus, the requesting party is not obligated to file a formal motion for extension of time. The prudent course, however, is always to file a motion when requesting an extension. n2

Counsel must check the individual judge's rules on extensions.

[2] Establishing Cause for Extension of Time

A court has wide discretion to grant an extension of time if the request is made before the time period has expired. n3

If the time period has already expired, the court will extend the time period only if the party can establish excusable neglect. n4

[3] Obtaining Court Approval of Stipulated Extension

Parties may stipulate to an extension of time. Even if the parties reach such an agreement, however, the stipulation must be approved by the court. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedureCounselGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 6(b); see Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 584 (1st Cir. 1994)* .

(n2)Footnote 2. *See Fed. R. Civ. P. 6(b).*

(n3)Footnote 3. *See Baden v. Craig-Hallum, Inc., 115 F.R.D. 582, 584-585 (D. Minn. 1987)* .

(n4)Footnote 4. *Fed. R. Civ. P. 6(b)*; *In re VMS Sec. Litig., 145 F.R.D. 458, 462 (N.D. Ill. 1992)* , *aff'd in part, vacated in part on other grounds*, *21 F.3d 139 (7th Cir. 1994*).

(n5)Footnote 5. *See Orange Theatre Corp. v. Rayherstz Amusement Corp., 130 F.2d 185, 187 (3d Cir. 1942*); *In re Sonoma V. 703 F.2d 429, 431-432 (9th Cir. 1983)* ; *Allstate Ins. Co. v. Administratia Asigurarilor De Stat, 163 F.R.D. 196, 199 (S.D.N.Y. 1995*).

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CHAPTER 3 Rule 12 Motions
B. Timing of Responsive Pleadings

1-3 Federal Litigation Guide § 3.14

§ 3.14 Late Answer Is Treated as Motion to Vacate Default

The filing of a late answer is treated as a motion to vacate a default and Rule 55(c) criteria will be applied. n1 For discussion of Rule 55(c) motions to vacate defaults, *see* Ch. 44, *Findings and Judgments*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedurePretrial JudgmentsDefaultRelief From Default

FOOTNOTES:
(n1)Footnote 1. *John v. Sotheby's, Inc., 141 F.R.D. 29, 35 (S.D.N.Y. 1992)* ; *see Fed. R.Civ. P. 55(c).*

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CHAPTER 3 Rule 12 Motions
B. Timing of Responsive Pleadings

1-3 Federal Litigation Guide § 3.15

§ 3.15 CHECKLIST: Deadline for Serving Responsive Pleadings and Motions

The following checklist will assist counsel in determining the deadline for serving an answer, a Rule 12(b) motion to dismiss, a Rule 12(e) motion for more definite statement, or a Rule 12(f) motion to strike. Counsel should check local rules and the individual judge's rules for motion procedures. Note that individual judge's rules may require scheduling a pre-motion conference.

Determine when response to pleading must be served. Upon receiving a pleading, determine which of the following is the applicable time period for serving an answer or a Rule 12 pre-answer motion:

☐ **Statutory time period.** If the claim was brought under a federal statute that prescribes a time period for responding, that time period prevails. n1

☐ **21-day period.** If there is no time period prescribed by statute, the defendant must usually serve an answer or a Rule 12 motion within 21 days of the date the complaint was served. n2

☐ **60-day period.** A response must be served within 60 days if:

☐ **Federal government defendant.** The United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity, must respond to a complaint, cross-claim, or counterclaim within 60 days after the U.S. Attorney is served with the pleading asserting the claim. n3 An officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States must serve a response to the complaint, cross-claim, or counterclaim within 60 days after service on the officer or employee, or service on the U.S. Attorney, whichever is later. n4

☐ **Foreign state defendant.** If the defendant is a foreign state or a political subdivision, agency or instrumentality of a foreign state, the defendant must serve an

answer or other responsive pleading within 60 days after service is made. n5

☐ **Service of process waived.** If the defendant timely waived service of summons upon request by the plaintiff, the defendant has 60 days from the date the request was sent within which to serve an answer or file a motion. If the request was sent to the defendant at an address outside a United States judicial district, this period is extended to 90 days. n6

☐ **Time period for responding to complaint amended as a matter of course.** The defendant must respond to the amended pleading within 14 days after it is served or within the time remaining for responding to the original complaint, whichever is longer, unless the court orders otherwise. n7

☐ **Time period for answering complaint after making Rule 12 motion.** If the defendant has made a pre-answer motion under Rule 12, counsel must serve an answer within 14 days of the following events. With respect to a motion to dismiss or strike, if the court denies the motion or postpones its disposition until the trial, the responsive pleading must be served within 14 days after notice of the court's action. n8 With respect to a motion for a more definite statement, the responsive pleading must be served within 14 days after the service of the more definite statement. n9 If, instead of dismissing the complaint, the court permits the plaintiff to amend, counsel must serve an answer within 14 days of the service of the amended pleading.

☐ **Determine whether time period is extended.** Determine whether the time period is extended because of any of the following:

☐ **Service by mail.** If the pleading was served by mail, three days are added to the applicable time period. n10

☐ **Electronic service and other means of delivery.** If the pleading was served by electronic or other means consented to in writing, three days are added to the applicable time period. n11

☐ **Service to the court clerk.** If the pleading was served to the clerk of the court based on no known address, three days are added to the applicable time period. n12

☐ **Counting Saturdays, Sundays, and Holidays.** Saturdays, Sundays and legal holidays are not counted toward the time period. If the last day of the period for responding is a Saturday, Sunday, or legal holiday, the time period is extended and ends on the first day that is not a Saturday, Sunday, or legal holiday. n13 For any response period, Saturdays, Sundays, and holidays are always counted. n14

☐ **Request additional time, if needed.** If a response cannot be made within the prescribed time period, request that the court grant additional time for responding. n15

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 12(a)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 12(a)(1)(A(i)).*

(n3)Footnote 3. *Fed. R. Civ. P. 12(a)(2).*

(n4)Footnote 4. *Fed. R. Civ. P. 12(a)(3); see also Fed. R. Civ. P. 4(i)(3).*

(n5)Footnote 5. *28 U.S.C. § 1608(d).*

(n6)Footnote 6. *Fed. R. Civ. P. 12(a)(1)(A)(ii).*

(n7)Footnote 7. *Fed. R. Civ. P. 15(a)(3).*

(n8)Footnote 8. *Fed. R. Civ. P. 12(a)(4)(A).*

(n9)Footnote 9. *Fed. R. Civ. P. 12(a)(4)(B).*

(n10)Footnote 10. *Fed. R. Civ. P. 6(d).*

(n11)Footnote 11. *Fed. R. Civ. P. 6(d).*

(n12)Footnote 12. *Fed. R. Civ. P. 6(d).*

(n13)Footnote 13. *Fed. R. Civ. P. 6(a).*

(n14)Footnote 14. *Fed. R. Civ. P. 6(a)(1).*

(n15)Footnote 15. *Fed. R. Civ. P. 6(b).*

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CHAPTER 3 Rule 12 Motions
B. Timing of Responsive Pleadings

1-3 Federal Litigation Guide §§ 3.16 through 3.19

[Reserved]

§§ 3.16[Reserved]

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CHAPTER 3 Rule 12 Motions
C. Procedure for Rule 12 Defenses and Objections
1. Rule 12 Motions

1-3 Federal Litigation Guide § 3.20

§ 3.20 Rule 12 Defenses and Objections Must Be Consolidated

[1] Joining Rule 12 Defenses in Single Motion

A party who raises a Rule 12 defense in a pre-answer motion must join with it any other Rule 12 defenses that are available to the party at the time the motion is made. n1

In other words, a party may not assert some Rule 12 defenses in a Rule 12 motion and others in the answer; likewise, the party may not bring successive Rule 12 motions. n2

[2] Joining Motions to Strike and Motions for More Definite Statement

If a motion for a more definite statement or a motion to strike is made, it must be consolidated in a pre-answer motion with any other Rule 12 defense then available to the party. For example, a defendant who moves for dismissal pursuant to Rule 12(b) and does not join with it a Rule 12(e) motion for a more definite statement waives the right to move for a more definite statement. n3

Likewise, a defendant who moves for a more definite statement pursuant to Rule 12(e) cannot later move to dismiss for lack of personal jurisdiction, if the defense was available at the time the motion for a more definite statement was made.

[3] Joining Inconsistent Defenses

A party does not waive a defense merely by joining it with another inconsistent or mutually exclusive defense. n4

[4] Raising Previously Unavailable Defenses

Mandatory consolidation applies only to defenses and objections "available to the party at the time the motion is filed." n5

If a new defense or objection becomes available after the party's initial pre-answer Rule 12 motion, the party may raise the defense or objection in either a new pre-answer motion or in the answer. If, for example, the defendant moves for and obtains a more definite statement, and that statement reveals a new ground for a motion to dismiss, the defendant

may make another Rule 12 motion raising the new defense, or may raise the new defense in its answer.

If the defendant files a Rule 12 motion to dismiss, and the plaintiff subsequently amends the complaint, the defendant may make a new Rule 12 motion if the amended complaint reveals a new defense.

However, amending a complaint does not revive omitted defenses or objections that the defendant could have raised in response to the original complaint. n6

[5] Waiving Objection to Successive Motions

A plaintiff may waive any objection to successive Rule 12 motions by responding to the merits of the defenses asserted in the second motion. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime Limitations

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 12(g)*; *Albany Ins. Co. v. Almacenadora Somex, S.A., 5 F.3d 907, 909 (5th Cir. 1993)* .

(n2)Footnote 2. *See, e.g., Santos v. State Farm Fire & Cas. Co., 902 F.2d 1092, 1095 (2d Cir. 1990)* .

(n3)Footnote 3. *See Fed. R. Civ. P. 12(g)*; *California Int'l Chem. Co. v. Neptune Pool Serv., Inc., 770 F. Supp. 1530, 1532 (M.D. Fla. 1991*).

(n4)Footnote 4. *See* Fed. R. Civ. P. 12(g); *see also Fed. R. Civ. P. 8(d)(3).*

(n5)Footnote 5. *Fed. R. Civ. P. 12(g); see Glater v. Eli Lilly & Co., 712 F.2d 735, 738 (1st Cir. 1983).*

(n6)Footnote 6. *See Gilmore v. Shearson/Am. Express, Inc., 811 F.2d 108, 112 (2d Cir. 1987)* ; *Harris Bank Naperville v. Pachaly, 902 F. Supp. 156, 157 (N.D. Ill. 1995)* ; *Church of Scientology v. Linberg, 529 F. Supp. 945, 967 (C.D. Cal. 1981)* .

(n7)Footnote 7. *See Guccione v. Flynt, 617 F. Supp. 917, 919 (S.D.N.Y. 1985)* .

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CHAPTER 3 Rule 12 Motions
C. Procedure for Rule 12 Defenses and Objections
1. Rule 12 Motions

1-3 Federal Litigation Guide § 3.21

§ 3.21 Waiving Rule 12 Defenses

[1] Understanding Which Rule 12 Defenses Are Subject to Waiver

The defenses of lack of personal jurisdiction, improper venue, insufficiency of process, and insufficiency of service of process are waived under either of the following circumstances: n1

- The party made a pre-answer motion under Rule 12 but omitted the defense, despite its availability at the time the motion was made. A waivable defense that is omitted from a pre-answer motion under Rule 12 may not be pleaded in the answer. n2

- The party did not make a pre-answer motion and did not include the defense in a responsive pleading or an amended pleading permitted to be made as a matter of course. n3

Accordingly, before filing the answer, the defendant must decide whether to object to personal jurisdiction, venue, process, or service.

The following defenses and objections are so fundamental that they are not waived if omitted from a Rule 12(b) motion or from a responsive pleading: n4

- Lack of subject matter jurisdiction [*see §§ 3.50 -3.55*]

- Failure to state a claim on which relief can be granted [*see §§ 3.90 -3.98*]

- Failure to join an indispensable party

- Failure to state a legal defense to a claim

[2] Waiver by Conduct

A party may waive a defense by his or her conduct, even though that party has technically complied with Rule 12 requirements for raising the defense. n5

Asserting lack of personal jurisdiction, insufficiency of process, or improper service of process in an answer does not preserve the defense in perpetuity. To preserve the defense, the defendant must still present it by motion for the court's consideration in a reasonably timely manner. n6

Likewise, if a defendant participates in substantial activity in the case after first asserting the defense in the answer but prior to moving to dismiss, the defendant may have waived the defense raised in the answer. n7

The following types of conduct have been held to waive a Rule 12(b) defense that was properly raised in a responsive pleading:

- **Engaging in extensive discovery addressed to the merits of the case.** Agreeing to a pre-trial discovery schedule and participating in extensive discovery is inconsistent with a defense of lack of personal jurisdiction or insufficiency of service of process. If the answer raises one of these defenses, the proper course is to engage in limited discovery on jurisdictional issues. n8

- **Delay in pursuing defense of improper service of process.** The defendants against whom a default judgment was entered participated in post-judgment proceedings for more than six years, after which they moved to vacate the judgment on grounds of insufficient service. The appellate court affirmed the lower court's finding that the defendants had waived the defense. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureVenueGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultEntry of Default Judgments

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 12(h)(1).*

(n2)Footnote 2. *See Fed. R. Civ. P. 12(h)*, Committee Note of 1966.

(n3)Footnote 3. *See Fed. R. Civ. P. 15(a).*

(n4)Footnote 4. *See Fed. R. Civ. P. 12(h)(2), (3).*

(n5)Footnote 5. *Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 168 (1939).*

(n6)Footnote 6. *See Yeldell v. Tutt, 913 F. 2d 533, 538-539 (8th Cir. 1990) .*

(n7)Footnote 7. *See Continental Bank, N.A. v. Meyer, 10 F. 3d 1293, 1296-1297 (7th Cir. 1993)* ; *Krank v. Express Funding Corp., 133 F.R.D. 14, 17 (S.D.N.Y. 1990)* ; *cf. Classic Motel, Inc. v. Purchasing Group Corp., 149 F.R.D. 528, 533 (1993)* (court found that defendant did not waive defense of absence of personal jurisdiction even though he waited two years to bring motion to dismiss and during those two years participated in written discovery, deposed plaintiff and an expert and brought motion for summary judgment).

(n8)Footnote 8. *Burton v. Northern Dutchess Hosp., 106 F.R.D. 477, 481 (S.D.N.Y. 1985) .*

(n9)Footnote 9. See *Trustees of Cent. Laborers' Welfare Fund v. Lowery, 924 F.2d 731, 734 (7th Cir. 1991) .*

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1-3 Federal Litigation Guide § 3.22

§ 3.22 Raising Non-Waivable Defenses and Objections

[1] Asserting Omitted Defense

A party who omits a non-waivable defense or objection n1 from a Rule 12 pre-answer motion may assert the omitted defense or objection in any of three ways: n2

- In a Rule 7(a) responsive pleading
- In a Rule 12(c) motion for judgment on the pleadings
- At trial on the merits

[2] Raising Lack of Subject Matter Jurisdiction

The defense of lack of subject matter jurisdiction may also be raised at any time "by suggestion of the parties" or sua sponte by the court. n3 Lack of subject matter jurisdiction may also be raised for the first time on appeal. n4

For complete discussion of subject matter jurisdiction and Rule 12, *see §§ 3.50 -3.55*.

[3] Non-Rule 12 Defenses and Matters Are Not Waived

Rule 12's consolidation and waiver provisions apply only to defenses or matters that may be raised by motion under Rule 12. They do not govern waiver of affirmative defenses, which must be pleaded in accordance with Rule 8(c).

Similarly, motions other than those specified in Rule 12, such as motions to stay or for transfer pursuant to *28 U.S.C. § 1404(a)*, are not waived if they are omitted from a Rule 12 pre-answer motion. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over

ActionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedurePretrial JudgmentsJudgment on the Pleadings

FOOTNOTES:

(n1)Footnote 1. *See § 3.21[1].*

(n2)Footnote 2. *Fed. R. Civ. P. 12(h)(2).*

(n3)Footnote 3. *Fed. R. Civ. P. 12(h)(3).*

(n4)Footnote 4. *See Things Remembered, Inc. v. Petrarca, 516 U.S. 124 (1995) .*

(n5)Footnote 5. *See, e.g., Giotis v. Apollo of the Ozarks, Inc., 800 F.2d 660, 664 (7th Cir. 1986) .*

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1-3 Federal Litigation Guide § 3.23

§ 3.23 Drafting Rule 12(b) Motions

Rule 12 motions are generally drafted and served like any other motions.

The following motion practice topics are covered in detail in Chapter 2, *The Mechanics of Motion Practice*:

- Governing procedural law of federal motion practice
- Oral motions
- Papers required in support of and in opposition to motions, including memoranda of law and affidavits or affidavit substitutes
- Scheduling the motion return date
- Use of orders to show cause, to expedite the return date, or to obtain ex parte relief
- Motions to enlarge (extend) time
- Serving and filing motion papers
- Opposing the motion and replying to opposition papers
- Filing cross-motions or counter-motions
- Oral argument of motions
- Settling orders

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensions

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1-3 Federal Litigation Guide § 3.24

§ 3.24 Trial Court Has Discretion to Determine Procedure

A district court judge has broad discretion to determine the procedure to be followed on a motion to dismiss. The court may determine the motion on the basis of affidavits alone, or it may permit discovery in aid of the motion and conduct an evidentiary hearing. The court may also defer the matter until trial. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedureJudicial OfficersJudgesDiscretion

FOOTNOTES:
(n1)Footnote 1. *Cutco Indus., Inc., v. Naughton, 806 F.2d 361, 365 (2d Cir. 1986)* .

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1-3 Federal Litigation Guide § 3.25

§ 3.25 CHECKLIST: Determining When to Raise Rule 12 Defenses and Objections

The following checklist will assist counsel in analyzing basic Rule 12 procedures, before deciding what defense to raise, and when to do so.

☐ **Joining defenses.** All available Rule 12 defenses must be joined in one motion. n1

☐ **Avoiding waiver.** The following defenses are waived if not raised in Rule 12 pre-answer motion, answer, or answer amended as matter of course: n2

- ☐ Lack of personal jurisdiction [*see §§ 3.60-3.66*].
- ☐ Improper venue [*see §§ 3.80-3.84*].
- ☐ Insufficiency of process [*see § 3.150*].
- ☐ Insufficiency of service of process [*see §§ 3.111-3.113*].

☐ **Analyzing waiver by omission from previous Rule 12 motion.** If the party has already served a Rule 12 motion, and the defense or objection was available at the time the motion was made, the following rules apply:

- ☐ The defense or objection may not be raised in a second Rule 12 pre-answer motion. n3
- ☐ Waivable defense may not be raised in the answer. n4

☐ Omitted non-waivable defense may be raised in pleading permitted under Rule 7(a), in motion for judgment on pleadings, or at trial on merits. n5

☐ Lack of subject matter jurisdiction may be raised at any time, including on appeal. n6

☐ **Raising non-waivable defenses.** Omitted defenses or objections can be raised by: n7

☐ Rule 7(a) responsive pleading.

☐ Rule 12(c) motion for judgment on the pleadings.

☐ At trial on the merits.

☐ **Following up on defenses raised by answer.** Raising a waivable defense (*i.e.*, lack of personal jurisdiction, improper venue, insufficiency of process, or improper service of process) in an answer does not preserve the defense indefinitely. The defendant must still present the defense for the court's consideration in a reasonably timely manner. n8

☐ **Avoiding sanctions.** Raising an improper defense or objection may result in sanctions under Rule 11. n9

☐ **Filing corporate disclosure statement.** When filing a pre-answer Rule 12 motion, corporate parties must file two copies of a statement that either:

☐ Identifies any parent corporation and any publicly held corporation that owns 10 percent or more of its stock

☐ Indicates that there is not a parent corporation nor any publicly held corporation that owns 10 percent or more of its stock

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureVenueGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePretrial JudgmentsJudgment on the PleadingsCivil ProcedureSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 12(g)*; *see § 3.20*.

(n2)Footnote 2. *See Fed. R. Civ. P. 12 (h)(1)*; *see also § 3.21*.

(n3)Footnote 3. *Fed. R. Civ. P. 12(g), (h).*

(n4)Footnote 4. *See Fed. R. Civ. P. 12(g), (h).*

(n5)Footnote 5. *Fed. R. Civ. P. 12(g).*

(n6)Footnote 6. *See Things Remembered, Inc. v. Petrarca, 516 U.S. 124 (1995)* ; *see also* §§ 3.50-3.55.

(n7)Footnote 7. *Fed. R. Civ. P. 12(h)(2).*

(n8)Footnote 8. *See Yeldell v. Tutt, 913 F. 2d 533, 538-539 (8th Cir. 1990)* .

(n9)Footnote 9. *Fed. R. Civ. P. 11.*

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1-3 Federal Litigation Guide §§ 3.26 through 3.29

[Reserved]

§§ 3.26[Reserved]

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CHAPTER 3 Rule 12 Motions
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1-3 Federal Litigation Guide § 3.30

§ 3.30 Responding to Motion

[1] Options for Responding to Motion

A party may respond to a Rule 12 motion to dismiss by taking any of the following actions: n1

- Filing and serving opposition papers [*see* [2], *below*]
- Voluntarily dismissing the action [*see* [3], *below*]
- Amending the complaint [*see* [4], *below*]

[2] Filing and Serving Opposition Papers

The Federal Rules of Civil Procedure require opposition papers to be served no later than 7 days before the hearing, unless otherwise permitted by the court. n2

As a general rule, opposition papers are filed with the court at the same time they are served on the other parties. Local rules should be checked for applicable requirements.

[3] Voluntarily Dismissing Action

At any time before an answer is filed or a motion for summary judgment is made, the plaintiff may voluntarily dismiss the action without a court order. In most instances, a voluntary dismissal is ***without prejudice***. However, if the plaintiff has previously dismissed an action based on or including the same claim in any state or federal court, the dismissal is ***with prejudice***. n3

Voluntary dismissal may be used to dismiss an action as to a nondiverse defendant for the purpose of preserving federal diversity jurisdiction, unless the defendant is an indispensable party pursuant to Rule 19. n4

[4] Amending the Complaint

A party may amend its pleading once as a matter of course within: n5

- 21 days after serving it, or
- 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

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersMotionsCivil ProcedureSummary JudgmentOppositionGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 41(a);* see *Fed. R. Civ. P. 15(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 6(c).*

(n3)Footnote 3. *Fed. R. Civ. P. 41(a)(1).*

(n4)Footnote 4. *See, e.g., Rhone-Poulenc Inc. v. International Ins. Co., 71 F.3d 1299, 1306 (7th Cir. 1996).*

(n5)Footnote 5. *Fed. R. Civ. P. 15(a)(1).*

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1-3 Federal Litigation Guide § 3.31

§ 3.31 Requesting Hearing on Motion to Dismiss or Motion for Judgment on the Pleadings

Unless a party requests a hearing, the court may decide a motion to dismiss or for judgment on the pleadings without conducting a hearing. The court also has the discretion to defer the hearing until trial. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedurePretrial JudgmentsJudgment on the Pleadings

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 12(i).*

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CHAPTER 3 Rule 12 Motions
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1-3 Federal Litigation Guide §§ 3.32 through 3.39

[Reserved]

§§ 3.32[Reserved]

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CHAPTER 3 Rule 12 Motions
C. Procedure for Rule 12 Defenses and Objections
3. Considering Appeals

1-3 Federal Litigation Guide § 3.40

§ 3.40 Appealing Ruling on Motions to Dismiss

[1] Order Denying Motion to Dismiss Not Appealable

The denial of a motion to dismiss is considered nonfinal, and is therefore not immediately appealable. n1

[2] Order Dismissing Less Than Entire Action

Ordinarily, an order that dismisses some claims or parties but leaves others in the action is not a final judgment, and is therefore not immediately appealable. n2

However, if the court makes an express determination that there is no just reason for delay, it may direct the entry of a final judgment as to fewer than all claims or parties in the action. In that case, the order of dismissal may be appealed. n3

[3] Order Dismissing Complaint With Leave to Amend

An order dismissing a complaint but granting leave to amend is not final, and is therefore not appealable. n4

However, an order that dismisses a complaint "without prejudice" but does not specifically grant the plaintiff leave to amend is a final order, and may therefore be appealed. n5

If an order dismisses a complaint with leave to amend, the plaintiff may elect to stand on the original complaint rather than file an amended complaint. In that case, the plaintiff may appeal the order dismissing the complaint. n6

A plaintiff who chooses to stand on the complaint should file a written disclaimer of his or her intent to amend. n7

[4] Order Dismissing Complaint Without Prejudice

If the district court dismisses a complaint without specifically granting leave to amend, the order of dismissal is a final order, and therefore appealable. Dismissals "with prejudice" and "without prejudice" are equally appealable.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendCivil ProcedureAppealsAppellate JurisdictionFinal Judgment RuleCivil ProcedureAppealsAppellate JurisdictionInterlocutory Orders

FOOTNOTES:
(n1)Footnote 1. *See, e.g., Hill v. City of New York, 45 F.3d 653, 659 (2d Cir. 1995)* ; *Holloway v. Walker, 765 F.2d 517, 525 (5th Cir. 1985)* ; *Briggs & Stratton Corp. v. Local 232, Int'l Union, Allied Industrial Workers of America (AFL-CIO), 36 F.3d 712, 714 (7th Cir. 1994)* .

(n2)Footnote 2. *Fed. R. Civ. P. 54(b).*

(n3)Footnote 3. *See Fed. R. Civ. P. 54(b).*

(n4)Footnote 4. *WMX Technologies, Inc. v. Miller, 104 F.3d 1133, 1135-1136 (9th Cir. 1997)* ; *Communications Workers of Am. v. American Tel. & Tel. Co., 932 F.2d 199, 204-205 (3d Cir. 1991)* ; *Bastian v. Petren Resources Corp., 892 F.2d 680, 682 (7th Cir. 1990)* .

(n5)Footnote 5. *See, e.g., Quartana v. Utterback, 789 F.2d 1297, 1299-1300 (8th Cir. 1986)* .

(n6)Footnote 6. *Shapiro v. UJB Financial Corp., 964 F.2d 272, 278-279 (3d Cir. 1992)* .

(n7)Footnote 7. *See, e.g., Connecticut Nat'l Bank v. Fluor Corp., 808 F.2d 957, 960-961 (2d Cir. 1987)* ; *Borelli v. City of Reading, 532 F.2d 950, 951 n.1 (3d Cir. 1976).*

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1-3 Federal Litigation Guide §§ 3.41 through 3.49

[Reserved]

§§ 3.41[Reserved]

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CHAPTER 3 Rule 12 Motions
D. Raising Specific Rule 12 Defenses
1. Moving to Dismiss for Lack of Subject Matter Jurisdiction

1-3 Federal Litigation Guide § 3.50

§ 3.50 Raising Lack of Subject Matter Jurisdiction

[1] Defense May Be Raised at Any Time

A party may seek dismissal based on lack of subject matter jurisdiction at any time during the course of trial or appellate proceedings. n1

Because the defense of lack of subject matter jurisdiction challenges the court's statutory or constitutional power to adjudicate the case, it cannot be waived. n2

[2] Defense May Be Raised by Any Party or by Court

Lack of subject matter jurisdiction may be raised by any party to an action. Even a party who sought the benefits of federal court jurisdiction by bringing an action in federal court or removing an action to federal court may subsequently challenge subject matter jurisdiction on appeal. n3

In addition, the court may sua sponte dismiss an action for lack of subject matter jurisdiction, even if the parties themselves neglect to raise the issue. n4

[3] Burden of Proof

If subject matter jurisdiction is challenged in a Rule 12(b)(1) motion, the party asserting subject matter jurisdiction has the burden of proving its existence. n5

This means that if the case was originally filed in federal court, the plaintiff has the burden of proof; if the case was removed from state court, the defendant has the burden of proof. n6

The nature of the burden of proof depends on whether subject matter jurisdiction is attacked on the face of the pleading or through the introduction of extrinsic evidence. n7

If a "facial attack" is made, the court accepts the allegations in the complaint as true, and the party asserting subject matter jurisdiction need not introduce any extrinsic evidence. However, if the truthfulness of the jurisdictional

allegations is attacked, the party alleging subject matter jurisdiction must establish those allegations by a preponderance of the evidence, through the introduction of competent proof. n8

[4] Court Resolves Jurisdictional Issues First

As a general rule, if a pre-answer motion raises several different defenses, including lack of subject matter jurisdiction, the district court should resolve the issue of subject matter jurisdiction first, since without subject matter jurisdiction the court lacks the power to hear the case. For example, if a defendant moves to dismiss a complaint under Rule 12(b)(1) for lack of subject matter jurisdiction and under Rule 12(b)(6) for failure to state a claim upon which relief may be granted, the court will usually consider the Rule 12(b)(1) challenge first. n9

However, in the interest of judicial economy, the court may exercise its discretion and dispose of the case on another ground, in order to avoid a difficult question of subject matter jurisdiction. n10 The Supreme Court has held that a motion to dismiss based on forum non conveniens may be considered prior to resolving challenges based on subject matter jurisdiction. Specifically, the Supreme Court held that courts may dispose of an action by a forum non conveniens dismissal, bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy warrant doing so. n11 If, however, the alternative ground must be decided by reference to state law, the court should consider the issue of subject matter jurisdiction first. n12

However, because jurisdictional facts may be interrelated with the factual merits of the case, the court may postpone a jurisdictional determination until later in the case, even delaying the jurisdictional determination for trial. n12.1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissEvidenceProcedural ConsiderationsBurdens of ProofAllocation

FOOTNOTES:
(n1)Footnote 1. *See Carlisle v. United States, 134 L. Ed. 2d 613 (1996)* (Ginsburg, J., concurring); *O'Brien v. R.J. O'Brien & Assocs., 998 F.2d 1394, 1399 (7th Cir. 1993)* .

(n2)Footnote 2. *See Fed. R. Civ. P. 12(h)(3)*; *see Laughlin v. Kmart Corp., 50 F.3d 871, 873-874 (10th Cir. 1995)* .

(n3)Footnote 3. *See American Fire & Cas. Co. v. Finn, 341 U.S. 6, 16-18 (1951)* .

(n4)Footnote 4. *See Fed. R. Civ. P. 12(h)(3)*; *Things Remembered, Inc. v. Petrarca, 516 U.S. 124 (1995)* (Ginsburg, J., concurring).

(n5)Footnote 5. *Bally Export Corp. v. Balicar, Ltd., 804 F.2d 398, 401 (7th Cir. 1986)* .

(n6)Footnote 6. *United Food & Commercial Workers Union, Local 919 v. Centermark Properties Meriden Square, 30 F.3d 298, 301 (2d Cir. 1994)* .

(n7)Footnote 7. *See* §§ 3.51, 3.52; *see also Garcia v. Copenhaver, Bell & Assocs., M.D.S., 104 F.3d 1256, 1260-1261 (11th Cir. 1997)* ; *Ohio Nat'l Life Ins. Co. v. United States, 922 F.2d 320, 325 (6th Cir. 1990)* ; *Oaxaca v. Roscoe, 641 F.2d 386, 391 (5th Cir. 1981)* .

(n8)Footnote 8. *United Food & Commercial Workers Union, Local 919 v. Centermark Properties Meriden Square, 30 F.3d 298, 305 (2d Cir. 1994)* .

(n9)Footnote 9. *See Bell v. Hood, 327 U.S. 678, 682-683 (1946).*

(n10)Footnote 10. *See Alpine View Co. v. Atlas Copco AB, 205 F.3d 208 (5th Cir. 2000)* (district court did not abuse its discretion in determining a motion to dismiss on personal jurisdiction grounds before considering motions to dismiss based on subject matter jurisdiction, when this order was supported by reasons of judicial economy).

(n11)Footnote 11. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 127 S. Ct. 1184, 1192, 167 L. Ed. 2d 15 (2007)* .

(n12)Footnote 12. *Cantor Fitzgerald, L.P. v. Peaslee, 88 F.3d 152, 155 (2d Cir. 1996)* .

(n13)Footnote 12.1. *See Valentin v. Hospital Bella Vista, 254 F.3d 358, 364 n.3 (1st Cir. 2001)* .

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1-3 Federal Litigation Guide § 3.51

§ 3.51 Attacking Subject Matter Jurisdiction on Face of Pleading

[1] Facial Attack Challenges Sufficiency of Allegations of Pleading

The defendant may make a "facial attack" on subject matter jurisdiction by challenging the sufficiency of the pleading to allege subject matter jurisdiction. n1

[2] Plaintiff's Allegations Accepted as True

In a facial attack, the defendant does not challenge the accuracy of the facts as alleged, and does not introduce extrinsic evidence to challenge jurisdiction. When a facial attack on jurisdiction is made, the trial court examines the complaint to determine if the party asserting jurisdiction has sufficiently alleged a basis for federal jurisdiction. The court must accept the allegations in the complaint as true, and must construe them most favorably to the plaintiff. n2

[3] Court May Consider Undisputed Facts in Record

Even if the complaint is facially defective, the court may regard the complaint as satisfactorily amended if undisputed facts in the record as a whole establish the existence of federal jurisdiction. n3

[4] Responding to Facial Attack by Amending Complaint

If the defendant makes a Rule 12(b)(1) motion to dismiss based on the insufficiency of the complaint, the plaintiff may amend the complaint as a matter of course to cure the defect within 21 days of service of the motion. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See Fed. R. Civ. P. 8(a)*; *Cummings v. United States, 648 F.2d 289, 291 (5th Cir. 1981)* .

(n2)Footnote 2. *Scheuer v. Rhodes, 416 U.S. 232, 236, 71 Ohio Op. 2d 474 (1974)* .

(n3)Footnote 3. *See Baer v. United Servs. Auto Association, 503 F.2d 393, 397 (2d Cir. 1974)*.

(n4)Footnote 4. *See Fed. R. Civ. P. 15(a)(1)(B)*.

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CHAPTER 3 Rule 12 Motions
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1-3 Federal Litigation Guide § 3.52

§ 3.52 Attacking Subject Matter Jurisdiction Based on Facts

[1] Using Extrinsic Evidence to Attack Jurisdiction

In a "factual attack" on the court's subject matter jurisdiction, the defendant attacks the accuracy of the jurisdictional facts asserted in the complaint through the introduction of extrinsic evidence. For example, if federal jurisdiction is based on diversity, the defendant may challenge diversity of citizenship by presenting extrinsic evidence showing that, contrary to the plaintiff's allegations, there is not complete diversity.

If a factual attack is made, the court does not presume that the allegations of the complaint are true. Instead, the court may look beyond the complaint and inquire into the facts as they exist. n1

[2] Evidence Considered in Deciding Motion

The court has discretion to allow affidavits, documents, and even a limited evidentiary hearing to resolve disputed jurisdictional facts. n2

[3] Introduction of Extrinsic Evidence Does Not Convert Motion

A Rule 12(b)(1) motion, unlike a Rule 12(b)(6) motion to dismiss for failure to state a claim, is not converted to a Rule 56 motion for summary judgment when evidentiary matters outside the pleadings are submitted. n3

However, when issues of fact are central both to subject matter jurisdiction and the claims on the merits, the trial court must assume jurisdiction and proceed to the merits. The court should deal with the objection to jurisdiction as an attack on the merits--that is, as a Rule 12(b)(6) motion to dismiss for failure to state a claim or as a motion for summary judgment. n4

The distinction between an attack on subject matter jurisdiction and an attack on the merits of the claim is critical, and sometimes the distinction is a fine one. For instance, the issue of whether an employer may be properly sued for sexual harassment under Title VII of the 1964 Civil Rights Act, which requires the employer to have at least 15 employees, has been deemed by the United States Supreme Court as an attack on the merits when, after judgment, the employer first raised the issue that it had fewer than 15 employees. n5

[4] Seeking Discovery

Either party may request discovery when subject matter jurisdiction is factually attacked. The court may permit the party asserting jurisdiction to engage in limited discovery if the facts demonstrating jurisdiction are within the other party's control. n6

Similarly, the party moving for dismissal may seek discovery if it is needed to controvert facts in the opposing party's affidavits. n7 The district court has broad discretion whether to allow discovery concerning jurisdiction in connection with a motion to dismiss. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedureDismissalsInvoluntary DismissalsFailures to State ClaimsCivil ProcedureSummary JudgmentSupporting MaterialsAffidavits

FOOTNOTES:
(n1)Footnote 1. *McCann v. Newman Irrevocable Trust, 458 F.3d 281, 290-291 (3d Cir. 2006)* ; *Luckett v. Bure, 290 F.3d 493, 496-497 (2d Cir. 2002)* .

(n2)Footnote 2. *Daniel v. Ferguson, 839 F.2d 1124, 1127 n.5 (5th Cir. 1988)* .

(n3)Footnote 3. *See Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004)* ; *Kamen v. American Tel. & Tel. Co., 791 F.2d 1006, 1010-1011 (2d Cir. 1986)* ; *Crawford v. United States, 796 F.2d 924, 927 (7th Cir. 1986)* .

(n4)Footnote 4. *See Gentek Building Prods., Inc. v. Sherwin-Williams Co., 491 F.3d 320, 330 (6th Cir. 2007)* ; *Montez v. Department of the Navy, 392 F.3d 147, 149-151 (5th Cir. 2004)* .

(n5)Footnote 5. *See Arbaugh v. Y&H Corp., 546 U.S. 500, 515-516, 126 S. Ct. 1235, 163 L. Ed. 2d 1097, 1110 (2006)* .

(n6)Footnote 6. *See, e.g., Kamen v. American Tel. & Tel. Co., 791 F.2d 1006, 1011 (2d Cir. 1986)* ; *Dew v. Illinois Cent. Gulf R.R. Co., 621 F. Supp. 153, 154 (S.D. Miss. 1985).*

(n7)Footnote 7. *See, e.g., Exchange National Bank of Chicago v. Touche Ross & Co., 544 F.2d 1126, 1131 (2d Cir. 1976)* .

(n8)Footnote 8. *See Freeman v. United States, 556 F.3d 326, 341-343 (5th Cir. 2009)* .

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CHAPTER 3 Rule 12 Motions
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1. Moving to Dismiss for Lack of Subject Matter Jurisdiction

1-3 Federal Litigation Guide § 3.53

§ 3.53 Challenging Jurisdiction Based on Amount in Controversy

[1] Basis for Challenge

The amount at issue in a diversity case must exceed $75,000. n1

Diversity jurisdiction may be challenged on the ground that the amount in controversy falls below the minimum jurisdictional amount for bringing suit in federal court. n2

[2] Determining Amount in Controversy

The amount in controversy is determined from the complaint itself. n3 Even if recovery of the jurisdictional minimum appears extremely unlikely from the allegations of the complaint, the court may not dismiss for lack of subject matter jurisdiction unless it appears "to a legal certainty" that the plaintiff will be unable to recover the jurisdictional minimum. n4

The amount in controversy is determined as of the time the plaintiff commenced the action. n5

An event that occurs after the suit is brought that reduces the plaintiff's potential recovery below the statutory minimum does not affect jurisdiction. n6

If the plaintiff discovers after commencing the action that he or she was mistaken as to the amount in controversy, and that the true amount is actually below the jurisdictional minimum, the court will be divested of jurisdiction to determine the claim. n7

Because the amount at issue is determined on the face of the complaint, a valid defense on the merits does not deprive the court of jurisdiction. n8 For example, in a diversity case in which the plaintiff alleged damages exceeding the jurisdictional minimum, the fact that the defendant's liability was limited by statute to an amount below the jurisdictional minimum did not deprive the federal court of jurisdiction. n9

The fact that the plaintiff is ultimately unable to recover at least the jurisdictional minimum does not divest the court of subject matter jurisdiction. In other words, a defendant may not argue on appeal that the court lacked diversity

jurisdiction based on the plaintiff's failure to recover the jurisdictional amount at trial. n10

[3] Burden of Proof

Once challenged, the party asserting subject matter jurisdiction has the burden of proving its existence. n10.1 If the party's allegations concerning the amount in controversy are challenged, the party must support those allegations with competent proof, and must establish to a "reasonable probability" that the claim is for more than the jurisdictional minimum. n11 A party meets its burden if it made its claim in apparent good faith. The party may establish its good faith belief by reference to the pleadings and to any relevant facts adduced in discovery. n12

Before determining that the plaintiff has not met the amount in controversy requirement, the court must afford the plaintiff a reasonable opportunity to demonstrate its good faith in believing that a recovery exceeding the statutory minimum was reasonably possible at the time the action was filed. n13

[4] Factors Considered by Court in Determining Whether to Dismiss Case Based on Amount in Controversy

In deciding whether to dismiss a case based on the amount in controversy, the court looks at two factors:

- Whether the plaintiff's allegations of damages were made in good faith, and not as a ruse to obtain federal jurisdiction n14

- Whether the legal impossibility of recovery is so certain from the face of the complaint or from the proofs "as to virtually negate the plaintiff's good faith in asserting the claim" n15

The court may ascertain a plaintiff's good faith by reference to the pleadings and to any facts adduced in discovery. n16 If the right of recovery is uncertain, the court must resolve all doubts in favor of the good faith of the plaintiff. n17 Even if the plaintiff acted in subjective good faith, the court will dismiss for lack of subject matter jurisdiction if it is certain that recovery of the jurisdictional minimum is legally impossible. n18

The court's inquiry depends on the stage of the proceedings at which the motion is decided, and whether the challenge to jurisdiction is facial or factual. If the motion is decided on the basis of the pleadings, the court must dismiss the suit if it appears to a legal certainty from the face of the pleadings that the plaintiff cannot recover the jurisdictional minimum. If the motion is decided after evidence has been admitted, dismissal is mandated if it appears to a legal certainty from the evidence that the plaintiff was never entitled to recover the jurisdictional amount and never had a colorable claim for the purpose of conferring jurisdiction. n19

If the damages sought are uncertain, the court must resolve doubts in favor of the plaintiff's pleadings, regardless of which party invoked federal court jurisdiction. However, if the pleadings are inconclusive as to the amount in controversy, the court may look outside the pleadings to other evidence in the record. n20

If the plaintiff seeks unliquidated damages in a tort action, the court should not predetermine whether the plaintiff could recover the jurisdictional minimum, but should instead permit the action to proceed. n21

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyDeterminationsCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionAmount in ControversyCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

FOOTNOTES:

(n1)Footnote 1. *28 U.S.C. § 1332(a).*

(n2)Footnote 2. *See Horton v. Liberty Mut. Ins. Co., 367 U.S. 348, 353 (1961)* ; *28 U.S.C. § 1332(a)(1).*

(n3)Footnote 3. *St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-289 (1938) .*

(n4)Footnote 4. *Pratt Cent. Park Ltd. Partnership v. Dames & Moore, Inc., 60 F.3d 350, 351 (7th Cir. 1995) .*

(n5)Footnote 5. *Gould v. Artisoft, Inc., 1 F.3d 544, 547 (7th Cir. 1993) .*

(n6)Footnote 6. *St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 290 (1938) .*

(n7)Footnote 7. *Tongkook Am., Inc. v. Shipton Sportswear Co., 14 F.3d 781, 785-786 (2d Cir. 1994) .*

(n8)Footnote 8. *Work v. U.S. Trade, Inc., 747 F. Supp. 1184, 1186 (E.D. Va. 1990)* (*citing Smithers v. Smith, 204 U.S. 632, 642 (1907)*).

(n9)Footnote 9. *Ochoa v. Interbrew Am., Inc., 999 F.2d 626, 629 (2d Cir. 1993) .*

(n10)Footnote 10. *St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289 (1938) .*

(n11)Footnote 10.1. *See Boudreau v. United States, 53 F.3d 81, 82 (5th Cir. 1995) .*

(n12)Footnote 11. *Columbia Gas Transmission Corp. v. Tarbuck, 62 F.3d 538, 541 (3d Cir. 1995) .*

(n13)Footnote 12. *Chase Manhattan Bank, N.A. v. American Nat'l Bank & Trust Co., 93 F.3d 1064, 1070 (2d Cir. 1996) .*

(n14)Footnote 13. *Chase Manhattan Bank, N.A. v. American Nat'l Bank & Trust Co., 93 F.3d 1064, 1070 (2d Cir. 1996) .*

(n15)Footnote 14. *See St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289, 58 S. Ct. 586, 82 L. Ed. 845 (1938) .*

(n16)Footnote 15. *Pachinger v. MGM Grand Hotel-Las Vegas, Inc., 802 F.2d 362, 364 (9th Cir. 1986) .*

(n17)Footnote 16. *See Chase Manhattan Bank, N.A. v. American Nat'l Bank & Trust Co., 93 F.3d 1064, 1070 (2d Cir. 1996) .*

(n18)Footnote 17. *See, e.g., Shaw v. Dow Brands, Inc., 994 F.2d 364, 366 (7th Cir. 1993) .*

(n19)Footnote 18. *Pratt Cent. Park Ltd. v. Dames & Moore, 60 F.3d 350, 353 (7th Cir. 1995) .*

(n20)Footnote 19. *Tongkook Am., Inc. v. Shipton Sportswear Co., 14 F.3d 781, 785 (2d Cir. 1994).*

(n21)Footnote 20. *See Giangrande v. Shearson Lehman/E.F. Hutton, 803 F. Supp. 464, 467 (D. Mass. 1992) .*

(n22)Footnote 21. *See Deutsch v. Hewes St. Realty Corp., 359 F.2d 96, 99-100 (2d Cir. 1966) .*

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CHAPTER 3 Rule 12 Motions
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1-3 Federal Litigation Guide § 3.54

§ 3.54 Challenging Diversity of Citizenship

[1] Court May Consider Unpleaded Bases for Federal Jurisdiction

Even if subject matter jurisdiction cannot be sustained on the grounds pleaded in the complaint, the court must examine the complaint to determine if it may assume jurisdiction on other grounds. The court must explore any possible basis for jurisdiction, irrespective of whether it has been pleaded by the parties. n1

[2] Court May Dismiss Nondiverse Parties

A court may drop a party by order of the court on motion by any party, or on its own initiative, at any stage of the action and on any terms that are just. n1.1 Accordingly, rather than dismiss an action because of lack of complete diversity, the court has the discretion to dismiss the party whose presence prevents diversity jurisdiction. The court may dismiss a non-diverse party at any stage of the proceedings, including appeal, unless there has been a reasoned determination that their nonjoinder makes a just resolution of the action impossible. In making this determination, the court must apply the "equity and good conscience" test of Rule 19(b). n2

If diversity jurisdiction is attacked for the first time on appeal, the equities in favor of preserving the fully litigated judgment are strong, and the court should be more reluctant to dismiss the action than it would be at an earlier stage of the proceedings. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

FOOTNOTES:
(n1)Footnote 1. *Curley v. Brignoli, Curley & Roberts Assocs., 915 F.2d 81, 85 (2d Cir. 1990)* .

(n2)Footnote 1.1. *Fed. R. Civ. P. 21.*

(n3)Footnote 2. *Universal Reinsurance Co. v. St. Paul Fire &Marine Ins. Co., 312 F.3d 82, 87-89 (2d Cir. 2002)* ; *see also Fed. R. Civ. P. 19(b), 21.*

(n4)Footnote 3. *See Sweeney v. Westvaco Co., 926 F.2d 29, 41 (1st Cir. 1991).*

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CHAPTER 3 Rule 12 Motions
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1-3 Federal Litigation Guide § 3.55

§ 3.55 Attacking Federal Question Jurisdiction

[1] Basis of Jurisdiction

Federal district courts have jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. n1

[2] Jurisdiction Exists If Federal Question Claim Not Frivolous

Challenges to subject matter jurisdiction on the grounds that the complaint fails to state a federal question rarely succeed unless either:

- On its face, the complaint does not seek recovery under a federal statute or the federal Constitution. n2

- The federal question claim is obviously without merit or wholly frivolous. n3 The district court may assume jurisdiction even if the federal question claim is "somewhat marginal." n4

Otherwise, the court must assume jurisdiction, despite the possibility that the complaint may fail to state a cause of action on which the plaintiff could actually recover. n5

[3] Challenge Treated as Motion to Dismiss on Merits

If the complaint seeks recovery under a federal statute or the Constitution, the court should not dismiss the complaint for lack of subject matter jurisdiction even if it believes that it would dismiss the complaint for failure to state a claim. n6 Instead, the court should deal with the objection to subject matter jurisdiction as a direct attack on the merits of the plaintiff's case, and should examine the merits pursuant to Rule 12(b)(6). n7

Whether the court labels its action as a dismissal for lack of subject matter jurisdiction or a dismissal for failure to state a claim is significant in some cases. There are two important differences between a Rule 12(b)(1) dismissal and a Rule 12(b)(6) dismissal that may impact the disposition of a case: n8

- **Res judicata effect.** Unlike a dismissal for failure to state a claim, a Rule 12(b)(1) dismissal for lack of subject matter jurisdiction does not have a res judicata effect.

- **Supplemental jurisdiction.** A Rule 12(b)(1) dismissal precludes a district court from exercising supplemental jurisdiction. By contrast, once the court has assumed jurisdiction, a Rule 12(b)(6) dismissal of the sole federal claim does not prevent the federal court from exercising jurisdiction over the remaining state claims.

[4] Effect of Dismissal

A dismissal for lack of subject matter jurisdiction is without prejudice, because it is not based on the merits of the claim. Such a dismissal has no claim preclusive or res judicata effect. n9

A court must have original jurisdiction in order to exercise supplemental jurisdiction over related state claims. Therefore, a Rule 12(b)(1) dismissal precludes a district court from exercising supplemental jurisdiction. n10

If the court determines that it lacks subject matter jurisdiction, it may not transfer the action to a court that has subject matter jurisdiction. Instead, it must dismiss the action. n11 The sole exception to this rule is if a federal statute vests exclusive jurisdiction over the action in another federal court, such as the Court of Claims, in which instance the court may transfer the case to the appropriate court. n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedureDismissalsInvoluntary DismissalsFailures to State ClaimsCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes Judicata

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1331.*

(n2)Footnote 2. *Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1188-1189 (2d Cir. 1996) .*

(n3)Footnote 3. *Bell v. Hood, 327 U.S. 678, 682-683, 66 S. Ct. 773, 90 L. Ed. 939 (1946)* ; *Nicodemus v. Union Pac. Corp., 440 F.3d 1227, 1236 (10th Cir. 2006) .*

(n4)Footnote 4. *Hagans v. Lavine, 415 U.S. 528, 537, 94 S. Ct. 1372, 39 L. Ed. 2d 577 (1974) .*

(n5)Footnote 5. *Bell v. Hood, 327 U.S. 678, 681-682 (1946) .*

(n6)Footnote 6. *Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1187-1189 (2d Cir. 1996) .*

(n7)Footnote 7. *Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1187-1189 (2d Cir. 1996) .*

(n8)Footnote 8. *Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1188 (2d Cir. 1996) .*

(n9)Footnote 9. *Thompson v. County of Franklin, 15 F.3d 245, 253 (2d Cir. 1994) .*

(n10)Footnote 10. *See Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1188 (2d Cir. 1996) .*

(n11)Footnote 11. *See Levitt v. Maryland Deposit Ins. Fund Corp., 643 F. Supp. 1485, 1489 n.3 (E.D.N.Y. 1986) .*

(n12)Footnote 12. *See 28 U.S.C. § 1631.*

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CHAPTER 3 Rule 12 Motions
D. Raising Specific Rule 12 Defenses
1. Moving to Dismiss for Lack of Subject Matter Jurisdiction

1-3 Federal Litigation Guide §§ 3.56 through 3.59

[Reserved]

§§ 3.56[Reserved]

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CHAPTER 3 Rule 12 Motions
D. Raising Specific Rule 12 Defenses
2. Moving to Dismiss for Lack of Personal Jurisdiction

1-3 Federal Litigation Guide § 3.60

§ 3.60 Raising Defense of Lack of Personal Jurisdiction

[1] Challenging Substantive Basis for Personal Jurisdiction

A Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction challenges the court's substantive authority to exercise jurisdiction over a nonresident defendant, rather than the sufficiency of process or service of process. In other words, this motion is used to challenge the court's assertion of long-arm jurisdiction over a nonresident defendant, based on statutory law, and constitutional principles of due process. n1

A motion to dismiss for insufficiency of process is brought under Rule 12(b)(4); a motion to dismiss for insufficiency of service of process is brought under Rule 12(b)(5). n2

[2] Methods of Challenging Personal Jurisdiction

There are three methods for challenging personal jurisdiction:

- **Filing Rule 12(b)(2) motion to dismiss.** The defendant may attack the court's exercise of personal jurisdiction by filing a Rule 12(b)(2) pre-answer motion to dismiss.

- **Raising defense in answer.** If the defendant does not file a pre-answer Rule 12(b) motion, the defendant may include an objection to personal jurisdiction in its answer or an answer amended as a matter of course. However, the defendant may not raise the objection in the answer if the defendant has already filed a Rule 12 motion on other grounds. n3

- **Collaterally attacking default judgment.** A defendant may decide not to appear in the action, allow the plaintiff to obtain a judgment by default, and then collaterally attack the default judgment for lack of jurisdiction. n4 However, if a default is taken, a finding that the court in the original action did have personal jurisdiction over the defendant will preclude any further litigation on the merits. As a result, the defendant will be faced with a final enforceable judgment without ever having had an opportunity to present relevant defenses or appropriate counterclaims.

[3] Combining Motion With Motion to Transfer Venue

A motion to dismiss for lack of personal jurisdiction may be combined with an alternative and less drastic motion to transfer venue. n5 Presenting both motions simultaneously gives the court a choice of options, which increases the likelihood that at least one motion will be granted.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsConstitutional LimitsCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsChallengesCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

FOOTNOTES:
(n1)Footnote 1. *Santos v. State Farm Fire & Cas. Co., 902 F.2d 1092, 1095 (2d Cir. 1990)* .

(n2)Footnote 2. *See Chilicky v. Schweiker, 796 F.2d 1131, 1136 (9th Cir. 1986)* , *rev'd on other grounds*, *487 U.S. 412 (1988)* .

(n3)Footnote 3. *Fed. R. Civ. P. 12(g), (h)(1)*; *see § 3.13*.

(n4)Footnote 4. *See Insurance Corp. of Ireland v. Compagnie de Bauxites, 456 U.S. 694, 706, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982)* .

(n5)Footnote 5. *See 28 U.S.C. §§ 1404(a), 1406(a).*

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CHAPTER 3 Rule 12 Motions
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1-3 Federal Litigation Guide § 3.61

§ 3.61 Waiving Defense of Lack of Personal Jurisdiction

[1] Failing to Assert Defense in Rule 12 Motion or Answer

A defendant waives any objection to the court's exercise of personal jurisdiction if the defendant makes a Rule 12 pre-answer motion, and omits the defense from the motion. A defendant who does not make such a motion must assert the defense in the answer or answer amended as a matter of course. n1 A defendant who alleges lack of personal jurisdiction in a timely answer does not waive the defense by asserting permissive counterclaims in the same pleading. n2 A defendant may not raise the defense of lack of personal jurisdiction for the first time in an amendment that requires leave of court. n3

A delay in challenging personal jurisdiction by motion to dismiss may result in waiver even when the defense was asserted in a timely manner. In one case, the court of appeals ruled that the defendant forfeited its defense of lack of personal jurisdiction by participating in extensive pretrial proceedings and forgoing numerous opportunities to move to dismiss for lack of jurisdiction during the four-year interval that followed its inclusion of the defense in the answer. n4

[2] Failing to Raise Defense in Motion for Change of Venue

A defendant may also waive any objection to personal jurisdiction by moving for a change of venue based on forum non conveniens without simultaneously moving for dismissal for lack of personal jurisdiction. Waiver will be found if the facts underlying the motion for change of venue are the same as the facts that form the basis for the claim of lack of personal jurisdiction. Moreover, a motion for change of venue presupposes initial proper jurisdiction in the transferor court. n5

[3] Failing to Pursue Defense Raised in Answer

Even if the defense of lack of personal jurisdiction is properly raised in the answer, it may be waived if the defendant does not press the issue in a timely fashion. Defenses referred to in Rule 12(h)(1), including lack of personal jurisdiction, may be waived by expressly submitting to a court's jurisdiction, or by submission through conduct. n6 Similarly, while asserting a counterclaim in the answer does not result in waiver of the jurisdictional defense, n7 seeking affirmative relief on a counterclaim prior to pressing the jurisdictional challenge will waive personal jurisdiction.

[4] Engaging in Discovery

A defendant who engages in extensive discovery addressed to the merits of the case may be found to have waived any objection to personal jurisdiction. Agreeing to a pretrial discovery schedule and participating in extensive discovery is inconsistent with a defense of lack of personal jurisdiction. Instead, if the answer raises lack of personal jurisdiction, the proper course is to engage in limited discovery on jurisdictional issues. n8

[5] Consenting to Forum Selection Clause

By consenting to a forum selection clause, a party waives its right to object to personal jurisdiction in the designated forum. n9

[6] Removing Case to Federal Court Does Not Waive Defense

Removing a case to federal court does not waive a defense of lack of personal jurisdiction. n10

[7] Plaintiff Automatically Waives Personal Jurisdiction Objection to Counterclaims

By virtue of bringing suit, the plaintiff waives any personal jurisdiction objections to a defendant's counterclaims. The plaintiff is deemed to have voluntarily submitted to the court's jurisdiction for all purposes. n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsConstitutional LimitsCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsChallengesCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 12(g), (h)(1)*; *see also Uffner v. La Reunion Francaise, S.A., 244 F.3d 38, 40-41 (1st Cir. 2001)* .

(n2)Footnote 2. *See Rates Tech., Inc. v Nortel Networks Corp., 399 F.3d 1302, 1307-1309 (Fed. Cir. 2005)* .

(n3)Footnote 3. *See Fed. R. Civ. P. 12(h)(1).*

(n4)Footnote 4. *Hamilton v. Atlas Turner, Inc., 197 F.3d 58, 60 (2d Cir. 1999)* .

(n5)Footnote 5. *Sangdahl v. Litton, 69 F.R.D. 641, 642-643 (S.D.N.Y. 1976)* .

(n6)Footnote 6. *See Hamilton v. Atlas Turner, Inc., 197 F.3d 58, 60 (2d Cir. 1999)* .

(n7)Footnote 7. *See Rates Tech. Inc. v Nortel Networks Corp., 399 F.3d 1302, 1307-1309 (Fed. Cir. 2005)* .

(n8)Footnote 8. *See Burton v. Northern Dutchess Hosp., 106 F.R.D. 477, 481 (S.D.N.Y. 1985)* ; *cf. Classic Motel, Inc. v. Purchasing Group Corp., 149 F.R.D. 528, 533 (S.D. Miss. 1993)* (defendant did not waive personal jurisdiction defense even though he waited two years to bring motion to dismiss, and during those two years participated in written discovery, deposed plaintiff and an expert, and brought motion for summary judgment); *Wilson v. Kuwahara Co., Ltd., 717 F. Supp 525, 527-528 (W.D. Mich. 1989)* (discovery activity not substantial enough to constitute waiver).

(n9)Footnote 9. *See, e.g., Monesson v. National Equip. Rental, Ltd., 594 S.W.2d 780, 781 (Tex. Ct. App. 1980).*

(n10)Footnote 10. *Cantor Fitzgerald L.P. v. Peaslee, 88 F.3d 152, 157 n.4 (2d Cir. 1996).*

(n11)Footnote 11. *Adam v. Saenger, 303 U.S. 59, 67-68 (1938).*

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CHAPTER 3 Rule 12 Motions
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1-3 Federal Litigation Guide § 3.62

§ 3.62 Submitting Evidence Outside Pleadings

The parties may submit evidence outside of the pleadings for the court's consideration on a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction. n1

Unlike a Rule 12(b)(6) motion, a Rule 12(b)(2) motion is not converted into a motion for summary judgment if the court considers extrinsic materials in deciding the motion. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsConstitutional LimitsCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

FOOTNOTES:
(n1)Footnote 1. *Moran v. Kingdom of Saudi Arabia, 27 F.3d 169, 171-172 (5th Cir. 1994).*

(n2)Footnote 2. *Pilates, Inc. v. Pilates Inst., Inc., 891 F. Supp. 175, 178 n.2 (S.D.N.Y. 1995) .*

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CHAPTER 3 Rule 12 Motions
D. Raising Specific Rule 12 Defenses
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1-3 Federal Litigation Guide § 3.63

§ 3.63 Burden of Proof

[1] Plaintiff Has Burden of Proof

If personal jurisdiction is challenged, the plaintiff has the burden of proving personal jurisdiction over the defendant. n1

[2] Showing Required Depends on Procedure

The showing that the plaintiff must make to meet its burden of proof depends on whether the lack of personal jurisdiction is presented by a Rule 12(b)(2) motion to dismiss, or is raised in the answer and presented by a Rule 56 motion for summary judgment. n2

If the defense is presented by a Rule 12(b)(2) motion to dismiss, the burden of proof also depends on whether discovery has been conducted, and if so, whether an evidentiary hearing has been held. n3

[3] When Motion Decided Before Discovery Is Conducted

If the court decides the motion before discovery is conducted and relies solely on pleadings and affidavits, the plaintiff need only make a prima facie showing that the court has personal jurisdiction over the defendant. The plaintiff makes a prima facie showing if the allegations, construed in the light most favorable to the plaintiff, are legally sufficient to establish personal jurisdiction. n4

[4] When Motion Decided After Discovery, But Without Evidentiary Hearing

If the court decides a Rule 12(b)(2) motion without an evidentiary hearing after discovery has been conducted, the plaintiff still need only make a prima facie showing. However, the plaintiff may not rely solely on the allegations in the complaint. Instead, the plaintiff's prima facie showing must include an averment of facts that if credited by the trier would be sufficient to establish jurisdiction over the defendant. n5

The requirement that a plaintiff need only make a prima facie showing prior to an evidentiary hearing on the issue of personal jurisdiction is not affected by a controverting presentation by the moving party. n6

[5] Effect of Challenge by Defendant

If the court rules on a Rule 12(b)(2) motion without conducting an evidentiary hearing, the plaintiff will be found to have met his or her burden of proof even if the defendant contests the plaintiff's allegations or averments of fact. n7

However, if the defendant contests the plaintiff's prima facie showing, the plaintiff will eventually be required to establish personal jurisdiction by a preponderance of the evidence, either at an evidentiary hearing or at trial. n8

[6] When Motion Decided After Evidentiary Hearing

If the court conducts a full evidentiary hearing on the motion, or if the motion is decided at trial, the plaintiff must establish personal jurisdiction by a preponderance of the evidence. Until such a hearing is held, a prima facie showing suffices, notwithstanding any controverting presentation by the moving party to defeat the motion. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissEvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofAllocation

FOOTNOTES:
(n1)Footnote 1. *D'Jamoos v. Pilatus Aircraft Ltd., 566 F.3d 94, 102 (3d Cir. 2009)* ; *Negron-Torres v. Verizon Commc'ns, Inc., 478 F.3d 19, 23 (1st Cir. 2007)* ; *Dever v. Hentzen Coatings, Inc., 380 F.3d 1070, 1072 (8th Cir. 2004)* .

(n2)Footnote 2. *See Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 197 (2d Cir. 1990)* .

(n3)Footnote 3. *See Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 197 (2d Cir. 1990)* .

(n4)Footnote 4. *TH Agric. & Nutrition, LLC v. Ace European Group Ltd., 488 F.3d 1282, 1286 (10th Cir. 2007)* ; *Northern Laminate Sales, Inc. v. Davis, 403 F.3d 14, 22-24 (1st Cir. 2005)* .

(n5)Footnote 5. *Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 197 (2d Cir. 1990)* .

(n6)Footnote 6. *Hoffritz for Cutlery, Inc. v. Amajac, Ltd., 763 F.2d 55, 57 (2d Cir. 1985)*.

(n7)Footnote 7. *Marine Midland Bank, N.A. v. Miller, 664 F.2d 899, 904 (2d Cir. 1981*).

(n8)Footnote 8. *See Rice v. Nova Biomedical Corp., 38 F.3d 909, 915 (7th Cir. 1994)*. .

(n9)Footnote 9. *PDK Labs, Inc. v. Friedlander, 103 F.3d 1105, 1108 (2d Cir. 1997)*.

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CHAPTER 3 Rule 12 Motions
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1-3 Federal Litigation Guide § 3.64

§ 3.64 Requesting Discovery on Jurisdictional Issues

[1] Court Has Discretion to Permit Discovery

The district court may allow a party asserting jurisdiction to conduct discovery to help establish the jurisdictional facts. n1 Whether discovery is allowed, and the scope of the discovery permitted, is within the court's discretion. n2

As a general rule, to be permitted jurisdictional discovery, the plaintiff must at least allege facts that would support a colorable claim of jurisdiction. n3

[2] Disputed Factual Allegations

If the defendant disputes the plaintiff's factual allegations, thereby requiring the plaintiff to prove jurisdiction by a preponderance of the evidence, the court should allow discovery. n4 Such discovery should be limited to the facts necessary to establish personal jurisdiction. n5

[3] Jurisdictional Facts and Merits Entwined

If the jurisdictional facts and questions of liability are entwined, and jurisdictional discovery and general discovery on the merits will overlap, the court should defer determination of the jurisdictional issue until after all discovery is completed. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedureDiscoveryGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See In re Magnetic Audiotape Antitrust Litigation, 334 F.3d 204, 207-208 (2d Cir. 2003)* .

(n2)Footnote 2. *See Moran v. Kingdom of Saudi Arabia, 27 F.3d 169, 172 (5th Cir. 1994)* .

(n3)Footnote 3. *See Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 455-458 (3d Cir. 2003*).

(n4)Footnote 4. *See, e.g., Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 713 (9th Cir. 1992)* .

(n5)Footnote 5. *See, e.g., Butcher's Union Local No. 498 v. SDC Inv., Inc., 788 F.2d 535, 540 (9th Cir. 1986)*.

(n6)Footnote 6. *See Kinetic Instruments, Inc. v. Lares, 802 F. Supp. 976, 988-989 (S.D.N.Y. 1992)* .

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1-3 Federal Litigation Guide § 3.65

§ 3.65 Challenge to Personal Jurisdiction Decided Before Challenge to Venue

If a Rule 12(b) motion challenges both personal jurisdiction and venue, the court typically decides the personal jurisdiction issue first. However, a court may decide the issue of venue first if there is a "sound prudential justification for doing so." n1

For example, if the challenge to personal jurisdiction raises a novel constitutional issue, and the issue of venue can be easily decided, the court should decide the venue question first. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureVenueGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

FOOTNOTES:
(n1)Footnote 1. *Leroy v. Great W. United Corp., 443 U.S. 173, 180 (1979)* .

(n2)Footnote 2. *Leroy v. Great Western United Corp., 443 U.S. 173, 180-181 (1979)* .

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1-3 Federal Litigation Guide § 3.66

§ 3.66 Court's Action on Motion to Dismiss for Lack of Personal Jurisdiction

[1] Denial of Motion to Dismiss

If the court denies a motion to dismiss for lack of personal jurisdiction, it will generally do so without prejudice to renewing the motion after discovery. n1

Denial of a motion to dismiss is not a final judgment. Consequently, a defendant may not take an interlocutory appeal from such a judgment. n2

[2] Dismissal Not Decision on Merits

A dismissal for lack of personal jurisdiction is not a decision on the merits. Consequently, after such a dismissal the plaintiff may bring the suit anew in another jurisdiction or under circumstances supporting jurisdiction. n3

[3] Court May Transfer Rather Than Dismiss Action

Instead of dismissing an action when it lacks personal jurisdiction, it is common for a court to transfer the action to the appropriate federal court. A court has the power to transfer an action even if it lacks personal jurisdiction over the defendants, if a dismissal would unjustly deny the plaintiff an adjudication on the merits of his or her claim. n4

A court may transfer an action without first determining whether it has personal jurisdiction over the defendant, if the balance of conveniences is in favor of the transferee jurisdiction. n5

The district court may *sua sponte* transfer an in the interest of justice. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedureAppealsAppellate JurisdictionInterlocutory Orders

FOOTNOTES:

(n1)Footnote 1. *See, e.g., Air-Flo M.G. Co., Inc. v. Louis Berkman Co., 933 F. Supp. 229, 234 (W.D.N.Y. 1996)* .

(n2)Footnote 2. *See Papilsky v. Berndt, 503 F.2d 554 (2d Cir. 1974)* .

(n3)Footnote 3. *Baris v. Sulpicio Lines, Inc., 74 F.3d 567, 571 (5th Cir. 1996)* .

(n4)Footnote 4. *28 U.S.C. § 1406*; *see also Schenck v. Walt Disney Co., 742 F. Supp. 838, 843 (S.D.N.Y. 1990)* .

(n5)Footnote 5. *See 28 U.S.C. § 1404(a)*; *Volk Corp. v. Art-Pak Clip Art Serv., 432 F. Supp. 1179, 1180-1181 (S.D.N.Y. 1977)* .

(n6)Footnote 6. *See Lead Indus. Ass'n v. Occupational Safety & Health Admin., 610 F.2d 70, 79 n.17 (2d Cir. 1979)* ; *St. Paul Fire & Marine Ins. Co. v. Servidone Constr. Corp., 778 F. Supp. 1496, 1508 (D. Minn. 1991)* ; *LaRose v. Sponco Mfg. Inc., 712 F. Supp. 455, 460 (D.N.J. 1989)* .

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1-3 Federal Litigation Guide §§ 3.67 through 3.79

[Reserved]

§§ 3.67[Reserved]

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CHAPTER 3 Rule 12 Motions
D. Raising Specific Rule 12 Defenses
3. Challenging Improper Venue

1-3 Federal Litigation Guide § 3.80

§ 3.80 Basis for Challenging Venue

[1] General Venue Statute

Unless an action is brought under a statute that contains its own venue provision, the proper venue for an action is determined according to the general venue statute, as follows:

- **Diversity cases.** If federal jurisdiction is based solely on diversity, venue is proper in any of the following judicial districts: n1
  - A district where any defendant resides, if all defendants reside in the same state
  - A 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
  - A district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought
- **Non-diversity cases.** If federal jurisdiction is not based solely on diversity, venue is proper in any of the following judicial districts: n2
  - A district where any defendant resides, if all defendants reside in the same state
  - A 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
  - A district in which any defendant may be found, if there is no district in which the action may otherwise be brought

In addition, the general venue statute contains provisions governing where an action may be brought if a defendant is a corporation, foreign citizen, alien, federal employee or agency, or foreign state n3 or when the action arises from an accident that results in at least 75 deaths. n4

[2] Federal Statute With Venue Provision

A federal act may contain its own venue provision, which governs the district in which an action may be brought. n5

A statutory venue provision only determines the proper venue for an action; it does not affect the court's subject matter jurisdiction to entertain a particular action. Therefore, if the venue selected by the plaintiff is improper under the venue provision of the applicable statute, the proper method for attacking venue is a *Rule 12(b)(3)* motion to dismiss for improper venue, and not a *Rule 12(b)(1)* motion to dismiss for lack of subject matter jurisdiction. n6

[3] Forum Selection Clause

A defendant may seek dismissal of a suit if the action arises out of a contract that includes a mandatory forum selection clause that requires that the action be tried in a different venue. n7

The Second Circuit has held that a motion to dismiss based on a forum selection clause is not a motion to dismiss for improper venue. The Circuit has found that "there is no existing [procedural] mechanism with which forum selection enforcement is a perfect fit." n8

If the defendant seeks dismissal based on a valid forum selection clause, the plaintiff must make a "strong showing" to overcome the presumption that the forum selection clause is enforceable. n9

However, at the initial stage of litigation, a plaintiff who seeks to avoid enforcement of a forum selection clause need only make a prima facie showing that the forum selection clause is not enforceable. When analyzing this preliminary showing, the court must view the facts in the light most favorable to the plaintiff. A disputed fact may be resolved in a manner adverse to the plaintiff only after an evidentiary hearing. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureVenueGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1391(a).*

(n2)Footnote 2. *28 U.S.C. § 1391(b).*

(n3)Footnote 3. *See 28 U.S.C. § 1391(c)-(f).*

(n4)Footnote 4. *See 28 U.S.C. § 1391(g)* (effective for accidents that occur on or after January 31, 2003).

(n5)Footnote 5. *See, e.g., 31 U.S.C. § 3732.*

(n6)Footnote 6. *See United States ex. rel. Thistlethwaite v. Dowty Woodville Polymer, Ltd., 110 F.3d 861, 864 (2d Cir. 1997)* .

(n7)Footnote 7. *See Rainforest Cafe, Inc. v. EklecCo, L.L.C., 340 F.3d 544, 546-547 (8th Cir. 2003)* ; *New Moon*

Shipping Co. v. Man B & W Diesel AG, 121 F.3d 24, 28 (2d Cir. 1997) .

(n8)Footnote 8. *New Moon Shipping Co. v. Man B & W Diesel AG, 121 F.3d 24, 28-29 (2d Cir. 1997)*.

(n9)Footnote 9. *New Moon Shipping Co. v. Man B & W Diesel AG, 121 F.3d 24, 29 (2d Cir. 1997)* .

(n10)Footnote 10. *New Moon Shipping Co., v. Man B & W Diesel AG, 121 F.3d 24, 29 (2d Cir. 1997)*.

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1-3 Federal Litigation Guide § 3.81

§ 3.81 Raising Challenge to Venue

[1] Who May Challenge Venue

A defendant may object to improper venue if the venue selected by the plaintiff is improper as to that defendant. n1

In a multi-defendant action, venue may be proper as to some defendants and improper as to others. An objection to venue may only be asserted by a party as to whom venue is improper. Thus, a defendant cannot object to venue on the ground that it is improper as to a codefendant. n2

In the vast majority of cases the plaintiff, by virtue of bringing suit, waives venue and personal jurisdiction objections to a defendant's counterclaims. By choosing a particular forum, the plaintiff is considered to have voluntarily submitted to the court's jurisdiction "for all purposes for which justice to the defendant requires his presence." n3

The district court may raise the issue of venue sua sponte, but not without notice and providing the parties an opportunity to be heard. n4 However, a court may not sua sponte dismiss an action for improper venue if the defendant has already waived any objection to venue. n5

[2] Challenging Venue in First Response

A defendant must challenge improper venue in its first response to the complaint, as follows:

- **Motion to dismiss under Rule 12(b)(3).** Prior to serving an answer, the defendant may move to dismiss the action for improper venue under Rule 12(b)(3). If the defendant makes a Rule 12 pre-answer motion on other grounds, failure to join a Rule 12(b)(3) motion waives any objection to venue. n6

- **Asserting defense in answer.** If the defendant chooses not to make a Rule 12 pre-answer motion, the defendant may assert the defense of improper venue in the answer or in an answer amended as a matter of course pursuant to Rule 15(a). n7

[3] Combining Venue Challenge With Motion to Dismiss for Lack of Personal Jurisdiction

A motion to dismiss for improper venue is frequently brought with a motion to dismiss for lack of personal jurisdiction, as the general venue statute provides that a civil action may be brought in "a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced." n8 In such a case, if personal jurisdiction is found, venue is also proper. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureVenueGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

FOOTNOTES:
(n1)Footnote 1. *See Camp v. Gress, 250 U.S. 308, 317 (1919).*

(n2)Footnote 2. *See Camp v. Gress, 250 U.S. 308, 317 (1919).*

(n3)Footnote 3. *Adam v. Saenger, 303 U.S. 59, 67-68 (1938) .*

(n4)Footnote 4. *Lipofsky v. New York State Workers Compensation Bd., 861 F.2d 1257, 1259 (11th Cir. 1988).*

(N5)Footnote 5. *Concession Consultants, Inc. v. Mirisch, 355 F.2d 369, 371 (2d Cir. 1966) .*

(n6)Footnote 6. *See Fed. R. Civ. P. 12(h)(1).*

(n7)Footnote 7. *See Fed. R. Civ. P. 12(h)(1).*

(n8)Footnote 8. *See 28 U.S.C. § 1391(a)(3).*

(n9)Footnote 9. *See Gilbert v. Wilson, 821 F. Supp. 857, 860 (N.D.N.Y. 1993) .*

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CHAPTER 3 Rule 12 Motions
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1-3 Federal Litigation Guide § 3.82

§ 3.82 Waiving Objections to Venue

[1] Omitting Objection From Rule 12 Motion or Answer

An objection to venue must be raised in either a pre-answer motion to dismiss, or in the answer (or an answer amended as a matter of course). n1 Thus, the following considerations determine whether a defendant has waived any objection to venue:

- **Defendant did not include objection in Rule 12 motion.** If the defendant's first response to the complaint is a Rule 12 motion that does not include an objection to venue, the objection is waived unless it was not available at the time the motion was made. n2

- **Defendant did not include objection in either answer or answer amended as matter of course.** If the defendant's first response to the complaint is an answer that does not include an available objection to venue, the defendant waives the objection, unless the defendant adds the objection in an amendment permitted as a matter of course. n3

If the defense of improper venue was not available at the time the defendant's first response to the complaint was due, no waiver occurs and the defendant may raise the defense as soon as it becomes available. n4

If an objection to venue that was available against the original complaint is waived, the objection is not resurrected by a subsequent amendment of the complaint. n5

[2] Waiving Objection by Taking Default

A defendant waives the defense of improper venue, unlike the defense of lack of personal jurisdiction, by failing to appear and allowing a default to be entered against him or her. n6 However, if the defendant later succeeds in setting aside the default, the defendant may then move to dismiss for improper venue. n7

[3] Waiving Objection by Conduct

Even if the defendant complies with Rule 12 by including the objection to improper venue in his or her answer to the

complaint, the defendant may waive the defense by engaging in pre-trial activity in the action before moving to dismiss for improper venue. n8

[4] Waiving Objection to Venue by Removing Action

The general venue provisions of *28 U.S.C. § 1391* do not apply to actions removed from state court. Instead, the venue of removed actions is governed by the removal statute itself, which provides that the proper venue of a removed action is "the district of the United States for the district and division embracing the place where such action is pending." n9

By removing an action from state court, the defendant waives any objection that venue would have been improper under the federal general venue statute if the plaintiff had originally commenced the action in the district court. n10

[5] Compare: Right to Request That Venue Be Transferred Is Not Waivable

The rules governing a defendant's waiver of the defense of improper venue do not apply to the defendant's right to request that venue be transferred for the convenience of the parties and witnesses. A motion to **transfer venue** may be made at any time. Thus, even if a defendant has waived the right to move for dismissal based on improper venue, the defendant may still seek a transfer of the action under *28 U.S.C. § 1404*. n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalElementsFederal VenueCivil ProcedureVenueGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticePleadingsAnswers

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 12(h)(1)*; *Wachovia Bank, N.A. v. Schmidt, 546 U.S. 303, 316, 126 S. Ct. 941, 163 L. Ed. 2d 797 (2006)* .

(n2)Footnote 2. *Fed. R. Civ. P. 12, (g), (h)*; *see King v. Russell, 963 F.2d 1301, 1304 (9th Cir. 1992)* .

(n3)Footnote 3. *Fed. R. Civ. P. 12(h)(1)*.

(n4)Footnote 4. *See Fed. R. Civ. P. 12(g)(2)*.

(n5)Footnote 5. *Gilmore v. Shearson/Am. Express, Inc., 811 F.2d 108, 112 (2d Cir. 1987)* .

(n6)Footnote 6. *See Hoffman v. Blaski, 363 U.S. 335, 343 (1960)* .

(n7)Footnote 7. *See, e.g., Bicicletas Windsor S.A. v. Bicycle Corp of Am., 783 F. Supp. 781, 785 (S.D.N.Y. 1992)* .

(n8)Footnote 8. *See Sherman v. Moore, 86 F.R.D. 471, 473 (S.D.N.Y. 1980)*.

(n9)Footnote 9. *See 28 U.S.C. § 1441(a)*; *Polizzi v. Cowles Magazines, Inc., 345 U.S. 663, 665-666 (1953)*.

(n10)Footnote 10. *Polizzi v. Cowles Magazines, Inc., 345 U.S. 663, 665-666 (1953)*.

(n11)Footnote 11. *See Kolko v. Holiday Inns, Inc., 672 F. Supp. 713, 716 (S.D.N.Y. 1987)*.

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CHAPTER 3 Rule 12 Motions
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1-3 Federal Litigation Guide § 3.83

§ 3.83 Responding to Motion to Dismiss for Improper Venue

[1] Burden of Proof

Most courts correctly treat the venue question as an affirmative defense. Therefore, the defendant has the burden of establishing that venue is improper. n1 However, some courts, apparently due to their confusion over the difference between subject matter jurisdiction and venue, have allocated the burden of proof to the plaintiff. n2 When determining a motion to dismiss for improper venue, the court should resolve all factual conflicts in favor of the non-moving party, unless the court holds an evidentiary hearing to resolve the factual issues. n3

If the case involves multiple claims, venue must be established as to each separate cause of action. n4

[2] Conducting Discovery

The court may permit the parties to conduct limited discovery on the issue of venue before ruling on a motion to dismiss for improper venue. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See* 17 MOORE'S Federal Practice (Matthew Bender 3d ed.) *§ 110.01[5][c].*

(n2)Footnote 2. *See Gulf Ins. Co. v. Glasbrenner, 417 F.3d 353, 355 (2d Cir. 2005) , aff'd, 2008 U.S. App. LEXIS 7998 (2d Cir. 2008)* (if district court holds evidentiary hearing, plaintiff must demonstrate venue by preponderance of evidence).

(n3)Footnote 3. *Murphy v. Schneider Nat'l, Inc., 362 F.3d 1133, 1137-1140 (9th Cir. 2004) .*

(n4)Footnote 4. *See Beattie v. United States, 756 F.2d 91, 100 (D.C. Cir. 1984)* .

(n5)Footnote 5. *See, e.g., Smehlik v. Athletes & Artists, Inc., 861 F. Supp. 1162, 1165 (W.D.N.Y. 1994*).

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CHAPTER 3 Rule 12 Motions
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1-3 Federal Litigation Guide § 3.84

§ 3.84 Court's Action on Motion to Dismiss for Improper Venue

[1] Dismissal Not on Merits

A dismissal for improper venue is not a judgment on the merits. n1

[2] Transferring Action When Venue Is Improper

Instead of dismissing a case that was filed in the wrong district for improper venue, a court may in its discretion transfer the case to any district in which it could have been brought, if such a transfer would be in the interest of justice. n2 If an action is transferred because venue was improper in the court in which the action was filed, the transferee court applies the law that it would have applied had the action originally been filed there. n3

The court need not have personal jurisdiction over the defendant to transfer the case. n4

The court may transfer a case even if the motion seeks dismissal only. n5

[3] Transferring Action When Venue Is Proper

Even if venue is proper, a court may transfer an action for the convenience of parties and witnesses, or in the interest of justice, to any other district or division where the action might have been brought. n6

If venue was proper in the transferor court, but the action was transferred for the convenience of the parties and witnesses under *28 U.S.C. § 1404(a)*, the transferee court must apply the substantive state law, including choice of law rules, that would have applied had there been no change of venue. n7

Under some circumstances, a court in which venue is proper may nonetheless transfer an action under *28 U.S.C. § 1406*, whose plain language appears to permit transfer only if venue is laid in the wrong district. Despite the language of the statute, some courts have read Section 1406 broadly to permit a transfer if it "would be in the interest of justice." n8

The critical distinction between a Section 1404 transfer and Section 1406 transfer is that the law of the **original** forum applies after a Section 1404 transfer, and the law of the **transferee** forum applies after a Section 1406 transfer.

Accordingly, a Section 1406 transfer may be needed to help the parties to surmount an obstacle, such as lack of personal jurisdiction over the defendant, which would have precluded suit in the original district. However, a court may not transfer an action under Section 1406 merely to avoid a statute of limitations problem which the plaintiff could have avoided through diligence. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueMotions to TransferConvenience of PartiesCivil ProcedureVenueMotions to TransferConvenience of WitnessesCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Baris v. Sulpicio Lines, Inc., 74 F.3d 567, 571 (5th Cir. 1996)* ; *Schaeffer v. Village of Ossining, 58 F.3d 48, 50 n.2 (2d Cir. 1995)* ; *Horwitz v. Alloy Automotive Co., 992 F.2d 100, 102 (7th Cir. 1993)* ; *Concha v. London, 62 F.3d 1493, 1507-1508 (9th Cir. 1995)* .

(n2)Footnote 2. *28 U.S.C. § 1406(a)*; *see Trujillo v. Williams, 465 F.3d 1210, 1216 (10th Cir. 2006)* .

(n3)Footnote 3. *Schaeffer v. Village of Ossining, 58 F.3d 48, 50 (2d Cir. 1995)* .

(n4)Footnote 4. *Goldlawr, Inc. v. Heiman, 369 U.S. 463, 465-466 (1962*).

(n5)Footnote 5. *Concession Consultants, Inc., v. Mirisch, 355 F.2d 369, 371 n.3 (2d Cir. 1966)* .

(n6)Footnote 6. *28 U.S.C. § 1404(a)*.

(n7)Footnote 7. *Van Dusen v. Barrack, 376 U.S. 612, 639 (1964)* .

(n8)Footnote 8. *See, e.g., Verosol B.V. v. Hunter Douglas, Inc., 806 F. Supp. 582, 594 (E.D. Va. 1992)* .

(n9)Footnote 9. *See Spar, Inc. v. Information Resources, Inc., 956 F.2d 392, 395 (2d Cir. 1992)* .

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CHAPTER 3 Rule 12 Motions
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1-3 Federal Litigation Guide §§ 3.85 through 3.89

[Reserved]

§§ 3.85[Reserved]

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CHAPTER 3 Rule 12 Motions
D. Raising Specific Rule 12 Defenses
4. Moving to Dismiss for Failure to State Claim

1-3 Federal Litigation Guide § 3.90

§ 3.90 Basis for Motion

To survive a motion to dismiss, a complaint must include sufficient factual context to state a claim for relief that is "plausible on its face." n1 All claims must be accompanied by facts which allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." n2 This "facial plausibility" cannot be supported by "mere conclusory statements" and a reviewing court is required to "draw on its experience and common sense" in its determination of plausibility. n3

Dismissal under Rule 12(b)(6) may be appropriate if a successful affirmative defense or other bar to relief appears on the face of the complaint or in the attached exhibits. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProcedureDismissalsInvoluntary DismissalsFailures to State ClaimsCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataGovernmentsLegislationStatutes of LimitationsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* .

(n2)Footnote 2. *See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* .

(n3)Footnote 3. *See Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 884-885 (2009)* .

(n4)Footnote 4. *See, e.g., Banco Santander de Puerto Rico v. Lopez-Stubbe (In re Colonial Mortgage Bankers Corp.), 324 F.3d 12, 16 (1st Cir. 2003)* (res judicata); *Brooks v. City of Winston-Salem, N.C., 85 F. 3d 178, 182 (4th Cir. 1996)* (statute of limitations).

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CHAPTER 3 Rule 12 Motions
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1-3 Federal Litigation Guide § 3.91

§ 3.91 Motion May Be Made by Any Defendant

Any defendant to a complaint, counterclaim, or cross-claim may move for dismissal on the ground that the pleading fails to state a claim upon which relief can be granted. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime Limitations

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 12(b)(6).*

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CHAPTER 3 Rule 12 Motions
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1-3 Federal Litigation Guide § 3.92

§ 3.92 Motion May Be Made at Any Time During Proceedings

A defendant may move for dismissal for failure to state a claim upon which relief may be granted at any time, as follows:

- **Prior to serving a responsive pleading.** The defense of failure to state a claim may be raised in a Rule 12 motion to dismiss prior to serving a responsive pleading. n1

- **After pleadings are closed.** The defense may be raised after the pleadings are closed by filing a motion for judgment on the pleadings. n2

- **During trial.** The defense may be raised at trial on the merits. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePretrial JudgmentsJudgment on the Pleadings

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 12(b)(6).*

(n2)Footnote 2. *Fed. R. Civ. P. 12(h)(2)*; *see Fed. R. Civ. P. 12(c).*

(n3)Footnote 3. *Fed. R. Civ. P. 12(h)(2).*

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CHAPTER 3 Rule 12 Motions
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1-3 Federal Litigation Guide § 3.93

§ 3.93 Materials Considered by Court

[1] Pleadings and Matters of Judicial Notice

A Rule 12(b)(6) motion is addressed to the face of the pleadings. A court may only consider the pleadings, documents referred to in the pleadings, and matters of judicial notice in ruling on a Rule 12(b)(6) motion to dismiss. n1

If the moving party submits matters outside the pleadings on a Rule 12(b)(6) motion to dismiss, the court must exercise one of the following options: n2

- The court may exclude the additional material and decide the motion on the complaint alone
- The court may convert the Rule 12(b)(6) motion to a motion for summary judgment under Rule 56, and give all parties notice and the opportunity to present all pertinent supporting materials n3

[2] Materials Court May Consider Without Converting Motion

Unless the court converts the Rule 12(b)(6) motion to a motion for summary judgment, the court may consider only the following materials:

- Facts alleged in the complaint n4
- Documents attached as exhibits to complaint n5
- Matters of which the judge may take judicial notice under *Federal Rule of Evidence 201* n6
- Public records n7
- Documents that have not been attached to the complaint or incorporated by reference if the complaint relies heavily on the documents, and the documents are integral to the complaint n8

[3] Materials Court May Not Consider Without Converting Motion

The court may not consider extrinsic evidence without converting the motion to a motion for summary judgment. The following are examples of extrinsic evidence in appropriate for a court to consider:

- Factual materials attached to the motion n9
- Exhibits attached to motion or opposition to motion n10
- Factual allegations in motion or opposition to motion n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureSummary JudgmentEvidenceCivil ProcedureSummary JudgmentSupporting MaterialsGeneral OverviewEvidenceJudicial NoticeGeneral OverviewEvidenceJudicial NoticeAdjudicative FactsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 12(b)(6)*; *Stahl v. USDA, 327 F.3d 697, 700-701 (8th Cir. 2003)* .

(n2)Footnote 2. *See Fed. R. Civ. P. 12(b)(6).*

(n3)Footnote 3. *See § 3.96*; *Alioto v. Marshall Field's & Co., 77 F.3d 934, 936 (7th Cir. 1996)* ; *David v. City & County of Denver, 101 F.3d 1344, 1352 (10th Cir. 1996)* ; *Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278, 283 n.7 (5th Cir. 1993)* .

(n4)Footnote 4. *See Paulemon v. Tobin, 30 F.3d 307, 308-309 (2d Cir. 1994)* .

(n5)Footnote 5. *See Taylor v. Appleton, 30 F.3d 1365, 1370 (11th Cir. 1994)* .

(n6)Footnote 6. *Lovelace v. Software Spectrum Inc., 78 F.3d 1015, 1017-1018 (5th Cir. 1996)* .

(n7)Footnote 7. *See Cinel v. Connick, 15 F.3d 1338, 1343 n.6 (5th Cir. 1994)* .

(n8)Footnote 8. *See GFF Corp. v. Associated Wholesale Grocers, Inc., 130 F.3d 1381, 1385 (10th Cir. 1997)* .

(n9)Footnote 9. *River City Mkts. v. Fleming Foods W., Inc., 960 F.2d 1458, 1460 (9th Cir. 1992)* .

(n10)Footnote 10. *See Finn v. Gunter, 722 F.2d 711, 713 (11th Cir. 1984)* .

(n11)Footnote 11. *See In re Colonial Ltd. Partnership Litig., 854 F. Supp. 64, 79 (D. Conn. 1994)* .

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CHAPTER 3 Rule 12 Motions
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1-3 Federal Litigation Guide § 3.94

§ 3.94 Determining If Claim for Relief Is Stated

[1] Moving Party's Burden of Persuasion

The party moving for dismissal must show beyond doubt that the plaintiff can prove no set of facts in support of plaintiff's claim that would entitle plaintiff to relief. n1 The Supreme Court has held that a complaint may not survive a motion to dismiss unless it contains "enough factual matter" to state a claim to relief that is "plausible on its face." n2

All claims must include factual allegations that "plausibly give rise to an entitlement to relief." n2.1

[2] Court Construes Allegations of Complaint in Favor of Plaintiff

In ruling on a 12(b)(6) motion, the court must accept the plaintiff's factual allegations as true. n3 The court will not accept as true any conclusory allegations, legal conclusions, or unwarranted deductions of fact in the complaint. n4 For example, to withstand a Rule 12(b)(6) motion to dismiss, a conspiracy claim should contain more than conclusory, vague, or general allegations, and should provide some details of time and place and the alleged effect of the conspiracy. n5

The court must draw all reasonable inferences in the plaintiff's favor on a Rule 12(b)(6) motion to dismiss. n6

In addition, the court must construe the complaint's allegations liberally. For most claims, the plaintiff need only allege a short and plain statement of the claim, sufficient to give the defendant notice of the claim, rather than detailed facts. n7 However, the pleading must set forth sufficient information for the court to determine whether some recognized legal theory exists upon which relief could be accorded the pleader. If it fails to do so, a motion under Rule 12(b)(6) will be granted. n8

If the plaintiff is proceeding pro se, the complaint is held to less stringent standards than a formal pleading drafted by a lawyer. n9 The court must make reasonable allowances so that a pro se plaintiff does not forfeit his or her rights by virtue of lack of legal training. n10

The court will not dismiss a complaint for failure to state a claim merely because the complaint requests inappropriate relief, or miscategorizes legal theories. n11 Instead, the court has a duty to examine the complaint to determine if the

allegations support a claim for relief on any possible theory. n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsFailures to State ClaimsEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Koehler v. Brody, 483 F.3d 590, 596 (8th Cir. 2007).*

(n2)Footnote 2. *See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929, 940-941 (2007)* .

(n3)Footnote 2.1. *Ashcroft v. Iqbal, -- U.S. --, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 884 (2009)* .

(n4)Footnote 3. *Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)* ("when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint").

(n5)Footnote 4. *Jeffery Y. v. St. Marys Area Sch. Dist., 967 F. Supp. 852, 854-855 (W.D. Pa. 1997)* ; *Sheridan v. Int'l. Bhd. of Elec. Workers, 940 F. Supp. 368, 372 (D. Mass. 1996)* ; *Davis v. Bayless, 70 F.3d 367, 371 (5th Cir. 1995)* .

(n6)Footnote 5. *Dwares v. City of New York, 985 F.2d 94, 100 (2d Cir. 1993)* (quoting **Moore's**).

(n7)Footnote 6. *Sanner v. Chicago Bd. of Trade, 62 F.3d 918, 925 (7th Cir. 1995)* .

(n8)Footnote 7. *See Fed. R. Civ. P. 8(a)*; *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993)* .

(n9)Footnote 8. *See, e.g., Resolution Trust Corp. v. Gallagher, 800 F. Supp. 595, 598 (N.D. Ill. 1992*), *aff'd on other grounds, 10 F.3d 416 (7th Cir. 1993)* .

(n10)Footnote 9. *Hughes v. Rowe, 449 U.S. 5, 9 (1980)* .

(n11)Footnote 10. *See, e.g., McBride v. Sharpe, 25 F.3d 962, 971 (11th Cir. 1994*).

(n12)Footnote 11. *See Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 925-926 (2d Cir. 1968)* .

(n13)Footnote 12. *Bowers v. Hardwick, 478 U.S. 186, 202 (1986)* (Blackmun, J., dissenting).

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CHAPTER 3 Rule 12 Motions
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1-3 Federal Litigation Guide § 3.95

§ 3.95 Moving to Dismiss Claim Involving Fraud or Mistake

[1] Methods of Attacking Pleading

Rule 9(b) creates special pleading requirements for claims involving fraud or mistake. The sufficiency of such a claim may be attacked by either a motion to dismiss for failure to plead fraud with particularity under Rule 9(b), or a motion to dismiss for failure to state a claim under Rule 12(b)(6), or a combination of both. n1

[2] Pleading Fraud and Mistake

If a claim involves fraud or mistake, the plaintiff must plead the following circumstances constituting fraud or mistake with particularity to survive a Rule 12(b)(6) motion to dismiss: n2

- Time and place of the alleged misrepresentation
- Identity of perpetrator
- Content of alleged false statement, and respect in which it was false
- Result of false representation

However, malice, intent, knowledge or other condition of the mind of a person may be averred generally, and need not be pleaded with great specificity. n3

The Private Securities Litigation Reform Act of 1995 n4 contains pleading requirements more rigorous than those of Rule 9(b).

Pleadings alleging fraud usually may not be based on information and belief, n5 unless the facts relating to the fraud are peculiarly within the opposing party's knowledge, and the pleader details his or her efforts to obtain the information. n6

[3] Applying Particularity Requirement on Motion to Dismiss

If the defendant seeks to dismiss a claim involving fraud or mistake, the general standards for analyzing a Rule 12(b)(6) motion to dismiss are applied in light of Rule 9(b)'s particularity requirements. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsHeightened Pleading RequirementsFraud ClaimsCivil ProcedureDismissalsInvoluntary DismissalsFailures to State Claims

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 9(b)*; *see, e.g., IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1052-1053 (2d Cir. 1993)* .

(n2)Footnote 2. *See Fed. R. Civ. P. 9(b)*; *Tuchman v. DSC Communications Corp., 14 F.3d 1061, 1068 (5th Cir. 1994)*.

(n3)Footnote 3. *Fed. R. Civ. P. 9(b)*.

(n4)Footnote 4. *15 U.S.C. § 78u-4*.

(n5)Footnote 5. *Tuchman v. DSC Communications Corp., 14 F.3d 1061, 1068 (5th Cir. 1994)* .

(n6)Footnote 6. *Weiner v. Quaker Oats Co., 129 F.3d 310, 319-320 (3d Cir. 1997)*.

(n7)Footnote 7. *Ross v. Bolton, 904 F.2d 819, 823 (2d Cir. 1990)*.

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CHAPTER 3 Rule 12 Motions
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1-3 Federal Litigation Guide § 3.96

§ 3.96 Court May Convert Rule 12(b)(6) Motion to Motion for Summary Judgment

[1] Court Considers Matters Outside Pleadings

The court has discretion to consider extrinsic materials offered by the parties in conjunction with a Rule 12(b)(6) motion. If the court chooses to consider extrinsic materials, it must treat the motion as a Rule 56 motion for summary judgment. n1

[2] Providing Notice of Conversion

If the court chooses to consider extrinsic evidence, thereby converting a Rule 12(b)(6) motion to a motion for summary judgment, it must provide all parties with a reasonable opportunity to present all material made pertinent to such a motion by Rule 56. n2

The court is not required to give the parties formal notice that it is converting a 12(b)(6) motion into a motion for summary judgment. n3 Notice is sufficient when a party is aware that material outside the pleadings is before the court; the circumstances are such that the parties should reasonably have recognized the possibility that the motion might be converted into one for summary judgment, and therefore had a sufficient opportunity to present any relevant extrinsic evidence. n4

By contrast, notice is **insufficient** if the plaintiff is taken by surprise by the conversion and is therefore "deprived of a reasonable opportunity to meet facts outside the pleadings." n5

[3] Consequences of Conversion: Court Applies Different Standard on Motion for Summary Judgment

If the motion is converted, the court will treat the motion as a motion for summary judgment, and will grant the motion only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The court makes this determination on the basis of the pleadings and discovery materials. n6

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278, 283 n.7 (5th Cir. 1993).*

(n2)Footnote 2. *Fed. R. Civ. P. 12(b)(6); see also Global Network Commc'ns, Inc. v. City of N.Y., 458 F.3d 150, 154-156 (2d Cir. 2006).*

(n3)Footnote 3. *See Boateng v. InterAmerican Univ., Inc., 210 F.3d 56, 60-61 (1st Cir. 2000).*

(n4)Footnote 4. *See Gulf Coast Bank & Trust Co. v. Reder, 355 F.3d 35, 38-39 (1st Cir. 2004)* ; *Gay v. Wall, 761 F.2d 175, 177 (4th Cir.1985)* ; *see also Milwaukee Typographical Union No. 23 v. Newspapers, Inc., 639 F.2d 386, 391 (7th Cir. 1981)* .

(n5)Footnote 5. *In re G. & A. Books, 770 F.2d 288, 295 (2d Cir. 1985)* .

(n6)Footnote 6. *Fed. R. Civ. P. 56(a).*

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CHAPTER 3 Rule 12 Motions
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4. Moving to Dismiss for Failure to State Claim

1-3 Federal Litigation Guide § 3.97

§ 3.97 Amending Complaint in Response to Motion to Dismiss for Failure to State Claim

[1] Clarifying Factual Allegations

A motion to dismiss for failure to state a claim alerts the plaintiff to the legal theory underlying the defendant's challenge. If the motion appears to be meritorious, the plaintiff should determine whether it is possible to clarify the factual allegations of the complaint to state a valid legal cause of action. n1 If it is possible to state a valid cause of action, the plaintiff should respond to the motion to dismiss by amending the complaint to cure the defect in pleading. n2

[2] Amending Complaint as Matter of Course

A party may amend its pleading once as a matter of course within: n3

- 21 days after serving it, or
- 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.

[3] Amending Complaint With Leave of Court

If the plaintiff has already amended the complaint once as a matter of course, or if the time period to amend has elapsed, the plaintiff may amend only with leave of the court or with the written consent of the defendant. n4

It is the usual practice upon granting a motion to dismiss for the court to allow the plaintiff to replead, unless the court has a substantial reason to deny the motion. n5 The court may deny leave to amend if it determines that, as a matter of law, the amendment would not cure the complaint's deficiencies. n6 The court may also deny leave to amend based on the additional factors listed below. n7

- Untimeliness

- Undue delay
- Bad faith
- Dilatory motive
- Prejudice to the other party

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedureDismissalsInvoluntary DismissalsFailures to State Claims

FOOTNOTES:
(n1)Footnote 1. *Neitzke v. Williams, 490 U.S. 319, 329-330 (1989)* .

(n2)Footnote 2. *See Fed. R. Civ. P. 15(a)(1)(A).*

(n3)Footnote 3. *Fed. R. Civ. P. 15(a)(1).*

(n4)Footnote 4. *Fed. R. Civ. P. 15(a)(2).*

(n5)Footnote 5. *See Alston v. Parker, 363 F.3d 229, 235-236 (3d Cir. 2004)* ; *Rolf v. City of San Antonio, 77 F.3d 823, 828 (5th Cir. 1996)* .

(n6)Footnote 6. *See DeSalle v. Wright, 969 F.2d 273, 278 (7th Cir. 1992)* .

(n7)Footnote 7. *See e.g.*, *Wade v. Hopper, 993 F.2d 1246, 1249 (7th Cir. 1993)* .

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CHAPTER 3 Rule 12 Motions
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4. Moving to Dismiss for Failure to State Claim

1-3 Federal Litigation Guide § 3.98

§ 3.98 Effect of Rule 12(b)(6) Dismissal

[1] Dismissal on Merits

A dismissal for failure to state a claim is a judgment on the merits, unlike dismissals for lack of subject matter or personal jurisdiction, improper venue, or failure to join the proper parties under Rule 19. Such a dismissal, presumed to be **with prejudice**, unless the order explicitly states otherwise, has a claim preclusive effect. n1

[2] Court May Still Consider Supplemental State Law Claims

Unlike a Rule 12(b)(1) dismissal for lack of jurisdiction, a Rule 12(b)(6) dismissal for failure to state a claim does not divest the district court of supplemental jurisdiction to consider pendent state law claims. n2

A court may, however, decline to exercise supplemental jurisdiction over state law claims if it has dismissed all claims over which it had original jurisdiction. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureDismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsFailures to State Claims

FOOTNOTES:
(n1)Footnote 1. *See Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 399 (1981).*

(n2)Footnote 2. *See, e.g., Finz v. Schlesinger, 957 F.2d 78, 83-84 (2d Cir. 1992) .*

(n3)Footnote 3. *28 U.S.C. § 1367(c)(3).*

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CHAPTER 3 Rule 12 Motions
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1-3 Federal Litigation Guide §§ 3.99 through 3.109

[Reserved]

§§ 3.99[Reserved]

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CHAPTER 3 Rule 12 Motions
D. Raising Specific Rule 12 Defenses
5. Challenging Defects in Process or Service

1-3 Federal Litigation Guide § 3.110

§ 3.110 Dismissal for Insufficiency of Process

A defendant may move to dismiss a complaint for insufficiency of process if the content of the summons does not comply with the requirements of Rule 4. n1

As a practical matter, dismissal of a complaint because of inadequate content of the summons occurs almost exclusively in state court, where counsel ordinarily prepares the summons. In federal court, counsel files the complaint with the court, and obtains a standard form summons authored by the United States judicial system. This form is simply filled out and served with the complaint. It is hard to have inadequate process when using the preprinted form. Consequently, Rule 12(b)(4) motions to dismiss for insufficiency of process are virtually unheard of in federal court.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 12(b)(4)*; *see also Shipley v. Orndoff, 491 F. Supp. 2d 498, 502-503 (D. Del. 2007)* .

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CHAPTER 3 Rule 12 Motions
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5. Challenging Defects in Process or Service

1-3 Federal Litigation Guide § 3.111

§ 3.111 Dismissal for Insufficiency of Service of Process

[1] Grounds for Dismissal

A defendant may move for dismissal of an action if the plaintiff failed to strictly comply with the requirements of Rule 4 in serving the summons. The fact that the defendant has full knowledge of the action does not confer jurisdiction on the court to enter a judgment against the defendant. n1

Rule 4 prescribes the procedures for properly serving a summons on various types of defendants, such as individuals, infants and incompetent persons, corporations and associations, and United States defendants. Rule 4 also provides for service on various types of defendants in accordance with state law procedures, as an alternative to the methods expressly authorized by Rule 4 itself. n2

Counsel should be aware that the current Rule 4(m) replaces a more stringent version of the Rule, which had been construed as forcing dismissal once the 120-day clock had expired. n3 Therefore, special caution should be used in citing and relying on cases applying the earlier version.

In addition to the requirements of Rule 4, the plaintiff must comply with any relevant district court procedures governing process and service. n4

Examples of
defects in service of process include the following:

- Service of summons without complaint n5
- Service of complaint without summons n6
- Serving an individual not authorized to accept service on behalf of a corporation n7

[2] Distinguished From Challenge to Personal Jurisdiction

A Rule 12(b)(5) defense of insufficient service of process is different from a Rule 12(b)(2) defense of lack of personal jurisdiction, and must therefore be separately asserted. n8

A defendant who challenges the court's personal jurisdiction asserts that the defendant's contacts with the forum state are insufficient to permit the court to adjudicate the defendant's rights. By contrast, a challenge to the sufficiency of service of process attacks only the method by which service has been made, and not the court's power to exercise jurisdiction over the defendant. n9

[3] Raising Challenge to Sufficiency of Service of Process

Although no specific time is specified for raising a defense of improper service of process, such a motion must be raised in a reasonably timely fashion. n10 An objection to sufficiency of service of process may be raised prior to answering the complaint by filing a Rule 12 motion to dismiss.

If the defendant files a Rule 12 pre-answer motion on other grounds, but does not include an objection to sufficiency of service of process, the objection is waived. n11 If the defendant's first response to the complaint is an answer, the defendant may assert the defense of insufficiency of service of process in the answer or in an answer amended as a matter of course. If the defendant fails to assert the defense, any objection to service of process is waived. n12

In asserting the defense, the defendant must specify the manner in which service was deficient. Merely stating that the court lacks personal jurisdiction or that service was insufficient is not enough to preserve the defense. n13

A defendant who has not been properly served may decide not to respond to the complaint and allow a default judgment to be entered. The defendant may then attack the default judgment on the grounds of insufficient service of process. If the defendant had actual notice of the action, however, the defendant may have waived the defense. n14

[4] Waiving Defense of Insufficient Service of Process

The defense of improper service may be waived by failure to assert it seasonably. n15 The defense of improper service may also be waived by conduct. n16 The following types of conduct, however, have been held to not constitute waiver:

- Appearance of counsel at a status conference n17
- Taking basic procedural steps, such as appearing in the action n18

A defendant who asserts the defense of insufficient service of process in its answer may subsequently waive the defense by failing to move for dismissal based on insufficient service in a reasonably timely manner. In determining whether a delay in challenging service by motion to dismiss has resulted in waiver, the court looks at the following factors: n19

- Whether the statute of limitations has expired
- Whether plaintiff could have cured the defect in service if the statute of limitations had not expired.
- Length of delay
- Whether the defendant had an opportunity to seek dismissal earlier
- Whether a timely motion to dismiss would have saved the opposing party and court significant time and expense

[5] Asserting Defense of Lack of Personal Jurisdiction Does Not Preserve Defense Based on Service

If a Rule 12(b) motion or answer asserts the defense of lack of personal jurisdiction but does not assert insufficient service of process, the objection to service of process is waived. n20

However, if the defendant merely mislabels an objection to service of process as an objection to personal jurisdiction, and the papers supporting the defendant's motion indicate the true nature of the defense, the court may consider the defense of insufficient service of process. n21

[6] Failing to Assert Lack of Personal Jurisdiction Does Not Waive Defense of Insufficient Service

A court does not have personal jurisdiction over a defendant until the defendant has been properly served with a summons and complaint, or has waived of service of process. n22

However, a defendant's failure to assert lack of personal jurisdiction as a defense does not waive the defendant's right to assert the defense of insufficient service of process. n23

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 4*; *McGuire v. Sigma Coatings, Inc., 48 F.3d 902, 907 (5th Cir. 1995)* ; *Mid-Continent Wood Products, Inc. v. Harris, 936 F.2d 297, 301 (7th Cir. 1991)* .

(n2)Footnote 2. *See Fed. R. Civ. P. 4*.

(n3)Footnote 3. *See Fed. R. Civ. P. 4(m)*.

(n4)Footnote 4. *See Schaeffer v. Village of Ossining, 58 F.3d 48, 50 (2d Cir. 1995)* .

(n5)Footnote 5. *See, e.g., Carimi v. Royal Caribbean Cruise Line, Inc., 959 F.2d 1344, 1345-1346 (5th Cir. 1992)* .

(n6)Footnote 6. *See, e.g., Bolivar v. Director of the FBI, 846 F. Supp. 163, 166 (D.P.R. 1994)* ; *In re City of Philadelphia Litigation, 123 F.R.D. 515, 518 (E.D. Pa. 1988)* .

(n7)Footnote 7. *See, e.g., Schaeffer v. Village of Ossing, 58 F. 3d 48, 49 (2d Cir. 1995)* .

(n8)Footnote 8. *See Santos v. State Farm Fire & Cas. Co., 902 F.2d 1092, 1095 (2d Cir. 1990)*.

(n9)Footnote 9. *Santos v. State Farm Fire & Cas. Co., 902 F.2d 1092, 1095 (2d Cir. 1990)* .

(n10)Footnote 10. *See, e.g., O'Brien v. R.J. O'Brien & Assocs., 998 F.2d 1394, 1399 (7th Cir. 1993)* .

(n11)Footnote 11. *Fed. R. Civ. P. 12, (g), (h)(1)*; *see Flory v. United States, 79 F.3d 24, 26 (5th Cir. 1996)* .

(n12)Footnote 12. *Fed. R. Civ. P., 12(h)(1)*; *see also Vax-D Med. Techs., LLC v. Texas Spine Med. Ctr., 485 F.3d 593, 597 (11th Cir. 2007)* .

(n13)Footnote 13. *See Santos v. State Farm Fire & Cas. Co., 902 F.2d 1092, 1095-1096 (2d Cir. 1990)* ; *see also*

O'Brien v. R.J. O'Brien Assocs., 998 F.2d 1394, 1400 (7th Cir. 1993) .

(n14)Footnote 14. *See Sanderford v. Prudential Ins. Co., 902 F.2d 897, 900 (11th Cir. 1990)* ; *but see Triad Energy Corp. v. McNell, 110 F.R.D. 382, 386 (S.D.N.Y. 1986)* .

(n15)Footnote 15. *Trustees of Cent. Laborers' Welfare Fund v. Lowery, 924 F.2d 731, 732-733 (7th Cir. 1991)* ; *see* [3], *above*.

(n16)Footnote 16. *See, e.g., Trustees of Cent. Laborers' Welfare Fund v. Lowery, 924 F.2d 731, 733 (7th Cir. 1991)*.

(n17)Footnote 17. *Howard v. Klynveld Peat Marwick Goerdeler, 977 F. Supp. 654, 659 (S.D.N.Y. 1997)* .

(n18)Footnote 18. *See Grammenos v. Lemos, 457 F.2d 1067, 1070 (2d Cir. 1972)* .

(n19)Footnote 19. *See Datskow v. Teledyne, Inc., 899 F.2d 1298, 1302-1304 (2d Cir. 1990)* .

(n20)Footnote 20. *See O'Brien v. R.J. O'Brien & Assocs., 998 F.2d 1394, 1399 (7th Cir. 1993)* .

(n21)Footnote 21. *Santos v. State Farm Fire & Cas. Co., 902 F.2d 1092, 1096 (2d Cir. 1990)*.

(n22)Footnote 22. *See Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987)*.

(n23)Footnote 23. *See, e.g., Guccione v. Flynt, 618 F. Supp. 164, 168 (S.D.N.Y. 1985)*.

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CHAPTER 3 Rule 12 Motions
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1-3 Federal Litigation Guide § 3.112

§ 3.112 Procedure on Motion to Dismiss for Insufficient Service of Process

[1] Plaintiff Has Initial Burden of Proof

If the sufficiency of service of process is challenged, the plaintiff has the burden of showing adequacy of service. n1 The plaintiff commonly meets this burden by submitting the process server's proof of service affidavit, which is presumptively valid. n2

[2] Burden Shifts to Defendant

If the process server's affidavit establishes that service was properly made, the burden shifts to the defendant to produce evidence, usually in the form of affidavits, establishing the insufficiency of service. n3 A bare allegation that service was improper is insufficient to overcome the presumption of validity of the process server's affidavit. n4

[3] Determining Disputed Facts

In deciding a motion to dismiss for insufficient service, the court may determine factual disputes between the parties on the basis of the parties' affidavits. n5

If the defendant's evidence challenges the assertions raised in the plaintiff's return of service, the court may conduct a hearing to determine the contested issues of fact as to the sufficiency of service. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessProofGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Grand Entertainment Group v. Star Media Sales, Inc., 988 F.2d 476, 486-491 (3d Cir. 1993)* ; *Aetna*

Business Credit Inc. v. Universal Decor I Interior Design, Inc., 635 F. 2d 434, 435 (5th Cir. 1981) .

(n2)Footnote 2. *Trustees of Local Union No. 727 Pension Fund v. Perfect Parking, Inc., 126 F.R.D. 48, 52 (N.D. Ill. 1989)* .

(n3)Footnote 3. *See, e.g., Nolan v. City of Yonkers, 168 F.R.D. 140, 144 (S.D.N.Y. 1995).*

(n4)Footnote 4. *See, e.g., FROF, Inc. v. Harris, 695 F. Supp. 827, 828-829 (E.D. Pa. 1988)* .

(n5)Footnote 5. *See, e.g., Michelson v. Merrill Lynch Pierce Fenner & Smith, Inc., 669 F. Supp. 1244, 1266-1267 (S.D.N.Y. 1987)* .

(n6)Footnote 6. *Fed. R. Civ. P. 12(i).*

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1-3 Federal Litigation Guide § 3.113

§ 3.113 Action by Court on Motion to Dismiss

[1] Court's Discretion

If the court determines that process or service of process was insufficient, the court has broad discretion to do either of the following:

- Dismiss the action n1
- Retain the case but quash service, and extend the time for service n2

Generally, the court will dismiss if a defendant is not served within 120 days, unless the plaintiff can show good cause for delay. n3

[2] Dismissal With or Without Prejudice

On finding that either process or service of process was insufficient, the court has discretion to dismiss the action without prejudice. n4 Although a dismissal without prejudice is not ordinarily a final judgment, if the statute of limitations has run by the time of the dismissal, the courts will treat it as a final judgment, because the plaintiff will be unable to refile the complaint. n5

A court may dismiss an action with prejudice if it has already given the plaintiff several opportunities to achieve proper service. n6

[3] Quashing Service

If process or service of process was insufficient, the court may quash service and direct the plaintiff to effect service within a specified period of time. n7

Ordinarily, the court should quash service and retain the case if there is a reasonable prospect that the plaintiff will be able to properly serve the defendant within the limitations period. n8

[4] Extension of Time

If the plaintiff does not perfect service of process within 120 days after filing the complaint, Rule 4(m) allows the court, either sua sponte after notice to the plaintiff or on motion by the party challenging process or service, to dismiss the action without prejudice. However, on a showing of good cause, the court must extend the time for service for an appropriate period. n9

If the court quashes service of the summons, it will normally extend the time within which the plaintiff must re-serve the summons. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessTime LimitationsDismissalsCivil ProcedurePleading & PracticeService of ProcessTime LimitationsExtensionsCivil ProcedureDismissalsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Adams v. Allied Signal Gen. Aviation Avionics, 74 F.3d 882, 887 (8th Cir. 1996)* .

(n2)Footnote 2. *McGann v. New York, 77 F.3d 672, 674 n.2 (2d Cir. 1996)* .

(n3)Footnote 3. *See Forest v. Holland Distribs., Inc., 824 F. Supp. 87, 88 (M.D. La. 1993)* .

(n4)Footnote 4. *See Ouzts v. Cummins, 825 F.2d 1276, 1278 (8th Cir. 1987)* .

(n5)Footnote 5. *See, e.g., Umbenhauer v. Woog, 969 F.2d 25, 31 (3d Cir. 1992)* ; *Powell v. Starwalt, 866 F.2d 964, 966 (7th Cir. 1989).*

(n6)Footnote 6. *See, e.g., Michelson v. Merrill Lynch Pierce Fenner & Smith, Inc., 669 F. Supp. 1244, 1266-1267 (S.D.N.Y. 1987)* .

(n7)Footnote 7. *McGann v. New York, 77 F.3d 672, 674 n.2 (2d Cir. 1996).*

(n8)Footnote 8. *See Zola v. Gordon, 685 F. Supp. 354, 377 (S.D.N.Y. 1988).*

(n9)Footnote 9. *Fed. R. Civ. P. 4(m).*

(n10)Footnote 10. *See, e.g., Myers v. Secretary of the Dept. of the Treasury, 173 F.R.D. 44, 47 (E.D.N.Y. 1997)* .

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1-3 Federal Litigation Guide §§ 3.114 through 3.119

[Reserved]

§§ 3.114[Reserved]

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CHAPTER 3 Rule 12 Motions
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1-3 Federal Litigation Guide § 3.120

§ 3.120 Moving to Dismiss for Failure to Join Party Under Rule 19

[1] Basis of Challenge

A defendant may move for dismissal if a person needed for a just adjudication pursuant to Rule 19 has not been made a party to the action. n1

A court will not dismiss an action for failure to join a necessary party unless it determines all of the following: n2

- Joinder of the absentee party is compulsory
- The absent party cannot be joined
- The prejudice resulting from nonjoinder of the absentee party outweighs the prejudice resulting from dismissal of the action

[2] Raising Challenge

A challenge based on failure to join an indispensable party may be raised at any stage of the proceedings. The challenge may be raised in a pre-answer motion, in any pleading permitted or ordered under Rule 7(a), by motion for judgment on the pleadings, or at the trial on the merits. n3

As a general rule, failure to join an indispensable party is a non-waivable defense. n4 However, a party may be barred from raising the defense by the doctrine of laches, if the party waits until late in the proceedings to raise the defense, despite ample opportunity to raise the defense earlier. n5

A party may not use its own failure to join a party offensively. In other words, a party who asserts a claim but fails to join a party indispensable to the adjudication of that claim may not later seek dismissal based on failure to join an indispensable party. n6

[3] Burden of Proof

A party moving for dismissal under Rule 12(b)(7) has the burden on the motion. n7 To meet its burden, the moving party must present credible evidence showing one of the following: n8

- Complete relief cannot be accorded among those already parties unless the person is joined as a party
- The person claims an interest relating to the subject of the action, and disposition of the action in the person's absence may impair or impede the person's ability to protect that interest
- The person claims an interest relating to the subject of the action, and disposition of the action in the person's absence may subject any of the existing parties to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the claimed interest

If the moving party intends to establish that a nonparty is a necessary party under either the second or third rationale listed above, the moving party must present evidence that the nonparty has actually claimed a legally protected interest relating to the subject matter of the action. The party seeking dismissal cannot merely claim such an interest on the absent party's behalf. n9

If the moving party meets its burden, the burden shifts to the opposing party to show that the action may proceed "in equity and good conscience" without joining the necessary party. The party opposing the motion may meet its burden by showing one or more of the following: n10

- That a judgment rendered in the nonparty's absence would not be prejudicial to the nonparty or to those already parties
- That any prejudice to the nonparty or the existing parties can be lessened by protective provisions in the judgment, by the shaping of relief, or by other measures n11
- That a judgment rendered in the nonparty's absence will be adequate
- That the plaintiff will not have an adequate remedy if the action is dismissed for nonjoinder

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePartiesJoinderCompulsory JoinderCivil ProcedurePartiesJoinderIndispensable PartiesCivil ProcedureJoinder of Claims & RemediesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 12(b)(7).*

(n2)Footnote 2. *See Fed. R. Civ. P. 19(b).*

(n3)Footnote 3. *Fed. R. Civ. P. 12(h)(2).*

(n4)Footnote 4. *See Fed. R. Civ. P. 12(h)(2).*

(n5)Footnote 5. *See Gil Enters., Inc. v. Delvy, 79 F.3d 241, 247 (2d Cir. 1996) .*

(n6)Footnote 6. *See Judwin Properties, Inc. v. United States Fire Ins. Co., 973 F.2d 432, 434 (5th Cir. 1992) .*

(n7)Footnote 7. *West Peninsular Title Co. v. Palm Beach County, 41 F.3d 1490, 1492 (11th Cir. 1995)* ; *Associated Dry Goods Corp. v. Towers Fin. Corp., 920 F.2d 1121, 1123-1125 (2d Cir. 1990).*

(n8)Footnote 8. *See Fed. R. Civ. P. 19(a)*; *see Associated Dry Goods Corp. v. Towers Fin. Corp., 920 F.2d 1121, 1123-1125 (2d Cir. 1990)* ; *West Peninsular Title Co. v. Palm Beach County, 41 F.3d 1490, 1492 (11th Cir. 1995)* .

(n9)Footnote 9. *See Fed. R. Civ. P. 19(a)(1)(B)*; *Conntech Dev. Co. v. University of Conn. Educ. Props., Inc., 102 F.3d 677, 683 (2d Cir. 1996)* .

(n10)Footnote 10. *See Fed. R. Civ. P. 19(b).*

(n11)Footnote 11. *See, e.g., Jaser v. New York Property Ins. Underwriting Ass'n, 815 F.2d 240, 243 (2d Cir. 1987)* .

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CHAPTER 3 Rule 12 Motions
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1-3 Federal Litigation Guide § 3.121

§ 3.121 Court's Inquiry on Motion to Dismiss for Failure to Join Party

In ruling on a Rule 19 motion to dismiss, the court must determine whether the party is a necessary party, and should therefore be joined. A person is a necessary party if any of the following are true: n1

- Complete relief cannot be accorded among those already parties unless the person is joined as a party
- The person claims an interest relating to the subject of the action, and disposition of the action in the person's absence may impair or impede the person's ability to protect that interest
- The person claims an interest relating to the subject of the action, and disposition of the action in the person's absence may subject any of the existing parties to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the claimed interest

In determining whether a person is a necessary party, a court must base its decision on the pleadings as they appear at the time of the proposed joinder. n2

If the court finds that the person is a necessary party who can be joined, the court will not dismiss the action but will instead order joinder of the necessary party. n3 If the person is found to be a necessary party under Rule 19(a) but cannot be joined, either because the person is not amenable to service of process or joining the person would deprive the court of subject matter jurisdiction, the court must then determine whether, "in equity and good conscience, the action should proceed" without the necessary party. In making this determination, the court must consider the following factors: n4

- The extent to which a judgment rendered in the person's absence might be prejudicial to the person or to those already parties
- The extent to which the prejudice can be lessened by protective provisions in the judgment, by the shaping of relief, or by other measures
- Whether a judgment rendered in the person's absence will be adequate

- Whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder

The court must determine the weight to be given each factor, based on the facts of the case and the governing "equity and good conscience test." n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePartiesJoinderNecessary PartiesCivil ProcedureJoinder of Claims & RemediesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 19(a)(1).*

(n2)Footnote 2. *Associated Dry Goods Corp v. Towers Fin. Corp., 920 F.2d 1121, 1124 (2d Cir. 1990) .*

(n3)Footnote 3. *See Fed. R. Civ. P. 19(a)(2).*

(n4)Footnote 4. *Fed. R. Civ. P. 19(b).*

(n5)Footnote 5. *Peninsular Title Co. v. Palm Beach County, 41 F.3d 1490, 1492 (11th Cir. 1995)* ; *Associated Dry Goods Corp. v. Towers Fin. Corp., 920 F.2d 1121, 1123-1125 (2d Cir. 1990) .*

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1-3 Federal Litigation Guide § 3.122

§ 3.122 Court's Action on Motion to Dismiss for Failure to Join Party

Courts take a flexible approach when deciding what parties need to be present for a just resolution. n1

Dismissal for failure to join a party is disfavored and should be avoided unless the court has made a reasoned determination that a just adjudication will be impossible in the absence of the party. As a result, very few cases should be terminated due to the absence of a nondiverse party. n2

If an action involves multiple claims, the court may not dismiss the entire action if there are claims that can be adjudicated in the absence of a party who cannot be joined. In such a case, the court should dismiss only those claims as to which the absentee party is indispensable. n3

If the court determines that the person is necessary for a proper adjudication and joinder is possible, the court should order that the person be joined as a party. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesJoinderGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 106, 88 S. Ct. 733, 19 L. Ed. 2d 936, (1968) .*

(n2)Footnote 2. *See Jaser v. New York Property Ins. Underwriting Ass'n, 815 F.2d 240, 242 (2d Cir. 1987) .*

(n3)Footnote 3. *See Clarendon, Ltd. v. State Bank of Saurashtra, 77 F.3d 631, 635 (2d Cir. 1996) .*

(n4)Footnote 4. *Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 118, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968) .*

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CHAPTER 3 Rule 12 Motions
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1-3 Federal Litigation Guide §§ 3.123 through 3.129

[Reserved]

§§ 3.123[Reserved]

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CHAPTER 3 Rule 12 Motions
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1-3 Federal Litigation Guide § 3.130

§ 3.130 CHECKLIST: Moving to Dismiss Pursuant to Rule 12

The following checklist will assist counsel in drafting a Rule 12 dismissal motion. Counsel should check the local district court rules, as well as the individual judge's rules, for motion procedures, including whether a pre-motion conference is required.

☐ **Lack of subject matter jurisdiction.**

- ☐ Is not waivable.
- ☐ May be raised at any time.
- ☐ May be raised by any party.
- ☐ May be used to challenge diversity.
- ☐ May be used to challenge amount in controversy.
- ☐ May be used to challenge federal question jurisdiction.

☐ **Lack of personal jurisdiction.**

- ☐ May be waived.
- ☐ May be used to challenge assertion of long-arm jurisdiction over a nonresident defendant.

☐ **Improper venue.**

- ☐ May be waived.
- ☐ General venue statute sets forth proper venue [*see 28 U.S.C. § 1391*].
- ☐ Some federal statutes contain venue provisions.
- ☐ Forum selection clauses are generally enforceable.
- ☐ Transfer of venue more likely than dismissal.

☐ **Insufficiency of process.**

- ☐ May be used to challenge the content of the summons as not complying with the requirements of Rule 4.

☐ **Insufficiency of service of process.**

- ☐ May be waived.
- ☐ May be used to challenge defects in service.

☐ **Failure to state a claim upon which relief can be granted.**

- ☐ May be raised at any time.
- ☐ May not be waived.
- ☐ May be raised by any party.
- ☐ Asserts that no facts support relief, or that affirmative defense mandates dismissal.
- ☐ Court will only consider pleadings and matters of judicial notice.
- ☐ Motion may be converted to motion for summary judgment.

☐ **Failure to join a party under Rule 19.**

☐ May be raised at any time.

☐ May not be waived.

☐ May be used to challenge absence of person needed for a just adjudication.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyChallengesCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsChallengesCivil ProcedureVenueGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureDismissalsGeneral OverviewCivil ProcedureSummary JudgmentNotices

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CHAPTER 3 Rule 12 Motions
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1-3 Federal Litigation Guide § 3.131

§ 3.131 CHECKLIST: Responding to Rule 12 Motion to Dismiss

The following checklist will assist counsel in responding to a defendant's Rule 12 motion to dismiss.

☐ **Preliminary considerations.**

☐ Consider amending pleading to cure defect.

☐ Consider dismissing action or claim and refiling when defect can be cured.

☐ **Opposing the motion.**

☐ Local district court rules govern the time for filing opposition papers. Generally opposition papers are filed with the court at the same time they are served on the other parties. Counsel should also check the individual judge's rules.

☐ Check local rules for required papers.

☐ Consider requesting a hearing. The court is required to conduct a hearing upon the request of any party. However, the court has the discretion to defer the hearing until trial.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewGovernmentsCourtsRule

Application & Interpretation

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CHAPTER 3 Rule 12 Motions
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1-3 Federal Litigation Guide §§ 3.132 through 3.139

[Reserved]

§§ 3.132[Reserved]

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CHAPTER 3 Rule 12 Motions
E. Defensive Motions to Narrow or Clarify Pleadings
1. Rule 12(e) Motion for More Definite Statement

1-3 Federal Litigation Guide § 3.140

§ 3.140 Evaluating Use of Motion for More Definite Statement

Before deciding to use the motion for a more definite statement, counsel should evaluate his or her strategy in the light of the courts' general disfavor of this motion. n1

A party may make a motion for a more definite statement to clarify a pleading to which the party is permitted to respond. Either party may bring a motion for a more definite statement to clarify a pleading that "is so vague or ambiguous that [the] party cannot reasonably be required to frame a responsive pleading." n2

Courts are reluctant to grant Rule 12(e) motions, and will not do so unless the pleading is so unintelligible that the defendant cannot respond. n3 A motion for a more definite statement is designed to clarify unintelligible pleadings, and not to correct for insufficient detail. n4

A complaint is only required to provide the adverse party fair notice of the claim asserted to enable the party to answer and prepare for trial. This requirement is satisfied if the pleading informs the opposing party of the general nature of the action, and the incident out of which the cause of action arose. n5

FOOTNOTES:
(n1)Footnote 1. *See Moore v. Fidelity Fin. Servs., 869 F. Supp. 557, 559-560 (N.D. Ill. 1994)* ; see *In re Hanford Nuclear Reservation Litig., 780 F. Supp. 1551, 1583 (E.D. Wash. 1991)* .

(n2)Footnote 2. *Fed. R. Civ. P. 12(e).*

(n3)Footnote 3. *Federal Deposit Ins. Corp. v. Wise, 758 F. Supp. 1414, 1418 (D. Colo. 1991)* .

(n4)Footnote 4. *Kelly v. L.L. Cool J., 145 F.R.D. 32, 35 (S.D.N.Y. 1992)* , *aff'd without opinion*, *23 F.3d 398 (2d Cir. 1994)* .

(n5)Footnote 5. *United States v. Uvalde Consol. Indep. Sch. Dist., 625 F.2d 547, 549 (5th Cir. 1980)* .

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CHAPTER 3 Rule 12 Motions
E. Defensive Motions to Narrow or Clarify Pleadings
1. Rule 12(e) Motion for More Definite Statement

1-3 Federal Litigation Guide § 3.141

§ 3.141 Specific Uses of Motion

[1] Determining Dates for Statute of Limitations

A defendant may use a motion for a more definite statement to force the plaintiff to allege dates necessary to determine whether there is a valid statute of limitations defense. n1 For example, in one case the complaint alleged that the defendant had breached numerous oral contracts over a 22-year period, but failed to specify the dates of the contracts. Observing that the absence of dates made it difficult to determine if the claims were barred by the statute of limitations, the court ordered the plaintiff to file a new complaint that included the date of each contract. n2

However, there is also authority that a defendant may not use a motion for a more definite statement to force the plaintiff to allege dates. For example, in a case in which the plaintiff alleged that the defendant bank had wrongfully transferred plaintiff's funds, the court denied the defendant's motion for a more definite statement to force the plaintiff to allege the date of the transfer. Although the court acknowledged that the date would determine whether the defendant could successfully plead a statute of limitations defense, it reasoned that the defendant could plead the defense without further information. n3

[2] Examples of Proper Motion for More Definite Statement

The following are examples of circumstances in which a court has granted a Rule 12(e) motion for a more definite statement:

- The complaint was brought against multiple defendants, and it could not be determined which of the defendants was charged with each act n4

- The complaint was cumbersome in asserting a myriad of claims n5

- In a copyright infringement action, the complaint failed to allege whether and when plaintiff registered the copyright on the work that was the subject of the action n6

- In an employment discrimination action in which "the nature of the supposed contract of employment was entirely unclear" from the complaint, the court granted a motion for a more definite

statement n7

[3] Motion May Not Be Used to Clarify Damages Claims

Because the plaintiff is not required to plead general damages with specificity, a court will not grant a motion for a more definite statement of general damages. n8

[4] Motion May Not Be Used as Substitute for Discovery

A motion for a more definite statement should not be used to obtain information that can be obtained through normal discovery procedures. n9

[5] Motion May Not Be Used to Ascertain Legal Theory

The court will deny a Rule 12(e) motion brought for the purpose of ascertaining the plaintiffs' legal theory or to pin the plaintiff down to a particular legal theory. n10

[6] Motion May Note Be Used to Avoid Answering Complaint

The court will deny a Rule 12(e) motion brought as a dilatory tactic to postpone filing an answer. n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Wood v. Apodaca, 375 F. Supp. 2d 942, 949-950 (N.D. Cal. 2005)*

(n2)Footnote 2. *Van Brunt v. Rauschenberg, 799 F. Supp. 1467, 1472 (S.D.N.Y. 1992).*

(n3)Footnote 3. Trustees of the Combined Pension Fund v. Chase Manhattan Bank, No. 92 Civ. 6251, 1993 U.S. Dist. LEXIS 9428, at *2-5 (S.D.N.Y. July 9, 1993).

(n4)Footnote 4. *See Gierlinger v. New York State Police, 738 F. Supp. 96, 98 (W.D.N.Y. 1990)* .

(n5)Footnote 5. *Anderson v. Board of Trustees, 77 F.3d 364, 367 (11th Cir. 1996)* .

(n6)Footnote 6. *Kelly v. L.L. Cool J., 145 F.R.D. 32, 35 (S.D.N.Y. 1992)* , *aff'd without opinion*, *23 F.3d 398 (2d Cir. 1994)* .

(n7)Footnote 7. *Bennett v. Beiersdorf, Inc., 889 F. Supp. 46, 52 (D. Conn. 1995)* .

(n8)Footnote 8. *See, e.g.,* Lampi Corp. v. American Power Prods., 1994 U.S. Dist. LEXIS 12828 (N.D. Ill. 1994).

(n9)Footnote 9. *See Marx v. Gumbinner, 855 F.2d 783, 792 (11th Cir. 1988)* .

(n10)Footnote 10. *See* Green v. First Reliance Standard Life Ins. Co., No. 96 Civ. 6859, 1997 U.S. Dist. LEXIS 6607, at *10-11 (S.D.N.Y. May 12, 1997).

(n11)Footnote 11. *Merrill Lynch Mortgage Corp. v. Narayan, 908 F.2d 246, 251-252 (7th Cir. 1990)* .

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CHAPTER 3 Rule 12 Motions
E. Defensive Motions to Narrow or Clarify Pleadings
1. Rule 12(e) Motion for More Definite Statement

1-3 Federal Litigation Guide § 3.142

§ 3.142 Motion Must Be Made Prior to Responding

A motion for a more definite statement is always made before responding to a pleading. A party waives the right to move for a more definite statement by making a Rule 12 pre-answer motion that does not include a motion for a more definite statement. n1

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 12(g).*

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CHAPTER 3 Rule 12 Motions
E. Defensive Motions to Narrow or Clarify Pleadings
1. Rule 12(e) Motion for More Definite Statement

1-3 Federal Litigation Guide §§ 3.143 through 3.149

[Reserved]

§§ 3.143[Reserved]

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CHAPTER 3 Rule 12 Motions
E. Defensive Motions to Narrow or Clarify Pleadings
2. Rule 12(f) Motion to Strike

1-3 Federal Litigation Guide § 3.150

§ 3.150 Using Motion to Strike

[1] Motion Not Favored

Before deciding to use the motion to strike, counsel should evaluate his or her strategy in the light of the courts' general disfavor of this motion. n1 Many courts view the motion as one that seeks an extreme remedy. n2

[2] Arguing Prejudice

Some courts require that a showing of prejudice to the defendant must be made before language in a pleading will be stricken. n3

[3] Motion Limited to Attacking Pleading

A motion to strike may only be used to attack material in a pleading. n4 Motions, briefs or memoranda, objections, or affidavits may not be attacked by a motion to strike. n5 However, a court has inherent authority to strike any filed paper that it determines to be abusive or otherwise improper. n6

Note
that the plaintiff may use this type of motion to attack the defendant's answer. n7

[4] Basis of Motion

A party may move to strike any of the following material from a pleading: n8

- Defense that is insufficient as a matter of law
- Impertinent or immaterial matter
- Scandalous matter
- Redundant matter

Some of the grounds listed in the rule for granting a motion to strike may overlap. But generally, courts will strike a claim as "redundant" when it essentially repeats another claim in the same complaint. n9 An allegation is "impertinent" or "immaterial" when it is neither responsive nor relevant to the issues involved in the action. n10 Material also may be struck as redundant, immaterial, or impertinent when the material seeks to raise issues that already have been fully decided by the court. n11

A party may not move to strike material from a pleading on the grounds that it is false. n12 However, such material may be subject to later challenge under Rule 11. n13

A successful motion to strike attacks allegations that are so unrelated to the plaintiff's claims that they are devoid of merit, and are prejudicial to the movant. n14

[5] Joining Rule 12 Defenses in Single Motion

A party who raises a Rule 12 defense in a pre-answer motion must join with it any other Rule 12 motion that is available to the party at the time the motion is made. n15

Accordingly, a motion to strike is often combined with a Rule 12(b) motion to dismiss. A defendant who moves for dismissal under Rule 12(b) and does not join with it a motion to strike waives the right to move to strike. n16

[6] Enforcing Order for More Definite Statement

A motion to strike may be used to request that the court enforce an order for more definite statement. n17

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See NOW, Inc. v. Scheidler, 897 F. Supp. 1047, 1087 n.28 (N.D. Ill. 1995)* .

(n2)Footnote 2. *See Stanbury Law Firm v. IRS, 221 F.3d 1059, 1063 (8th Cir. 2000)* (citing **Moore's**).

(n3)Footnote 3. *See, e.g., In re NASDAQ Market-Makers Antitrust Litig., 164 F.R.D. 346, 350 (S.D.N.Y. 1996)* ; *Giuliano v. Everything Yogurt, Inc., 819 F. Supp. 240, 246 (E.D.N.Y. 1993)* .

(n4)Footnote 4. *Fed. R. Civ. P. 12(f)*.

(n5)Footnote 5. *See, e.g., Hrubec v. National R.R. Passenger Corp., 829 F. Supp. 1502, 1506 (N.D. Ill. 1993)* ; *Anna Ready Mix, Inc. v. N.E. Pierson Constr. Co., 747 F. Supp. 1299, 1303 (S.D. Ill. 1990)* .

(n6)Footnote 6. *In re NASDAQ Market-Makers Antitrust Litig., 164 F.R.D. 346, 349 (S.D.N.Y. 1996); see also In re Smith, 656 F.2d 1101, 1104 n.8 (5th Cir. 1981)* (approving third party's motion to strike his name from a criminal information and seal the record as an "innovative hybrid" of *Fed. R. Crim. P. 7(d)* and *Fed. R. Civ. P. 12(f))*.

(n7)Footnote 7. *See, e.g., EEOC v. First Nat'l Bank, 614 F.2d 1004, 1008 (5th Cir. 1980)* .

(n8)Footnote 8. *Fed. R. Civ. P. 12(f)*.

(n9)Footnote 9. *Munie v. Stag Brewery, 131 F.R.D. 559, 560 (N.D. Ill. 1990)* .

(n10)Footnote 10. *Morse v. Weingarten, 777 F. Supp. 312, 319 (S.D.N.Y. 1991)* .

(n11)Footnote 11. *Cambridge Toxicology Group., Inc. v. Exnicios, 495 F.3d 169, 178 (5th Cir. 2007)* .

(n12)Footnote 12. *See Fleischer v. A.A.P., Inc., 180 F. Supp. 717, 721 (S.D.N.Y. 1959)* .

(n13)Footnote 13. *Kounitz v. Slaaten, 901 F. Supp. 650, 658 (S.D.N.Y. 1995)* .

(n14)Footnote 14. *NOW, Inc. v. Scheidler 897 F. Supp. 1047, 1087 n.28 (N.D. Ill. 1995)* .

(n15)Footnote 15. *Fed. R. Civ. P. 12(g).*

(n16)Footnote 16. *See Fed. R. Civ. P. 12(g)*; *Williams v. Jader Fuel Co., 944 F.2d 1388, 1399 (7th Cir. 1991)* .

(n17)Footnote 17. *See Fed. R. Civ. P. 12(e).*

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CHAPTER 3 Rule 12 Motions
E. Defensive Motions to Narrow or Clarify Pleadings
2. Rule 12(f) Motion to Strike

1-3 Federal Litigation Guide § 3.151

§ 3.151 Understanding Time Limits for Motion to Strike

A motion to strike must be made within the following time limits: n1

- Before responding to the offending pleading
- Within 21 days after the pleading is served, if a responsive pleading is not permitted

A court may consider a motion to strike that would otherwise be waived if doing so seems proper. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 12(e).*

(n2)Footnote 2. *See, e.g. Wilson v. City of Chicago, 900 F. Supp. 1015, 1023 n.1 (N.D. Ill. 1995) .*

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CHAPTER 3 Rule 12 Motions
E. Defensive Motions to Narrow or Clarify Pleadings
2. Rule 12(f) Motion to Strike

1-3 Federal Litigation Guide §§ 3.152 through 3.159

[Reserved]

§§ 3.152[Reserved]

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CHAPTER 3 Rule 12 Motions
F. Moving for Judgment on the Pleadings

1-3 Federal Litigation Guide § 3.160

§ 3.160 Moving for Judgment After Pleadings Close

[1] Nature of Motion

At any time after the pleadings close and before the trial commences, a party may move for a judgment on the pleadings under Rule 12(c). When no counterclaim or cross-claim is made, the pleadings are closed after the complaint and answer are filed. Accordingly, the motion for judgment on the pleadings may not be filed prior to the defendant's answer. n1 A court may grant judgment on the pleadings if the material facts are undisputed, and a judgment on the merits can be reached by considering only the contents of the pleadings and matters of which the court may take judicial notice. n2 In deciding the motion, the court may consider any of the pleadings, including the complaint, the answer, and any written instruments attached to them. n3

If the parties present materials outside the pleadings, the court may only consider such materials if it first converts the motion to a motion for summary judgment. n4

[2] Defenses and Objections Raised by Motion for Judgment on Pleadings

A Rule 12(c) motion for judgment on the pleadings may be used to raise any of the following defenses and objections: n5

- Lack of subject matter jurisdiction
- Failure to state a claim upon which relief may be granted
- Failure to join an indispensable party
- Failure to state a legal defense to a claim

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeCivil ProcedurePleading & PracticeMotion PracticeGeneral

OverviewCivil ProcedurePretrial JudgmentsJudgment on the Pleadings

FOOTNOTES:

(n1)Footnote 1. *See Doe v. United States, 419 F.3d 1058, 1061-1062 (9th Cir. 2005).*

(n2)Footnote 2. *See Hebert Abstract Co. v. Touchstone Properties, Ltd., 914 F.2d 74, 76 (5th Cir. 1990).*

(n3)Footnote 3. *Commercial Money Ctr., Inc. v. Illinois Union Ins. Co., 508 F.3d 327, 335 (6th Cir. 2007)* (documents attached to pleadings became part of pleadings and could be considered on motion for judgment on pleadings without converting motion to one for summary judgment).

(n4)Footnote 4. *See Rubin v. Schottenstein, Zox & Dunn, 110 F.3d 1247, 1253 (6th Cir. 1997)* ; *Latecoere Int'l, Inc. v. United States Dep't of the Navy, 19 F.3d 1342, 1356 (11th Cir. 1994)* .

(n5)Footnote 5. *Fed. R. Civ. P. 12(h)(2).*

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CHAPTER 3 Rule 12 Motions
F. Moving for Judgment on the Pleadings

1-3 Federal Litigation Guide § 3.161

§ 3.161 Timing of Motion for Judgment on the Pleadings

Either party may move for judgment on the pleadings after the pleadings close. Unless the court orders a reply to an answer or third-party answer, the pleadings close after the last of the following pleadings in the case has been filed: answer, answer to a counterclaim, answer to a cross-claim, and third-party answer. n1

A motion for judgment on the pleadings cannot be made at a time that will delay the trial. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsRule Application & InterpretationCivil ProcedurePretrial JudgmentsJudgment on the Pleadings

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 7(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 12(c).*

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CHAPTER 3 Rule 12 Motions
F. Moving for Judgment on the Pleadings

1-3 Federal Litigation Guide § 3.162

§ 3.162 Standards Applicable to Determining Motion for Judgment on the Pleadings

[1] Court Applies Standards Applicable to 12(b)(6) Motion

The same standards apply to dismissing a complaint under Rule 12(c) and Rule 12(b)(6). n1 In deciding a Rule 12(c) motion, the court will accept the allegations contained in the complaint as true, and draw all reasonable inferences in favor of the non-movant. n2

Because the same standards apply to Rule 12(b)(6) motions and Rule 12(c) motions, most of the voluminous authority on Rule 12(b)(6) applies to Rule 12(c). In fact, the cases often discuss both motions.

[2] Court Assumes Truth of Facts Pleaded by Party Opposing Motion

In considering a motion for judgment on the pleadings, the court must accept all allegations in the complaint as true, and draw all inferences in favor of the plaintiff. n3

Accordingly, dismissal on a 12(c) motion is proper only if it "appears beyond doubt that the plaintiff can prove no set of facts in support of [the] claim which would entitle [the plaintiff] to relief." n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePretrial JudgmentsJudgment on the Pleadings

FOOTNOTES:
(n1)Footnote 1. *GATX Leasing Corp. v. National Union Fire Ins. Co., 64 F.3d 1112, 1114 (7th Cir. 1995)* .

(n2)Footnote 2. *Sheppard v. Beerman, 18 F.3d 147, 150 (2d Cir. 1994)* .

(n3)Footnote 3. *Park Univ. Enters., Inc. v. American Cas. Co., 442 F.3d 1239, 1244 (10th Cir. 2006)* .

(n4)Footnote 4. *GATX Leasing Corp. v. National Union Fire Ins. Co., 64 F.3d 1112, 1114 (7th Cir. 1995)* ;

Sheppard v. Beerman, 18 F.3d 147, 150 (2d. Cir. 1994).

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CHAPTER 3 Rule 12 Motions
F. Moving for Judgment on the Pleadings

1-3 Federal Litigation Guide § 3.163

§ 3.163 Conversion to Motion for Summary Judgment

[1] Court Considers Matters Outside Pleadings

A court must treat a motion for judgment on the pleadings under Rule 12(c) as a Rule 56 motion for summary judgment if the parties present matters outside the pleadings, and those matters are not excluded by the court. n1

[2] Court Must Provide Reasonable Opportunity to Present Relevant Materials

If the court decides to treat a motion for judgment on the pleadings as a motion for summary judgment, it must give all of the parties a "reasonable opportunity to present all the material that is pertinent to the motion." n2

The court may consider the following factors, among others, in determining whether the non-moving party had a reasonable opportunity to present relevant extrinsic evidence:

- Whether the contents of the motion put the non-moving party on notice. For example, when the defendant sought judgment on the pleadings based on both jurisdictional grounds and on the merits, but submitted an affidavit supporting only the jurisdictional grounds, the plaintiff was not put on notice that the motion would be converted to a motion for summary judgment on the underlying merits of the claim. n3

- Whether the caption of the motion put the non-moving party on notice. For example, a motion that is titled "motion to dismiss or, in the alternative, for summary judgment" may put the non-movant on notice that the motion may be converted. n4

[3] Propriety of Conversion Depends on Facts of Specific Case

In determining whether a trial court properly converted a motion to dismiss into a motion for summary judgment, the reviewing court must consider the facts and circumstances of the individual case. n5

Conversion is disfavored when: n6

- The motion comes quickly after the complaint

- Discovery is in its infancy, so that the non-movant is limited in obtaining and submitting evidence to counter the motion

- The non-movant does not have reasonable notice that a conversion might occur.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePretrial JudgmentsJudgment on the PleadingsCivil ProcedureSummary JudgmentGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 12(d)*; *Rubin v. Schottenstein, Zox & Dunn, 110 F.3d 1247, 1253 (6th Cir. 1997)* .

(n2)Footnote 2. *See Fed. R. Civ. P. 12(c)*; *Krijn v. Pogue Simone Real Estate Co., 896 F.2d 687, 689 (2d Cir. 1990)* .

(n3)Footnote 3. *See Krijn v. Pogue Simone Real Estate Co., 896 F.2d 687, 689-690 (2d Cir. 1990)* .

(n4)Footnote 4. *National Ass'n of Pharmaceutical Mfrs. v. Ayerst Labs., 850 F.2d 904, 911 (2d Cir. 1988)* .

(n5)Footnote 5. *See, e.g., Krijn v. Pogue Simone Real Estate Co., 896 F.2d 687, 689-690 (2d Cir. 1990)* .

(n6)Footnote 6. *Rubert-Torres ex rel. Cintron-Rubert v. Hospital San Pablo, Inc., 205 F.3d 472, 475-476 (1st Cir. 2000)* .

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CHAPTER 3 Rule 12 Motions
F. Moving for Judgment on the Pleadings

1-3 Federal Litigation Guide §§ 3.164 through 3.199

[Reserved]

§§ 3.164[Reserved]

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CHAPTER 3 Rule 12 Motions
G. Forms

1-3 Federal Litigation Guide § 3.200

§ 3.200 Notice of Motion to Dismiss for Lack of Subject Matter Jurisdiction

[1] FORM

Notice of Motion to Dismiss for Lack of Subject Matter Jurisdiction

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

NOTICE IS HEREBY GIVEN that on *date*] at [*time of day (specify a.m. or p.m.)*], or as soon thereafter as counsel may be heard, [*party designation and name of moving party*] will move this Court, at the United States Courthouse located at [*address of court*], Courtroom [*courtroom number*], for an order:

(a) pursuant to *Federal Rules of Civil Procedure, Rule 12(b)(1)* dismissing this action for lack of subject matter jurisdiction on the ground that [*state basis of motion, e.g., the required diversity of citizenship of the parties is not present under 28 U.S.C. § 1332(a)*]; and

(b) granting [*moving party*] such other incidental relief as may be appropriate.

This motion is based on this Notice of Motion, the accompanying Declaration (*or other appropriate affidavit substitute*) of [*name of signatory*] sworn to (*or dated*) [*date*], the accompanying Memorandum of Law (*if required*) dated [*date*], and on all of the pleadings and papers on file in this action.

[*Date*]

Respectfully submitted,

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for [*name and designation of party*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules;*]

TO: [*Name of opposing counsel*], Attorney for [*name of party*]

[2] Use of Form

This is a form of notice of motion pursuant to *Fed. R. Civ. P. 12(b)(1)* to dismiss an action for lack of subject matter jurisdiction. For discussion of the burden of proof on a challenge to subject matter jurisdiction, *see § 3.50[3].*

Jurisdiction may be attacked either facially or factually. In a facial attack, all of the plaintiff's factual allegations are taken as true, but the defendant argues those allegations do not establish the presence of jurisdiction. In a factual attack, the defendant introduces extrinsic evidence to contradict the jurisdictional facts alleged by the plaintiff.

[3] Time for Raising Lack of Subject Matter Jurisdiction

Lack of subject matter jurisdiction is a fundamental defect that is not waivable, and therefore may be raised at any time by any party, even after the entry of judgment. If subject matter jurisdiction is lacking, the court must dismiss the action.

No local rule may operate as a bar to an objection to subject matter jurisdiction.

[4] Consolidation of Rule 12 Motions Required

If the defendant has any other available defenses or motions under *Fed. R. Civ. P. 12*, they should be consolidated and presented in a single motion under Rule 12. If one Rule 12 motion is made, failure to include any of the following defenses or motions waives them: n1

- Lack of personal jurisdiction
- Improper venue
- Insufficiency of process
- Insufficiency of service of process
- Motion to strike under Rule 12(f)
- Motion for more definite statement under Rule 12(e)

However, other Rule 12 defenses available to a defendant are not forever waived if not included in an initial motion under the rule. These include: n2

- Lack of subject matter jurisdiction
- Failure to state a claim on which relief can be granted
- Failure to join an indispensable party

[5] Challenging Diversity Jurisdiction

Diversity jurisdiction exists only when there is complete diversity of citizenship and the amount in controversy exceeds $75,000. The party asserting the existence of diversity jurisdiction has the burden of proving both of these elements necessary to jurisdiction. As to the element of amount in controversy, the plaintiff's good faith allegation of a greater amount is sufficient, unless it appears to a legal certainty that the plaintiff cannot recover that amount. As to the citizenship element, if the plaintiff's allegations are insufficient, the plaintiff usually will be given leave to amend the complaint. However, if diversity is demonstrably lacking, the court may, if permittedunder *Fed. R. Civ. P. 19* and *Fed. R. Civ. P. 21*, dismiss the nondiverse defendant to preserve jurisdiction.

[6] Challenging Federal Question Jurisdiction

A complaint that purports to rely on federal question jurisdiction may be dismissed for lack of subject matter jurisdiction only if the federal claims are obviously without merit or wholly frivolous. Failure to state a federal claim is grounds for dismissal under *Fed. R. Civ. P. 12(b)(6)*, but does not justify a dismissal for lack of subject matter jurisdiction.

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 12(g), (h)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 12(h)(2), (3).*

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CHAPTER 3 Rule 12 Motions
G. Forms

1-3 Federal Litigation Guide § 3.201

§ 3.201 Alternative Paragraph: Lack of Personal Jurisdiction

[1] FORM

Alternative Paragraph: Lack of Personal Jurisdiction

(a) pursuant to *Federal Rules of Civil Procedure, Rule 12(b)(2)*, dismissing this action for lack of personal jurisdiction over [*party designation and name of moving party*] on the ground that [*state basis of motion, e.g., an exercise of personal jurisdiction by this court over this defendant would violate due process*]; and

[2] Use of Form

This form is an alternative paragraph for the form in § 3.200, for moving under *Fed. R. Civ. P. 12(b)(2)* to dismiss an action for lack of personal jurisdiction. Related, but distinct, is a motion to dismiss for insufficiency of service of process [*Fed. R. Civ. P. 12(b)(5)*]. A challenge to personal jurisdiction disputes the *power* of the court to exercise jurisdiction over the defendant, while a challenge to sufficiency of process disputes the *method* by which that power was invoked.

[3] Time for Raising Lack of Personal Jurisdiction; Waiver

The defense of personal jurisdiction is unique in that it is fundamental, yet nevertheless it is waivable. It is fundamental in the sense that a federal court cannot render a valid in personam judgment without obtaining personal jurisdiction over the defendant. However, it is waivable in the sense that the defense is personal and must be raised by the defendant at the first available opportunity. Thus, if the defendant appears to defend the action, the defense must be interposed either in the first motion made under *Fed. R. Civ. P. 12* or in the initial answer.

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CHAPTER 3 Rule 12 Motions
G. Forms

1-3 Federal Litigation Guide § 3.202

§ 3.202 Alternative Paragraph: Improper Venue

[1] FORM

Alternative Paragraph: Improper Venue

(a) pursuant to *Federal Rules of Civil Procedure, Rule 12(b)(3)*, and *28 U.S.C. § 1406(a)*, dismissing this action on the ground that venue is improper as to [*party designation and name of moving party*] under [*state applicable venue statute, e.g., 28 U.S.C. § 1391(a)*]; and

[2] Use of Form

This form is an alternative paragraph for the form in *§ 3.200*, for use by a party in moving under *Fed. R. Civ. P. 12(b)(3)* to dismiss an action for improper venue under *28 U.S.C. § 1406(a)*.

[3] Venue Provisions; Burden of Proof

Most actions in federal court are subject to the general venue statute [*28 U.S.C. § 1391*]. However, some federal claims have specific venue provisions that generally expand the venue options. Although the cases are not uniform, the better view is that when venue is challenged by a defendant, the plaintiff bears the burden of defending its venue choice.

[4] Transfer as Alternative to Dismissal for Improper Venue

While the improper venue statute authorizes an outright dismissal, it also provides for a transfer of the action to a proper venue "if it be in the interest of justice." n1 In general, the less drastic remedy of transfer will be ordered in lieu of dismissal, unless, of course, the plaintiff disclaims any desire to a transfer. For a form of notice of motion for seeking transfer rather than dismissal, *see § 3.203*. A related but distinct motion is a motion to transfer venue for the convenience of the witnesses and parties under *28 U.S.C. § 1404*.

[5] Time for Raising Improper Venue

The defense of improper venue is personal and must be raised by the defendant at the first available opportunity. Thus, the defense must be interposed either in the first motion made under *Fed. R. Civ. P. 12* or in the initial answer.

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1406(a).*

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CHAPTER 3 Rule 12 Motions
G. Forms

1-3 Federal Litigation Guide § 3.203

§ 3.203 Alternative Paragraph: Transfer for Improper Venue

[1] FORM

Alternative Paragraph: Transfer for Improper Venue

(a) pursuant to *Federal Rules of Civil Procedure, Rule 12(b)(3)*, and *28 U.S.C. § 1406(a)*, transferring this action to the [*name of district, if any e.g., Middle*] District of [*state in which district located*] on the ground that venue is improper in this district as to [*party designation and name of moving party*] under [*state applicable venue statute, e.g., 28 U.S.C. § 1391(a)*]; and

[2] Use of Form

This form is an alternative paragraph for the form in *§ 3.200* to transfer the action, pursuant to *Fed. R. Civ. P. 12(b)(3)*, to another district on the ground of improper venue. n1

[3] Venue Provisions; Burden of Proof

Most actions in federal court are subject to the general venue statute [*28 U.S.C. § 1391*]; however, some federal claims have specific venue provisions that generally expand the venue options. Although the cases are not uniform, the better view is that when venue is challenged by a defendant, the plaintiff bears the burden of defending its venue choice. A related but distinct motion is a motion to transfer venue for the convenience of the witnesses and parties under *28 U.S.C. § 1404*.

[4] Dismissal as Alternative to Transfer for Improper Venue

The improper venue statute authorizes either dismissal or transfer of the action to a proper venue "if it be in the interest of justice." n2

[5] Time for Raising Improper Venue

The defense of improper venue is personal and must be raised by the defendant at the first available opportunity. Thus, the defense must be interposed either in the first motion made under *Fed. R. Civ. P. 12* or in the initial answer.

FOOTNOTES:

(n1)Footnote 1. *28 U.S.C. § 1406(a).*

(n2)Footnote 2. *28 U.S.C. § 1406(a).*

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CHAPTER 3 Rule 12 Motions
G. Forms

1-3 Federal Litigation Guide § 3.204

§ 3.204 Alternative Paragraph: Failure to State Claim

[1] FORM

Alternative Paragraph: Failure to State Claim

(a) pursuant to *Federal Rules of Civil Procedure, Rule 12(b)(6)*, dismissing this action on the ground that the Complaint of [*party designation and name of party against whom relief is sought*] fails to state a claim on which relief can be granted in that [*state basis of motion, e.g., the Plaintiff's Complaint establishes that the statute of limitations has run on all claims*]; and

[2] Use of Form

This form is an alternative paragraph for the form in *§ 3.200,* pursuant to *Fed. R. Civ. P. 12(b)(6)*, to dismiss the action for failure of the plaintiff to state a claim on which relief can be granted.

[3] Burden of Proof

The movant bears the burden of demonstrating the failure of the plaintiff's complaint to state a claim on which relief can be granted. The movant must show that the plaintiff cannot prove any set of facts in support of the claim that would justify the granting of any relief. All of the factual allegations of the plaintiff's complaint are taken as true, and the plaintiff is given the benefit of any reasonable inferences from those facts.

[4] Granting Leave to Amend Before Dismissal

Even if the movant demonstrates that the complaint fails to state a claim, dismissal of the action generally will not be ordered until the plaintiff has been given at least one opportunity to correct the deficiencies of the complaint through amendment.

[5] Time for Raising Failure to State Claim

The defense of failure to state a claim on which relief can be granted may be raised at any time prior to the entry of judgment.

Local rules cannot supersede the federal rule permitting the defense to be raised at the trial on the merits. n1

[6] Special Pleading Standards Applicable to Fraud and Other Actions

Although generally only a short and plain statement of the claim for relief is required, a claim of fraud and certain other claims are subject to a heightened pleading standard. n2 The failure of a complaint to comply with these pleading standards makes it subject to dismissal for failure to state a claim.

[7] Submission of Extrinsic Evidence; Conversion to Summary Judgment Motion

In general, it is improper to submit evidentiary materials in support of a motion to dismiss for failure to state a claim, because that motion tests only the sufficiency of the pleadings. However, if such material is submitted, the district court may disregard it and decide the motion based only on the pleadings, or it may consider the extrinsic evidence and convert the motion into one for summary judgment. Such conversion requires notice to all parties and an opportunity to submit any further evidentiary materials.

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 12(h)(2).*

(n2)Footnote 2. *Fed. R. Civ. P. 9(b).*

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CHAPTER 3 Rule 12 Motions
G. Forms

1-3 Federal Litigation Guide § 3.205

§ 3.205 Notice of Motion for Judgment on Pleadings

[1] FORM

Notice of Motion for Judgment on Pleadings

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

TO [*party designation and name of party against whom relief is sought*] AND ITS ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on [*date*] at [*time of day (specify a.m. or p.m.)*], or as soon thereafter as counsel may be heard, [*party designation and name of moving party*] will move this Court, at the United States Courthouse located at [*address of court*], Courtroom [*courtroom number*], for an order:

(a) pursuant to *Federal Rules of Civil Procedure, Rule 12(c)*, granting judgment on the pleadings in favor of [*party designation and name of moving party*] on the ground that [*state basis of motion, e.g., the pleadings establish that the statute of limitations has run on all of Plaintiff's claims*]; and

(b) granting [*moving party*] such other incidental relief as may be appropriate.

This motion is based on this Notice of Motion, the accompanying Declaration (*or other appropriate affidavit substitute*) of [*name of signatory*] sworn to (*or dated*) [*date*], the accompanying Memorandum of Law [*if required*] dated [*date*], and on all of the pleadings and papers on file in this action.

[*Date*]

Respectfully submitted,

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for [*name and designation of party*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

TO: [*Name of opposing counsel*], Attorney for [*name of party*]

[2] Use of Form

This is a form of notice of motion for judgment on the pleadings under *Fed. R. Civ. P. 12(c)*.

[3] Grounds for Motion for Judgment on Pleadings

A motion for judgment on the pleadings may raise any defense not previously waived under the provisions of *Fed. R. Civ. P. 12(h)*, including lack of subject matter jurisdiction, failure to state a claim, and the failure to join an indispensable party. The motion also may be made in support of an affirmative defense that appears from the face of the pleadings, such as the statute of limitations or res judicata. Usually a motion for judgment on the pleadings alleges the failure of the complaint to state a claim on which relief can be granted. For this reason, the standards applicable to the motion are the same as those under *Fed. R. Civ. P. 12(b)(6)*.

[4] Time for Moving for Judgment on Pleadings

A motion for judgment on the pleadings may be made at any time after the pleadings are closed, subject only to the requirement that the motion not delay the trial. n1 The pleadings close when the last of the mandatory pleadings is served and filed, or when the last of any court-ordered replies is served and filed. n2

[5] Submission of Extrinsic Evidence; Conversion to Summary Judgment Motion

In general, it is improper to submit evidentiary materials in support of a motion for judgment on the pleadings, because that motion, as indicated by its name, tests only the sufficiency of the pleadings. If such material is submitted, however, the district court may disregard it and decide the motion based only on the pleadings, or it may consider the extrinsic evidence and convert the motion into one for summary judgment.

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 12(c)*.

(n2)Footnote 2. *Fed. R. Civ. P. 7(a)*.

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CHAPTER 4 Motions as to the Parties

1-4 Federal Litigation Guide 4.syn

§ 4.syn Synopsis to Chapter 4: Motions as to the Parties

§ 4.01 Understanding Types of Rule 19 Motions

§ 4.02 Defining Necessary Party

§ 4.03 Determining Whether Joinder of Necessary Party is Feasible

§ 4.04 Determining Whether Absent Party is Indispensable

§ 4.05 Naming Joined Party as Plaintiff or Defendant

§ 4.06 Newly Joined Party May Challenge Venue

§ 4.07 Timing of Rule 19 Motion

§§ 4.08 through 4.19 [Reserved]

§ 4.20 Understanding Rule 21

§ 4.21 Defining Misjoinder

§ 4.22 Moving to Add Party Under Rule 21
[1] Determining Grounds for Adding Party
[2] Time for Adding Party Under Rule 21
[3] Notice and Service of Motion
[4] Motion to Add Party Granted in Discretion of Court
[5] Opposing Rule 21 Motion to Add Party

§ 4.23 Moving to Drop Party Under Rule 21
[1] Determining Grounds for Dropping Party
[2] Time for Dropping Party Under Rule 21
[3] Motion to Drop Party Granted in Discretion of Court
[4] Court May Dismiss Party But Not Action
[5] Dismissal is Without Prejudice
[6] Opposing Motion to Drop Party

§ 4.24 Moving to Sever Claim Under Rule 21
[1] Understanding Severance
[2] Motion to Sever Granted in Discretion of Court
[3] Opposing Motion to Sever

§§ 4.25 through 4.29 [Reserved]

§ 4.30 Intervention Allows Nonparty to Gain Party Status

§ 4.31 Intervention as of Right
[1] Grounds for Intervention as of Right
[2] Moving to Intervene When Unconditional Right Conferred by Federal Statute
[3] United States May Intervene as of Right When Constitutionality of Federal Statute Affecting Public Interest Is Challenged
[4] Statutes Granting United States Right to Intervene
[5] State Governments May Intervene When Constitutionality of State Statute at Issue
[6] Statutes Granting Private Individuals Right to Intervene
[7] Intervention When No Statutory Basis Exists
[7.--1] Four Factors Must Be Established
[7.--2] Applicant Must Have Sufficient Interest in Property or Transaction at Issue
[7.--3] Disposition of Action Must Impair or Impede Applicant's Interest
[7.--4] Interest Must Be Inadequately Represented by Existing Parties
[8] Standing

§ 4.32 Permissive Intervention
[1] Grounds for Permissive Intervention
[2] Factors Considered on Motion for Permissive Intervention
[3] Moving Under Federal Statute Conferring Conditional Right to Intervene
[4] Permissive Intervention When Common Questions of Law or Fact Exist

§ 4.33 Intervention for Purposes of Appeal

§ 4.34 Considering Timeliness of Intervention Motion

§ 4.35 Analyzing Intervention in Context of Diversity Jurisdiction

§ 4.36 Tactical Considerations for Intervention
[1] Defensive Intervention
[2] Offensive Intervention

§ 4.37 Drafting Motion to Intervene
[1] Pleading Must Accompany Motion Seeking Intervention
[2] Drafting Intervention Pleading

§ 4.38 Serving and Filing Motion to Intervene and Pleading

§ 4.39 Evaluating Jurisdiction and Venue Issues
[1] District Court With Original Jurisdiction May Exercise Supplemental Jurisdiction Over Related Claims
[2] Intervenor Must Independently Meet Jurisdictional Requirements in Diversity Actions
[3] Intervenor May Not Object to Venue

§ 4.40 Opposing Motion Seeking Intervention

[1] Consider Timeliness Objection
[2] Consider Objecting on Ground That Intervention Will Unduly Complicate Litigation
[3] Consider Objecting on Ground That Proposed Intervenor Lacks Sufficient Connection to Action
[4] Consider Objecting on Ground That Representation Is Already Adequate
[5] Consider Fall Back Argument That Limited Intervention Will Sufficiently Protect Applicant's Rights

§ 4.41 Considering Alternatives to Intervention
[1] Assisting Existing Parties
[2] Requesting Leave to File Amicus Curiae Brief
[3] Joining or Adding Party
[4] Filing Separate Action

§ 4.42 Appealing Intervention Order

§ 4.43 CHECKLISTS: Motion to Intervene
[1] CHECKLIST: Drafting Motion for Intervention as of Right
[2] CHECKLIST: Drafting Motion for Permissive Intervention

§§ 4.44 through 4.49 [Reserved]

§ 4.50 Understanding Rule 25

§ 4.51 Moving for Substitution of Deceased Party Under Rule 25(a)
[1] Governing Law
[2] Motion Seeking Substitution May Be Made Without Filing Suggestion of Death
[3] Deadline for Filing Motion Seeking Substitution of Deceased Party
[4] Serving and Filing Suggestion of Death
[5] Substitution of Deceased Party Is Discretionary
[6] Understanding Effect of Death and Survival of Action
[7] Opposing Motion Seeking Substitution of Deceased Party

§ 4.52 Moving for Substitution of Incompetent Party Under Rule 25(b)

§ 4.53 Moving for Substitution on Transfer of Interest Under Rule 25(c)
[1] Defining Transfer of Interest
[2] Transfer of Interest Must Occur After Commencement of Action
[3] Deadline for Filing Motion Based on Transfer of Interest
[4] Serving Substitution Motion Based on Transfer of Interest
[5] Discretion of Court on Motion
[6] Considering Effect of Substitution Under Rule 25(c)

§ 4.54 Understanding Automatic Substitution of Public Officer Under Rule 25(d)
[1] Public Officer's Successor is Automatically Substituted
[2] Defining Official Capacity
[3] Deadline for Seeking Substitution of Public Officer

§ 4.55 CHECKLIST: Substituting Party

§§ 4.56 through 4.99 [Reserved]

§ 4.100 Notice of Motion for Severance of Party
[1] FORM

Notice of Motion for Severance of Party
[2] Use of Form
[3] Grounds for Ordering Severance
[4] Deadline for Seeking Severance
[5] Propriety of Joinder of Defendants; Misjoinder
[6] Propriety of Joinder of Plaintiffs; Misjoinder

§ 4.101 Notice of Motion for Intervention
[1] FORM
Notice of Motion for Intervention
[2] Use of Form
[3] Deadline for Seeking Intervention
[4] Grounds for Intervention as of Right
[5] Grounds for Permissive Intervention
[6] Jurisdictional Considerations as to Intervenors
[7] Pleading Must Accompany Motion

§ 4.102 Caption: Intervention
[1] FORM
Caption: Intervention
[2] Use of Form
[3] Captions

§ 4.103 Notice of Motion Seeking Substitution Because of Death of Party
[1] FORM
Notice of Motion Seeking Substitution Because of Death of Party
[2] Use of Form
[3] Deadline for Seeking Substitution
[4] Action Must Survive Death of Party

§ 4.104 Suggestion of Death of Party on the Record
[1] FORM
Suggestion of Death of Party on the Record
[2] Use of Form
[3] Deadline for Filing Suggestion of Death
[4] Who May File Suggestion of Death
[5] Service of Suggestion of Death

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CHAPTER 4 Motions as to the Parties

1-4 Federal Litigation Guide Scope

Scope

SCOPE

This chapter discusses who may or should be parties to a lawsuit. The plaintiff, in drafting the complaint, has the first chance to select the participants. The parties the plaintiff chooses to include, and even those the plaintiff chooses to exclude, may have the opportunity to challenge the plaintiff's choice by appropriate motions. The plaintiff may also move to add or drop parties after the suit has been filed.

The facts of any given controversy will determine who should be made a party to a lawsuit. Careful thought should be given to the determination of all potential parties who may be involved in the action. Rules 19 through 25 provide the appropriate framework for such consideration.

Issues related to parties arise in many and varied contexts. This chapter divides party-related motion practice into four overall categories:

- **Motions related to "non-joinder" of necessary party under Rules 19 and 21. These motions are generally made by a defendant who contends that an essential party has not been joined in the suit. These motions seek to join the missing party or to dismiss the action because it would be improper to proceed in the absence of the missing party.**

- **Motions related to "misjoinder" of a party under Rule 21. Misjoinder motions are based on the contention that the action contains a party who should not be involved. These motions are brought either to drop the "misjoined" party, or to sever the claims against that party from the rest of the action.**

- **Intervention motions under Rule 24. Intervention provides a vehicle for an absentee party to join the action on a motion of their own.**

- **Substitution motions under Rule 25. These motions may be brought when one of the original parties dies, becomes incompetent, transfers an interest relevant to the litigation, or if the party is a public official, dies or leaves office.**

The chapter suggests tactics and techniques for making and opposing each type of motion. The chapter also provides

procedural checklists for use in moving to add or drop parties, intervene, or substitute, as well as checklists for opposing such motions. The chapter also provides the following sample forms:

- **Notice of motion for severance of party**
- **Notice of motion for intervention**
- **Notice of motion seeking substitution because of death of party**
- **Suggestion of death of party on the record**

For expanded coverage of the topics covered in this chapter, ***see*** the following chapters of MOORE'S Federal Practice, (Matthew Bender 3d ed.):

- Ch. 19, ***Joinder of Persons Needed for Just Adjudication***
- Ch. 21, ***Misjoinder and Non-Joinder of Parties***
- Ch. 24, ***Intervention***
- Ch. 25, ***Substitution of Parties***

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CHAPTER 4 Motions as to the Parties
A. Understanding Compulsory Joinder Under Rule 19

1-4 Federal Litigation Guide § 4.01

§ 4.01 Understanding Types of Rule 19 Motions

Rule 19 motions challenge the complainant's selection of parties, and thus are always made by a defendant. Generally, two types of Rule 19 motions are available:

- Motion to add a necessary party who can be joined n1
- Motion to dismiss pursuant to Rule 12(b) because an indispensable party cannot be joined n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderCompulsory JoinderCivil ProcedurePartiesJoinderIndispensable PartiesCivil ProcedurePartiesJoinderNecessary Parties

FOOTNOTES:
(n1)Footnote 1. *See § 4.03.*

(n2)Footnote 2. *See § 4.04.*

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CHAPTER 4 Motions as to the Parties
A. Understanding Compulsory Joinder Under Rule 19

1-4 Federal Litigation Guide § 4.02

§ 4.02 Defining *Necessary Party*

Motions under Rule 19 seek to join an unnamed party or to dismiss the action entirely because it would be improper to proceed in the absence of the missing, "necessary party." "Necessary parties" are any of the following: n1

- Absentees needed to grant complete relief to existing parties to the action
- Absentees needed to assure that the court's judgment as a practical matter does not impair or impede that absentee's ability to protect its interest in later litigation
- Absentees who have an interest in the litigation such that their nonjoinder would leave an existing party exposed to substantial risk of multiple liability or inconsistent obligations

If the particular absentee does not fall into one of the three enumerated categories, the issue of whether that absentee may be joined will need to be resolved by reference to either Rule 20 (permissive joinder), n2 or Rule 24 (intervention). n3

Absentees are not necessary parties when their interests were identical to those of existing parties who are capable of adequately representing the interests of the absentees. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderCompulsory JoinderCivil ProcedurePartiesJoinderIndispensable PartiesCivil ProcedurePartiesJoinderNecessary Parties

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 19(a)(1).*

(n2)Footnote 2. *See § 4.22.*

(n3)Footnote 3. *See §§ 4.30-4.43.*

(n4)Footnote 4. *See Ohio Valley Envtl. Coalition v. Bulen, 429 F.3d 493, 504-505 (4th Cir. 2005)* .

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CHAPTER 4 Motions as to the Parties
A. Understanding Compulsory Joinder Under Rule 19

1-4 Federal Litigation Guide § 4.03

§ 4.03 Determining Whether Joinder of Necessary Party is Feasible

Once the court determines that a person or entity is a necessary party, n1 it mustdetermine whether joinder of that person or entity is feasible. n1.1

Joinder will *not* be feasible if it destroys subject matter jurisdiction. n2 This concern refers to the possibility that joining the absentee will destroy diversity of citizenship jurisdiction. The assessment requires the court to align the absentee on the side of the dispute most closely reflecting its interest.

If joinder of the necessary party is not feasible because subject matter jurisdiction will be destroyed, the court must determine under Rule 19(b) whether in equity and good conscience the action should proceed without the necessary party, or whether the action should be dismissed. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderCompulsory JoinderCivil ProcedurePartiesJoinderIndispensable PartiesCivil ProcedurePartiesJoinderNecessary Parties

FOOTNOTES:
(n1)Footnote 1. *See § 4.02.*

(n2)Footnote 1.1. *See EEOC v. Peabody W. Coal Co., 400 F.3d 774, 778-784 (9th Cir. 2005)* ; *see also Glancy v. Taubman Ctrs., Inc., 373 F.3d 656, 666 (6th Cir. 2004)* (citing **Moore's**).

(n3)Footnote 2. *See Fed. R. Civ. P. 19(a)*; *see also Gabriel v. Preble, 396 F.3d 10, 13-16 (1st Cir. 2005)* .

(n4)Footnote 3. *See § 4.04.*

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CHAPTER 4 Motions as to the Parties
A. Understanding Compulsory Joinder Under Rule 19

1-4 Federal Litigation Guide § 4.04

§ 4.04 Determining Whether Absent Party is *Indispensable*

If joinder of the necessary party is not feasible because subject matter jurisdiction will be destroyed, n1 the court must determine under Rule 19(b) whether in equity and good conscience the action should proceed without the necessary party, or whether the action should be dismissed. If the court decides that the missing person is **indispensable**, the action should be dismissed. n2

In determining whether a party is indispensable, Rule 19(b) directs the court to consider the following factors: n3

- To what extent a judgment rendered in the person's absence might be prejudicial to the person or to those already parties
- The extent to which, by protective provisions in the judgment, by shaping of relief, or by other measures, the prejudice can be lessened or avoided
- Whether a judgment rendered in the person's absence will be adequate
- Whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder

Courts generally will dismiss the action only when serious harm may result from nonjoinder of the necessary party, and the plaintiff's interest can be protected by proceeding in another forum. n4

Rule 19 attempts to balance the following key interests: n5

- The plaintiff's interest in having a forum
- The defendant's interest in avoiding multiple litigation, or inconsistent relief, or sole responsibility for a liability shared with another
- The interest of the outsider whom it would have been desirable to join
- The interest of the courts and the public in complete, consistent, and efficient settlement of

controversies

As a general rule, all parties to a contract will be necessary in an action to set aside the contract. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderCompulsory JoinderCivil ProcedurePartiesJoinderIndispensable PartiesCivil ProcedurePartiesJoinderNecessary Parties

FOOTNOTES:
(n1)Footnote 1. *See § 4.03.*

(n2)Footnote 2. *Fed. R. Civ. P. 19(b)*; *Extra Equipamentose Exportacao Ltda. v. Case Corp., 361 F.3d 359, 362-364 (7th Cir. 2004)* .

(n3)Footnote 3. *Fed. R. Civ. P. 19(b)*; *see also Baker Group, L.C. v. Burlington N. & Santa Fe Ry. Co., 451 F.3d 484, 490-491 (8th Cir. 2006)* ; *Carnero v. Boston Scientific Corp., 433 F.3d 1, 18-19 (1st Cir. 2005)* .

(n4)Footnote 4. *See Kelly v. Commercial Union Ins. Co., 709 F.2d 973, 977 (5th Cir. 1983)* .

(n5)Footnote 5. *Provident Tradesmen Bank & Trust Co. v. Patterson, 390 U.S. 102, 109-111, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968)* .

(n6)Footnote 6. *See Wilbur v. Locke, 423 F.3d 1101, 1111-1116 (9th Cir. 2005)* (citing **Moore's**).

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CHAPTER 4 Motions as to the Parties
A. Understanding Compulsory Joinder Under Rule 19

1-4 Federal Litigation Guide § 4.05

§ 4.05 Naming Joined Party as Plaintiff or Defendant

Initially, the party seeking joinder denominates the absent person as a plaintiff or a defendant. However, that alignment is not binding on the court, and is frequently contested. The court will align the absent person according to the party's interests in the litigation. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderCompulsory JoinderCivil ProcedurePartiesJoinderIndispensable PartiesCivil ProcedurePartiesJoinderNecessary Parties

FOOTNOTES:
(n1)Footnote 1. *City of Dawson v. Columbia Ave. Title & Trust Co., 197 U.S. 178, 180, 25 S. Ct. 420, 421, 49 L. Ed. 713 (1905)* ; *see also Gabriel v. Preble, 396 F.3d 10, 13-16 (1st Cir. 2005)* (derivative action suit where court realigned the corporation as a defendant).

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CHAPTER 4 Motions as to the Parties
A. Understanding Compulsory Joinder Under Rule 19

1-4 Federal Litigation Guide § 4.06

§ 4.06 Newly Joined Party May Challenge Venue

If the previously absent party is joined, Rule 19 provides that the new party may assert that venue is improper. n1 This is particularly likely to happen in a diversity action where venue is based in the district where "all defendants reside," n2 and the joined party is not a resident of that district.

If the newly joined party objects to venue, and joinder renders the venue of the action improper, the party must be dismissed from the action. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderCompulsory JoinderCivil ProcedurePartiesJoinderIndispensable PartiesCivil ProcedurePartiesJoinderNecessary Parties

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 19(a).*

(n2)Footnote 2. *28 U.S.C. § 1391(a).*

(n3)Footnote 3. *Fed. R. Civ. P. 19(a)(3).*

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CHAPTER 4 Motions as to the Parties
A. Understanding Compulsory Joinder Under Rule 19

1-4 Federal Litigation Guide § 4.07

§ 4.07 Timing of Rule 19 Motion

A motion to add a party is typically made pursuant to Rule 12(b)(7) if it precedes the service of an answer. Otherwise, the motion is typically made pursuant to Rule 21, which allows for joinder motions at any stage of the proceedings. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderCompulsory JoinderCivil ProcedurePartiesJoinderIndispensable PartiesCivil ProcedurePartiesJoinderNecessary Parties

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 12(b)(7)*; *Fed. R. Civ. P. 21*; *see §§ 4.20-4.24* (using Rule 21 motion to cure non-joinder or misjoinder).

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CHAPTER 4 Motions as to the Parties
A. Understanding Compulsory Joinder Under Rule 19

1-4 Federal Litigation Guide §§ 4.08 through 4.19

[Reserved]

§§ 4.08 [Reserved]

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CHAPTER 4 Motions as to the Parties
B. Using Rule 21 Motion to Cure Non-Joinder or Misjoinder

1-4 Federal Litigation Guide § 4.20

§ 4.20 Understanding Rule 21

Rule 21 provides as follows: n1

- Misjoinder of parties is not ground for dismissal of an action [*see § 4.21*]

- Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action, and on such terms as are just [*see § 4.22[4]*]

- Any claim against a party may be severed and proceeded with separately [*see § 4.24*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderCompulsory JoinderCivil ProcedurePartiesJoinderIndispensable PartiesCivil ProcedurePartiesJoinderMisjoinderCivil ProcedurePartiesJoinderNecessary Parties

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 21.*

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CHAPTER 4 Motions as to the Parties
B. Using Rule 21 Motion to Cure Non-Joinder or Misjoinder

1-4 Federal Litigation Guide § 4.21

§ 4.21 Defining *Misjoinder*

Misjoinder of parties is not ground for dismissal of an action. n1 The Federal Rules do not define *misjoinder*. Several district courts have held that parties are misjoined if the claims asserted against them do not arise out of the same transaction or occurrence, or do not present some common question of law and fact; for example:

- Corporation and its officers were improperly joined in civil rights action against subsidiary n2
- Claims alleging systematic gender discrimination by individuals in employer's management group were not misjoined n3
- Parties were not misjoined when fraud/conversion claims arose from the same transaction and presented common issues n4

Misjoinder can also result from the plaintiff's naming the wrong party or violating a statutory ban on joinder. n5

Rule 21 also applies outside the context of the joinder rules, for example to cure lack of diversity of citizenship jurisdiction. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderMisjoinder

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 21.*

(n2)Footnote 2. *Glendora v. Malone, 917 F. Supp. 224, 227 (S.D.N.Y. 1996)* .

(n3)Footnote 3. *Henderson v. AT&T Corp., 918 F. Supp. 1059, 1061 (S.D. Tex. 1996)* .

(n4)Footnote 4. *Winner's Circle of Las Vegas, Inc. v. AMI Franchising, Inc., 916 F. Supp. 1024, 1029 (D. Nev.*

1996) .

(n5)Footnote 5. *See, e.g., 28 U.S.C. § 1346*.

(n6)Footnote 6. *Newman-Green, Inc v. Alfonzo-Larrain, 490 U.S. 826, 828, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989)* .

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CHAPTER 4 Motions as to the Parties
B. Using Rule 21 Motion to Cure Non-Joinder or Misjoinder

1-4 Federal Litigation Guide § 4.22

§ 4.22 Moving to Add Party Under Rule 21

[1] Determining Grounds for Adding Party

The most common grounds for adding a party are the necessary party requirements found in the compulsory joinder rule. n1

Absentees who would merely be *proper* parties in the action are not subject to compulsory joinder. The plaintiff may name proper parties, or a defendant may seek to join proper parties, but their presence is not required. n2

[2] Time for Adding Party Under Rule 21

A motion to add a party may be made at any stage of the action. n3

[3] Notice and Service of Motion

A proposed new party need not be given notice of the motion to add that party. n4

[4] Motion to Add Party Granted in Discretion of Court

Rule 21 requires that orders adding parties are to be made "on such terms as are just." n5 The Rule vests great discretion in the court in determining whether to add or drop parties. n6

In exercising its discretion under Rule 21, the court must consider principles of fundamental fairness and judicial efficiency. n7

[5] Opposing Rule 21 Motion to Add Party

Opposition to a motion seeking to add a party may be based on:

- Prejudice to the other parties n8
- The moving party's delay in seeking to add the party; late joinder is disfavored because it can create

discovery problems n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderCompulsory JoinderCivil ProcedurePartiesJoinderMisjoinder

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 19*; *see* §§ *4.01*-4.07.

(n2)Footnote 2. *See Fed. R. Civ. P. 20.*

(n3)Footnote 3. *Fed. R. Civ. P. 21*; *see also Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc., 500 F.3d 171, 180 (2d Cir. 2007)* .

(n4)Footnote 4. *See Fed. R. Civ. P. 19*; *see also Fed. R. Civ. P. 21* (neither Rule requires that notice be given to absent party).

(n5)Footnote 5. *Fed. R. Civ. P. 21.*

(n6)Footnote 6. *Applewhite v. Reichhold Chems., Inc., 67 F.3d 571, 574 (5th Cir. 1995)* ; *Bhatla v. U.S. Capital Corp., 990 F.2d 780, 786 (3d Cir. 1993)* ; *Aiello v. Kingston, 947 F.2d 834, 835 (7th Cir. 1991)* ; *New York v. Hendrickson Bros., Inc., 840 F.2d 1065, 1082 (2d Cir. 1988)* ; *Michaels Bldg. Co. v. Ameritrust Co., 848 F.2d 674, 682 (6th Cir. 1988)* (citing **Moore's**).

(n7)Footnote 7. *Intercon Research Assocs., Ltd. v. Dresser Indus., Inc., 696 F.2d 53, 58 (7th Cir. 1982)* ; *Desert Empire Bank v. Insurance Co. of N. Am., 623 F.2d 1371, 1375 (9th Cir. 1980)* .

(n8)Footnote 8. *Newman-Green, Inc., v. Alfonzo-Larrain, 490 U.S. 826, 838, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989)* .

(n9)Footnote 9. *See Giorgio Morandi, Inc. v. Textport Corp., 761 F. Supp. 12, 14 (S.D.N.Y. 1991)* ; *see also Hensgens v. Deere & Co., 833 F.2d 1179, 1182 (5th Cir. 1987)* .

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CHAPTER 4 Motions as to the Parties
B. Using Rule 21 Motion to Cure Non-Joinder or Misjoinder

1-4 Federal Litigation Guide § 4.23

§ 4.23 Moving to Drop Party Under Rule 21

[1] Determining Grounds for Dropping Party

Parties may be dropped by order of the court on motion of any party or on the court's own initiative at any stage of the action, and on such terms as are just. n1

Rule 21 may also be used to drop a properly joined party for the purpose of maintaining diversity of citizenship jurisdiction. n2

[2] Time for Dropping Party Under Rule 21

A motion to drop a party may be made at any stage of the action. n3 A dispensable nondiverse party may be dropped even after judgment has been rendered. n4

[3] Motion to Drop Party Granted in Discretion of Court

Rule 21 requires that orders dropping parties are to be made "on such terms as are just." n5 The Rule vests great discretion in the court in determining whether to drop parties. In exercising its discretion to drop a party under Rule 21, the court must consider principles of fundamental fairness and judicial efficiency. n6 As part of this inquiry, the court should consider whether an order under Rule 21 would prejudice any party. n7

[4] Court May Dismiss Party But Not Action

Misjoinder is not grounds for dismissal of an entire action; rather, the court may rely on Rule 21 to dismiss parties that have no connection to the claims asserted. n8

[5] Dismissal is Without Prejudice

Dismissal of a misjoined party under Rule 21 is without prejudice; a claim by or against such a party may be refiled as a separate suit. n9

[6] Opposing Motion to Drop Party

Opposition to a Rule 21 motion seeking to drop a party may be based on:

- Prejudice to the other parties n10
- The fact that the party proposed to be dropped is properly joined n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderCompulsory JoinderCivil ProcedurePartiesJoinderMisjoinderCivil ProcedurePartiesJoinderPermissive JoinderCivil ProcedureDismissalsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 21.*

(n2)Footnote 2. *Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 832-833 (1989*); *see St. Paul Fire & Marine Ins. Co. v. Universal Builders Supply, 409 F.3d 73, 80-82 (2d Cir. 2005*).

(n3)Footnote 3. *Fed. R. Civ. P. 21.*

(n4)Footnote 4. *Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 832 (1989)* .

(n5)Footnote 5. *Fed. R. Civ. P. 21.*

(n6)Footnote 6. *Intercon Research Assocs., Ltd. v. Dresser Indus., Inc., 696 F.2d 53, 58 (7th Cir. 1982)* ; *Desert Empire Bank v. Insurance Co. of N. Am., 623 F.2d 1371, 1375 (9th Cir. 1980*).

(n7)Footnote 7. *Newman-Green, Inc., v. Alfonzo-Larrain, 490 U.S. 826, 838 (1989)* .

(n8)Footnote 8. *See Fed. R. Civ. P. 21.*

(n9)Footnote 9. *Michaels Bldg. Co. v. Ameritrust Co., 848 F.2d 674, 682 (6th Cir. 1988)* .

(n10)Footnote 10. *Newman-Green, Inc., v. Alfonzo-Larrain, 490 U.S. 826, 838, 109 S. Ct. 2218, 104 L. Ed. 2d 893* .

(n11)Footnote 11. *See Fed. R. Civ. P. 19, 20.*

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CHAPTER 4 Motions as to the Parties
B. Using Rule 21 Motion to Cure Non-Joinder or Misjoinder

1-4 Federal Litigation Guide § 4.24

§ 4.24 Moving to Sever Claim Under Rule 21

[1] Understanding Severance

Rule 21 provides for severance as a cure for misjoinder of parties. A motion to sever a claim against a party may be made by any party. n1

Severance under Rule 21 results in separate actions. A single claim that is severed from a multiclaim action may be prosecuted separately. n2 In other words, the severed claim proceeds as a discrete, independent suit. It and the original case result in their own separate final judgments from which appeals may be taken. n3 If a severed claim is one of multiple claims asserted by a single plaintiff against a single defendant, both parties are involved in two separate actions. n4

By contrast, an order of separate trials does not result in the filing of separate cases. It leads to two or more separate factual inquiries in the context of a single, properly joined case. No matter how many separate trials the court may order, they remain part of a single case. n5

Because a severed claim becomes a separate case, it may be transferred based upon convenience and interest of justice. n6

[2] Motion to Sever Granted in Discretion of Court

The question of whether to enter a severance order is committed to the sound discretion of the district court. n7

The district court has broad authority to proceed with separate trials for a wide variety of reasons, including the prevention of embarrassment, delay, prejudice or expense. n8

[3] Opposing Motion to Sever

Under Rule 21, the only ground for severance is misjoinder of parties. n9 Accordingly, counsel opposing the severance motion must argue that the party has been properly joined. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderCompulsory JoinderCivil ProcedurePartiesJoinderMisjoinderCivil ProcedurePartiesJoinderPermissive Joinder

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 21.*

(n2)Footnote 2. *See, e.g., Acevedo-Garcia v. Monroig, 351 F.3d 547, 558-560 (1st Cir. 2003)* ; *Abdullah v. Acands, Inc., 30 F.3d 264, 269 (1st Cir. 199* 4).

(n3)Footnote 3. *See, e.g., Abdullah v. Acands, Inc., 30 F.3d 264, 269 (1st Cir. 199* 4).

(n4)Footnote 4. *Henderson v. AT&T Corp., 918 F. Supp. 1059, 1062 (S.D. Tex. 1996)* .

(n5)Footnote 5. *United States v. O'Neil, 709 F.2d 361, 368 (5th Cir. 1983).*

(n6)Footnote 6. *See 28 U.S.C. §§ 1404(a)*, 1406(a).

(n7)Footnote 7. *See Nase v. Teco Energy, Inc., 347 F. Supp. 2d 313, 322-323 (E.D. La. 2004)* ; *see also Applewhite v. Reichhold Chems., Inc., 67 F.3d 571, 574 (5th Cir. 1995)* ; *Aiello v. Kingston, 947 F.2d 834, 835 (7th Cir. 1991)* .

(n8)Footnote 8. *Bank of Lincolnwood v. Federal Leasing, Inc., 622 F.2d 944, 947 (7th Cir. 1980)* .

(n9)Footnote 9. *Fed. R. Civ. P. 21.*

(n10)Footnote 10. *See Fed. R. Civ. P. 20.*

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CHAPTER 4 Motions as to the Parties
B. Using Rule 21 Motion to Cure Non-Joinder or Misjoinder

1-4 Federal Litigation Guide §§ 4.25 through 4.29

[Reserved]

§§ 4.25 [Reserved]

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CHAPTER 4 Motions as to the Parties
C. Seeking Intervention Under Rule 24

1-4 Federal Litigation Guide § 4.30

§ 4.30 Intervention Allows Nonparty to Gain Party Status

Intervention is the procedure that allows a nonparty to an action to gain party status without the consent of the existing parties. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesInterventionTimeliness

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 24.*

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CHAPTER 4 Motions as to the Parties
C. Seeking Intervention Under Rule 24

1-4 Federal Litigation Guide § 4.31

§ 4.31 Intervention as of Right

[1] Grounds for Intervention as of Right

Intervention is a matter of right when either:

- A federal statute confers an unconditional right to intervene in the action n1

- The applicant has an interest in the subject matter of the action that may, as a practical matter, be impaired or impeded without the applicant's participation, because the interest is not adequately represented by the existing parties n2

[2] Moving to Intervene When Unconditional Right Conferred by Federal Statute

Only a "statute of the United States" will support a motion for intervention as of right based on unconditional statutory authority. n3

If a state statute appears to grant an unconditional right to intervene, the applicant will nevertheless need to satisfy the alternative basis for intervention as of right--the applicant will need to claim an interest relating to the property or transaction which is the subject of the action, and must be so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest. n4

[3] United States May Intervene as of Right When Constitutionality of Federal Statute Affecting Public Interest Is Challenged

The United States may intervene as of right when the constitutionality of a federal statute affecting the public interest is at issue, and the United States or an agency, officer, or employee thereof is not initially made a party to the action. The court must notify the Attorney General in such a case, and permit the United States to present evidence and argue the constitutionality issue. n5

[4] Statutes Granting United States Right to Intervene

- **Private Civil Rights Actions.** When a private civil rights action is certified by the Attorney General

to be of general public importance, the federal government may intervene. n6

- **ERISA Actions.** When a private action under the Employee Retirement Income Security Act (ERISA) is brought for a purpose other than for the recovery of benefits due under an employee benefit plan, the Secretary of Labor and the Secretary of the Treasury must be served with a copy of the complaint by certified mail. The Secretary of Labor may intervene as of right in such an action, and the Secretary of the Treasury may intervene unless the action is brought under the fiduciary responsibility section of the federal labor statutes. n7

- **Certain Patent and Trademark Cases.** When a party to an interference is dissatisfied with a decision of the Board of Patent Appeals and Interferences, and commences a civil suit for relief, the Commissioner of Patents may intervene. n8 The Commissioner of Patents may also intervene when an applicant for registration of a trademark appeals a decision of the Commissioner or a decision of the Trademark Trial and Appeal Board. n9

- **False Claims Act.** A private person may bring an action in the name of the government under the False Claims Act, which provides a cause of action for knowingly making a false or fraudulent claim when seeking payment from the government. In such a case, the Attorney General must be provided with a copy of the complaint and written disclosure of substantially all material evidence. The Attorney General will then have 60 days from receipt of these materials within which to intervene as of right. n10 If the government seeks intervention after the 60-day period has run, the court may permit such intervention only upon a "showing of good cause." n11

- **Action to Enforce Deepwater Ports Regulation.** A private person may bring an action requesting equitable relief for the violation of deepwater ports regulations, if the Secretary or Attorney General are not diligently prosecuting such an action in federal court. The Secretary of Transportation or the Attorney General may intervene in such an action. n12

[5] State Governments May Intervene When Constitutionality of State Statute at Issue

When the constitutionality of a state statute is at issue, the state attorney general must be notified and given an opportunity to intervene. n13 The state will be given the opportunity to present evidence and to argue the constitutionality question. However, a state attorney general will not be permitted to intervene as of right if an agency, officer, or employee of the state is already a party to the action. n14

[6] Statutes Granting Private Individuals Right to Intervene

- **Administrative Procedure Act.** Interested persons may participate in federal agency proceedings, as long as their participation does not disrupt the orderly conduct of public business, and if time, the nature of the proceeding, and the public interest permit it. n15 Individual agencies may enact their own rules governing intervention. n16

- **Appeal of Federal Agency Proceedings.** A person adversely affected by an agency proceeding has a direct right of judicial review. n17 Communities, associations, corporations, firms, or individuals whose interests would be affected by an agency order, but who were not joined as parties to the agency proceeding, may intervene in the judicial review process. n18

- **Environmental Statutes.** Private persons may intervene in government suits to enforce the provisions of various environmental statutes, if the private persons would have been entitled to bring "citizen's suits" in the absence of governmental action. n19

- **Civil Rights Action by EEOC or Attorney General.** A person aggrieved may intervene in a civil rights action brought by the Equal Employment Opportunity Commission (EEOC) or in an action brought by the United States Attorney General that involves a political entity. n20 Many of the procedures of the Civil Rights Act have been incorporated into the Americans with Disabilities Act of 1990. Thus, a person alleging discrimination on the basis of disability may intervene in a related action brought by the EEOC or the Attorney General. n21

- **Action Under Fair Housing Act.** A person aggrieved by an alleged violation of the Fair Housing Act may intervene in an action brought on the aggrieved person's behalf by the Attorney General. n22 Similarly, an aggrieved party may intervene when the Attorney General brings an action to remedy discriminatory housing practices that are part of a "pattern or practice" of resistance to the full enjoyment of rights protected under the Constitution or federal laws. n23

- **Corporation's Action to Recover Insider Profits.** A corporate shareholder may intervene in the corporation's action to recover short-swing insider profits (obtained within a period of six months), if the corporation fails diligently to prosecute the action. While the Securities Exchange Act of 1934 does not expressly use the term "intervention," it provides: "Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter." n24

- **Intervention by Trustee in Bankruptcy in Tax Court Action.** The trustee of the debtor's estate in a Chapter 11 bankruptcy case may intervene in a proceeding before the Tax Court to which the debtor is aparty. Intervention in such a case is solely on behalf of the debtor's estate. n25

- **Action Involving Surface Transportation Board.** Interested communities, associations, corporations, firms, or individuals may intervene in a proceeding or judicial action brought by the Attorney General that relates to an order of the Surface Transportation Board (formerly the Interstate Commerce Commission). Such an action may be to enjoin or suspend a rule, regulation, or order, or to enforce an order that does not involve the payment of money or collection of fines. The Attorney General cannot discontinue the action over the objection of an intervenor, who may prosecute, defend, or continue the action regardless of the Attorney General's "action or nonaction." n26

- **FCC License Application Hearings.** Parties interested in the outcome of a Federal Communications Commission (FCC) license hearing may "acquire the status of a party to the proceeding" by filing a petition that shows the basis for their interest. The applicant and all parties in interest are entitled to participate in the hearing. n27

[7] Intervention When No Statutory Basis Exists

[7.--1] Four Factors Must Be Established

In the absence of a statutory basis, intervention as of right may be obtained if the applicant can establish each of the following: n28

- Motion has been timely filed [*see § 4.34*]

- Applicant has an interest relating to the property or transaction that is the subject of the action [*see* [7.--2]]

- Disposition of the action will impair or impede the applicant's interest if intervention is not permitted [*see* [7.--3]]

- Interest is not adequately represented by the existing parties [*see* [7.--4]]

[7.--2] Applicant Must Have Sufficient Interest in Property or Transaction at Issue

The applicant for intervention as of right must establish a sufficient "legally protectable" interest in the property or transaction that is the subject of the action. n29 Non-property interests generally do not satisfy the "sufficient interest" requirement. n30 However, a party has a sufficient interest for intervention if it will potentially suffer a practical impairment of its interests. n31

[7.--3] Disposition of Action Must Impair or Impede Applicant's Interest

The applicant for intervention as of right must show that the ability to protect his or her interest will be injured as a *practical* matter if the motion is not granted. This is a flexible standard. Clearly, if the applicant would be prevented from bringing a separate action by the doctrine of res judicata or collateral estoppel, his or her ability to protect the interest would be totally impeded. n32

[7.--4] Interest Must Be Inadequately Represented by Existing Parties

The burden of establishing the inadequacy of representation of the applicant's interest by existing parties is minimal. All that must be shown is that the representation "may" be inadequate. n33

Intervention as of right will be denied when the existing parties have precisely the same objectives as the absent party, and likewise possesses the same motivation and ability to protect the absent party's interest. n34

When a governmental entity brings an action as a representative of its citizens, the applicant for intervention must demonstrate an interest different from that of the public at large, and that this interest will not be adequately represented by the government. n35

[8] Standing

The circuit courts have reached varying conclusions as to whether a party seeking to intervene as of right must himself or herself have standing. n36

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesInterventionRight to InterveneCivil ProcedurePartiesInterventionStatutory Right to InterveneCivil ProcedurePartiesInterventionTimeliness

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 24(a)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 24(a)(2)*; *see also In re New Motor Vehicles Canadian Export Antitrust Litig., 225 F.R.D. 62, 62-64 (D. Me. 2004)* .

(n3)Footnote 3. *Fed. R. Civ. P. 24(a)(1).*

(n4)Footnote 4. *Fed. R. Civ. P. 24(a)(2).*

(n5)Footnote 5. *28 U.S.C. § 2403(a).*

(n6)Footnote 6. *42 U.S.C. § 2000h-2.*

(n7)Footnote 7. *29 U.S.C. § 1132(h).*

(n8)Footnote 8. *35 U.S.C. § 146.*

(n9)Footnote 9. *15 U.S.C. § 1071.*

(n10)Footnote 10. *31 U.S.C. § 3730(b)(2).*

(n11)Footnote 11. *31 U.S.C. § 3730(c)(3).*

(n12)Footnote 12. *33 U.S.C. § 1515(b)(1)*; *see also 30 U.S.C. § 1270(c)(2).*

(n13)Footnote 13. *Fed. R. Civ. P. 5.1.*

(n14)Footnote 14. *28 U.S.C. § 2403(b).*

(n15)Footnote 15. *5 U.S.C. § 551.*

(n16)Footnote 16. *5 U.S.C. § 552.*

(n17)Footnote 17. *5 U.S.C. § 702.*

(n18)Footnote 18. *28 U.S.C. § 2348.*

(n19)Footnote 19. *See, e.g., 42 U.S.C. § 4911(b)(1)(B)* (noise control action); *42 U.S.C. § 6972(b)(1)* (hazardous waste action); *30 U.S.C. § 1270(b)(1)(B)* (surface coal mining environmental regulations); *33 U.S.C. § 1515(b)(1)(B)* (deepwater ports regulations).

(n20)Footnote 20. 42 U.S.C. § 2000(e)-5(f)(1); *see also General Tel. Co. v. EEOC, 446 U.S. 318, 326, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980)* (EEOC's authority to bring civil action does not replace private action).

(n21)Footnote 21. *42 U.S.C. § 12117(a)* (incorporating by reference *42 U.S.C. § 2000e-5*).

(n22)Footnote 22. *42 U.S.C. § 3612(o)(2).*

(n23)Footnote 23. *42 U.S.C. § 3614(a), (b), (e).*

(n24)Footnote 24. *15 U.S.C. § 78p(b).*

(n25)Footnote 25. *26 U.S.C. § 7464.*

(n26)Footnote 26. *28 U.S.C. §§ 2321, 2323.*

(n27)Footnote 27. *47 U.S.C. § 309(e).*

(n28)Footnote 28. *Northwest Forest resource Council v. Glickman, 82 F.3d 825, 838 (9th Cir. 1996)* .

(n29)Footnote 29. *Donaldson v. United States, 400 U.S. 517, 530-531 (1971)* ; *see also United States v. Alisal Water Corp., 370 F.3d 915, 919-921 (9th Cir. 2004)* ; *Arakaki v. Cayetano, 324 F.3d 1078, 1084 (9th Cir. 2003*).

(n30)Footnote 30. *Kitzmiller v. Dover Area Sch. Dist., 229 F.R.D. 463, 467-468 (M.D. Pa. 2005)* ; *General Star Indem. Co. v. Virgin Islands Port Auth., 224 F.R.D. 372, 375-376 (D.V.I. 2004)* .

(n31)Footnote 31. *California ex rel. Lockyer v. United States, 450 F.3d 436, 440-442 (9th Cir. 2006)* .

(n32)Footnote 32. *See Sierra Club v. Glickman, 82 F.3d 106, 109-110 (5th Cir. 1996)* .

(n33)Footnote 33. *Fed. R. Civ. P. 24(a)(2)*; *Trbovich v. United Mine Workers of Am., 404 U.S. 528, 538 (1972)* (citing **Moore's**).

(n34)Footnote 34. *In re General Tire & Rubber Co. Secs. Litig., 726 F.2d 1075, 1087 (6th. Cir. 1984)* .

(n35)Footnote 35. *United States v. Hooker Chems. & Plastics, 749 F.2d 968, 985 (2d Cir. 1984)* .

(n36)Footnote 36. *Compare United States v. 39.36 Acres of Land, 754 F.2d 855, 859 (7th Cir. 1985*) (intervention requires an interest in excess of that required for standing); *Roeder v. Islamic Republic of Iran, 333 F.3d 228, 233-234 (D.C. Cir. 2003)* (applicant for intervention who met the Rule 24(a) requirements also met the Article III requirements for standing), *and Jones v. Prince George's County, 348 F.3d 1014, 1017-1018 (D.C. Cir. 2003*) (the intervenor had a concrete and cognizable interest in the litigation that satisfied Article III standing demands), *with Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983)* (resolving intervention questions without reference to standing doctrine), *and Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action, 558 F.2d 861 (8th Cir. 1977)* (same).

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CHAPTER 4 Motions as to the Parties
C. Seeking Intervention Under Rule 24

1-4 Federal Litigation Guide § 4.32

§ 4.32 Permissive Intervention

[1] Grounds for Permissive Intervention

On timely application, anyone may be permitted to intervene in an action when either:

- A federal statute confers a conditional right to intervene in the action n1
- The applicant's claim or defense and the main action have a common question of law or fact n2

The district court possesses broad discretion to decide whether to allow permissive intervention and will rarely be reversed on appeal. n3

[2] Factors Considered on Motion for Permissive Intervention

The principal consideration set forth in Rule 24(b)(2) is whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. n4

[3] Moving Under Federal Statute Conferring Conditional Right to Intervene

Only federal statutes may be cited as a basis for permissive intervention. n5

The following are examples of a statutory conditional right to intervene:

- A "party in interest" may intervene in a case brought under the **Bankruptcy Code** upon a showing of cause. n6
- A person with an interest in the subject matter of an action under the **Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)**, relating to the clean-up of hazardous waste sites, may intervene if disposition of the action may impair or impede the person's interest. n7
- An employee may intervene in an action brought by a union representative pursuant to the **Fair**

Labor Standards Act. n8

- A parent or guardian may intervene in a school desegregation action, brought pursuant to the **Equal Education Opportunities Act**, by showing that implementation of a court busing order poses a risk to the health or education of a child. n9

- The **United States** may intervene in an action that involves property against which it claims a tax lien. n10

- When issues of public importance are involved, the Equal Employment Opportunity Commission (EEOC) or the Attorney General may intervene in a **private employment discrimination action**. n11

- The Attorney General may intervene in an action under the **Civil Rights of Institutionalized Persons Act** with a showing that the conditions that are the basis of the action are part of a pattern or practice of constitutional violations. n12

[4] Permissive Intervention When Common Questions of Law or Fact Exist

Permissive intervention may be obtained by showing that there is a common question of either law or fact between the applicant's claim and the underlying action. n13

The applicant for intervention does not need to show a direct interest in the litigation, as is required for intervention as of right under Rule 24(a)(2). n14

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesInterventionPermissive InterventionsCivil ProcedurePartiesInterventionRight to InterveneCivil ProcedurePartiesInterventionTimeliness

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 24(b)(1)(A).*

(n2)Footnote 2. *Fed. R. Civ. P. 24(b)(1)(B)*; *see also In re New Motor Vehicles Canadian Export Antitrust Litig., 225 F.R.D. 62, 62-64 (D. Me. 2004)* .

(n3)Footnote 3. *Northland Family Planning Clinic, Inc. v. Cox, 487 F.3d 323, 346-347 (6th Cir. 2007)* .

(n4)Footnote 4. *Purcell v. Bank Atlantic Fin. Corp., 85 F.3d 1508, 1512-1513 (11th Cir. 1996*).

(n5)Footnote 5. *Fed. R. Civ. P. 24(b)(1)(A).*

(n6)Footnote 6. *Fed. R. Bankr. P. 2018(a).*

(n7)Footnote 7. *42 U.S.C. § 9613(I).*

(n8)Footnote 8. *29 U.S.C. § 216(b).*

(n9)Footnote 9. *20 U.S.C. § 1717.*

(n10)Footnote 10. *26 U.S.C. § 7424.*

(n11)Footnote 11. *42 U.S.C. § 2000e-5(f)(1).*

(n12)Footnote 12. *42 U.S.C. § 1997c(a)(1).*

(n13)Footnote 13. *Fed. R. Civ. P. 24(b)(1)(B).*

(n14)Footnote 14. *SEC v. United States Realty & Improvement Co., 310 U.S. 434, 459 (1940) .*

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CHAPTER 4 Motions as to the Parties
C. Seeking Intervention Under Rule 24

1-4 Federal Litigation Guide § 4.33

§ 4.33 Intervention for Purposes of Appeal

If the original parties choose not to appeal a judgment, an applicant may intervene for purposes of appeal when the motion is filed promptly after the entry of final judgment. n1 Post-judgment intervention is rarely permitted.

FOOTNOTES:
(n1)Footnote 1. *United Airlines, Inc. v. McDonald, 432 U.S. 385, 395-396, 97 S. Ct. 2464, 53 L. Ed. 2d 423 (1977)* .

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1-4 Federal Litigation Guide § 4.34

§ 4.34 Considering Timeliness of Intervention Motion

Timeliness is crucial to intervention. A motion for either intervention as of right or permissive intervention must be "timely" filed. n1

Although Rule 24 does not define timeliness, courts may properly deny permissive intervention in order to avoid the likelihood of undue delay or prejudice to the rights of the existing parties. n2

In evaluating timeliness, courts may look to the stage of the proceeding at which the applicant seeks to intervene, prejudice caused to other parties, and the reason for and length of any delay. n3

While motions for intervention filed after judgment are frequently denied as untimely, there is no absolute measure of timeliness, and post-judgment intervention may be allowed if the rights of the existing parties are not prejudiced and intervention does not interfere with the orderly processes of the court. Post-judgment intervention may be considered timely when it is sought for the purpose of appealing a decision the existing parties do not wish to appeal. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionRight to InterveneCivil ProcedurePartiesInterventionTimeliness

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 24(a), (b).*

(n2)Footnote 2. *See, e.g., United States v. 36.96 Acres of Land, 754 F.2d 855, 860 (7th Cir. 1985)* .

(n3)Footnote 3. *See United States v. State of Washington, 86 F.3d 1499, 1503 (9th Cir. 1996)* ; *see also United States v. British Am. Tobacco Australia Servs., Ltd., 437 F.3d 1235, 1238-1239 (D.C. Cir. 2006).*

(n4)Footnote 4. *See Ross v. Marshall, 426 F.3d 745, 750-52, 754-755 (5th Cir. 2005)* .

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CHAPTER 4 Motions as to the Parties
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1-4 Federal Litigation Guide § 4.35

§ 4.35 Analyzing Intervention in Context of Diversity Jurisdiction

If a party intervenes as of right, the court has supplemental jurisdiction over that party even when the party lacks diverse citizenship. n1

Permissive intervention, on the other hand, must have an independent basis for subject matter jurisdiction. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesInterventionGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Nelson v. Greenspoon, 103 F.R.D. 118, 121 (S.D.N.Y. 1984)* .

(n2)Footnote 2. *See Davila v. Arlasky, 141 F.R.D. 68, 73 (N.D.Ill 1991)* .

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CHAPTER 4 Motions as to the Parties
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1-4 Federal Litigation Guide § 4.36

§ 4.36 Tactical Considerations for Intervention

[1] Defensive Intervention

Given the proper grounds, a motion for intervention may be considered when disposition of the underlying litigation is likely to adversely affect the nonparty's interests if he or she does not participate in the litigation. This may occur when the nonparty is a privy of one of the parties, and would be bound by a judgment in the action by application of res judicata or collateral estoppel. n1

Even if the nonparty could not be bound by a judgment, application of the doctrine of stare decisis could affect the nonparty's ability to argue a point of law in a later action. n2 Intervention may also be considered when a nonparty determines that the existing parties may not adequately represent the nonparty's interests.

[2] Offensive Intervention

Intervention may be considered if participation in an ongoing litigation will allow the nonparty to assert a claim or defense in a more effective manner than in an independent suit. It may be more advantageous to intervene if:

- The nonparty lacks the resources to bring an independent action
- The nonparty's claim complements existing claims and can be more effectively asserted in the ongoing case
- Two distinct claims will benefit by being tried together
- Participation in the litigation provides an opportunity to advance the interests of a public interest group or other association
- The nonparty has factual information of data particularly helpful to the desired result, or counsel with special capacities to advance the claim

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesInterventionMotions to InterveneCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *International Marine Towing, Inc. v. Southern Leasing Partners, Ltd., 722 F.2d 126, 129-130 (5th Cir. 1983)* .

(n2)Footnote 2. *See Nuesse v. Camp, 385 F.2d 694, 702 (D.C. Cir. 1967)* .

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CHAPTER 4 Motions as to the Parties
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1-4 Federal Litigation Guide § 4.37

§ 4.37 Drafting Motion to Intervene

[1] Pleading Must Accompany Motion Seeking Intervention

A pleading setting forth the claim or defense of the proposed intervenor must accompany the motion seeking intervention. n1 The applicant may not simply adopt the prior pleadings of an existing party. n2 However, a court may approve an intervention motion that is not accompanied by a pleading if the parties are on notice of the grounds for the motion and would not be prejudiced. n3

[2] Drafting Intervention Pleading

The applicant should state necessary allegations to establish the court's jurisdiction over the claims being asserted. n4

If the basis of jurisdiction is diversity of the parties, intervention that would otherwise destroy diversity will not rob the court of jurisdiction, if the new parties are not indispensable but merely conditionally necessary parties to the suit. n5

The applicant's claim for relief should be stated in accordance with the usual rules of pleading. If the pleading is an answer, the applicant should respond to all allegations in the complaint and state affirmative defenses and proposed counterclaims or cross-claims, as usual.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesInterventionMotions to Intervene

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 24(c)*; *see also Gaskin v. Pennsylvania, 231 F.R.D. 195, 196 n.1 (E.D. Penn. 2005)* .

(n2)Footnote 2. *Retired Chicago Police Ass'n v. City of Chicago, 7 F.3d 584, 595 (7th Cir. 1993)* (differences between motions to intervene and the complaint applicants attempted to adopt by reference were too significant to allow waiver of Rule 24(c) procedural requirements).

(n3)Footnote 3. *See Providence Baptist Church v. Hillandale Comm., Ltd., 425 F.3d 309, 313-315 (6th Cir. 2005)* .

(n4)Footnote 4. *See Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 472 (1982)* .

(n5)Footnote 5. *Brooks v. Sussex County State Bank, 167 F.R.D. 347, 352 (N.D.N.Y. 1996)* .

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CHAPTER 4 Motions as to the Parties
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1-4 Federal Litigation Guide § 4.38

§ 4.38 Serving and Filing Motion to Intervene and Pleading

A motion to intervene, accompanied by a pleading that sets forth the claim or defense for which intervention is sought, must be filed and served on all of the existing parties to the action. n1

Technical noncompliance will not necessarily result in denial of the intervenor's motion, since the court may disregard purely formal defects in the absence of prejudice to the parties. For example, a court may approve an intervention motion that is not accompanied by a pleading, if the court is otherwise apprised of the grounds for the motion. n2 Likewise, failure to serve all parties with the motion to intervene was justifiable in a case in which the entire court file was sealed, and the intervenors therefore did not know the identities of the defendants and their attorneys when they made their motion. n3

All motions to intervene, whether permissive or as of right, must be timely filed. Judicial assessment of intervention timeliness is essentially discretionary, and timeliness is determined based on all the circumstances of the case. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionPermissive Interventions

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 24(c)*; *Fed. R. Civ. P. 5* (service on parties); *see also Armstrong v. Capshaw, Goss & Bowers, L.L.P., 404 F.3d 933, 936-937 (5th Cir. 2005)* .

(n2)Footnote 2. *Marshall v. Meadows, 921 F. Supp. 1490, 1492 (E.D. Va. 1996)* .

(n3)Footnote 3. *Grove Fresh Distribs., Inc. v. Everfresh Juice Co., 24 F.3d 893, 896 (7th Cir. 1994)* .

(n4)Footnote 4. *NAACP v. New York, 413 U.S. 345, 366, 93 S. Ct. 2591, 37 L. Ed. 2d 648 (1973)* .

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CHAPTER 4 Motions as to the Parties
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1-4 Federal Litigation Guide § 4.39

§ 4.39 Evaluating Jurisdiction and Venue Issues

[1] District Court With Original Jurisdiction May Exercise Supplemental Jurisdiction Over Related Claims

Applications for intervention must have an independent basis of federal subject matter jurisdiction. For example, the intervenor may plead a federal question claim, or base jurisdiction upon diversity of citizenship.

Alternatively, it is sometimes possible for the intervenor who lacks diversity or a federal claim to demonstrate supplemental jurisdiction. The jurisdictional requirements regarding supplemental jurisdiction are governed by federal statute. n1 Specifically, in any civil action in which a district court has original jurisdiction, the court may exercise supplemental jurisdiction over all other claims "that are so related to claims in the action" to "form part of the same constitutional case or controversy." n2

The district court may decline to exercise its supplemental jurisdiction if either: n3

- The claim raises a novel or complex issue of state law
- The claim would substantially predominate over the original action
- The district court has dismissed all claims over which it had original jurisdiction
- In exceptional circumstances, there are other compelling reasons for declining jurisdiction

[2] Intervenor Must Independently Meet Jurisdictional Requirements in Diversity Actions

The use of supplemental jurisdiction is severely restricted in diversity cases. If the subject matter jurisdiction in the original action is based on diversity of citizenship, the court is prohibited from exercising supplemental jurisdiction over either the intervenor's claim or claims by the plaintiff against the intervenor where such exercise would be inconsistent with the requirements of diversity jurisdiction. n4

A court lacks the discretion to find supplemental jurisdiction if, in a diversity case, the intervenor's citizenship renders the dispute inconsistent with the complete diversity requirement. n5

The applicant who seeks to intervene only to defend a claim should not be prevented from using supplemental jurisdiction. n6 Some courts will also allow for the exercise of supplemental jurisdiction over cross-claims by an intervenor aligned as a defendant, notwithstanding a lack of complete diversity. n7

A court may be willing to realign the parties to retain subject matter jurisdiction and hear claims by or against an intervenor. When party designations have jurisdictional consequences, courts normally will realign the parties before determining jurisdiction. n8

[3] Intervenor May Not Object to Venue

A person who intervenes as plaintiff or defendant cannot object to the venue chosen for the action. Since the intervenor specifically invoked the jurisdiction of the court, any potential venue objections are considered waived.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionSame Case & ControversyCivil ProcedureVenueGeneral OverviewCivil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesInterventionMotions to Intervene

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1367.*

(n2)Footnote 2. *See 28 U.S.C. § 1367(a)*; *Cf. 28 U.S.C. 1367(b)* (if jurisdiction is based on diversity, the intervenor's claim must meet the requirements for diversity jurisdiction).

(n3)Footnote 3. *See 28 U.S.C. § 1367(c).*

(n4)Footnote 4. *28 U.S.C. § 1367(b)*; *28 U.S.C. § 1332.*

(n5)Footnote 5. *Betancourt-Torres v. Puerto Rico Elec. Power Auth., 164 F.R.D. 307, 308 (D.P.R. 1996) .*

(n6)Footnote 6. *MCI Telecommunications Corp. v. Logan Group, Inc., 848 F. Supp. 86, 89 (N.D. Tex. 1994) .*

(n7)Footnote 7. *See Langone v. Flint Ink N. Am. Corp., 231 F.R.D. 114, 116-117 (D. Mass. 2005) .*

(n8)Footnote 8. *In re Texas E. Transmission Corp. PCB Contamination Ins. Coverage Litig., 15 F.3d 1230, 1241 (3d Cir. 1994) .*

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CHAPTER 4 Motions as to the Parties
C. Seeking Intervention Under Rule 24

1-4 Federal Litigation Guide § 4.40

§ 4.40 Opposing Motion Seeking Intervention

[1] Consider Timeliness Objection

Four factors are generally considered in determining whether a motion has been timely filed. These factors may be used as a basis for attacking the motion: n1

- The applicant knew or should have known of his or her interest for a considerable amount of time before making the motion to intervene
- There will be prejudice to existing parties resulting from any delay
- There will be no prejudice to the applicant if the motion is denied
- Unusual circumstances exist militating against a finding of timeliness

[2] Consider Objecting on Ground That Intervention Will Unduly Complicate Litigation

If the party opposing intervention can demonstrate that intervention will radically change the nature of the litigation or will unduly complicate it, the motion may be denied. n2

[3] Consider Objecting on Ground That Proposed Intervenor Lacks Sufficient Connection to Action

Intervention as of right. The opposing party can argue that the proposed intervenor does not have a sufficient interest in the subject matter of the litigation. n3

Permissive intervention. The opposing party can argue that the proposed intervenor does not have a common question of law or fact with the parties to the action. n4

[4] Consider Objecting on Ground That Representation Is Already Adequate

The party opposing a motion seeking intervention should consider whether the proposed intervenor's interests are already adequately represented by the parties in the suit. n5

[5] Consider Fall Back Argument That Limited Intervention Will Sufficiently Protect Applicant's Rights

An alternative position to the wholesale opposition to the intervention motion is the argument that intervention should be limited by specific conditions, such as limits on the intervenor's right to conduct discovery or to assert specific types of claims. Such conditions will minimize delays and unnecessary complication of the litigation. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionTimeliness

FOOTNOTES:
(n1)Footnote 1. *Edwards v. City of Houston, 37 F.3d 1097, 1105 (5th Cir. 1994)* (en banc); *Shea v. Angulo, 19 F.3d 343, 348 (7th Cir. 1994)* ; *Banco Popular de Puerto Rico v. Greenblatt, 964 F.2d 1227, 1231 (1st Cir. 1992)* ; *Farmland Dairies v. Commissioner of NY Dep't of Agric. & Mkts., 847 F.2d 1038, 1044 (2d Cir. 1988)* .

(n2)Footnote 2. *Washington Elec. Coop., Inc. v. Massachusetts Mun. Wholesale Elec. Co., 922 F.2d 92, 97 (2d Cir. 1990)* .

(n3)Footnote 3. *See Fed. R. Civ. P. 24(a).*

(n4)Footnote 4. *See Fed. R. Civ. P. 24(b).*

(n5)Footnote 5. *See, e.g., Shea v. Angulo, 19 F.3d 343, 347 (7th Cir. 1994)* .

(n6)Footnote 6. *Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 378, 107 S. Ct. 1177, 94 L. Ed. 2d 389 (1987*).

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CHAPTER 4 Motions as to the Parties
C. Seeking Intervention Under Rule 24

1-4 Federal Litigation Guide § 4.41

§ 4.41 Considering Alternatives to Intervention

[1] Assisting Existing Parties

An alternative to intervention is to assist the existing parties to the litigation, especially in cases in which a party and the nonparty sharesimilar, although not identical interests. In such a case, the nonparty can assist the existing party by providing any or all of the following: financial assistance, counsel, support staff, documents, technical advice, or witnesses.

The nonparty must be careful not to control the litigation. Such an exercise of control may result in the nonparty's being bound by the results of the litigation. Mere financial assistance, however, will not be considered controlling the litigation. n1

[2] Requesting Leave to File Amicus Curiae Brief

An alternative to formal intervention is to seek leave to file an amicus curiae brief. n2 When the nonparty's interest in the litigation is principally centered on an issue of law, this is a viable alternative to intervention. The decision whether to grant leave to file an amicus curiae brief is discretionary with the court. n3

[3] Joining or Adding Party

As an alternative to intervention, counsel should consider the possibility that an existing party may move for joinder of the nonparty pursuant to Rule 21. n4

[4] Filing Separate Action

In some cases, the nonparty's interests may be protected most effectively by filing a separate action. Factors that will help determine whether it will be more effective to move to intervene or to file an independent action include the following:

- **Timing of the respective actions.** When the pending litigation will determine all related claims, a separate action will be practical only if the pending suit can be stayed, if it can be transferred to the forum of the second suit, or if the second action can be decided first.

- **Convenience of the forum.** A different forum may be more convenient to the nonparty, and may offer advantageous rules of law.

- **Existing parties and counsel.** In some cases, it will be preferable not to associate with or share control of the litigation with parties and counsel from the original litigation. n5

- **Court's prior rulings.** The court's prior rulings in the existing action or rulings by the court in prior cases involving the same subject matter may dictate a preference for filing an independent action in a different forum. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesInterventionMotions to InterveneCivil ProcedureAppealsAmici Curiae

FOOTNOTES:

(n1)Footnote 1. *See Rumford Chem. Works v. Hygienic Chem. Co., 215 U.S. 156, 160 (1909)* .

(n2)Footnote 2. *See, e.g., Getty Oil Co. v. Dep't of Energy, 865 F.2d 270, 277 (Temp. Emer. Ct. App. 1988)* .

(n3)Footnote 3. *See, e.g., United States v. Brooks, 164 F.R.D. 501, 507 (D. Or. 1995)* .

(n4)Footnote 4. *See* §§ 4.20-4.24.

(n5)Footnote 5. *See, e.g., Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983)* .

(n6)Footnote 6. *United States v. School Dist. of Omaha, 367 F. Supp. 198, 200-201 (D.Neb. 1973)* .

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CHAPTER 4 Motions as to the Parties
C. Seeking Intervention Under Rule 24

1-4 Federal Litigation Guide § 4.42

§ 4.42 Appealing Intervention Order

An order granting intervention cannot be immediately appealed because it is not a final order. n1 However, an order denying intervention is immediately appealable because it is a final collateral order. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesInterventionMotions to InterveneCivil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsMotions on Appeal

FOOTNOTES:
(n1)Footnote 1. *Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 379, 107 S. Ct. 1177, 94 L. Ed. 2d 389 (1987)* (grant of permissive intervention with conditions is not immediately appealable).

(n2)Footnote 2. *Alternative Research & Dev. Found. v. Veneman, 262 F.3d 406, 408-411 (D.C. Cir. 2001)* ; *Shea v. Angulo, 19 F.3d 343, 345 (7th Cir. 1994)* ; *Carlough v. Amchem Prods., Inc., 5 F.3d 707, 712 (3d Cir. 1993)* .

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§ 4.43 CHECKLISTS: Motion to Intervene

[1] CHECKLIST: Drafting Motion for Intervention as of Right

☐ **Grounds.** The following checklist may be used in drafting a motion pursuant to Rule 24(a) seeking intervention as of right:

☐ Allege that intervention of right is being premised on either:

☐ An unconditional right conferred by federal statute. n1

☐ An interest in the subject matter of the action that may be impaired or impeded, because it is not adequately represented by the existing parties. n2

☐ **Timeliness.** Allege that motion has been timely filed with the court.

☐ **Statutory authority.** If basing intervention on a federal statute, provide the relevant statutory authority.

☐ **Required criteria.** If basing intervention on an interest that may be impaired in the absence of intervention, allege each of the following:

☐ A direct, legally protectable interest in the property or transaction that is the subject matter of the action.

☐ Disposition of the action will, as a practical matter, impair or impede the applicant's interest.

☐ The applicant's interest is not adequately represented by the existing parties.

☐ **Allegation of special expertise.** If applicable, allege how participation in the action will provide the court with special expertise not held by the parties.

☐ **Points and authorities.** If necessary, include detailed discussion of the legal basis supporting intervention in the accompanying memorandum of points and authorities.

☐ **Pleading.** A pleading setting forth the claim or defense must accompany the motion. n3

[2] CHECKLIST: Drafting Motion for Permissive Intervention

The following checklist may be used in drafting a motion pursuant to Rule 24(b) seeking permissive intervention:

☐ **Grounds.** Allege that permissive intervention is being premised on either:

☐ A conditional right conferred by federal statute. n4

☐ The fact that the applicant's claim or defense and the main action have a common question of fact or law. n5

☐ **Timeliness.** Allege that motion has been timely filed with the court. n6

☐ **Statutory authority.** If basing intervention on a federal statute, provide the relevant statutory authority.

☐ **Common question.** If basing intervention on a common question of law or fact, allege that judicial efficiency and consistency will benefit from resolving related issues in a single proceeding.

☐ **Points and authorities.** If necessary, include detailed discussion of the legal basis supporting intervention in an accompanying memorandum of points and authorities.

☐ **Pleading.** A pleading setting forth the claim or defense must accompany the motion. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionPermissive InterventionsCivil ProcedurePartiesInterventionRight to InterveneCivil ProcedurePartiesInterventionTimeliness

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 24(a)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 24(a)(2).*

(n3)Footnote 3. *Fed. R. Civ. P. 24(c)*; *see also Gaskin v. Pennsylvania, 231 F.R.D. 195, 196 n.1 (E.D. Penn. 2005)*
.

(n4)Footnote 4. *Fed. R. Civ. P. 24(b)(1)(A).*

(n5)Footnote 5. *Fed. R. Civ. P. 24(b)(1)(B).*

(n6)Footnote 6. *Fed. R. Civ. P. 24(c).*

(n7)Footnote 7. *Fed. R. Civ. P. 24(c).*

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CHAPTER 4 Motions as to the Parties
C. Seeking Intervention Under Rule 24

1-4 Federal Litigation Guide §§ 4.44 through 4.49

[Reserved]

§§ 4.44 [Reserved]

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CHAPTER 4 Motions as to the Parties
D. Seeking Substitution of Parties Under Rule 25

1-4 Federal Litigation Guide § 4.50

§ 4.50 Understanding Rule 25

Rule 25 provides for the substitution of parties under the following circumstances: n1

- Death of a party [*see § 4.51*]
- Incompetency of a party [*see § 4.52*]
- Transfer of a party's interest [*see § 4.53*]
- Death or separation from office of a public official who is a party [*see § 4.54*]

Rule 25 provides for substitution only in the circumstances enumerated above. Parties may, however, be added under Rule 21 in the discretion of the court in situations not covered by Rule 25. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesSubstitutionsGeneral OverviewCivil ProcedurePartiesSubstitutionsMotions for Substitution

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 25.*

(n2)Footnote 2. *See Fed. R. Civ. P. 21.*

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CHAPTER 4 Motions as to the Parties
D. Seeking Substitution of Parties Under Rule 25

1-4 Federal Litigation Guide § 4.51

§ 4.51 Moving for Substitution of Deceased Party Under Rule 25(a)

[1] Governing Law

Substitution of a deceased party may be accomplished under Rule 25 by the following procedure: n1

- The motion for substitution may be made by any party or by the successors or representatives of the deceased party
- The motion must be made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death
- If the motion to substitute is not timely made, the action must be dismissed as to the deceased party

In the event of the death of a plaintiff or defendant in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death must be suggested upon the record, and the action must proceed in favor of or against the surviving parties. n2

[2] Motion Seeking Substitution May Be Made Without Filing Suggestion of Death

A motion to substitute for a deceased party may be made by any party or by the representative of the deceased party without awaiting the suggestion of death provided for in Rule 25(a). n3

[3] Deadline for Filing Motion Seeking Substitution of Deceased Party

The deadline for filing a motion seeking substitution for a deceased party is measured not from the date of the death, but rather from the date a formal "suggestion of death" is made on the record (*i.e.* service of a statement of the fact of the death). n4 If the suggestion of death is not served, there is no strict deadline for the motion. If the suggestion of death is served, the motion must be made not later than 90 days after the date of service. n5 If the motion is not timely made, the action will be dismissed as to the deceased party. n6 Accordingly, if any party or the representative of the deceased party desires to limit the time within which another may make the motion, he or she may do so by suggesting the death upon the record.

A Rule 6(b) motion to enlarge time to file a motion seeking substitution is available to counsel. n7 The party moving for extension has the burden of showing that the failure to move for substitution in a timely manner was excusable. This requires a demonstration of good faith, and a showing of some reasonable basis for noncompliance, rather than mere inadvertence. n8

One court has held that a deceased plaintiff's counsel had "standing" to file a motion for extension of time pending the appointment of an administrator for the plaintiff's estate. n9

If no motion to substitute is made after service of the suggestion of death, opposing counsel can move for dismissal as to the deceased party after the expiration of the 90 days. n10

[4] Serving and Filing Suggestion of Death

A "suggestion of death" must be served, if at all, in the same manner as the motion for substitution. n11 The suggestion of death must be personally served on a representative who has been appointed for the estate of the deceased party. n12 The suggestion must also be served on the parties. Service may be effected in any judicial district. n13

Rule 25(a)(1) does not require a suggestion of death to identify the successor or legal representative; it merely requires that the suggestion of death be served on the involved parties. n14 Although Rule 25(a) contains no such requirement on its face, some courts have held that the suggestion of death is insufficient unless it identifies the representative or successor who may be substituted as a party in place of the decedent. n15

[5] Substitution of Deceased Party Is Discretionary

Substitution of a deceased party is discretionary. n16

A motion to substitute made within the prescribed time will ordinarily be granted, but the court may deny the motion in the exercise of sound discretion if the motion is made long after the death--as can occur if the suggestion of death is not made or is delayed--and circumstances have arisen rendering it unfair to allow substitution. n17

[6] Understanding Effect of Death and Survival of Action

If a party dies and the claim is not extinguished by the death, the court may order substitution of the proper parties. n18 The determination of whether a claim survives is a function of substantive law and is unaffected by Rule 25(a). n19

Federal courts will apply state law to decide whether a state law claim survives the death of a party. n20 To determine the substantive rights involved in or as a condition to substitution in a nonfederal case, the district court must look to state law and apply the appropriate survival statute of the state in which the federal court sits. n21

Survival of a federal question claim is determined under federal common law, in the absence of a specific federal statutory directive. The general rule under federal common law is that an action survives the death of a party if it is remedial and not penal in nature. n22

[7] Opposing Motion Seeking Substitution of Deceased Party

In opposing a motion seeking substitution for a decedent, counsel should consider the following:

- Whether the claim fails to survive the death of the party n23
- Whether an improper party has been named as the substitute n24

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesSubstitutionsGeneral OverviewCivil ProcedurePartiesSubstitutionsDeath of PartyCivil ProcedurePartiesSubstitutionsMotions for Substitution

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 25(a)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 25(a)(2).*

(n3)Footnote 3. *See Fed. R. Civ. P. 25(a)*, advisory committee note 1963.

(n4)Footnote 4. *Fed. R. Civ. P. 25(a)*, advisory committee note 1963.

(n5)Footnote 5. *Fed. R. Civ. P. 25(a)(1).*

(n6)Footnote 6. *Fed. R. Civ. P. 25(a)(1).*

(n7)Footnote 7. *See Fed. R. Civ. P. 25(a)(1)* advisory committee note (1963); *see also Fed. R. Civ. P. 6(b).*

(n8)Footnote 8. *See also Russell v. City of Milwaukee, 338 F.3d 662, 667-668 (7th Cir. 2003).*

(n9)Footnote 9. *See Kernisant v. City of New York, 225 F.R.D. 422, 427-430 (E.D.N.Y. 2005)* .

(n10)Footnote 10. *Fed. R. Civ. P. 25(a)(1).*

(n11)Footnote 11. *Fed. R. Civ. P. 25(a).*

(n12)Footnote 12. *Barlow v. Ground, 39 F.3d 231, 234 (9th Cir. 1994); see also Fed. R. Civ. P. 4* (manner of service).

(n13)Footnote 13. *Fed. R. Civ. P. 25(a)(1).*

(n14)Footnote 14. *See Ray v. Koester, 215 F.R.D. 533, 534-535 (W.D. Tex. 2003*).

(n15)Footnote 15. *See Smith v. Planas, 151 F.R.D. 547, 549 (S.D.N.Y. 1993)* ; *see also Fehrenbacher v. Quackenbush, 759 F. Supp. 1516, 1519 (D. Kan. 1991*).

(n16)Footnote 16. *Fed. R. Civ. P. 25(a)(1).*

(n17)Footnote 17. *Fed. R. Civ. P. 25(a)*, advisory committee note 1963; *see Coffee v. Cutter Biological, 809 F.2d 191, 193 n.1 (2d Cir. 1987)* ; *Henkel v. Stratton, 612 F. Supp. 190, 191 n.1 (N.D. Ohio 1985)* .

(n18)Footnote 18. *Fed. R. Civ. P. 25(a)(1).*

(n19)Footnote 19. *Saylor v. Bastedo, 623 F.2d 230, 238 (2d Cir. 1980)* (citing **Moore's**); *see also Covert v. Liggett Group, Inc., 750 F. Supp. 1303, 1310 (M.D. La. 1990*) (abatement of an action governed by law of sovereign that created course of action); *Marcano v. Offshore Venezuela, C.A., 497 F. Supp. 204, 208 (E.D. La. 1980)* (conflict of laws under diversity jurisdiction).

(n20)Footnote 20. *See In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig., 244 F.R.D. 558, 558-559 (N.D. Cal. 2007)* .

(n21)Footnote 21. *Knauer v. Johns-Manville Corp., 638 F. Supp. 1369, 1387 (D. Md. 1986*) (citing **Moore's**).

(n22)Footnote 22. *See Kilgo v. Bowman Transp., Inc., 789 F.2d 859, 876 (11th Cir. 1986*); *see also James v. Home Constr. Co., 621 F.2d 727, 730 (5th Cir. 1980)* .

(n23)Footnote 23. *See* [6], *above*.

(n24)Footnote 24. *See F.D.I.C. v. Conner, 20 F.3d 1376, 1384 (5th Cir. 1994)* (estate not legal entity and cannot be sued as such); *see also Ashley v. Illinois Cent. Gulf R.R. Co., 98 F.R.D. 722, 724 (S.D. Miss. 1983)* ; *Marcano v. Offshore Venezuela, C.A., 497 F. Supp. 204, 207-209 (E.D. La. 1980)* (denying motion to substitute and rejecting claim by Venezuelan national that Venezuelan law permits her to become administratrix of decedent's estate without obtaining some judicial designation, but allowing opportunity to make a proper showing).

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CHAPTER 4 Motions as to the Parties
D. Seeking Substitution of Parties Under Rule 25

1-4 Federal Litigation Guide § 4.52

§ 4.52 Moving for Substitution of Incompetent Party Under Rule 25(b)

If a party becomes incompetent, the court may allow the action to be continued by or against the party's representative. n1

The Federal Rules do not define "incompetency," or provide for a determination of competency. Apparently state law determines incompetency, as well as the procedure for appointment of a representative.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesSubstitutionsGeneral OverviewCivil ProcedurePartiesSubstitutionsIncompetencyCivil ProcedurePartiesSubstitutionsMotions for Substitution

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 25(b).*

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CHAPTER 4 Motions as to the Parties
D. Seeking Substitution of Parties Under Rule 25

1-4 Federal Litigation Guide § 4.53

§ 4.53 Moving for Substitution on Transfer of Interest Under Rule 25(c)

[1] Defining *Transfer of Interest*

In case of any transfer of interest by a party, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action, or joined with the original party. n1

Courts have applied the term "transfer of interest" broadly to cover transfers of assets. The types of transfers of interests embraced by the Rule include a corporate acquisition, change in ownership of a financial instrument, or a receiver or trustee in bankruptcy succeeding to the assets and liabilities of the debtor. n2 Accordingly, the asset acquisition of a defendant closely held corporation by another closely held corporation falls within the Rule. n3

[2] Transfer of Interest Must Occur *After* Commencement of Action

Rule 25(c) only applies to pending litigation. Accordingly, the transfer of interest must take place after the commencement of the action. n4

[3] Deadline for Filing Motion Based on Transfer of Interest

Rule 25(c) does not provide a deadline for filing a motion for substitution based on transfer of interest. n5 Arguably, a Rule 25(c) motion may be made at any time. n6

No existing cases deny a Rule 25(c) motion based on a lack of a timely request. Yet, the vast discretion inherent in Rule 25(c) n7 would presumably incorporate considerations of efficiency that could mitigate against an untimely filing.

[4] Serving Substitution Motion Based on Transfer of Interest

Rule 25(c) provides specifically that the motion to substitute based on transfer of interest must be served as provided by Rule 25(a)(1). Therefore, the motion must be served on the parties as provided in Rule 5, n8 and upon nonparties in the manner provided in Rule 4 n9 for the service of a summons. Service may be effected in any judicial district. n10

[5] Discretion of Court on Motion

There is some authority to the effect that substitution of a party under Rule 25(c) is discretionary, the better view appears to be that so long as a timely motion is filed, the court's discretion relates only to continuation of the original party. n11

In general, the court has the following three alternatives: n12

- Keep the original party
- Substitute the transferee
- Join the transferee and keep the original party

Keeping both parties in the action may be done when both retain an interest in the outcome of the action and are real parties in interest, such as when the transferor retains a mortgage on the property. n13

[6] Considering Effect of Substitution Under Rule 25(c)

Substitution or joinder under Rule 25(c) has no effect on subject matter jurisdiction. Even if substitution destroys complete diversity of citizenship, the court retains subject matter jurisdiction as long as proper jurisdiction was previously established by the original parties. n14

Likewise, a Rule 25(c) substitution does not effect venue or personal jurisdiction. n15

A Rule 25(c) change of parties does not substantively determine what claims survive the transfer of interest; rather, it provides substitution procedures for a claim that does survive. n16 The procedural nature of Rule 25 means that substantive rights are not affected when the proper party is joined in the suit. n17

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesSubstitutionsGeneral OverviewCivil ProcedurePartiesSubstitutionsMotions for SubstitutionCivil ProcedurePartiesSubstitutionsTransfers of Interests

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 25(c).*

(n2)Footnote 2. *See Trombino v. Transit Casualty Co., 110 F.R.D. 139, 147 (D.R.I. 1986*).

(n3)Footnote 3. *Virgo v. Riviera Bench Assocs., Ltd., 30 F.3d 1350, 1358 (11th Cir. 1994)* .

(n4)Footnote 4. *Horphag Research Ltd. v. Consac Indus., Inc., 116 F.3d 1450, 1453 (Fed. Cir. 1997)* (citing **Moore's**).

(n5)Footnote 5. *General Battery Corp. v. Globe-Union, Inc., 100 F.R.D. 258, 261 (D. Del. 1982)* .

(n6)Footnote 6. *See Air Line Pilots Ass'n Int'l v. Texas Int'l Airlines, Inc., 567 F. Supp. 78, 81 (S.D. Tex. 1983)* .

(n7)Footnote 7. *See* [5], *below.*

(n8)Footnote 8. *See Fed. R. Civ. P. 5.*

(n9)Footnote 9. *See Fed. R. Civ. P. 4.*

(n10)Footnote 10. *Fed. R. Civ. P. 25(a)(1), (c).*

(n11)Footnote 11. *Trombino v. Transit Casualty Co., 110 F.R.D. 139, 147 (D.R.I 1986)* .

(n12)Footnote 12. *Fed. R. Civ. P. 25(c).*

(n13)Footnote 13. *Burka v. Aetna Life Ins. Co., 87 F.3d 478, 479 n.1 (D.C. Cir. 1996)* .

(n14)Footnote 14. *Freeport-McMoRan Inc. v. K N Energy, Inc., 498 U.S. 426, 428-429, 860, 112 L. Ed.2d 951, 954 (1991)* .

(n15)Footnote 15. *Minnesota Mining & Mfg. Co. v. Eco-Chem, Inc., 757 F.2d 1256, 1264 (Fed. Cir. 1985).*

(n16)Footnote 16. *ELCA Enters., Inc. v. Sisco Equip. Rental & Sales, Inc., 53 F.3d 186, 191 (8th Cir. 1995)* .

(n17)Footnote 17. *Maysonet-Robles v. Cabrero, 323 F.3d 43, 49 (1st Cir. 2003)* ; *In re Covington Grain Co., Inc., 638 F.2d 1357, 1361 (5th Cir. 1981)* .

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CHAPTER 4 Motions as to the Parties
D. Seeking Substitution of Parties Under Rule 25

1-4 Federal Litigation Guide § 4.54

§ 4.54 Understanding Automatic Substitution of Public Officer Under Rule 25(d)

[1] Public Officer's Successor is Automatically Substituted

When a public officer is a party to an action in an official capacity, and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate, and the officer's successor is automatically substituted as a party. n1

Because no motion is required to achieve automatic substitution involving a public officer, the court may order substitution sua sponte. n2 The court may take judicial notice of the fact that a public officer has been replaced where it is common knowledge that officer has been succeeded in office. n3

When a court formally orders substitution, it should also direct the clerk of court to change the caption of the case on the court's records to reflect the substitution. n4 An order of substitution is not required, but may be entered at any time if a party desires or the court sees fit. n5

[2] Defining *Official Capacity*

The Rule governing substitution of a public officer applies to actions against officers to compel performance of official duties, or to obtain judicial review of their orders. It also applies to actions to prevent officers from acting in excess of their authority or under authority not validly conferred, or from enforcing unconstitutional enactments. In general, it applies whenever effective relief would call for corrective behavior by the one then having official status and power. n6

If the original official was named as a defendant in both an individual and official capacity, automatic substitution applies only to the official capacity, and the original official should remain a party in the officer's individual capacity only. The successor official will become a party defendant only in his or her official capacity. n7

If a public official dies in office and was a defendant in both official and individual capacities, the successor will be substituted in the official capacity claim automatically under Rule 25(d). However, for the claim in an individual capacity, the substitution procedures of Rule 25(a)(1) for deceased parties n8 will have to be used to avoid dismissal. n9

[3] Deadline for Seeking Substitution of Public Officer

An order of substitution of a public officer may be entered at any time. n10 Substitution may be effected at the time

judgment is entered, or even afterward. n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesSubstitutionsGeneral OverviewCivil ProcedurePartiesSubstitutionsMotions for SubstitutionCivil ProcedurePartiesSubstitutionsPublic Officers

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 25(d)(1).*

(n2)Footnote 2. *Joy Technologies, Inc. v. Manbeck, 751 F. Supp. 225, 227 n.1 (D.D.C. 1990) .*

(n3)Footnote 3. *Klassy v. Weaver, 575 F. Supp. 801, 804 (N.D. Ga. 1982).*

(n4)Footnote 4. *See, e.g., Modern Computer Corp. v. Ma, 862 F. Supp. 938, 950 (E.D.N.Y. 1994) .*

(n5)Footnote 5. *Fed. R. Civ. P. 25(d)* advisory committee's note (1961).

(n6)Footnote 6. *Fed. R. Civ. P. 25(d)* advisory committee's note (1961).

(n7)Footnote 7. *Kentucky v. Graham, 473 U.S. 159, 165, 121 (1985)* ; *Saldana-Sanchez v. Lopez-Gerena, 256 F.3d 1, 9 n.16 (1st Cir. 2001) .*

(n8)Footnote 8. *See § 4.51.*

(n9)Footnote 9. *Kentucky v. Graham, 473 U.S. 159, 166 (1985) .*

(n10)Footnote 10. *Fed. R. Civ. P. 25(d)(1).*

(n11)Footnote 11. *Fay v. Ryan, 818 F. Supp. 882, 885 n.1 (W.D. Pa. 1993) .*

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1-4 Federal Litigation Guide § 4.55

§ 4.55 CHECKLIST: Substituting Party

☐ **Moving for substitution due to death of party**

- ☐ Determine if death occurred during pendency of action.
- ☐ Determine whether claim survives.
- ☐ Ascertain name and address of person to be substituted and his or her capacity (*i.e.*, administrator,etc.), if possible.
- ☐ File suggestion of death.
- ☐ Move to substitute within 90 day period after suggestion.
- ☐ Move to extend time limit if representative has not been named.

☐ **Moving to substitute due to incompetency of party, transfer of interest, or replacement of public official**

- ☐ Ascertain name and address of person to be substituted.
- ☐ Draft motion for substitution. Explain reasons for substitution.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesSubstitutionsGeneral OverviewCivil ProcedurePartiesSubstitutionsMotions for Substitution

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CHAPTER 4 Motions as to the Parties
D. Seeking Substitution of Parties Under Rule 25

1-4 Federal Litigation Guide §§ 4.56 through 4.99

[Reserved]

§§ 4.56 [Reserved]

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CHAPTER 4 Motions as to the Parties
E. Forms

1-4 Federal Litigation Guide § 4.100

§ 4.100 Notice of Motion for Severance of Party

[1] FORM

Notice of Motion for Severance of Party

Notice of Motion for Severance of Party

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

NOTICE IS HEREBY GIVEN that on [*date*] at [*time of day (specify a.m. or p.m.)*], or as soon thereafter as counsel may be heard, Defendant [*name of moving party*] will move this Court, at the United States Courthouse located at [*address of Court*], Courtroom [*courtroom number*], for an order:

[*If seeking severance of another defendant:*]

(a) pursuant to *Federal Rules of Civil Procedure, Rule 20(a)* and Rule 21, severing all claims asserted by Plaintiff against Defendant [*name of moving party*] from the claims asserted by Plaintiff against Defendant(s) [*name of codefendant(s)*] on the ground that [*state basis of motion, e.g., the claims asserted against the said defendants are not transactionally related and therefore are not properly joined in a single action*]; and

[*OR, if seeking severance of one of plaintiffs:*]

(b) pursuant to *Federal Rules of Civil Procedure, Rule 20(a)* and Rule 21, severing all claims asserted by Plaintiff [*name of one coplaintiff*] from the claims asserted by Plaintiff(s) [*name of other coplaintiff(s)*] on the ground that [*state basis of motion, e.g., the claims asserted by the said plaintiffs do not share any common question of fact or law and therefore are not properly joined in a single action*];

[*CONTINUE*]

(c) granting [*moving party*] such other incidental relief as may be appropriate.

This motion is based on this Notice of Motion, the accompanying Declaration (*or other appropriate affidavit substitute*) of [*name of signatory*] sworn to (*or dated*) [*date*], the accompanying Memorandum of Law [*if required; see*] dated [*date*], and on all of the pleadings and papers on file in this action.

[*Date*]

Respectfully submitted,

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for [*name and designation of party*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

TO: [*Name of opposing counsel*], Attorney for [*name of party*]

[2] Use of Form

This is a form of notice of motion by a defendant for severance of another party on the ground of misjoinder, or for any other reason. It may be used by one of multiple defendants to seek severance of the claims against one of those defendants, or it may be used by a defendant sued by multiple plaintiffs to seek severance of one of the plaintiffs. This form is designed for use by a defendant only. If the plaintiff seeks severance, it may do so by amendment of the pleadings, or by nonsuiting one or more defendants.

Related, but analytically distinct, is a motion seeking separate trials of the claims against multiple defendants. True severance creates a new action in the district court, while separate trials simply are phases of a single action.

[3] Grounds for Ordering Severance

Misjoinder of parties is not a ground for dismissal of an action. n1 Instead, the court may sever any claim against any party, thereby creating a new civil action in the district court. Although the provision for severance is contained in the misjoinder rule, severance is not limited to those circumstances; severance may be ordered for any reason, subject only to review for an abuse of discretion. For example, if venue is proper as to some claims but not as to others, the claims may be severed and transferred to a proper venue.

[4] Deadline for Seeking Severance

A motion seeking severance is not subject to any particular time restriction; nevertheless, misjoinder is a waivable defect that should be raised as soon as practicable. The longer a defendant waits to seek severance, the less likely it is that the remedy will protect the defendant from the cost, delay, or other prejudice that severance is designed to prevent.

[5] Propriety of Joinder of Defendants; Misjoinder

Multiple defendants may be joined in a single action if the claims against those joined (1) arise from the same transaction or occurrence, and (2) present a common question of law or fact. n2 If a defendant is joined without the required connection, misjoinder has occurred, and any defendant may move to sever the misjoined defendant from the action.

[6] Propriety of Joinder of Plaintiffs; Misjoinder

Multiple plaintiffs may join in a single action if the claims by those joining (1) arise from the same transaction or occurrence, and (2) present a common question of law or fact. n3 If a plaintiff joins in an action without the required connection, misjoinder has occurred, and any defendant may move to sever the misjoined plaintiff from the action.

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 21.*

(n2)Footnote 2. *Fed. R. Civ. P. 20(a)(2).*

(n3)Footnote 3. *Fed. R. Civ. P. 20(a)(1).*

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CHAPTER 4 Motions as to the Parties
E. Forms

1-4 Federal Litigation Guide § 4.101

§ 4.101 Notice of Motion for Intervention

[1] FORM

Notice of Motion for Intervention

Notice of Motion for Intervention

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

NOTICE IS HEREBY GIVEN that on [*date*] at [*time of day (specify a.m. or p.m.)*], or as soon thereafter as counsel may be heard, [*identify prospective intervenor, e.g., Intervenor, XYZ Corporation*] will move this Court, at the United States Courthouse located at [*address of court*], Courtroom [*courtroom number*], for an order:

(a) pursuant to *Federal Rules of Civil Procedure, Rule 24*, granting permission to the Intervenor to intervene as a [Plaintiff/Defendant] in this action on the ground that [*state basis of motion, e.g., the Intervenor has a right to intervene in this action under Federal Rules of Civil Procedure, Rule 24(a)(2)*]; and

(b) granting [*moving party*] such other incidental relief as may be appropriate.

This motion is based on this Notice of Motion, the accompanying Declaration (*or other appropriate affidavit substitute*) of [*name of signatory*] sworn to (*or dated*) [*date*], the accompanying Memorandum of Law [*if required*] dated [*date*], and on all of the pleadings and papers on file in this action.

[*Date*]

Respectfully submitted,

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for [*name and designation of party*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

TO: [*Name of opposing counsel*], Attorney for [*name of party*]

[2] Use of Form

This is a form of notice of motion for use by a nonparty to a federal action seeking intervention in the action pursuant to *Fed. R. Civ. P. 24*. The form may be used whether intervention is as of right or permissive.

A sample form of *Motion to Intervene as a Defendant Under Rule 24* is included in the Official Forms Appendix to the Federal Rules of Civil Procedure. n1 The Official Forms may be utilized by the practitioner, but are not mandatory.

[3] Deadline for Seeking Intervention

Any application for intervention, even one seeking the remedy as of right, must be timely filed. n2 The motion to intervene need not be filed within any defined time period. Instead, timeliness is an issue determined under all the facts and circumstances of the case. n3

[4] Grounds for Intervention as of Right

Intervention as of right is available when: n4

- A statute of the United States confers the right
- The intervenor's interest in the action is likely to be impaired or impeded by the disposition of action, and that interest is not already represented by one of the parties to the action

[5] Grounds for Permissive Intervention

Permissive intervention is available when: n5

- A statute of the United States so provides
- The prospective intervenor's claims or defenses have at least one question of law or fact in common with the main action

[6] Jurisdictional Considerations as to Intervenors

The intervention motion and pleading should state the basis of federal jurisdiction over the claims asserted by or against the intervenor. In a federal question case, claims by or against intervenors as of right always will fall within supplemental jurisdiction under *28 U.S.C. § 1367(a)*. In a diversity case, claims by plaintiffs intervening as of right are not within supplemental jurisdiction under *28 U.S.C. § 1367(b)*, and so musthave an independent basis of jurisdiction. Any permissive intervenor must show a basis for federal jurisdiction over the claims in intervention, although if those claims arise from the same constitutional case or controversy, supplemental jurisdiction is available in a federal question case.

[7] Pleading Must Accompany Motion

The pleading to be filed by the prospective intervenor must accompany the notice of motion and motion for intervention. n6

FOOTNOTES:

(n1)Footnote 1. *See* Fed. R. Civ. P., Official Form 23.

(n2)Footnote 2. *Fed. R. Civ. P. 24(a), (b).*

(n3)Footnote 3. *NAACP v. New York, 413 U.S. 345 (1973)* .

(n4)Footnote 4. *Fed. R. Civ. P. 24(a).*

(n5)Footnote 5. *Fed. R. Civ. P. 24(b).*

(n6)Footnote 6. *Fed. R. Civ. P. 24(c).*

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1-4 Federal Litigation Guide § 4.102

§ 4.102 Caption: Intervention

[1] FORM

Caption: Intervention

[*Party designation and name of plaintiff*]	)	
v.	)	
[*Party designation and name of defendant*],	)	Civil Action No. [*number*] [*Identify document, e.g., Motion to Intervene as Plaintiff/Defendant*]
[*Identify prospective intervenor, e.g., XYZ Corporation, Applicant for Intervention*]	)	
	)	

[2] Use of Form

This is a form of caption in proceedings seeking intervention. Once intervention has occurred, the caption will need to be modified to show the intervenor's party status.

[3] Captions

The proper form for a caption to an action generally is dictated by local rules of the district courts. Intervention, however, presents unique issues in captioning because a prospective intervenor has no identifiable party status; intervention is an attempt to obtain that status. Once intervention is obtained, the caption may require further changes.

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CHAPTER 4 Motions as to the Parties
E. Forms

1-4 Federal Litigation Guide § 4.103

§ 4.103 Notice of Motion Seeking Substitution Because of Death of Party

[1] FORM

Notice of Motion Seeking Substitution Because of Death of Party

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

NOTICE IS HEREBY GIVEN that on [*date*] at [*time of day (specify a.m. or p.m.)*], or as soon thereafter as counsel may be heard, [*party designation and name of moving party*] will move this Court, at the United States Courthouse located at [*address of Court*], Courtroom [*courtroom number*], for an order:

(a) pursuant to *Federal Rules of Civil Procedure, Rule 25(a)(1)*, substituting [*identify legal representative of deceased party, e.g., Jane Doe, Executor of the Estate of John Doe*] as a party in this action due to the death of [*party designation and name of deceased party*] as indicated in the Suggestion of Death filed in this action on [*date*]; and

(b) granting [*moving party*] such other incidental relief as may be appropriate.

This motion is based on this Notice of Motion, the accompanying Declaration (or other appropriate affidavit substitute) of [*name of signatory*] sworn to (*or dated*) [*date*], the accompanying Memorandum of Law [*if required*] dated [*date*], and on all of the pleadings and papers on file in this action.

[*Date*]

Respectfully submitted,

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for [*name and designation of party*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

TO: [*Name of opposing counsel*], Attorney for [*name of party*]

[2] Use of Form

This is a form of notice of motion for use by a party in seeking substitution under *Fed. R. Civ. P. 25(a)(1)* of the legal representative of a party who has died during the pendency of an action.

[3] Deadline for Seeking Substitution

A motion seeking substitution of the legal representative of a deceased party need not be made within any particular time of the death itself, but rather must be madewithin 90 days of the date on which a Suggestion of Death was made on the record. n1 If the motion for substitution is not made within the 90 days, the rule states that the action "shall" be dismissed as to the deceased party. n2 Despite this language, the time period is not jurisdictional, so that dismissal is not mandatory, and the court has discretion to grant a motion for substitution made outside the 90-day period. The substitution motion may be made either by any of the remaining parties to the action, or by the legal representative of the deceased party. n3 The movant need not wait until a Suggestion of Death is filed before moving for substitution.

[4] Action Must Survive Death of Party

Substitution in the event of death is proper only if under the substantive law applicable to the action, the claims survive the death of the party. If the claims do not survive, the action is extinguished as to the deceased party.

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 25(a)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 25(a)(1).*

(n3)Footnote 3. *Fed. R. Civ. P. 25(a)(1).*

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CHAPTER 4 Motions as to the Parties
E. Forms

1-4 Federal Litigation Guide § 4.104

§ 4.104 Suggestion of Death of Party on the Record

[1] FORM

Suggestion of Death of Party on the Record

[*Insert caption of action and title of document pursuant to local district court rule requirements]*

[*Party designation and name of party making suggestion of death*] hereby informs the court, and advises the other parties to this action, pursuant to *Federal Rules of Civil Procedure, Rule 25(a)(1)*, of the death of [*party designation and name of deceased party*], a party in this action. The duly appointed legal representative of the deceased is [*identify legal representative of deceased party, e.g., Jane Doe, Executor of the Estate of John Doe*].

[*Date*]

Respectfully submitted,

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for [*name and designation of party*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

[2] Use of Form

This is a form of suggestion of death on the record to be filed under *Fed. R. Civ. P. 25(a)(1)* whenever the death of a party occurs during the pendency of an action and, under the substantive law applicable to the action, the claims survive the death of the party.

A sample form of *Suggestion of Death Upon the Record Under Rule 25(a)(1)* is included in the Official Forms Appendix to the Federal Rules of Civil Procedure. n1 The Official Forms may be utilized by the practitioner, but are not mandatory.

[3] Deadline for Filing Suggestion of Death

A suggestion of death on the record need not be filed within any particular time of the party's death. n2 However, the filing and service of the suggestion of death begins the running of the 90 days permitted for making a motion for substitution as to the deceased party. n3

[4] Who May File Suggestion of Death

Rule 25(a)(1) contains no restriction on who may file the statement of the fact of death. There is no requirement that the statement of the fact of death must be filed by a party or a formal or appointed representative of the decedent.

[5] Service of Suggestion of Death

If the suggestion of death is made by one of the remaining parties to the action, service of the suggestion must be made on the legal representative of the deceased party. Such service is treated as original process, and therefore must be made as provided in *Fed. R. Civ. P. 4*. n4

FOOTNOTES:
(n1)Footnote 1. *See* Fed. R. Civ. P., Official Form 30.

(n2)Footnote 2. *Fed. R. Civ. P. 25(a)(1).*

(n3)Footnote 3. *Fed. R. Civ. P. 25(a)(1).*

(n4)Footnote 4. *Fed. R. Civ. P. 25(a)(1).*

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CHAPTER 5 Motions for Summary Judgment

1-5 Federal Litigation Guide 5.syn

§ 5.syn Synopsis to Chapter 5: Motions for Summary Judgment

§ 5.01 Scope of Rule 56: Resolving Case Without Trial

§ 5.02 Considering Advantages of Summary Judgment Motion
[1] Avoiding Wasteful Litigation
[2] Focusing Litigation

§ 5.03 Court May Grant Summary Judgment Sua Sponte

§ 5.04 Differences Between Summary Judgment and Rule 12 Motions
[1] Bases and Time Limits Differ
[2] Motion to Dismiss for Failure to State Claim
[3] Motion for Judgment on Pleadings

§§ 5.05 through 5.09 [Reserved]

§ 5.10 Analyzing the Case
[1] No Genuine Issue of Material Fact
[2] Identifying Who Has Burden of Proof
[2.--1] Movant's Burden of Production
[2.--2] When Movant Successfully Discharges Burden of Production, Burden Shifts to Opponent

§ 5.11 Bringing Timely and Proper Motion
[1] Filing up to 30 Days After the Close of all Discovery
[2] Motion Must Be Served 14 Days Prior to Date of Hearing, Unless Court Shortens Time
[3] Contents of Motion

§ 5.12 Following Rule 56 Procedures
[1] Supporting Factual Positions
[2] Objecting That a Fact is Not Supported by Admissible Evidence
[3] Court May Consider Materials Not Cited
[4] Submitting Affidavits or Declarations

§ 5.13 Using Affidavits in Summary Judgment Motions

[1] Affidavits Not Required Under Rule 56
[2] Submitting Affidavits in Support of Motion
[2.--1] Affidavits Must Be Based on Personal Knowledge
[2.--2] Affidavits Must Contain Admissible Trial Evidence
[2.--3] Affidavits Must Show That Affiant Is Competent to Testify to Matters Stated
[3] Verified Pleading in Lieu of Affidavit
[4] Signed Declaration in Lieu of Affidavit
[5] Expert Affidavits
[6] Inconsistent Statements
[7] Submitting Affidavit or Declaration in Bad Faith

§ 5.14 Using Discovery Materials in Summary Judgment Motions
[1] Rule 56 Authorizes Use of Discovery Materials
[2] Depositions
[3] Interrogatory Responses
[4] Admissions

§ 5.15 Moving for Partial Summary Judgment
[1] Partial Summary Judgment May Be Granted
[2] Procedure
[3] Standard For Partial Summary Judgment

§ 5.16 Hearing Is Not Required by Rule 56

§ 5.17 Procedure When Rule 12(b)(6) Motion Is Converted Into Summary Judgment Motion

§§ 5.18 through 5.29 [Reserved]

§ 5.30 Showing of Specific Facts Required

§ 5.31 Filing Timely Opposition
[1] Filing Pursuant to Scheduling Order, Federal Rules, and Local Rules
[2] Moving for Extension of Time Within Which to Respond

§ 5.32 Continuance for Further Discovery
[1] Availability of Continuance
[2] Submission of Affidavit Generally Required
[3] Demonstrating That Further Specified Discovery Will Defeat Summary Judgment Motion

§ 5.33 Contents of Opposition Papers
[1] Opponent Must Identify Specific Facts Creating Genuine Issue
[2] Affidavits Generally Not Required

§ 5.34 When Burden Shifts to Opposing Party
[1] After Movant Demonstrates No Material Facts Are in Dispute
[2] Specificity Required

§ 5.35 Filing Cross-Motion for Summary Judgment

§ 5.36 Notice Required When Rule 12(b)(6) Motion Is Converted Into Summary Judgment Motion

§ 5.37 Moving for Sanctions

[1] Rule 56(h) Sanctions
[2] Rule 11 Sanctions

§§ 5.38 through 5.49 [Reserved]

§ 5.50 Required Determination: No Genuine Issue of Material Fact

§ 5.51 Required Showing Based on Burden of Proof at Trial

§ 5.52 Determination Generally Does Not Involve Fact Finding

§ 5.53 Evidence Evaluated in Light Most Favorable to Opponent

§ 5.54 Failing to Properly Support or Address a Fact

§ 5.55 Granting Less Than all the Requested Relief

§§ 5.56. through 5.59 [Reserved]

§ 5.60 Judgment Must Be Final
[1] What Is Final Judgment
[2] Appealing Denial of Motion
[3] Appealing Grant of Motion

§ 5.61 Collateral Order Exception

§ 5.62 Appealing Partial Summary Judgment Under Rule 54(b)

§§ 5.63 through 5.99 [Reserved]

§ 5.100 Notice of Motion for Summary Judgment
[1] FORM
Notice of Motion for Summary Judgment
[2] Use of Form
[3] Supporting and Opposing Affidavits or Declarations
[4] Statement of Material Facts
[5] Sanctions for Affidavits Made in Bad Faith
[6] Timing of Motion
[7] Service of Motion

§ 5.101 Notice of Motion for Partial Summary Judgment
[1] FORM
Notice of Motion for Partial Summary Judgment
[2] Use of Form
[3] Supporting and Opposing Affidavits or Declarations
[4] Statement of Material Facts
[5] Sanctions Based on Affidavits Made in Bad Faith
[6] Timing of Motion
[7] Service of Motion

§ 5.102 Statement of Material Facts
[1] FORM
Statement of Material Facts

[2] Use of Form

§ 5.103 Request for Continuance Pursuant to Rule 56(d)
[1] FORM
Response in Support of Rule 56(d) Continuance
[2] Use of Form
[3] Continuance of Hearing Date

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CHAPTER 5 Motions for Summary Judgment

1-5 Federal Litigation Guide Scope

Scope

SCOPE

This chapter discusses how and when to move for summary judgment under Rule 56, including:

- Bringing a timely motion
- Contents of the motion
- Using affidavits and discovery material to supplement the motion
- Specific procedures required to support factual positions
- How and when to oppose a motion for summary judgment
- The possibility of moving for sanctions
- Appealing a decision on a motion for summary judgment

The chapter contains the following sample forms:

- Notice of Motion for Summary Judgment
- Notice of Motion for Partial Summary Judgment
- Statement of Material Facts
- Request for Continuance Pursuant to Rule 56(f)

For expanded coverage of motions for summary judgment, *see* Moore's Federal Practice, Ch. 56, *Summary Judgment* (Matthew Bender 3d ed.).

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CHAPTER 5 Motions for Summary Judgment
A. Understanding Summary Judgment

1-5 Federal Litigation Guide § 5.01

§ 5.01 Scope of Rule 56: Resolving Case Without Trialn1

A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--as to which summary judgment is sought. n2 The court shall grant summary judgment if the movant shows each of the following: n2.1

- There is no genuine issue of material fact
- The movant is entitled to judgment as a matter of law

Summary judgment motions may be made with respect to an entire case or part of a case. n3 Partial summary judgment is commonly used in cases where liability may be separate from damages or to enforce indemnification obligations.

The court should state on the record the reasons for granting or denying the motion. n3.1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentStandardsGenuine DisputesCivil ProcedureSummary JudgmentStandardsMaterialityCivil ProcedureSummary JudgmentTime Limitations

FOOTNOTES:
(n1)Footnote 1. *See Moore's Federal Practice*, § 56.02 (Matthew Bender 3d ed.).

(n2)Footnote 2. *Fed. R. Civ. P. 56(a).*

(n3)Footnote 2.1. *Fed. R. Civ. P. 56(a).*

(n4)Footnote 3. *Fed. R. Civ. P. 56(a).*

(n5)Footnote 3.1. *Fed. R. Civ. P. 56(a).*

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CHAPTER 5 Motions for Summary Judgment
A. Understanding Summary Judgment

1-5 Federal Litigation Guide § 5.02

§ 5.02 Considering Advantages of Summary Judgment Motionn1

[1] Avoiding Wasteful Litigation

Motions for summary judgment may accomplish the following:

- Prevent wasteful trials n2
- Eliminate those cases from the trial calendar that are predestined to result in a directed verdict n3

[2] Focusing Litigation

A summary judgment motion that does not ask for judgment on the entire case will focus the issues. The court on hearing the motion will ascertain what material facts exist without substantial controversy, and what material facts are actually and in good faith controverted. n4

The court will then make an order specifying the facts that appear without substantial controversy; at trial the facts so specified are deemed established, and the trial conducted accordingly. n5

The grant of partial summary judgment can speed up litigation by eliminating some issues or facts before trial. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentTime LimitationsCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawDirected Verdicts

FOOTNOTES:
(n1)Footnote 1. *See Moore's Federal Practice*, § 56.32 (Matthew Bender 3d ed.).

(n2)Footnote 2. *Capital Imaging Assocs. P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 541 (2d Cir. 1993) , cert. denied, 510 U.S. 947 (1993)* ; *Shaw v. McFarland Clinic, P.C., 231 F. Supp. 2d 924, 931 (S.D. Iowa*

2002) , *aff'd on other grounds, 363 F.3d 744 (8th Cir. 2004)* .

(n3)Footnote 3. *United Nat. Ins. Co. v. Bernstein, 988 F.2d 351, 355 (2d Cir. 1993)* .

(n4)Footnote 4. *Fed. R. Civ. P. 56(d).*

(n5)Footnote 5. *Fed. R. Civ. P. 56(d).*

(n6)Footnote 6. *Fed. R. Civ. P. 56(d)* advisory committee's note (1946); *Algie v. RCA Global Communications, Inc, 891 F. Supp. 875, 883 (S.D.N.Y. 1994)* ; *see also Lovejoy Electronics, Inc. v. O'Berto, 616 F. Supp. 1464, 1473 (N.D. Ill. 1985)* .

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CHAPTER 5 Motions for Summary Judgment
A. Understanding Summary Judgment

1-5 Federal Litigation Guide § 5.03

§ 5.03 Court May Grant Summary Judgment Sua Sponten1

After giving notice and a reasonable time to respond, the court may do any of the following: n2

- Grant summary judgment for a nonmovant
- Grant a summary judgment motion on grounds not raised by a party
- Grant summary judgment on its own after identifying for the parties material facts that are not genuinely in dispute

The court should state on the record its reasons for granting or denying the motion. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentBurdens of Production & ProofMovantsCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentPartial Summary JudgmentsCivil ProcedureSummary JudgmentTime Limitations

FOOTNOTES:
(n1)Footnote 1. *See Moore's Federal Practice, § 56.10* (Matthew Bender 3d ed.).

(n2)Footnote 2. *Fed. R. Civ. P. 56(f).*

(n3)Footnote 3. *Fed. R. Civ. P. 56(a).*

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CHAPTER 5 Motions for Summary Judgment
A. Understanding Summary Judgment

1-5 Federal Litigation Guide § 5.04

§ 5.04 Differences Between Summary Judgment and Rule 12 Motionsn1

[1] Bases and Time Limits Differ

Rule 12 motions are based on the pleadings and are available only to the answering party. n2

Rule 56 motions are based on discovery materials and affidavits, as well as the pleadings, and are available to *any* party. n3

Motions to dismiss under Rule 12(b)(6) must be served within 21 days of service of the pleadings, unless extended. n4

[2] Motion to Dismiss for Failure to State Claim

A party may move to dismiss for failure of the pleading to state a claim upon which relief can be granted. n5

A court may dismiss a claim for failure to state a claim upon which relief may be granted only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. n6

The defendant may move for dismissal for failure to state a claim under any of the following circumstances:

- The legal theory advanced by the plaintiff is not a cognizable legal theory n7
- The plaintiff has advanced a cognizable legal theory, but has failed to include allegations concerning all elements necessary to support recovery n8
- An affirmative defense to the claim appears on the face of the complaint or exhibits thereto n9

If matters outside the pleading are presented to and not excluded by the court, the motion must be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties must be given a reasonable opportunity to present all material that is pertinent to the motion by Rule 56. n10

[3] Motion for Judgment on Pleadings

At any time after the pleadings close and before the trial commences, a party may move for a judgment on the pleadings. n11

A court may grant judgment on the pleadings if the material facts are undisputed and a judgment on the merits can be reached by considering only the contents of the pleadings and matters of which the court may take judicial notice. n12

If the parties present materials outside the pleadings, the court may consider such materials only if it first converts the motion to a motion for summary judgment. n13

The key difference between summary judgment and a motion for judgment on the pleadings is that a summary judgment motion requires analysis of facts, and not merely legal contentions. The parties in a summary judgment proceeding are expected to provide evidentiary factual material outside of the pleadings. n14

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsJudgment on the PleadingsCivil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentPartial Summary JudgmentsCivil ProcedureSummary JudgmentTime Limitations

FOOTNOTES:
(n1)Footnote 1. *See Moore's Federal Practice*, § 56.30 (Matthew Bender 3d ed.).

(n2)Footnote 2. *Fed. R. Civ. P. 12.*

(n3)Footnote 3. *Fed. R. Civ. P. 56(a).*

(n4)Footnote 4. *Fed. R. Civ. P. 12(a).*

(n5)Footnote 5. *Fed. R. Civ. P. 12(b)(6).*

(n6)Footnote 6. *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957) .*

(n7)Footnote 7. *See Brower v. County of Inyo, 489 U.S. 593, 594-595, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989)* .

(n8)Footnote 8. *See Teltronics Proprietary, Ltd v. Medtronic, Inc., 687 F. Supp. 832, 837 (S.D.N.Y. 1988)* ; *see also King v. Port Authority of N.Y. and N.J., 909 F. Supp. 938, 941 (D.N.J. 1995)* ; *Carey v. Mt. Desert Island Hosp., 910 F. Supp. 7, 9 (D. Me. 1995) .*

(n9)Footnote 9. *See Sykes v. James, 13 F.3d 515, 519 (2d Cir. 1993) , cert. denied, 512 U.S. 1240 (1994)* ; *see also Sabo v. Parisi, 583 F. Supp. 1468, 1470 (E.D. Pa. 1984) .*

(n10)Footnote 10. *Fed. R. Civ. P. 12(d)*; *see also Kopec v. Coughlin, 922 F.2d 152, 153 (2d Cir. 1991)* ; *see also Advanced Cardiovascular Systems, Inc. v. Scimed Life Systems, Inc., 988 F.2d 1157, 1164 (8th Cir. 1993)* ; *Miller v. Glanz, 948 F.2d 1562, 1565 (10th Cir. 1991)* ; *Farley v. Henderson, 883 F.2d 709, 711 (9th Cir. 1989) .*

(n11)Footnote 11. *Fed. R. Civ. P. 12(c).*

(n12)Footnote 12. *Juster Assocs. v. City of Rutland, 901 F.2d 266, 269 (2d Cir. 1990)* ; *Huntt v. Virgin Islands,*

339 F.2d 309, 310 (3d Cir. 1964) .

(n13)Footnote 13. *Fed. R. Civ. P. 12(d)*; *see also Sheppard v. Beerman, 94 F.3d 823, 828-829 (2d Cir. 1996)* ; *see also Taylor v. United States I.R.S., 915 F. Supp. 1015, 1018 (D.N.D. 1996)* , *aff'd on other grounds, 106 F.3d 833 (8th Cir. 1997)* .

(n14)Footnote 14. *Garside v. Osco Drug, Inc., 895 F.2d 46, 49 (1st Cir. 1995)* .

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CHAPTER 5 Motions for Summary Judgment
A. Understanding Summary Judgment

1-5 Federal Litigation Guide §§ 5.05 through 5.09

[Reserved]

§§ 5.05[Reserved]

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CHAPTER 5 Motions for Summary Judgment
B. Moving for Summary Judgment

1-5 Federal Litigation Guide § 5.10

§ 5.10 Analyzing the Casen1

[1] No Genuine Issue of Material Fact

Summary judgment is appropriate only if there is no genuine issue of material fact. Substantive law identifies which facts are material; only disputes over facts that might affect the outcome of the case under the governing law will properly preclude the entry of summary judgment. A material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. n2

[2] Identifying Who Has Burden of Proof

[2.--1] Movant's Burden of Production

A party who moves for summary judgment has the burden of showing that: n3

- No genuine issues of material fact exist
- The undisputed facts entitle that party to judgment as a matter of law

The movant's burden on a summary judgment motion is tied to the movant's burden of persuasion at trial. n4

The movant's required prima facie showing is relatively higher if the movant also bears the burden of persuasion at trial. n5

The movant must rely upon specific portions of the record presented to the court to support its case for summary judgment. It is not enough to submit material to the court or to include broad sweeping statements in a summary judgment motion, without detailing exactly where the proof relating to each claim is found in the supporting material. n6

When the moving party does not bear the ultimate burden of proof on an issue, that party satisfies its summary judgment burden by pointing to the absence of evidence to support an essential element of the non-moving party's claim. n7

[2.--2] When Movant Successfully Discharges Burden of Production, Burden Shifts to Opponent

If the movant adequately establishes a prima facie case for summary judgment, the burden is then placed on the opponent to rebut the evidence presented by demonstrating either: n8

- A genuine dispute of material facts exists, which requires a trial to resolve
- That the movant is not entitled to judgment as a matter of law

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentBurdens of Production & ProofMovantsCivil ProcedureSummary JudgmentEvidenceCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentSupporting MaterialsGeneral OverviewCivil ProcedureSummary JudgmentTime Limitations

FOOTNOTES:
(n1)Footnote 1. *See Moore's Federal Practice, § 56.11* (Matthew Bender 3d ed.).

(n2)Footnote 2. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* .

(n3)Footnote 3. *See Fed. R. Civ. P. 56(a)*; *Celotex Corp. v. Catrett, 477 U.S. 317, 323-324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* .

(n4)Footnote 4. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-254, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* .

(n5)Footnote 5. *See United Missouri Bank v. Gagel, 815 F. Supp. 387, 391 (D. Kan. 1993)* .

(n6)Footnote 6. *Williams & Sons Erectors Inc. v. South Carolina Steel Corp., 983 F.2d 1176, 1182-1183 (2d Cir. 1993)* .

(n7)Footnote 7. *Celotex Corp. v. Catrett, 477 U.S. 317, 323-324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* .

(n8)Footnote 8. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* .

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CHAPTER 5 Motions for Summary Judgment
B. Moving for Summary Judgment

1-5 Federal Litigation Guide § 5.11

§ 5.11 Bringing Timely and Proper Motionn1

[1] Filing up to 30 Days After the Close of all Discovery

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. n2 However, in most cases, the court will set the timing for summary judgment motions in a scheduling order.

[2] Motion Must Be Served 14 Days Prior to Date of Hearing, Unless Court Shortens Time

A summary judgment motion must be served at least 14 days prior to the date of the hearing on the motion. n3

If the motion is served by any of the following methods, three additional days must be added to the 14 day time period. n4

- Service by mail
- Service to the clerk of the court based on no known address
- Electronic or other means of delivery consented to in writing

Local rules often address timing of the motion, and some local rules require notice periods longer than that required by Rule 6.

The district court has discretion to shorten the 14-day period for good cause shown, provided the opposing party will not be unduly prejudiced. n5

Any opposing affidavit must be served at least 7 days before the hearing, unless the court permits service at another time. n6

[3] Contents of Motion

The conventional package of filings made in seeking summary judgment should include the following:

- **Notice of the Motion.** Includes the date, time, and location of the hearing on the motion

- **Motion.** Identifies the party seeking summary judgment, the claims on which summary judgment is sought, and the legal and factual grounds for the motion

- **Proposed Order.** Sets forth the relief sought by the moving party

- **Memorandum of Law/Statement of Facts.** Advocates the granting of the motion-either the memorandum or a separate statement of facts must state the asserted undisputed material facts with citations to the record

- **Affidavits or Other Papers.** Supports the basis for the motion

Local district court rules may specify additional requirements, provided those rules are consistent with the Federal Rules of Civil Procedure. n6 Although affidavits and other materials are not strictly required by Rule 56, local rules or standing orders often require specific motion papers such as a notice of motion, a statement of uncontested facts, a proposed order, affidavits, or discovery materials.

Some local rules provide that if a movant's submissions are not specifically contested by the opponent, the facts asserted by the movant are deemed admitted. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentSupporting MaterialsGeneral OverviewCivil ProcedureSummary JudgmentTime Limitations

FOOTNOTES:
(n1)Footnote 1. *See Moore's Federal Practice, § 56.10* (Matthew Bender 3d ed.).

(n2)Footnote 2. *Fed. R. Civ. P. 56(b).*

(n3)Footnote 3. *Fed. R. Civ. P. 6(c)(1).*

(n4)Footnote 4. *Fed. R. Civ. P. 6(d).*

(n5)Footnote 5. *Rule v. Brine, 85 F.3d 1002, 1010 (2d Cir. 1996) .*

(n6)Footnote 6. *Fed. R. Civ. P. 6(c)(2).*

(n7)Footnote 6. *See Fed. R. Civ. P. 83(a)(1).*

(n8)Footnote 7. *See, e.g.*, E.D.N.Y. L.R. 3(g) (facts set forth by movant deemed admitted unless controverted by opponent); S.D.N.Y. L.R. 3(g) (same).

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CHAPTER 5 Motions for Summary Judgment
B. Moving for Summary Judgment

1-5 Federal Litigation Guide § 5.12

§ 5.12 Following Rule 56 Procedures

[1] Supporting Factual Positions

A party asserting that a fact cannot be genuinely disputed, or conversely that a fact is genuinely disputed, must support the assertion by either of the following means: n1

- 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.

- 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] Objecting 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. n2

[3] Court May Consider Materials Not Cited

The court need not consider only the cited materials. It may also consider other materials in the record. n3

[4] Submitting 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. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentWritten MotionsCivil

ProcedureSummary JudgmentSupporting MaterialsGeneral OverviewCivil ProcedureSummary JudgmentSupporting MaterialsAffidavits

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 56(c)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 56(c)(2).*

(n3)Footnote 3. *Fed. R. Civ. P. 56(c)(3).*

(n4)Footnote 4. *Fed. R. Civ. P. 56(c)(4).*

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CHAPTER 5 Motions for Summary Judgment
B. Moving for Summary Judgment

1-5 Federal Litigation Guide § 5.13

§ 5.13 Using Affidavits in Summary Judgment Motionsn1

[1] Affidavits Not Required Under Rule 56

There is no requirement that affidavits must accompany a motion for summary judgment. n2 As long as the movant satisfies the standard for summary judgment set forth in Rule 56(a), summary judgment should be granted. n3

Likewise, there is no requirement that nonmoving parties must use affidavits in their defense of a summary judgment motion. n4

[2] Submitting Affidavits in Support of Motion

[2.--1] Affidavits Must Be Based on Personal Knowledge

If affidavits are submitted in support of or in opposition to a summary judgment motion, they must be prepared by an individual with personal knowledge of the facts. n5

The following cases have interpreted this requirement:

- An affidavit in support of or in opposition to a motion for summary judgment may not be based on information and belief n6

- An attorney's affidavit may not contain claims which counsel believes to be true, but which are not based on personal knowledge n7

- An attorney's affidavit submitted on personal knowledge as to procedural matters, items obtained through discovery, or other matters in evidence are competent summary judgment evidence n8

- Personal knowledge may be inferred from the content of the affidavit and the position of the affiant, such as a corporate officer's or principal's affidavit regarding information about the company n9

- Family members are presumed to have personal knowledge of certain family information n10

- Affidavits containing inadmissible hearsay may not be considered in summary judgment proceedings n11

[2.--2] Affidavits Must Contain Admissible Trial Evidence

Affidavits in support of or in opposition to a summary judgment motion must set forth such facts as would be admissible in evidence. n12

Substance, not form, of the evidence is the focus at summary judgment stage.

- Rule 56(e) does not require the parties to submit evidence in the proper form at the summary judgment stage n13

- Affidavits are admissible if the affiant would be permitted to testify as to the content of the affidavit at trial n14

- Affidavits that contain nothing more than conclusory allegations or speculation are not sufficient to overcome a properly supported summary judgment motion n15

- Affidavits lacking specific facts to support legal conclusions will not be considered by the court in deciding the summary judgment motion n16

[2.--3] Affidavits Must Show That Affiant Is Competent to Testify to Matters Stated

Affidavits in support of or in opposition to a summary judgment motion must show affirmatively that the affiant is competent to testify to the matters stated therein. n17 Moreover, the affidavit or declaration used to support or oppose a motion must be made on personal knowledge. n18

[3] Verified Pleading in Lieu of Affidavit

A verified complaint may be sufficient material to support or oppose summary judgment. n19

A verified pleading is treated as an affidavit for summary judgment purposes, provided that it meets the other requirements for an affidavit under Rule 56(e). n20

[4] Signed Declaration in Lieu of Affidavit

Unnotarized signed declarations containing the statement "I declare under penalty of perjury that the foregoing is true and correct" are sufficient to meet Rule 56(c)(4) requirements for affidavits in support of summary judgment motion. n21

[5] Expert Affidavits

Affidavits containing expert opinion testimony must contain admissible evidence. Specifically, the expert affidavit must: n22

- Be sworn

- Be based on personal knowledge

- Explain the expert's competency

- Set forth specific facts to support the expert's conclusion

A summary judgment affidavit may not contain expert testimony unless the affiant has first been designated an expert witness under Rule 26(a)(2). n23 The opinions of an expert contained in an affidavit must generally be competent in the same measure that they would be at trial. A conclusory affidavit may not be submitted as competent evidence to support a motion for summary judgment. n24

An expert's affidavit need not contain actual data upon which the expert's opinion is based, but must clearly reference the data used to form that opinion. This is especially true in certain types of cases, such as those in which the supporting data is typically the product of volumes of highly technical material. n25

Expert opinion submitted in opposition to summary judgment must be based on established facts. n26 The underlying methodologies of the expert must be explained in the affidavit. n27

[6] Inconsistent Statements

If a party's deposition and affidavit are in conflict, the affidavit is to be disregarded unless a legitimate reason can be given for the discrepancies. Courts generally give a deposition more weight because there was an opportunity for cross-examination. n28

A party cannot create a material issue of triable fact simply by submitting conflicting or contradictory sworn statements to prevent the entry of summary judgment. n29

[7] Submitting Affidavit or Declaration 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. n30 An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions. n31

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentWritten MotionsCivil ProcedureSummary JudgmentSupporting MaterialsGeneral OverviewCivil ProcedureSummary JudgmentSupporting MaterialsAffidavits

FOOTNOTES:
(n1)Footnote 1. *See Moore's Federal Practice, § 56.14* (Matthew Bender 3d ed.).

(n2)Footnote 2. *See Fed. R. Civ. P. 56(a), (c).*

(n3)Footnote 3. *Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* .

(n4)Footnote 4. *See Fed. R. Civ. P. 56(c).*

(n5)Footnote 5. *Fed. R. Civ. P. 56(c)(4); see also Kemper v. Saline Lectronics, 348 F. Supp. 2d 897, 899 (N.D. Ohio 2004)* .

(n6)Footnote 6. *Richardson v. Oldham, 12 F.3d 1373, 1378 (5th Cir. 1994)* ; *Cooper v. Lane, 969 F.2d 368, 372-373 (7th Cir. 1992)* .

(n7)Footnote 7. *Friedel v. City of Madison, 832 F.2d 965, 969-970 (7th Cir. 1987)* .

(n8)Footnote 8. *Sitts v. United States, 811 F.2d 736, 741-742 (2d Cir. 1987)* .

(n9)Footnote 9. *FDIC v. Patel, 46 F.3d 482, 484 (5th Cir. 1995)* ; *Barthelemy v. Air Line Pilots Ass'n, 897 F.2d 999, 1018 (9th Cir. 1989)* .

(n10)Footnote 10. *Cattawba Indian Tribe v. South Carolina, 978 F.2d 1334, 1342 (4th Cir. 1992)* , *cert. denied, 507 U.S. 972 (1993)* .

(n11)Footnote 11. *Richardson v. Oldham, 12 F.3d 1373, 1378 (5th Cir. 1994)* ; *Cooper v. Lane, 969 F.2d 368, 372-373 (7th Cir. 1992)* ; *H. Sand & Co. v. Airtemp Corp., 934 F.2d 450, 454-455 (2d Cir. 1991)* .

(n12)Footnote 12. *Fed. R. Civ. P. 56(c)(4)*; *see also Dora Homes, Inc. v. Epperson, 344 F. Supp. 2d 875, 882 (E.D.N.Y. 2004)* .

(N13)Footnote 13. *Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* .

(n14)Footnote 14. *Azrielli v. Cohen Law Offices, 21 F.3d 512, 516-517 (2d Cir. 1994)* ; *Winskunas v. Birnbaum, 23 F.3d 1264, 1267-1268 (7th Cir. 1994)* ; *Salas v. Carpenter, 980 F.2d 299, 304-305 (5th Cir. 1992)* ; *Hughes v. United States, 953 F.2d 531, 543 (9th Cir. 1992)* .

(n15)Footnote 15. *Allen v. Coughlin, 64 F.3d 77, 80 (2d Cir. 1995)* ; *Rosemary B. v. Board of Educ. of Community High School No. 155, 52 F.3d 156, 159 (7th Cir. 1995)* ; *Peppers v. Coates, 887 F.2d 1493, 1498 (11th Cir. 1989)* .

(n16)Footnote 16. *Burlington Coat Factory Warehouse Corp. v. Esprit De Corp., 769 F.2d 919, 922-923 (2d Cir. 1985)* .

(n17)Footnote 17. *Fed. R. Civ. P. 56(c)(4).*

(n18)Footnote 18. *See Fed. R. Civ. P. 56(c)(4).*

(n19)Footnote 19. *Lavado v. Keohane, 992 F.2d 601, 604 (6th Cir. 1993)* ; *Williams v. Griffin, 952 F.2d 820, 823 (4th Cir. 1991)* ; *Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc., 831 F.2d 77, 80 (5th Cir. 1987)* .

(n20)Footnote 20. *Colon v. Coughlin, 58 F.3d 865, 872 (2d Cir. 1995)* ; *Resolution Trust Corp. v. Starkey, 41 F.3d 1018, 1023 (5th Cir. 1995)* ; *Schroeder v. McDonald, 41 F.3d 1272, 1277-1278 (9th Cir. 1994)* ; *Sammons v. Taylor, 967 F.2d 1533, 1544-1545 n.5 (11th Cir. 1992)* ; *Williams v. Griffin, 952 F.2d 820, 823 (4th Cir. 1991)* .

(n21)Footnote 21. *Lantec, Inc. v. Novell, Inc., 306 F.3d 1003, 1019 (10th Cir. 2002)* .

(n22)Footnote 22. *See Iacobelli Const., Inc. v. County of Monroe, 32 F.3d 19, 25 (2d Cir. 1994)* ; *Brown v. Woodland Joint Unified School District, 27 F.3d 1373, 1382 (9th Cir. 1994)* ; *Fowle v. C & C Cola, a Div. of ITT-Continental Baking Co., 868 F.2d 59, 67 (3d Cir. 1989)* .

(n23)Footnote 23. *See Bryant v. Farmers Ins. Exch., 432 F.3d 1114, 1122 (10th Cir. 2005)* .

(n24)Footnote 24. *Reinke v. O'Connell, 790 F.2d 850, 851-852 (11th Cir. 1986)* (physicians' affidavits stating merely that they were not guilty of malpractice were conclusory and not sufficient to support motion for summary

judgment).

(n25)Footnote 25. *Iacobelli Const., Inc. v. County of Monroe, 32 F.3d 19, 25 (2d Cir. 1994)* .

(n26)Footnote 26. *Monks v. General Elec. Co., 919 F.2d 1189, 1192 (6th Cir. 1990)* ; *Cabrales v. Los Angeles, 864 F.2d 1454, 1460 (9th Cir. 1988)* ; *Merit Motors v. Chrysler Corp., 569 F.2d 666, 673 (D.C. Cir. 1977)* .

(n27)Footnote 27. *Mid-State Fertilizer Co. v. Exchange Nat. Bank of Chicago, 877 F.2d 1333, 1339 (7th Cir. 1989)* .

(n28)Footnote 28. *Russell v. Acme-Evans Co., 51 F.3d 64, 67 (7th Cir. 1995)* ; *Mack v. United States, 814 F.2d 120, 124-125 (2d Cir. 1987)* ; *Camfield Tires v. Michelin Tire Corp., 719 F.2d 1361, 1364 (8th Cir. 1983)* ; *Kennett-Murray Corp. v. Bone, 622 F.2d 887, 893 (5th Cir. 1980)* .

(n29)Footnote 29. *Darnell v. Target Stores, 16 F.3d 174, 176-177 (7th Cir. 1994)* ; *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc., 925 F.2d 566, 572 (2d Cir. 1991)* .

(n30)Footnote 30. *Fed. R. Civ. P. 56(h).*

(n31)Footnote 31. *Fed. R. Civ. P. 56(h).*

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CHAPTER 5 Motions for Summary Judgment
B. Moving for Summary Judgment

1-5 Federal Litigation Guide § 5.14

§ 5.14 Using Discovery Materials in Summary Judgment Motionsn1

[1] Rule 56 Authorizes Use of Discovery Materials

Depositions, answers to interrogatories, and admissions on file, together with affidavits, may be used to support a motion for summary judgment. n2

[2] Depositions

Statements made in depositions are competent summary judgment evidence. Rule 56(c) specifically allows the use of depositions to support or oppose a summary judgment motion. n3

[3] Interrogatory Responses

Responses to interrogatories may be used to support or oppose a motion for summary judgment. n4 Like affidavits, responses to interrogatories must be based on personal knowledge and contain admissible trial evidence; hearsay is not admissible. n5

The court will disregard portions of interrogatory responses that contain inadmissible or hearsay information, regardless of the probative nature of the evidence. Therefore, interrogatories containing hearsay will not be available to support or defeat a motion for summary judgment unless that evidence is independently supported by an admissible affidavit or deposition. n6

[4] Admissions

Admissions on file are among the types of competent summary judgment evidence listed in Rule 56(c). Admissions may take many forms, including, but not limited to: n7

- Admissions in response to a Rule 36 Request for Admissions
- Admissions made in interrogatory responses, depositions, or a party's pleadings
- Admissions made in written stipulations, as well as stipulations or statements made in open court

Certain types of admissions may have a substantial impact on summary judgment litigation. For example, admissions obtained pursuant to a Rule 36 Request for Admissions cannot be debated, and trump any conflicting evidence. n8

Other types of admissions that are deemed irrefutably established include: n9

- Default admissions, obtained when a party fails to respond or to timely respond to a Rule 36 Request for Admissions

- Judicial admissions, obtained during discovery or motion practice (*i.e.*, uncontested statement of facts)

During the pendency of a summary judgment motion, the court may permit withdrawal or amendment of an admission made in response to a Rule 36 Request for Admissions only if: n10

- The presentation of the merits will be promoted by the withdrawal or amendment

- The party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentWritten MotionsCivil ProcedureSummary JudgmentSupporting MaterialsGeneral OverviewCivil ProcedureSummary JudgmentSupporting MaterialsDiscovery Materials

FOOTNOTES:
(n1)Footnote 1. *See Moore's Federal Practice, § 56.14[2]* (Matthew Bender 3d ed.).

(n2)Footnote 2. *Fed. R. Civ. P. 56(c)(1)(A).*

(n3)Footnote 3. *Fed. R. Civ. P. 56(c)(1)(a); see also Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* ; *Cronin v. Aetna Life Ins. Co., 46 F.3d 196, 202, 206 (2d Cir. 1995)* ; *Collier v. Budd Co., 66 F.3d 886, 892 (7th Cir. 1995)* ; *Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991)* .

(n4)Footnote 4. *See Underberg v. United States, 362 F. Supp. 2d 1278, 1283 (D.N.M. 2005)* .

(n5)Footnote 5. *Fed. R. Civ. P. 56(c)(1)(a); 33(b)(4).*

(n6)Footnote 6. *Garside v. Osco Drug, Inc., 895 F.2d 46, 49-50 (1st Cir. 1990)* ; *Vidrine v. Enger, 752 F.2d 107, 110 (5th Cir. 1984)* .

(n7)Footnote 7. *United States v. 2204 Barbara Lane, 960 F.2d 126, 129 (11th Cir. 1992)* ; *United States v. Kasuboski, 834 F.2d 1345, 1350 (7th Cir. 1987)* ; *Dukes v. South Carolina Ins. Co., 770 F.2d 545, 548-549 (5th Cir. 1985)* ; *Donovan v. Carl's Drug Co., 703 F.2d 650, 651 (2d Cir. 1983)* .

(n8)Footnote 8. *Fed. R. Civ. P. 36(b); see also AAA v. AAA Legal Clinic 930 F.2d 1117, 1120 (5th Cir. 1991)* ; *Appley v. West, 929 F.2d 1176, 1179-1180 (7th Cir. 1991)* .

(n9)Footnote 9. *Tobey v. Extel/JWP, Inc., 985 F.2d 330, 333 (7th Cir. 1993)* ; *Donovan v. Carl's Drug Co., 703*

F.2d 650, 651 (2d Cir. 1983) .

(n10)Footnote 10. *Fed. R. Civ. P. 36(b)*; *see also Nguygen v. CNA Corp., 44 F.3d 234, 242-243 (4th Cir. 1995)* ; *Hadley v. United States, 45 F.3d 1345, 1348 (9th Cir. 1995)* ; *American Auto. Ass'n. (Inc.) v. AAA Legal Clinic of Jefferson Crooke, P.C., 930 F.2d 1117, 1119 (5th Cir. 1991)* ; *Smith v. First Nat'l Bank of Atlanta, 837 F.2d 1575, 1577 (11th Cir. 1988)* ; *Donovan v. Carls Drug Co., 703 F.2d 650, 651-652 (2d Cir. 1983)* .

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CHAPTER 5 Motions for Summary Judgment
B. Moving for Summary Judgment

1-5 Federal Litigation Guide § 5.15

§ 5.15 Moving for Partial Summary Judgmentn1

[1] Partial Summary Judgment May Be Granted

Summary judgment may be granted on all or *any part of* a claim. n2 Additionally, the court may enter a summary judgment which decides only the issue of liability and allows for a trial on the matter of damages. n3

[2] Procedure

The procedure for moving for a partial summary judgment is the same as moving for a summary judgment on the entire case.

Although a partial summary judgment decision is entered on less than the entire case, it is not a true judgment because it is not an appealable final order. n4 The court's grant of partial summary judgment, however, may establish the existence or nonexistence of certain facts which will be binding on the parties. n5

The following timing rules apply for motions for partial summary judgment unless a different time is set by local rule or the court orders otherwise: n6

- A party may move for partial summary judgment at any time until 30 days after the close of all discovery
- A written motion and notice of the hearing must be served at least 14 days before the time specified for the hearing
- Any opposing affidavit must be served at least 7 days before the hearing, unless the court permits service at another time

[3] Standard For Partial Summary Judgment

Courts employ the normal summary judgment standard in making partial summary judgment rulings resolving a claim or establishing facts. The failure to demonstrate that there is a genuine issue of material fact as it relates to a particular claim or aspect of a claim may therefore support a ruling eliminating that issue from the litigation. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentWritten MotionsCivil ProcedureSummary JudgmentPartial Summary JudgmentsCivil ProcedureSummary JudgmentSupporting MaterialsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Moore's Federal Practice, § 56.40* (Matthew Bender 3d ed.).

(n2)Footnote 2. *Fed. R. Civ. P. 56(a).*

(n3)Footnote 3. *Fed. R. Civ. P. 56(a), (g).*

(n4)Footnote 4. *Deimer v. Cincinnati Sub-Zero Products, 990 F.2d 342, 346 (7th Cir. 1993)* .

(n5)Footnote 5. *Fed. R. Civ. P. 56(d).*

(n6)Footnote 6. *Fed. R. Civ. P. 56(c)(1), 6(c)(2), 56(b).*

(n7)Footnote 7. *Deimer v. Cincinnati Sub-Zero Products, 990 F.2d 342, 345 (7th Cir. 1993)* .

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CHAPTER 5 Motions for Summary Judgment
B. Moving for Summary Judgment

1-5 Federal Litigation Guide § 5.16

§ 5.16 Hearing Is Not Required by Rule 56n1

Rule 56 does not require that a hearing to be held on a summary judgment motion; the opportunity to submit written evidence and argument satisfies the requirements of the rule. n2

Rule 43(c), authorizes that oral testimony may be used for summary judgment motions. n3 Oral testimony, however, is extremely rare and counsel should check both the local district court rules and the individual judge's rules with respect to hearings on summary judgment motions.

When the record contains an enormous mass of material, the court may decide that a hearing would allow it to assess the record more efficiently. n4 Complex factual determinations also present situations where oral testimony may be helpful in determining the existence of a factual dispute. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentHearingsOral ArgumentsCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentWritten MotionsCivil ProcedureSummary JudgmentSupporting MaterialsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Moore's Federal Practice, § 56.15* (Matthew Bender 3d ed.).

(n2)Footnote 2. *Sheinkopf v. Stone, 927 F.2d 1259 (1st Cir. 1991)* ; *Anchorage Assocs. v. Virgin Islands Bd. of Tax Review, 922 F.2d 168, 176 (3d Cir. 1990)* (citing cases from various circuits).

(n3)Footnote 3. *Fed. R. Civ. P. 43(c).*

(n4)Footnote 4. *See Argus Inc. v. Eastman Kodak, 801 F.2d 38, 42 n.2 (2d Cir. 1986)* .

(n5)Footnote 5. *County of Oakland v. City of Berkeley, 742 F.2d 289, 297-298 (6th Cir. 1984)* ; *Utah v. Marsh, 740 F.2d 799, 801 (10th Cir. 1984)* .

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CHAPTER 5 Motions for Summary Judgment
B. Moving for Summary Judgment

1-5 Federal Litigation Guide § 5.17

§ 5.17 Procedure When Rule 12(b)(6) Motion Is Converted Into Summary Judgment Motion

If, on a Rule 12(b) motion seeking to dismiss for failure to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion will be treated as one for summary judgment and disposed of as provided in Rule 56. All parties must be given a reasonable opportunity to present all material made pertinent to such a motion by Rule 56. n1

The court must give sufficient notice to the opposing party and an opportunity to be heard. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 12(d)*; *see also Tri-Gen Inc. v. International Union of Operating Eng'rs, 433 F.3d 1024, 1029-1030 (7th Cir. 2006)* .

(n2)Footnote 2. *Fed. R. Civ. P. 56(f)*; *Groden v. Random House Inc., 61 F.3d 1045, 1052 (2d Cir. 1995)* .

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CHAPTER 5 Motions for Summary Judgment
B. Moving for Summary Judgment

1-5 Federal Litigation Guide §§ 5.18 through 5.29

[Reserved]

§§ 5.18[Reserved]

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CHAPTER 5 Motions for Summary Judgment
C. Opposing Motion for Summary Judgment

1-5 Federal Litigation Guide § 5.30

§ 5.30 Showing of Specific Facts Requiredn1

In order to defeat a summary judgment motion that is properly supported by affidavits, depositions, and documents as envisioned by Rule 56(c), the opposing party is required to come forward with materials setting forth specific facts showing there is a genuine issue of material fact to be tried. n2

The opponent must demonstrate that there are issues of fact that must be decided by a factfinder because they may reasonably be decided in favor of either party. n3

Opposition papers may consist of the same general types of evidence available to the moving party under Rule 56. This includes pleadings, affidavits, documentary evidence, electronically stored information, interrogatory responses, depositions, admissions on file and any other admissible evidence. n4 It is not enough for the opponent to rely on mere allegations or denials of the adverse party's pleading to overcome the motion. n5 Likewise, it is insufficient for the opponent to present unsworn documents, n6 or papers containing nothing more than the opponent's speculation. n7

A right to judgment as a matter of law is not established merely because the opposing party fails to respond. The court must first determine whether the movant has met its summary judgment burden. n8

However, if the moving party meets its initial summary judgment burden, it is quite likely that the court will enter a summary judgment in the absence of any opposition. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentOppositionGeneral OverviewCivil ProcedureSummary JudgmentOppositionMemoranda in OppositionCivil ProcedureSummary JudgmentSupporting MaterialsAffidavits

FOOTNOTES:
(n1)Footnote 1. *See Moore's Federal Practice, § 56.13[4]* (Matthew Bender 3d ed.).

(n2)Footnote 2. *See National Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 735 (1st Cir. 1995)* ; *Irby v. Bittick, 44 F.3d 949, 953 (11th Cir. 1995)* .

(n3)Footnote 3. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* ; *Tolle v. Carroll Touch Inc., 23 F.3d 174, 179 (7th Cir. 1994)* ; *United States v. Gilbert, 920 F.2d 878, 882-883 (11th Cir. 1991)* ; *Dister v. Continental Group, Inc., 859 F.2d 1108, 1114-1115 (2d Cir. 1988)* .

(n4)Footnote 4. *Fed. R. Civ. P. 56(c)(1)(A)*; *see also Kehoe v. Anheuser-Busch, 995 F.2d 117 (8th Cir. 1993)* (summary judgment reversed on basis of affidavits); *see also §§ 5.13*, *5.14*.

(n5)Footnote 5. *Fed. R. Civ. P. 56(c)*; *see also Celotex Corp. v. Catrett, 477 U.S. 317, 323-324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* ; *Campbell v. Sonat Offshore Drilling, Inc., 979 F.2d 1115, 1119 (5th Cir. 1992)* ; *Bald Mountain Park, Ltd. v. Oliver, 863 F.2d 1560, 1563 (11th Cir. 1989)* .

(n6)Footnote 6. *First Nat'l Life Ins. v. California Pac. Life, 876 F.2d 877, 881 (11th Cir. 1989)* .

(n7)Footnote 7. *Slowiak v. Land O'Lakes, Inc., 987 F.2d 1293, 1295-1297 (7th Cir. 1993)* .

(n8)Footnote 8. *See Reed v. Bennett, 312 F.3d 1190, 1195 (10th Cir. 2002)* .

(n9)Footnote 9. *Fed. R. Civ. P. 56(e)(2)*; *Hugueley v. Dresden Police Dep't, 469 F. Supp. 2d 507, 510 (W.D. Tenn. 2007)* (defendants were entitled to summary judgment as matter of law when evidence presented refuted complaint allegations and plaintiff failed to respond to summary judgment motion).

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CHAPTER 5 Motions for Summary Judgment
C. Opposing Motion for Summary Judgment

1-5 Federal Litigation Guide § 5.31

§ 5.31 Filing Timely Oppositionn1

[1] Filing Pursuant to Scheduling Order, Federal Rules, and Local Rules

The scheduling order typically will set forth filing deadlines for motions for summary judgment. n2

In general, a written motion and notice of the hearing must be served at least 14 days before the time specified for the hearing, and any opposing affidavit must be served at least 7 days before the hearing, unless the court permits service at another time. n3 Local rules may also set forth filing deadlines for motions for summary judgment.

[2] Moving for Extension of Time Within Which to Respond

If counsel is unable to submit a timely reply to a summary judgment motion, the prudent course is to request an extension of time within which to respond. n4 A history of timely filings is helpful in supporting a request for an extension of time within which to reply to a summary judgment motion. n5

A request for an extension of time within which to file a reply to a motion of summary judgment should be distinguished from a continuance pursuant to Rule 56(d) made when affidavits are unavailable. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentOppositionGeneral OverviewCivil ProcedureSummary JudgmentOppositionMemoranda in OppositionCivil ProcedureSummary JudgmentTime Limitations

FOOTNOTES:
(n1)Footnote 1. *See Moore's Federal Practice, § 56.10[3]* (Matthew Bender 3d ed.).

(n2)Footnote 2. *See Fed. R. Civ. P. 16(b)(3).*

(n3)Footnote 3. *Fed. R. Civ. P. 6(c)(1), (2).*

(n4)Footnote 4. *Fed. R. Civ. P. 6(b).*

(n5)Footnote 5. *See Ruotolo v. IRS, 28 F.3d 6, 9 (2d Cir. 1994)* .

(n6)Footnote 6. *See § 5.32.*

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1-5 Federal Litigation Guide § 5.32

§ 5.32 Continuance for Further Discoveryn1

[1] Availability of Continuance

If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may do any of the following: n2

- Defer considering the motion or deny it
- Allow time to obtain affidavits or declarations or to take discovery
- Issue any other appropriate order

The district courts have a duty under Rule 56(d) to ensure that the parties have been given a reasonable opportunity to make their record complete before ruling on a motion for summary judgment. To this end, it has been held that Rule 56(d) should be liberally construed. n3

A party seeking a Rule 56(d) continuance is generally required to demonstrate due diligence both in pursuing discovery before the summary judgment motion is made, n4 and in pursuing the extension of time after the motion is made. n5

A court may reject a request for time to conduct further discovery, even if properly and timely made, if it deems the request to be based on speculation as to what potentially could be discovered. n6 A Rule 56(d) continuance is inappropriate if the information sought is already available to the summary judgment opponent. n7

[2] Submission of Affidavit Generally Required

A Rule 56(d) request for a continuance generally must be supported by an affidavit or declaration. n8 Some courts have developed detailed requirements for such affidavits. For example, the Second Circuit requires the party seeking further discovery to file an affidavit explaining: n9

- The nature of the uncompleted discovery (*i.e.*, what facts are sought and how they are to be obtained)
- How those facts are reasonably expected to create a genuine issue of material fact

- What efforts have been made to obtain the facts
- Why the efforts were unsuccessful

The Third Circuit applies a similar three-part requirement. Specifically, the affidavit must specify: n10

- The particular information being sought
- How, if uncovered, the information would preclude summary judgment
- Why the information has not previously been obtained

[3] Demonstrating That Further Specified Discovery Will Defeat Summary Judgment Motion

A party seeking Rule 56(d) relief must demonstrate specifically how a continuance for further discovery will enable that party to rebut the assertions contained in the pending summary judgment motion. n11 The movant is required to state with some precision the material sought, and exactly how that material will help in opposing summary judgment. n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentOppositionGeneral OverviewCivil ProcedureSummary JudgmentOppositionMemoranda in OppositionCivil ProcedureSummary JudgmentTime Limitations

FOOTNOTES:
(n1)Footnote 1. *See Moore's Federal Practice, § 56.10[8]* (Matthew Bender 3d ed.).

(n2)Footnote 2. *Fed. R. Civ. P. 56(d).*

(n3)Footnote 3. *In re Deep Vein Thrombosis, 356 F. Supp. 2d 1055, 1060 (N.D. Cal. 2005)* ; *Elliott Assoc., L.P. v. Republic of Peru, 961 F. Supp. 83, 86 (S.D.N.Y. 1997)* .

(n4)Footnote 4. *See Baker v. American Airlines, Inc., 430 F.3d 750, 756 (5th Cir. 2005)* .

(n5)Footnote 5. *See Ayala-Gerena v. Bristol Myers-Squibb Co., 95 F.3d 86, 92 (1st Cir. 1996)* ; *see also Nidds v. Schindler Elevator Corp., 113 F.3d 912, 921 (9th Cir. 1996)* .

(n6)Footnote 6. *Ortiz Cameron v. D.E.A., 959 F. Supp. 92, 93-94 (D.P.R. 1997)* , *aff'd on other grounds, 139 F.3d 4 (1st Cir. 1998)* ; *Mason Tenders Dist. Council Pension Fund v. Messera, 958 F. Supp. 869, 894 (S.D.N.Y. 1997)* ; *City of Rome v. Glanton, 958 F. Supp. 1026, 1039 (E.D. Pa. 1997)* , *aff'd mem., 133 F.3d 909 (3d Cir. 1997)* .

(n7)Footnote 7. *See Mason Tenders Dist. Council Pension Fund v. Messera, 958 F. Supp. 869, 894 (S.D.N.Y. 1997)* ; *see also Paul Kadair, Inc. v. Sony Corp., 694 F.2d 1017, 1032 (5th Cir. 1983)* .

(n8)Footnote 8. *Di Benedetto v. Pan Am World Serv., Inc., 359 F.3d 627, 630 (2d Cir. 2004)* ; *Gettings v. Building Laborers Local 310 Fringe Benefits Fund, 349 F.3d 300, 305 (6th Cir. 2003)* ; *Rivera-Flores v. Bristol-Myers Squibb Caribbean, 112 F.3d 9, 14 (1st Cir. 1997)* .

(n9)Footnote 9. *Burlington Coat Factory Warehouse Corp. v. Esprit de Corp., 769 F.2d 919, 926 (2d Cir. 1985)* .

(n10)Footnote 10. *City of Rome v. Glanton, 958 F. Supp. 1026, 1039 (E.D. Pa. 1997)* .

(n11)Footnote 11. *Messina v. Krakower, 439 F.3d 755, 762 (D.C. Cir. 2006)* ; *Allen v. CSX Transp., Inc., 325 F.3d 768, 775-776 (6th Cir. 2003)* .

(n12)Footnote 12. *Bliss v. Franco, 446 F.3d 1036, 1042 (10th Cir. 2006)* ; *Simmons Oil Corp. v. Tesoro Petroleum Corp., 86 F.3d 1138, 1144 (Fed. Cir. 1996)* ; *S.E.C. v. Spence & Green Chemical Co., 612 F.2d 896, 901 (5th Cir. 1980)* .

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CHAPTER 5 Motions for Summary Judgment
C. Opposing Motion for Summary Judgment

1-5 Federal Litigation Guide § 5.33

§ 5.33 Contents of Opposition Papersn1

[1] Opponent Must Identify Specific Facts Creating Genuine Issue

The summary judgment opponent must prepare and present opposing papers that clearly and concisely illustrate the exact issue or issues presented by the case and detail the support within the record that support the opponent's position that a trial is necessary to resolve those material issues. n2

- Mere allegations or denials of the adverse party's pleadings are not sufficient n3
- The existence of a disputed fact alone without proving materiality will not defeat a motion for summary judgment n4
- Parties cannot create a disputed issue where none exists by submission of conflicting or contradictory statements in an attempt to defeat a summary judgment motion n5
- The summary judgment opponent cannot defeat the motion by merely relying on conclusory, speculative, immaterial, frivolous or non-credible evidence n6

A critical filing requirement for summary judgment motions commonly imposed by local rules is the requirement that the moving party submit a statement of facts that the moving party claims are undisputed, with citations to support in the record for each such fact listed in the statement. The opposing party is required to file a responsive statement as well, also with citations to the record. In virtually every court with such a requirement, the local rules provide that any fact supported by citation to the record that is not properly and timely opposed is deemed admitted. n7

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. n7.1

[2] Affidavits Generally Not Required

The summary judgment opponent may use any form of competent summary judgment evidence to establish the presence of a disputed material fact. These materials are specified in Rule 56(c), and include pleadings, discovery and disclosure materials, electronically stored information, and affidavits.

Affidavits may be used but are not *required* in opposing the summary judgment motion. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentOppositionGeneral OverviewCivil ProcedureSummary JudgmentOppositionMemoranda in OppositionCivil ProcedureSummary JudgmentOppositionSupporting MaterialsCivil ProcedureSummary JudgmentTime Limitations

FOOTNOTES:
(n1)Footnote 1. *See Moore's Federal Practice, § 56.13[3]* (Matthew Bender 3d ed.).

(n2)Footnote 2. *Fed. R. Civ. P. 56(c)*; *see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)* .

(n3)Footnote 3. *Fed. R. Civ. P. 56(c)*.

(n4)Footnote 4. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* .

(n5)Footnote 5. *Mack v. United States, 814 F.2d 120, 124-125 (2d Cir. 1987)* .

(n6)Footnote 6. *See e.g., Resolution Trust Corp. v. Juergens, 965 F.2d 149, 152 (7th Cir. 1992)* ; *Gonzales v. Millers Casualty Ins. Co. of Texas, 923 F.2d 1417, 1419 (10th Cir. 1991)* ; *United States v. One Lot of U.S. Currency ($68,000), 927 F.2d 30, 32 (1st Cir. 1991)* ; *Knight v. United States Fire Ins. Co., 804 F.2d 9, 12 (2d Cir. 1986)* .

(n7)Footnote 7. *See, e.g.*, Local Rules, D. Me., L.R. 56(b), (c), (f); Local Rules, D. Mass., L.R. 56.1; Local Rules, E.D.N.Y & S.D.N.Y., L. Civ. R. 56.1(a)(c); Local Rules, S.D. Fla., L.R. 7.5(A)(D); *see also New York State Teamsters Conference Pension & Ret. Fund v. Express Servs., 426 F.3d 640, 648-649 (2d Cir. 2005)* (citing **Moore's**, Second Circuit enforces local rules on required statements of undisputed facts because those rules relieve courts "of the onerous task of hunting through voluminous records without guidance from the parties").

(n8)Footnote 7.1. *Fed. R. Civ. P. 56(c)(2)*.

(n9)Footnote 8. *Fed. R. Civ. P. 56(c)*.

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CHAPTER 5 Motions for Summary Judgment
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1-5 Federal Litigation Guide § 5.34

§ 5.34 When Burden Shifts to Opposing Partyn1

[1] After Movant Demonstrates No Material Facts Are in Dispute

Once the movant has demonstrated that no material facts are in dispute, the opposing party must set forth specific facts demonstrating that a genuine issue for trial exists in order to defeat the summary judgment motion. n2

[2] Specificity Required

The summary judgment opponent must cite 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 show that the materials cited by the movant do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentBurdens of Production & ProofGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentOppositionGeneral OverviewCivil ProcedureSummary JudgmentOppositionMemoranda in OppositionCivil ProcedureSummary JudgmentOppositionSupporting Materials

FOOTNOTES:
(n1)Footnote 1. *See Moore's Federal Practice*, § 56.13 (Matthew Bender 3d ed.).

(n2)Footnote 2. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* ; *Campbell v. Sonat Offshore Drilling, Inc., 979 F.2d 1115, 1119 (5th Cir. 1992)* ; *Scherer v. Rockwell Int'l Corp., 975 F.2d 356, 360 (7th Cir. 1992)* ; *DeHorney v. Bank of America Nat. Trust and Sav., 879 F.2d 459, 465 (9th Cir. 1989)* .

(n3)Footnote 3. *Fed. R. Civ. P. 56(c)(1).*

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CHAPTER 5 Motions for Summary Judgment
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1-5 Federal Litigation Guide § 5.35

§ 5.35 Filing Cross-Motion for Summary Judgment

The summary judgment opponent may cross-move for summary judgment. The fact that both sides have moved for summary judgment does not necessarily mean that summary judgment may properly be granted for either side; the court must evaluate each motion on its own merits. n1

The burden of demonstrating the absence of a genuine issue of fact does not shift when cross-motions are before the court. n2

Although Rule 56 does not require any waiting period before filing motions or cross-motions for summary judgment, scheduling orders are likely to supersede the rule provisions in most cases, deferring summary judgment motions until a stated time or establishing different deadlines. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentOppositionGeneral OverviewCivil ProcedureSummary JudgmentOppositionMemoranda in OppositionCivil ProcedureSummary JudgmentOppositionSupporting Materials

FOOTNOTES:
(n1)Footnote 1. *See Association of Int'l Auto. Mfrs. Inc. v. Abrams, 84 F.3d 602, 611 (2d Cir. 1996)* ; *see also Otis Elevator Co. v. Factory Mut. Ins. Co., 353 F. Supp. 2d 274, 279 (D. Conn. 2005)* ; *Burlington Ins. Co. v. Okie Dokie, Inc., 398 F. Supp. 2d 147, 155 (D.D.C. 2005)* (citing **Moore's)**.

(n2)Footnote 2. *See Eastman Mach. Co. v. United States, 841 F.2d 469, 473 (2d Cir. 1988)* ; *see also Cram v. Sun Ins. Office, Ltd., 375 F.2d 670 (4th Cir. 1967)* .

(n3)Footnote 3. *Fed. R. Civ. P. 56(a)*, Committee Note of 2008.

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CHAPTER 5 Motions for Summary Judgment
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1-5 Federal Litigation Guide § 5.36

§ 5.36 Notice Required When Rule 12(b)(6) Motion Is Converted Into Summary Judgment Motion

If the court converts a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, the court must give notice to the opposing party and an opportunity to be heard. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProcedureDismissalsInvoluntary DismissalsFailures to State ClaimsCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentOppositionGeneral OverviewCivil ProcedureSummary JudgmentOppositionMemoranda in Opposition

FOOTNOTES:
(n1)Footnote 1. *Grodin v. Random House Inc., 61 F.3d 1045, 1052 (2d Cir. 1995)* .

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CHAPTER 5 Motions for Summary Judgment
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1-5 Federal Litigation Guide § 5.37

§ 5.37 Moving for Sanctionsn*

[1] Rule 56(h) Sanctions

If affidavits are submitted in bad faith or for the sole purpose of delay, opposing counsel may move for sanctions. The court may order the payment of expenses incurred by opposing counsel as a result of the offending affidavit, and may cite the offending party or counsel for contempt. n1

Rule 56(h) sanctions will not be imposed merely because an affidavit is inaccurate or misleading. Rather, the court must conclude that the affidavit's failings result from bad faith. n2

[2] Rule 11 Sanctions

Rule 11 provides for sanctions when a pleading, written motion, or other paper is presented:

- For an improper purpose n3
- That contains claims, defenses, or other legal contentions that are not warranted by existing law or by a nonfrivolous argument to change existing law or establish new law n4
- That contains allegations or factual contentions that do not have or are unlikely to have evidentiary support n5
- That contains denials of factual contentions that are not are warranted on the evidence n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSanctionsBaseless FilingsBad Faith MotionsLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote *. *See Moore's Federal Practice*, *§ 56.33* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 56(h).*

(n3)Footnote 2. *Turner v. Baylor Richardson Med. Ctr., 476 F.3d 337, 349 (5th Cir. 2007)* ; *Fort Hill Builders, Inc. v. National Grange Mut. Ins. Co., 866 F.2d 11, 15-16 (1st Cir. 1989)* ; *Stewart v. RCA Corp., 790 F.2d 624, 632 (7th Cir. 1986)* .

(n4)Footnote 3. *Fed. R. Civ. P. 11(b)(1).*

(n5)Footnote 4. *Fed. R. Civ. P. 11(b)(2).*

(n6)Footnote 5. *Fed. R. Civ. P. 11(b)(3).*

(n7)Footnote 6. *Fed. R. Civ. P. 11(b)(4).*

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CHAPTER 5 Motions for Summary Judgment
C. Opposing Motion for Summary Judgment

1-5 Federal Litigation Guide §§ 5.38 through 5.49

[Reserved]

§§ 5.38[Reserved]

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CHAPTER 5 Motions for Summary Judgment
D. Anticipating Court's Approach

1-5 Federal Litigation Guide § 5.50

§ 5.50 Required Determination: No Genuine Issue of Material Factn*

Summary judgment may only be granted if the court determines that there is no genuine issue of material fact. n1 Substantive law identifies which facts are material; only disputes over facts that might affect the outcome of the case under the governing law will properly preclude the entry of summary judgment. A material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. n2

The determination of whether a given factual dispute requires submission to the factfinder is guided by the substantive evidentiary standard that applies in the case; for example, the clear and convincing standard applies in a libel action against a public figure. n3

The court should state on the record the reasons for granting or denying the motion. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentStandardsGenuine DisputesCivil ProcedureSummary JudgmentStandardsMateriality

FOOTNOTES:
(n1)Footnote *. *See Moore's Federal Practice, § 56.11* (Matthew Bender 3d ed.).

(n2)Footnote 1. *DeMars v. O'Flynn, 287 F. Supp. 2d 230, 240 (W.D.N.Y. 2003)* .

(n3)Footnote 2. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* .

(n4)Footnote 3. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* .

(n5)Footnote 4. *Fed. R. Civ. P. 56(a)*.

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CHAPTER 5 Motions for Summary Judgment
D. Anticipating Court's Approach

1-5 Federal Litigation Guide § 5.51

§ 5.51 Required Showing Based on Burden of Proof at Trialn*

Rule 56 mandates the entry of summary judgment, on motion after adequate time for discovery, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. n1

Failure of the movant to establish proof on each and every essential element of its claim will preclude the entry of summary judgment in its favor. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentBurdens of Production & ProofGeneral OverviewCivil ProcedureSummary JudgmentBurdens of Production & ProofMovantsCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentStandardsGenuine DisputesCivil ProcedureSummary JudgmentStandardsMateriality

FOOTNOTES:
(n1)Footnote *. *See Moore's Federal Practice, § 56.13* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* .

(n3)Footnote 2. *See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* ; *FDIC v. Giammettei, 34 F.3d 51, 54 (2d Cir. 1994)* ; *Tidmore Oil v. BP Oil Co./Gulf Products Div., 932 F.2d 1384, 1387-1388 (11th Cir. 1991)* .

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CHAPTER 5 Motions for Summary Judgment
D. Anticipating Court's Approach

1-5 Federal Litigation Guide § 5.52

§ 5.52 Determination Generally Does Not Involve Fact Findingn*

Credibility assessments, choices between conflicting versions of the events, and the weighing of evidence are matters for the jury, and not for the court on a motion for summary judgment. n1

In deciding a motion for summary judgment, the court must be careful not to overstep its bounds by resolving issues of fact, whether through assessing the credibility of witnesses, weighing evidence, or through the inference of fact. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentEvidenceCivil ProcedureSummary JudgmentStandardsGeneral OverviewCivil ProcedureSummary JudgmentStandardsNeed for Trial

FOOTNOTES:
(n1)Footnote *. *See Moore's Federal Practice, § 56.11* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fischl v. Armitage, 128 F.3d 50, 55 (2d Cir. 1997)* .

(n3)Footnote 2. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* .

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CHAPTER 5 Motions for Summary Judgment
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1-5 Federal Litigation Guide § 5.53

§ 5.53 Evidence Evaluated in Light Most Favorable to Opponentn1

The court is required to view the evidence in the light most favorable to the summary judgment opponent, and to draw all permissible inferences in favor of that party. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentEvidenceCivil ProcedureSummary JudgmentStandardsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Moore's Federal Practice, § 56.11* (Matthew Bender 3d ed.).

(n2)Footnote 2. *Fischl v. Armitage, 128 F.3d 50, 55 (2d Cir. 1997)* .

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CHAPTER 5 Motions for Summary Judgment
D. Anticipating Court's Approach

1-5 Federal Litigation Guide § 5.54

§ 5.54 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: n1

- Give an opportunity to properly support or address the fact
- Consider the fact undisputed for purposes of the motion
- Grant summary judgment if the motion and supporting materials--including the facts considered undisputed--show that the movant is entitled to it
- Issue any other appropriate order

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureSummary JudgmentBurdens of Production & ProofMovantsCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentStandardsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 56(e).*

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CHAPTER 5 Motions for Summary Judgment
D. Anticipating Court's Approach

1-5 Federal Litigation Guide § 5.55

§ 5.55 Granting Less Than 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. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureRemedies

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 56(g).*

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CHAPTER 5 Motions for Summary Judgment
D. Anticipating Court's Approach

1-5 Federal Litigation Guide §§ 5.56. through 5.59

[Reserved]

§§ 5.56.[Reserved]

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CHAPTER 5 Motions for Summary Judgment
E. Appealing Decision on Motion

1-5 Federal Litigation Guide § 5.60

§ 5.60 Judgment Must Be Finaln1

[1] What Is Final Judgment

A judgment is considered final when the trial court has conclusively adjudicated all the issues before it and there remains nothing left for it to do but execute the order. n2

[2] Appealing Denial of Motion

A denial of summary judgment is a nonfinal judgment as it does not resolve the case. Accordingly, a denial of summary judgment is not automatically appealable. n3 However, an order denying summary judgment is appealable when it is coupled with a grant of summary judgment to the opposing party. n4

[3] Appealing Grant of Motion

A granting of summary judgment as to the entire case is a final ruling, and is reviewable on appeal. n5 The appellate court reviews a district court's grant of summary judgment de novo, construing all evidence in connection with the motion in the light most favorable to the nonmoving party. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentAppellate ReviewGeneral OverviewCivil ProcedureSummary JudgmentAppellate ReviewAppealabilityCivil ProcedureSummary JudgmentAppellate ReviewStandards of ReviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Moore's Federal Practice, § 56.41* (Matthew Bender 3d ed.).

(n2)Footnote 2. *Catlin v. United States, 324 U.S. 229, 233, 65 S. Ct. 631, 89 L. Ed. 911 (1945)* .

(n3)Footnote 3. *Kutner Buick, Inc. v. American Motors Corp., 868 F.2d 614, 619 (3d Cir. 1989)* ; *Akerman v.*

Oryx Communications, Inc., 810 F.2d 336, 339 (2d Cir. 1987) .

(n4)Footnote 4. *See American & Foreign Ins. Co. v. Sequatchie Concrete Servs., 441 F.3d 341, 344 (6th Cir. 2006)* .

(n5)Footnote 5. *SCS Communications, Inc. v. Herrick Co., 360 F.3d 329, 338 (2d Cir. 2004)* ; *Aaro, Inc. v. Daewoo Int'l (Am.) Corp., 755 F.2d 1398, 1401 (11th Cir. 1985)* .

(n6)Footnote 6. *See Horvath v. Westport Library Ass'n, 362 F.3d 147, 151 (2d Cir. 2004)* .

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CHAPTER 5 Motions for Summary Judgment
E. Appealing Decision on Motion

1-5 Federal Litigation Guide § 5.61

§ 5.61 Collateral Order Exceptionn1

A *collateral order* is an immediately appealable final decision under *28 U.S.C. § 1291*, even though the district court may have entered it long before the case has ended, provided the order does all of the following: n2

- Conclusively determines the disputed question
- Resolves an important issue completely separate from the merits of the action
- Will be effectively unreviewable on appeal from the final judgment

The practitioner should note that a defendant who has asserted the defense of qualified immunity and whose motion for summary judgment is denied may be permitted to bring an appeal under the collateral order doctrine. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentAppellate ReviewGeneral OverviewCivil ProcedureSummary JudgmentAppellate ReviewAppealabilityCivil ProcedureSummary JudgmentAppellate ReviewStandards of ReviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionCollateral Order Doctrine

FOOTNOTES:
(n1)Footnote 1. *See Moore's Federal Practice, § 56.41* (Matthew Bender 3d ed.).

(n2)Footnote 2. *Johnson v. Jones, 515 U.S. 304, 115 S. Ct. 2151, 2154, 132 L. Ed. 2d 238 (1995)* .

(n3)Footnote 3. *Mitchell v. Forsyth, 472 U.S. 511, 528, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)* .

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CHAPTER 5 Motions for Summary Judgment
E. Appealing Decision on Motion

1-5 Federal Litigation Guide § 5.62

§ 5.62 Appealing Partial Summary Judgment Under Rule 54(b)

An order granting partial summary judgment is interlocutory. n1 Accordingly it is not a final judgment and is not appealable. n2

However, counsel can request certification for appeal under Rule 54(b) under the following circumstances: when more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. n3 Without the court's certification, a partial summary judgment is merely interlocutory. n4

Note that a partial summary judgment that dismisses a claim against one party but neither the claim nor the party is completely dismissed from the action is not eligible for entry of final judgment under Rule 54(b). n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentAppellate ReviewGeneral OverviewCivil ProcedureSummary JudgmentAppellate ReviewAppealabilityCivil ProcedureSummary JudgmentAppellate ReviewStandards of ReviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentPartial Summary Judgments

FOOTNOTES:
(n1)Footnote 1. *See In re Chateatgay Corp. 922 F.2d 86, 89-90 (2d Cir. 1990) .*

(n2)Footnote 2. *28 U.S.C. § 1291.*

(n3)Footnote 3. *Fed. R. Civ. P. 54(b).*

(n4)Footnote 4. *Fed. R. Civ. P. 54(b).*

(n5)Footnote 5. *Steve's Homemade Ice Cream, Inc., v. Stewart, 907 F.2d 364, 365-366 (2d Cir. 1990) .*

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CHAPTER 5 Motions for Summary Judgment
E. Appealing Decision on Motion

1-5 Federal Litigation Guide §§ 5.63 through 5.99

[Reserved]

§§ 5.63[Reserved]

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CHAPTER 5 Motions for Summary Judgment
F. Forms

1-5 Federal Litigation Guide § 5.100

§ 5.100 Notice of Motion for Summary Judgmentn1

[1] FORM

Notice of Motion for Summary Judgment

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

Notice of Motion for Summary Judgment

NOTICE IS HEREBY GIVEN that on [*date*] at [*time of day (specify a.m. or p.m.)*], or as soon thereafter as counsel may be heard, [*party designation and name of moving party*] will move this Court, at the United States Courthouse located at [*address of court*], Courtroom [*courtroom number*], for an order:

(a) pursuant to *Federal Rules of Civil Procedure, Rule 56(c)*, for summary judgment in favor of [*party designation and name of moving party*], on the ground there is no genuine issue of material fact, and that [*party designation and name of moving party*] is entitled to judgment as a matter of law; and

(b) granting [*moving party*] such other relief as may be appropriate.

This motion is based on this Notice of Motion, the accompanying Declaration (*or other appropriate affidavit substitute*) of [*name of signatory*] sworn to (*or dated*) [*date*], the annexed Statement of Material Facts, the accompanying Memorandum of Law (*if required*) dated [*date*], and on all of the pleadings and papers on file in this action.

[*Date*]

Respectfully submitted,

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for [*name of party*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

TO: [*Name of opposing counsel*], Attorney for [*name of party*]

[2] Use of Form

This is a form of notice of motion for use by a party who seeks summary judgment.

A party seeking to recover on a claim, or a party against whom a claim, is asserted, may move with or without supporting affidavits for a summary judgment in the party's favor on all or any part thereof. n2

Summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. n3

[3] Supporting and Opposing Affidavits or Declarations

Any supporting and opposing affidavits or declarations must: n4

- Be made on personal knowledge
- Set forth such facts as would be admissible in evidence
- Show affirmatively that the affiant is competent to testify to the matters stated therein

A party asserting that a fact cannot be genuinely disputed, or conversely that a fact is genuinely disputed, must support the assertion by either of the following means: n5

- 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
- 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

[4] Statement of Material Facts

Local court rules often require the moving party to annex a separate short statement of material facts to the moving papers, in addition to the requirements of Rule 56. n6

[5] Sanctions for Affidavits Made in Bad Faith

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to Rule 56 are presented in bad faith or solely for the purpose of delay, the court will order the party employing them to pay to the other party the amount of the reasonable expenses that the filing of the affidavits caused the other party to incur, including reasonable attorney's fees. Any offending party or attorney may be adjudged guilty of contempt. n7

[6] Timing of Motion

The scheduling order typically will set forth filing deadlines for motions for summary judgment. n8 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. n9 In general, a written motion and notice of the hearing must be served at least 14 days before the time specified for the hearing, and any opposing affidavit must be served at least 7 days before the hearing, unless the court permits service at another time. n10 Local rules may also set forth filing deadlines for motions for summary judgment.

[7] Service of Motion

A summary judgment motion must be served at least 14 days prior to the date of the hearing on the motion. n11

FOOTNOTES:

(n1)Footnote 1. This sample motion for summary judgment was furnished courtesy of James P. Collins, Jr. and William D. Naeve, Cotkin, Collins & Franscell, Santa Ana, California. The names of all parties and opposing counsel have been changed.

(n2)Footnote 2. *Fed. R. Civ. P. 56(a).*

(n3)Footnote 3. *Fed. R. Civ. P. 56(a).*

(n4)Footnote 4. *Fed. R. Civ. P. 56(c)(4).*

(n5)Footnote 5. *Fed. R. Civ. P. 56(c)(1).*

(n6)Footnote 6. *See, e.g.,* E.D.N.Y. & S.D.N.Y., L.R. 56.1.

(n7)Footnote 7. *Fed. R. Civ. P. 56(h)*; *see also* Ch. 8A, *Sanctions*.

(n8)Footnote 8. *See Fed. R. Civ. P. 16(b)(3).*

(n9)Footnote 9. *Fed. R. Civ. P. 56(b).*

(n10)Footnote 10. *Fed. R. Civ. P. 6(c)(1), (2).*

(n11)Footnote 11. *Fed. R. Civ. P. 6(c)(1).*

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CHAPTER 5 Motions for Summary Judgment
F. Forms

1-5 Federal Litigation Guide § 5.101

§ 5.101 Notice of Motion for Partial Summary Judgment

[1] FORM

Notice of Motion for Partial Summary Judgment

[*Insert caption of action and title of document pursuant to local district court rule requirements]*

Notice of Motion for Partial Summary Judgment

NOTICE IS HEREBY GIVEN that on [*date*] at [*time of day (specify a.m. or p.m.)*], or as soon thereafter as counsel may be heard, [*party designation and name of moving party*] will move this Court, at the United States Courthouse located at [*address of court*], Courtroom [*courtroom number*], for an order:

(a) pursuant to *Federal Rules of Civil Procedure, Rule 56(c)*, for summary judgment in favor of [*party designation and name of moving party*] with respect to the issue of [*specify, e.g., liability on a specified cause of action*], on the ground there is no genuine issue of material fact with respect to this matter, and that [*party designation and name of moving party*] is entitled to judgment in [its/his/her] favor on this issue as a matter of law; and

(b) granting [*moving party*] such other relief as may be appropriate.

This motion is based on this Notice of Motion, the accompanying Declaration (*or other appropriate affidavit substitute*) of [*name of signatory*] sworn to (*or dated*) [*date*], the annexed Statement of Material Facts, the accompanying Memorandum of Law (*if required*) dated [*date*], and on all of the pleadings and papers on file in this action.

[*Date*]

Respectfully submitted,

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for [*name of party*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

TO: [*Name of opposing counsel*], Attorney for [*name of party*]

[2] Use of Form

This is a form of notice of motion for use by a party who seeks partial summary judgment with respect to specified issues in the case.

A party seeking to recover on a claim or a party against whom a claim is asserted, may move with or without supporting affidavits for a summary judgment in the party's favor on all or any part thereof. n1

An interlocutory summary judgment may be rendered on the issue of liability alone, even though there is a genuine issue as to the amount of damages. n2

Summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. n3

[3] Supporting and Opposing Affidavits or Declarations

Any supporting and opposing affidavits must: n4

- Be made on personal knowledge
- Set forth such facts as would be admissible in evidence
- Show affirmatively that the affiant is competent to testify to the matters stated therein

A party asserting that a fact cannot be genuinely disputed, or conversely that a fact is genuinely disputed, must support the assertion by either of the following means: n5

- 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
- 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

[4] Statement of Material Facts

Local rules often require the moving party to annex a separate short statement of material facts to the moving papers, in addition to the requirements of Rule 56. n6

[5] Sanctions Based on Affidavits Made in Bad Faith

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to Rule 56 are presented in bad faith or solely for the purpose of delay, the court will order the party employing them to pay to the other party the amount of the reasonable expenses that the filing of the affidavits caused the other party to incur, including reasonable attorney's fees. Any offending party or attorney may be adjudged guilty of contempt. n7

[6] Timing of Motion

The scheduling order typically will set forth filing deadlines for motions for summary judgment. n8 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. n9 In general, a written motion and notice of the hearing must be served at least 14 days before the time specified for the hearing, and any opposing affidavit must be served at least 7 days before the hearing, unless the court permits service at another time. n10 Local rules may also set forth filing deadlines for motions for summary judgment.

[7] Service of Motion

A summary judgment motion must be served at least 14 days prior to the date of the hearing on the motion. n11

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 56(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 56(a).*

(n3)Footnote 3. *Fed. R. Civ. P. 56(a).*

(n4)Footnote 4. *Fed. R. Civ. P. 56(c)(4).*

(n5)Footnote 5. *Fed. R. Civ. P. 56(c)(1).*

(n6)Footnote 6. *See* E.D.N.Y. & S.D.N.Y., L.R. 56.1.

(n7)Footnote 7. *Fed. R. Civ. P. 56(h)*; *see also* Ch. 8A, *Sanctions*.

(n8)Footnote 8. *See Fed. R. Civ. P. 16(b)(3).*

(n9)Footnote 9. *Fed. R. Civ. P. 56(b).*

(n10)Footnote 10. *Fed. R. Civ. P. 6(c)(1), (2).*

(n11)Footnote 11. *Fed. R. Civ. P. 6(c)(1).*

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CHAPTER 5 Motions for Summary Judgment
F. Forms

1-5 Federal Litigation Guide § 5.102

§ 5.102 Statement of Material Facts

[1] FORM

Statement of Material Facts

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

Statement of Material Facts

In conjunction with the Motion for Summary Judgment of the [Plaintiff/Defendant], [*name*], against the [Defendant/Plaintiff], [*name*], and in compliance with Local Rule [*number*], Local Rules of the United States District Court for the [*name*] District of [*state*], the [Plaintiff/Defendant] [*name*] contends there is no genuine issue as to the following facts:

1. [*Set forth facts*]

2. [*Set forth additional facts, using as many additional paragraphs as necessary*]

[*Date*]

Respectfully submitted,

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for [*name and designation of party*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

TO: [*Name of opposing counsel*], Attorney for [*name of party*]

[2] Use of Form

This is a form of statement of material facts required by local court rule to be annexed to a motion for summary judgment. The district courts generally require the moving party to annex a separate short statement of material facts to the moving papers, in addition to the requirements of Rule 56. n1

FOOTNOTES:
(n1)Footnote 1. *See, e.g.*, E.D.N.Y. & S.D.N.Y., L.R. 56.1.

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CHAPTER 5 Motions for Summary Judgment
F. Forms

1-5 Federal Litigation Guide § 5.103

§ 5.103 Request for Continuance Pursuant to Rule 56(d)

[1] FORM

Response in Support of Rule 56(d) Continuance

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

Request for Continuance Pursuant to Rule 56(d)

TO [*party designation and name of moving party*] AND ITS ATTORNEYS OF RECORD:

[Plaintiff/Defendant], [*name*], by [its/his/her] attorneys, submits this response to the motion of [Defendant/Plaintiff], [*name*], for summary judgment, and requests a continuance of the motion pursuant to *Fed. R. Civ. P. 56(d)* as follows:

1. The following genuine issues of material fact exist in the above-entitled case: [*describe genuine issues of material fact*].

2. [*Name and address*] can attest to the following facts: [*describe facts supporting existence of genuine issues of material fact, and identify corresponding issues of fact*].

3. [Plaintiff/Defendant], [*name*], has attempted to [obtain the affidavit of (*name*), *or* serve (*name*) with a notice of deposition to obtain testimony, *or other discovery attempt*] to this effect, but has been unsuccessful in doing so because [*state reasons*].

4. [Plaintiff/Defendant], [*name*], reasonably expects to [obtain an affidavit to this effect from (*name*), *or* serve a notice of deposition on (*name*), *or other discovery*] by [*date*].

WHEREFORE, [Plaintiff/Defendant], [*name*], requests that the court continue the hearing on motion for summary judgment of [*party designation and name of moving party*] until such time as [Plaintiff/Defendant] has [obtained the affidavit *or* taken the deposition, *or obtained other discovery*] described above.

[*Date*]

Respectfully submitted,

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for [*name and designation of party*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

TO: [*Name of opposing counsel*], Attorney for [*name of party*]

[2] Use of Form

This is a response to a motion for summary judgment to request a continuance of the hearing date in order to obtain discovery in support of opposition to the motion.

[3] Continuance of Hearing Date

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may do the following: n1

- Defer considering the motion or deny it
- Allow time to obtain affidavits or declarations or to take discovery
- Issue any other appropriate order

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 56(d).*

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CHAPTER 6 Voluntary Dismissals and Dismissals for Failure to Prosecute

1-6 Federal Litigation Guide 6.syn

§ 6.syn Synopsis to Chapter 6: Voluntary Dismissals and Dismissals for Failure to Prosecute

§ 6.01 Voluntarily Dismissing Action or Parties
[1] Rule 41(a) Applies to Dismissal of Parties or Entire Action
[2] Three Methods of Voluntary Dismissal
[3] Rule 41 Applies to Dismissal of Counterclaims, Cross-Claims and Third-Party Claims

§ 6.02 Effect of Voluntary Dismissal
[1] Immediate Termination
[2] Voluntary Dismissal Generally Without Prejudice
[3] Voluntary Dismissal With Prejudice If Claim Previously Dismissed
[4] Costs of Previously Dismissed Action

§ 6.03 Drafting Notice of Voluntary Dismissal
[1] Deadline for Filing Notice of Voluntary Dismissal
[2] Notice of Voluntary Dismissal Must Be Served and Filed
[3] Content of Notice of Voluntary Dismissal

§ 6.04 Drafting Stipulation of Voluntary Dismissal
[1] Use of Stipulation of Voluntary Dismissal
[2] Stipulation of Voluntary Dismissal Requires Signatures of All Parties Who Have Appeared
[3] Stipulation of Voluntary Dismissal Must Be Filed
[4] Content of Stipulation of Voluntary Dismissal

§ 6.05 Actions Which May Not Be Voluntarily Dismissed Without Court Approval

§ 6.06 Consideration of Collateral Issues Following Voluntary Dismissal

§ 6.07 CHECKLIST: Obtaining Voluntary Dismissal by Filing Notice of Dismissal

§ 6.08 CHECKLIST: Obtaining Voluntary Dismissal by Filing Stipulation of Voluntary Dismissal

§§ 6.09 through 6.19 [Reserved]

§ 6.20 Situations in Which Court Order Is Required for Voluntary Dismissal

§ 6.21 Decision Whether to Grant Motion for Voluntary Dismissal Is Within Discretion of Court
[1] Motion Granted Only If No Undue Prejudice to Opposing Party
[2] Evaluating Prejudice to Opposing Party

§ 6.22 Imposing Terms and Conditions of Voluntary Dismissal by Court Order
[1] Purpose of Terms and Conditions Is to Protect Opposing Party From Prejudice
[2] Typical Terms and Conditions of Voluntary Dismissal by Court Order

§ 6.23 Procedure for Filing Motion for Voluntary Dismissal or Opposition to Motion

§ 6.24 Effect of Voluntary Dismissal by Court Order
[1] Voluntary Dismissal by Court Order Generally Without Prejudice
[2] Costs of Previously Dismissed Action
[3] Effect of Voluntary Dismissal With Prejudice
[4] Consideration of Collateral Issues Following Voluntary Dismissal by Court Order

§ 6.25 Postjudgment Dismissal

§§ 6.26 through 6.29 [Reserved]

§ 6.30 Grounds for Involuntary Dismissal

§ 6.31 Court May Dismiss Claims on Motion or Sua Sponte

§ 6.32 Effect of Involuntary Dismissal
[1] Involuntary Dismissal Generally With Prejudice
[2] Involuntary Dismissal Without Prejudice for Lack of Jurisdiction, Improper Venue, or Failure to Join a Party

§ 6.33 Factors Governing Involuntary Dismissal

§ 6.34 Likelihood of Prejudice to Opposing Party
[1] Prejudice Must Be Considered by Court
[2] Prejudice May Be Presumed as Matter of Law
[3] Need to Show Actual Prejudice Increases Where Delay Is More Moderate

§ 6.35 Consideration of Less Drastic Sanctions

§ 6.36 Procedure for Filing or Opposing Motion for Involuntary Dismissal

§ 6.37 CHECKLIST: Obtaining or Opposing Involuntary Dismissal

§§ 6.38 through 6.99 [Reserved]

§ 6.100 Notice of Voluntary Dismissal
[1] Form
Notice of Voluntary Dismissal
[2] Use of Form
[3] Deadline for Filing of Notice of Voluntary Dismissal
[4] Content of Notice of Voluntary Dismissal
[5] Notice of Voluntary Dismissal Must Be Served and Filed

§ 6.101 Stipulation of Voluntary Dismissal
[1] Form

Stipulation of Voluntary Dismissal
[2] Use of Form
[3] Stipulation of Voluntary Dismissal Requires Signatures of All Parties Who Have Appeared
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§ 6.102 Notice of Motion for Voluntary Dismissal
[1] Form
Notice of Motion for Voluntary Dismissal
[2] Use of Form
[3] Situations in Which Court Order Is Required for Voluntary Dismissal
[4] Motion Granted Only If No Undue Prejudice to Opposing Party
[5] Voluntary Dismissal by Court Order Generally Without Prejudice

§ 6.103 Notice of Motion to Dismiss for Failure to Prosecute, or Failure to Comply With Court Order or Federal Rules
[1] Form
Notice of Motion to Dismiss for Failure to Prosecute, or Failure to Comply With Court Order or Federal Rules
[2] Use of Form
[3] Grounds for Involuntary Dismissal
[4] Court May Dismiss Claims on Motion or Sua Sponte
[5] Involuntary Dismissal Generally With Prejudice

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CHAPTER 6 Voluntary Dismissals and Dismissals for Failure to Prosecute

1-6 Federal Litigation Guide Scope

Scope

SCOPE

This chapter discusses voluntary and involuntary dismissal of claims and parties under *Rule 41 of the Federal Rules of Civil Procedure*. The chapter covers the following topics:

- **Actions and parties which may be voluntarily dismissed without court approval**
- **Drafting notice of voluntary dismissal**
- **Drafting stipulation of voluntary dismissal**
- **Effect of voluntary dismissal**
- **Consideration of collateral issues following voluntary dismissal**
- **Voluntary dismissal by court order when dismissal by notice or stipulation is unavailable**
- **Effect of voluntary dismissal by court order**
- **Grounds for involuntary dismissal**
- **Procedure for filing or opposing motion for involuntary dismissal**
- **Effect of involuntary dismissal**

The chapter contains the following forms:

- **Notice of Voluntary Dismissal**
- **Stipulation of Voluntary Dismissal**
- **Notice of Motion for Voluntary Dismissal**

- **Notice of Motion for Failure to Prosecute or Failure to Comply With Court Order or Federal Rules**

For expanded coverage of voluntary dismissals and dismissals for failure to prosecute, ***see*** Moore's Federal Practice, Ch. 41, ***Dismissal of Actions*** (Matthew Bender 3d ed.).

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CHAPTER 6 Voluntary Dismissals and Dismissals for Failure to Prosecute
A. Voluntary Dismissal Without Court Order

1-6 Federal Litigation Guide § 6.01

§ 6.01 Voluntarily Dismissing Action or Parties

[1] Rule 41(a) Applies to Dismissal of Parties or Entire Action

Although Rule 41(a) speaks of voluntary dismissal of an *action,* a voluntary dismissal may be taken against specific *parties,* provided *all* claims are dismissed as against each party affected. n1

A plaintiff wishing to eliminate *specific* claims or issues from the action should amend the complaint under Rule 15(a), rather than dismiss under Rule 41(a), n2 although several courts have suggested the difference is technical or immaterial. n3

Because Rule 41(a) permits dismissal of particular parties, a dispensable nondiverse party may be dismissed to preserve the court's diversity jurisdiction provided the party has not yet served an answer or motion for summary judgment. n4

[2] Three Methods of Voluntary Dismissal

Rule 41(a) establishes three distinct methods of voluntary dismissal of an action. n5

The first two methods of voluntary dismissal are as of right under Rule 41(a)(1), n6 which permits dismissal by filing a notice of dismissal or a stipulation of dismissal. The third method of dismissal, n7 addressed in Rule 41(a)(2), requires a motion for leave to dismiss by order of the court. n8

[3] Rule 41 Applies to Dismissal of Counterclaims, Cross-Claims and Third-Party Claims

The provisions of Rule 41 apply to the dismissal of counterclaims, cross-claims, and third-party claims. A voluntary dismissal by the claimant alone pursuant to a notice of dismissal must be made before a responsive pleading is served, or if there is no responsive pleading, before the introduction of evidence at the trial or hearing. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsNoticesGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See, e.g., Gobbo Farms & Orchards v. Poole Chem. Co. 81 F.3d 122, 123 (10th Cir. 1996)* ; *General Signal Corp. v. MCI Telcoms. Corp., 66 F.3d 1500, 1513 (9th Cir. 1995)* ; *Gronholz v. Sears, Roebuck & Co., 836 F.2d 515, 518 (Fed. Cir. 1987)* ; *Exxon Corp. v. Maryland Casualty Co., 599 F.2d 659, 661 (5th Cir. 1979)* ; *Management Investors v. United Mine Workers of Am., 610 F.2d 384, 394-395 (6th Cir. 1979)* (citing **Moore's**).

(n2)Footnote 2. *See Skinner v. First Am. Bank of Virginia, 64 F.3d 659 (4th Cir. 1995)* (citing **Moore's**); *Ethridge v. Harbor House Restaurant, 861 F.2d 1389, 1392 (9th Cir. 1988)* (citing **Moore's**); *Gronholz v. Sears, Roebuck & Co., 836 F.2d 515, 518 (Fed. Cir. 1987)* ; *Management Investors v. United Mine Workers of Am., 610 F.2d 384, 394-395 (6th Cir. 1979)* (citing **Moore's**); *Vogel v. American Kiosk Mgmt., 371 F. Supp. 2d 122, 129 (D. Conn. 2005)* (citing **Moore's**).

(n3)Footnote 3. *See Wakefield v. Northern Telecom, Inc., 769 F.2d 109, 114 (2d Cir. 1985)* ; *Mechmetals Corp. v. Telex Computer Prods., Inc., 709 F.2d 1287, 1294 (9th Cir. 1983)* ; *Wilson v. Crouse-Hinds Co., 556 F.2d 870, 873 (8th Cir. 1977)* .

(n4)Footnote 4. *See Guigliano v. Danbury Hosp., 396 F. Supp. 2d 220, 224 (D. Conn. 2005)* .

(n5)Footnote 5. *See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 396-397, 110 S. Ct. 2447, 110 L. Ed. 2d 359, 376 (1990)* .

(n6)Footnote 6. *See §§ 6.03, 6.04.*

(n7)Footnote 7. *See § 6.20.*

(n8)Footnote 8. *See Fed. R. Civ. P. 41(a).*

(n9)Footnote 9. *Fed. R. Civ. P. 41(c).*

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CHAPTER 6 Voluntary Dismissals and Dismissals for Failure to Prosecute
A. Voluntary Dismissal Without Court Order

1-6 Federal Litigation Guide § 6.02

§ 6.02 Effect of Voluntary Dismissal

[1] Immediate Termination

A notice of voluntary dismissal is self-executing, and upon filing immediately terminates the action. n1 Once the action is terminated, the district court lacks the authority to issue further orders addressing the merits of the case. n2 Moreover, because a Rule 41(a)(1) dismissal has the same effect as if the suit had never been filed, and any orders issued in the dismissed action also have no effect. n3

[2] Voluntary Dismissal Generally *Without* Prejudice

A notice or stipulation of voluntary dismissal is without prejudice, unless the notice or stipulation states otherwise. n4 A dismissal without prejudice means that the plaintiff may sue again on the same claim. n5

Although a voluntary dismissal under Rule 41(a)(1) may be without prejudice, a subsequent action may be barred as a practical matter, since voluntary dismissal without prejudice of an action does not ordinarily toll the statute of limitations. n6

[3] Voluntary Dismissal *With* Prejudice If Claim Previously Dismissed

A notice of voluntary dismissal operates as an adjudication on the merits if the claimant has previously dismissed in any federal or state court an action based on or including the same claim. This "second dismissal rule" applies only to *notices* of voluntary dismissal, and not to *stipulations* of voluntary dismissal. n7

[4] Costs of Previously Dismissed Action

If a claimant who has once voluntarily dismissed an action in any court commences an action based on or including the same claim against the same opposing party, the court may order the claimant to pay the costs of the action previously dismissed. Moreover, the court may stay the proceedings in the second action until the claimant complies with the order. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersDismissals With PrejudiceCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersDismissals Without PrejudiceCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersMotionsCivil ProcedureDismissalsVoluntary DismissalsStipulations

FOOTNOTES:

(n1)Footnote 1. *See Janssen v. Harris, 321 F.3d 998, 1000 (10th Cir. 2003)* .

(n2)Footnote 2. *In re Matthews, 395 F.3d 477, 482 (4th Cir. 2005)* .

(n3)Footnote 3. *See Harvey Specialty & Supply, Inc. v. Anson Flowline Equip., Inc., 434 F.3d 320, 324 (5th Cir. 2005)* .

(n4)Footnote 4. *Fed. R. Civ. P. 41(a)(1)*; *see Concha v. London, 62 F.3d 1493, 1506 (9th Cir. 1995)* .

(n5)Footnote 5. *Brown v. Hartshorne Public School Dist. No. 1, 926 F.2d 959, 961 (10th Cir. 1991)* .

(n6)Footnote 6. *See Rodriguez v. Holmes, 963 F.2d 799, 804-805 (5th Cir. 1992)* .

(n7)Footnote 7. *See Fed. R. Civ. P. 41(a)(1)(B).*

(n8)Footnote 8. *Fed. R. Civ. P. 41(d).*

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CHAPTER 6 Voluntary Dismissals and Dismissals for Failure to Prosecute
A. Voluntary Dismissal Without Court Order

1-6 Federal Litigation Guide § 6.03

§ 6.03 Drafting Notice of Voluntary Dismissal

[1] Deadline for Filing Notice of Voluntary Dismissal

A notice of voluntary dismissal may be filed by the plaintiff at any time before the defendant has served an answer or a motion for summary judgment. Likewise, a notice of dismissal may be filed by a claimant who has asserted a counterclaim, cross-claim, or third-party claim at any time before a responsive pleading is served, or if there is no responsive pleading, at any time before the introduction of evidence at the trial or hearing. n1

[2] Notice of Voluntary Dismissal Must Be Served and Filed

Provided a notice of dismissal is an appropriate means of dismissing a claim or party, n2 *filing* the notice effects the dismissal. No court order is required. n3 A copy of the notice of voluntary dismissal must be served on each of the parties. n4

[3] Content of Notice of Voluntary Dismissal

Rule 41(a) does not prescribe the precise form the notice of dismissal must take. The notice of dismissal should state, as appropriate, whether claims, counterclaims, cross-claims, or third-party claims are being dismissed.

The notice of dismissal may specify that the dismissal is effective against less than all parties, and in that case, the notice should identify the parties being dismissed. The notice of dismissal should specify that dismissal is without prejudice, unless there is some reason for dismissing with prejudice. n5

The notice of dismissal may not include any conditions in it. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersMotionsCivil ProcedureDismissalsVoluntary DismissalsNotices

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 41(a)(1), 41(c); see also In re Microsoft Corp. Antitrust Litig., 332 F. Supp. 2d 890, 895 (D. Md. 2004)* .

(n2)Footnote 2. *See* [1], *above*.

(n3)Footnote 3. *See Fed. R. Civ. P. 41(a)(1).*

(n4)Footnote 4. *See Fed. R. Civ. P. 5(a).*

(n5)Footnote 5. *See § 6.02.*

(n6)Footnote 6. *See e.g., Hyde Constr. Co. v. Koehring Co., 388 F.2d 501, 507 (10th Cir. 1968)* .

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CHAPTER 6 Voluntary Dismissals and Dismissals for Failure to Prosecute
A. Voluntary Dismissal Without Court Order

1-6 Federal Litigation Guide § 6.04

§ 6.04 Drafting Stipulation of Voluntary Dismissal

[1] Use of Stipulation of Voluntary Dismissal

A stipulation of voluntary dismissal is typically used when the time for filing a notice of dismissal has lapsed; for example, either the defendant has served an answer or motion for summary judgment, or with respect to a counterclaim, cross-claim, or third-party claim, a responsive pleading has been served, or evidence has already been introduced at the trial or hearing. n1

The parties have an absolute right to a dismissal by stipulation, and the court is not permitted to impose terms or conditions, so that the court's role in resolving the matter is minimal. n2

[2] Stipulation of Voluntary Dismissal Requires Signatures of All Parties Who Have Appeared

A stipulation of voluntary dismissal must be signed by all of the parties who have appeared in the action. n3 For discussion of types of actions that may not be voluntarily dismissed, *see § 6.05*.

[3] Stipulation of Voluntary Dismissal Must Be Filed

A stipulation of dismissal is not self-executing. The stipulation must be filed with the court clerk to effectuate the dismissal, although an oral stipulation in open court may effectuate dismissal. n4

[4] Content of Stipulation of Voluntary Dismissal

A stipulation of voluntary dismissal should include: n5

- A statement that the parties stipulate to voluntary dismissal of the action or of specific parties
- Provision concerning costs, fees, or other conditions of the stipulation

If dismissal is sought in connection with a settlement, the stipulation of voluntary dismissal may include a statement incorporating the terms of the settlement. Counsel should consider whether the terms of the settlement should be part of the public record. In the absence of an independent basis for jurisdiction, the federal court may enforce the settlement

agreement only if the dismissal order specifically reserves such authority or incorporates the terms of settlement. n6

A stipulated voluntary dismissal does not remove the district court's jurisdiction to impose fees and costs pursuant to *28 U.S.C. § 1927* for unreasonably and vexatiously multiplying the proceedings. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersMotionsCivil ProcedureDismissalsVoluntary DismissalsStipulations

FOOTNOTES:
(n1)Footnote 1. *See § 6.03[1].*

(n2)Footnote 2. *See Bryant v. MV Transp., Inc., 231 F.R.D. 480, 481 (E.D. Va. 2005)* (citing **Moore's**).

(n3)Footnote 3. *See Fed. R. Civ. P. 41(a)(1), (c)*; *see also GMAC Commercial Mortgage Corp. v. LaSalle Bank Nat'l Assoc., 213 F.R.D. 150, 150-151 (S.D.N.Y. 2003)* .

(n4)Footnote 4. *See e.g., Role v. Eureka Lodge No. 434, 402 F.3d 314, 318 (2d Cir. 2005)* ; *Camacho v. Mancuso, 53 F.3d 48, 51 (4th Cir. 1995)* ; *Morris v. City of Hobart, 39 F.3d 1105, 1109 (10th Cir. 1994)* ; *Broadcast Music, Inc. v. M.T.S. Enterprises, Inc., 811 F.2d 278, 279 280 n.1 (5th Cir. 1987)* ; *Eitel v. McCool, 782 F.2d 1470, 1472 n.3 (9th Cir. 1986)* .

(n5)Footnote 5. *See Fed. R. Civ. P. 41(a)(1)(A)(ii).*

(n6)Footnote 6. *See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 381-382, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)* ; *Blue Cross & Blue Shield Ass'n v. American Express Co., 225 F.R.D. 230, 232 (N.D. Ill. 2004)* .

(n7)Footnote 7. *Macheska v. Thomson Learning, 347 F. Supp. 2d 169, 179 (M.D. Pa. 2004)* .

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CHAPTER 6 Voluntary Dismissals and Dismissals for Failure to Prosecute
A. Voluntary Dismissal Without Court Order

1-6 Federal Litigation Guide § 6.05

§ 6.05 Actions Which May Not Be Voluntarily Dismissed Without Court Approval

The following types of actions may not be voluntarily dismissed without court approval:

- Class actions n1
- Shareholder derivative suits n2
- Actions in which a receiver has been appointed n3
- Any action for which court approval is required by federal statute prior to dismissal n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsDerivative ActionsGeneral OverviewCivil ProcedureDismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 23(e), 41(a)(1); Baker v. America's Mortg. Servicing, Inc., 58 F.3d 321, 324 (7th Cir. 1995)* .

(n2)Footnote 2. *Fed. R. Civ. P. 23.1(c).*

(n3)Footnote 3. *Fed. R. Civ. P. 41(a)(1), 66.*

(n4)Footnote 4. *See Fed. R. Civ. P. 41(a)(1).*

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CHAPTER 6 Voluntary Dismissals and Dismissals for Failure to Prosecute
A. Voluntary Dismissal Without Court Order

1-6 Federal Litigation Guide § 6.06

§ 6.06 Consideration of Collateral Issues Following Voluntary Dismissal

Even after an action or party has been voluntarily dismissed pursuant to a notice of dismissal, the district court may consider independent, collateral issues, n1 such as availability of attorney's fees n2 or sanctions, n3 including Rule 11 sanctions. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 394-395, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)* .

(n2)Footnote 2. *Baumgartner v. Harrisburg Hous. Auth., 21 F.3d 541, 544 (3d Cir. 1994)* .

(n3)Footnote 3. *Bolivar v. Pocklington, 975 F.2d 28, 31 (1st Cir. 1992)* .

(n4)Footnote 4. *See Bolivar v. Pocklington, 975 F.2d 28, 31 (1st Cir. 1992)* ; *Schering Corp. v. Vitarine Pharmaceuticals, Inc., 889 F.2d 490, 494-496 (3d Cir. 1989)* ; *Szabo Food Serv. Inc. v. Canteen Corp., 823 F.2d 1073, 1076-1079 (7th Cir. 1987)* , *cert. denied, 485 U.S. 901 (1988)* ; *Greenberg v. Sala, 822 F.2d 882, 885 (9th Cir. 1987)* .

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CHAPTER 6 Voluntary Dismissals and Dismissals for Failure to Prosecute
A. Voluntary Dismissal Without Court Order

1-6 Federal Litigation Guide § 6.07

§ 6.07 CHECKLIST: Obtaining Voluntary Dismissal by Filing Notice of Dismissal

☐ Voluntary dismissal available by filing notice of dismissal with clerk before: n1

- ☐ Defendant serves answer or motion for summary judgment.
- ☐ Service of responsive pleading to counterclaim, cross-claim, or third-party claim, or if no responsive pleading, before introduction of evidence at trial or hearing.

☐ Notice of voluntary dismissal is without prejudice unless: n2

- ☐ Notice states otherwise.
- ☐ Plaintiff previously voluntarily dismissed action based on or including same claim in any court.

☐ Notice of voluntary dismissal should contain statement: n3

- ☐ Identifying actions or parties dismissed.
- ☐ That dismissal is without prejudice, if appropriate.
- ☐ Notice of dismissal must be served on all parties. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsNoticesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See § 6.03[1].*

(n2)Footnote 2. *See § 6.02.*

(n3)Footnote 3. *See § 6.02.*

(n4)Footnote 4. *See § 6.03[2].*

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CHAPTER 6 Voluntary Dismissals and Dismissals for Failure to Prosecute
A. Voluntary Dismissal Without Court Order

1-6 Federal Litigation Guide § 6.08

§ 6.08 CHECKLIST: Obtaining Voluntary Dismissal by Filing Stipulation of Voluntary Dismissal

☐ Voluntary dismissal available by filing with court clerk stipulation of voluntary dismissal signed by all parties appearing in the action. n1

☐ Stipulation is without prejudice unless it states otherwise. n2

☐ Stipulation should include:

- ☐ Statement that parties stipulate to voluntary dismissal of action or party.
- ☐ Statement that dismissal is without prejudice, if appropriate.
- ☐ Incorporation of settlement terms, if dismissal is in conjunction with settlement and parties want court to be able to enforce terms.
- ☐ Provisions concerning costs, fees, or other conditions.

☐ Oral stipulation in open court may effectuate dismissal.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsNoticesGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsNoticesDismissals Without PrejudiceCivil ProcedureDismissalsVoluntary DismissalsStipulations

FOOTNOTES:
(n1)Footnote 1. *See § 6.04[1].*

(n2)Footnote 2. *See § 6.02[1].*

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CHAPTER 6 Voluntary Dismissals and Dismissals for Failure to Prosecute
A. Voluntary Dismissal Without Court Order

1-6 Federal Litigation Guide §§ 6.09 through 6.19

[Reserved]

§§ 6.09[Reserved]

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CHAPTER 6 Voluntary Dismissals and Dismissals for Failure to Prosecute
B. Voluntary Dismissal by Court Order When Dismissal by Notice or Stipulation Unavailable

1-6 Federal Litigation Guide § 6.20

§ 6.20 Situations in Which Court Order Is Required for Voluntary Dismissal

A court order is required any time a claimant seeks to dismiss an action but the time within which a notice of dismissal may be filed has expired, and the claimant is unable to obtain a stipulation of dismissal from all parties. n1

Thus, a court order is required if: n2

- The plaintiff seeks to dismiss the action or a defendant, but another defendant has already served an answer or motion for summary judgment, and the plaintiff is unable to obtain a stipulation of dismissal from all parties n3

- The claimant seeks to dismiss a counterclaim, cross-claim, or third-party claim, but a responsive pleading has been served, or evidence has already been introduced at the trial or hearing, and the claimant is unable to obtain a stipulation of dismissal from all parties n4

- The action is of a type that may not be dismissed without court order n5

If a defendant has asserted a counterclaim prior to service on the defendant of the plaintiff's motion to voluntarily dismiss, the court is not permitted to dismiss the action over the defendant's objection, unless the counterclaim can remain pending for independent adjudication by the court. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersMotionsCivil ProcedureDismissalsVoluntary DismissalsNoticesGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsStipulations

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 41(a)(2)*; *see also §§ 6.03*, *6.04*.

(n2)Footnote 2. *See Fed. R. Civ. P. 41(a)(1)*, *(a)(2)*.

(n3)Footnote 3. *See §§ 6.03, 6.04.*

(n4)Footnote 4. *See §§ 6.03, 6.04.*

(n5)Footnote 5. *See § 6.05.*

(n6)Footnote 6. *Fed. R. Civ. P. 41(a)(2).*

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CHAPTER 6 Voluntary Dismissals and Dismissals for Failure to Prosecute
B. Voluntary Dismissal by Court Order When Dismissal by Notice or Stipulation Unavailable

1-6 Federal Litigation Guide § 6.21

§ 6.21 Decision Whether to Grant Motion for Voluntary Dismissal Is Within Discretion of Court

[1] Motion Granted Only If No Undue Prejudice to Opposing Party

Voluntary dismissal by court order pursuant to Rule 41(a)(2) is not a matter of right, but rather is at the court's discretion. A district court may grant such dismissal only if the opposing party will not be unduly prejudiced, and then only on terms and conditions that protect the opposing party from any unfairness. n1

Some courts have held that the court lacks discretion to deny a motion under Rule 41(a)(2) when the plaintiff requests that the dismissal be made with prejudice, because the defendant receives all the relief that could have been obtained after a full trial and is protected from future litigation by the doctrine of res judicata. n2 However, not all courts have adopted that rule. n3 When the dismissal with prejudice does not dispose of the entire litigation, the court may inquire as to whether the remaining parties would be prejudiced by a dismissal with prejudice. n4 For discussion of terms and conditions that the court may impose, *see § 6.22*.

[2] Evaluating Prejudice to Opposing Party

Factors relevant in determining whether a voluntary dismissal by court order will prejudice the opposing party include: n5

- The extent to which the suit has progressed, including the defendant's effort and expense in preparing for trial
- The plaintiff's diligence in prosecuting the action or in bringing the motion
- The duplicative expense of relitigation
- The adequacy of the movant's explanation of the need for dismissal

Other factors that have been cited include whether the motion is made at some critical juncture in the case, such as after the defendant has made a dispositive motion, n6 and any vexatious conduct or bad faith on plaintiff's part. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersConditionsCivil ProcedureDismissalsVoluntary DismissalsNoticesGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes Judicata

FOOTNOTES:

(n1)Footnote 1. *Zagano v. Fordham Univ., 900 F.2d 12, 14 (2d Cir. 1990)* .

(n2)Footnote 2. *See ITV Direct, Inc. v. Healthy Solutions, LLC, 445 F.3d 66, 70 (1st Cir. 2006)* .

(n3)Footnote 3. *See County of Santa Fe v. Public Serv. Co., 311 F.3d 1031, 1049 (10th Cir. 2002)* .

(n4)Footnote 4. *See Allen v. Indeck Corinth L.P., 161 F.R.D. 233, 235 (N.D.N.Y. 1995)* .

(n5)Footnote 5. *United States ex rel. Doe v. Dow Chem. Co., 343 F.3d 325, 330 (5th Cir. 2003)* ; *Grover v. Eli Lilly & Co., 33 F.3d 716, 718 (6th Cir. 1994)* ; *Clark v. Tansy, 13 F.3d 1407, 1411 (10th Cir. 1993)* ; *FDIC v. Knostman, 966 F.2d 1133, 1142 (7th Cir. 1992)* ; *Paulucci v. City of Duluth, 826 F.2d 780, 783 (8th Cir. 1987)* ; *Gap, Inc. v. Stone Int'l Trading, Inc., 169 F.R.D. 584, 588 (S.D.N.Y. 1997)* .

(n6)Footnote 6. *See FDIC v. Knostman, 966 F.2d 1133, 1142 (7th Cir. 1992)* ; *Paulucci v. City of Duluth, 826 F.2d 780 (8th Cir. 1987)* ; *see also Langley v. DaimlerChrysler Corp., 407 F. Supp. 2d 897, 905 (N.D. Ohio 2005)* .

(n7)Footnote 7. *Zagano v. Fordham Univ., 900 F.2d 12, 14 (2d Cir. 1990)* .

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CHAPTER 6 Voluntary Dismissals and Dismissals for Failure to Prosecute
B. Voluntary Dismissal by Court Order When Dismissal by Notice or Stipulation Unavailable

1-6 Federal Litigation Guide § 6.22

§ 6.22 Imposing Terms and Conditions of Voluntary Dismissal by Court Order

[1] Purpose of Terms and Conditions Is to Protect Opposing Party From Prejudice

Once the court concludes that dismissal is permissible, the court next must determine what terms and conditions, if any, should be imposed as part of the dismissal. n1

The purpose of authorizing terms and conditions on a voluntary dismissal by court order is to protect the opposing party from prejudice. n2

[2] Typical Terms and Conditions of Voluntary Dismissal by Court Order

Courts setting terms for voluntary dismissal typically require the claimant to pay attorney's fees and costs incurred by the opposing party in defense of the dismissed litigation. However, such costs cannot include expenses for items that will be useful to the opposing party in another action, or that were incurred unnecessarily. n3

In contrast, if the dismissal is *with* prejudice, the district court generally lacks the power to require the payment of attorney's fees. n4

Other conditions typically imposed by federal district courts include:

- Permitting the opposing party to use discovery obtained in the dismissed action in any subsequent action between the parties n5

- Requiring the claimant to furnish documents to other parties for use in ongoing or subsequent litigation between the remaining parties n6

- Requiring the claimant to make certain witnesses within its control available for pretrial interviews, and at trial n7

A plaintiff who finds the terms or conditions set by the court to be too onerous need not accept the dismissal, but is entitled to withdraw the motion and proceed with the action. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersConditionsCivil ProcedureDismissalsVoluntary DismissalsNoticesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 41(a)(2).*

(n2)Footnote 2. *See Cross Westchester Dev. Corp. v. Chiulli, 887 F.2d 431, 432 (2d Cir. 1989)* ; *McCall-Bey v. Franzen, 777 F.2d 1178, 1183-1184 (7th Cir. 1985)* ; *D.C. Circuit GAF Corp. v. Transamerica Ins. Co., 665 F.2d 364, 367 (D.C. Cir. 1981)* ; *Bath Iron Works Corp. v. Parmatic Filter Corp., 736 F. Supp. 1175, 1178 (D. Me. 1990)* .

(n3)Footnote 3. *See Marlow v. Winston & Strawn, 19 F.3d 300, 306 (7th Cir. 1994)* ; *Kern v. TXO Prod. Corp., 738 F.2d 968, 971 (8th Cir. 1984)* ; *Farmaceutisk Laboratorium Ferring A/S v. Reid Rowell, Inc., 142 F.R.D. 179, 181 (N.D. Ga. 1991)* ; *Bath Iron Works Corp. v. Parmatic Filter Corp., 736 F. Supp. 1175, 1178 (D. Me. 1990)* .

(n4)Footnote 4. *See Colombrito v. Kelly, 764 F.2d 122, 133 (2d Cir. 1985)* ; *Cauley v. Wilson, 754 F.2d 769, 772 (7th Cir. 1985)* ; *Mobile Power Enters., Inc. v. Power Vac. Inc., 496 F.2d 1311, 1312 (10th Cir. 1974)* ; *Smoot v. Fox, 353 F.2d 830, 833 (6th Cir. 1965)* ; *Murdock v. Prudential Ins. Co. of Am., 154 F.R.D. 271, 272 (M.D. Fla. 1994)* ; *Burnette v. Godshall, 828 F. Supp. 1439 (N.D. Cal. 1993)* ; *John Evans Sons, Inc. v. Majik-Ironers, Inc., 95 F.R.D. 186, 190 (E.D. Pa. 1982)* .

(n5)Footnote 5. *Templeton v. Nedlloyd Lines, 901 F.2d 1273, 1276 (5th Cir. 1990)* .

(n6)Footnote 6. *See* Hunter v. Surgitek/Medical Eng'g Corp., No. 592-56m, *1992 U.S. Dist. LEXIS 9696, at *11-12 (N.D. Ind. May 29, 1992)* .

(n7)Footnote 7. *Hudson Eng'g Co. v. Bingham Pump Co., 298 F. Supp. 387, 389 (S.D.N.Y. 1969)* .

(n8)Footnote 8. *See Jaramillo v. Burkhart, 59 F. 3d 78, 79 (8th Cir. 1995)* ; *De Fontanez v. Jefferson Pilot Life Ins. Co., No. 93-2268, 1994 U.S. App. LEXIS 21581, at *1-2 (1st Cir. Aug. 15, 1994)* ; *Marlow v. Winston & Strawn, 19 F.3d 300, 305 (7th Cir. 1994)* ; *Choice Hotels Int'l, Inc. v. Goodwin & Boone, 11 F.3d 469, 471 (4th Cir. 1993)* ; *Mortgage Guar. Ins. Corp. v. Richard Carlyon Co., 904 F.2d 298, 300 (5th Cir. 1990)* ; *Beard v. Sheet Metal Works Union, 908 F.2d 474, 476 (9th Cir. 1990)* ; *Gravatt v. Columbia Univ., 845 F.2d 54, 55-56 (2d Cir. 1988)* ; *GAF Corp. v. Transamerica Ins. Co., 665 F.2d 364, 367 (D.C. Cir. 1981)* ; *Scholl v. Felmont Oil Corp., 327 F.2d 697, 700 (6th Cir. 1964)* .

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CHAPTER 6 Voluntary Dismissals and Dismissals for Failure to Prosecute
B. Voluntary Dismissal by Court Order When Dismissal by Notice or Stipulation Unavailable

1-6 Federal Litigation Guide § 6.23

§ 6.23 Procedure for Filing Motion for Voluntary Dismissal or Opposition to Motion

A claimant seeking an order of voluntary dismissal under Rule 41(a)(2) must make a formal motion to the court for voluntary dismissal. Likewise, the opposing party may file opposing papers.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersMotions

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CHAPTER 6 Voluntary Dismissals and Dismissals for Failure to Prosecute
B. Voluntary Dismissal by Court Order When Dismissal by Notice or Stipulation Unavailable

1-6 Federal Litigation Guide § 6.24

§ 6.24 Effect of Voluntary Dismissal by Court Order

[1] Voluntary Dismissal by Court Order Generally *Without* Prejudice

Unless otherwise specified in the order, a dismissal pursuant to a motion for voluntary dismissal is *without* prejudice, so the claimant is not precluded from raising the claim in subsequent litigation. n1 When a party seeking to voluntarily dismiss a claim pursuant to Rule 41(a)(2) is silent as to whether the dismissal should be with or without prejudice, the Tenth Circuit requires the district judge to interpret the motion one way or the other. n2

[2] Costs of Previously Dismissed Action

If a claimant who has once dismissed an action in any court commences an action based on or including the same claim against the same opposing party, the court may order the claimant to pay the costs of the action previously dismissed. Moreover, the court may stay the proceedings in the second action until the claimant complies with the order. n3

[3] Effect of Voluntary Dismissal *With* Prejudice

A dismissal *with* prejudice is a final judgment on the merits favorable to the opposing party, which precludes all further claims between the parties based on the same cause of action that were *or could have been* litigated in the initial action. n4 Accordingly, a voluntary dismissal by court order *with prejudice* of a federal claim also precludes subsequent litigation of an unasserted state claim arising out of a common nucleus of operative fact, unless the court granting the dismissal clearly indicates a contrary intention, or it is clear that the court would not have considered the state claim on the merits if it had been asserted. n5

[4] Consideration of Collateral Issues Following Voluntary Dismissal by Court Order

Even after an action or party has been voluntarily dismissed by court order pursuant to Rule 41(a)(2), the district court may consider independent, collateral issues such as availability of attorney's fees. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil

ProcedureDismissalsVoluntary DismissalsCourt OrdersDismissals With PrejudiceCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersDismissals Without PrejudiceCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersMotions

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 41(a)(2).*

(n2)Footnote 2. *GF Gaming Corp. v. City of Black Hawk, 405 F.3d 876, 888 (10th Cir. 2005) .*

(n3)Footnote 3. *Fed. R. Civ. P. 41(d).*

(n4)Footnote 4. *Channell v. Gulf Operators, Inc., No. 89-5391, 1990 U.S. Dist. LEXIS 3090, at *2 (E.D. La. Mar. 19, 1990) .*

(n5)Footnote 5. *See Fitzgerald v. Alleghany Corp., 882 F. Supp. 1433, 1435-1437 (S.D.N.Y. 1995) .*

(n6)Footnote 6. *Valley Disposal, Inc. v. Central Vt. Solid Waste Management Dist., 71 F.3d 1053, 1055-1056 (2d Cir. 1995) .*

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CHAPTER 6 Voluntary Dismissals and Dismissals for Failure to Prosecute
B. Voluntary Dismissal by Court Order When Dismissal by Notice or Stipulation Unavailable

1-6 Federal Litigation Guide § 6.25

§ 6.25 Postjudgment Dismissal

Sometimes, settlement of an action is reached after judgment has already been entered. The purpose behind postjudgment settlement typically is to avoid a possible reversal on appeal.

However, if the case is already on appeal, a settlement does not automatically set aside the judgment. Even if the parties stipulate that the judgment is to be set aside, mootness by reason of settlement does not justify vacating the judgment absent exceptional circumstances. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersDismissals With PrejudiceCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersDismissals Without PrejudiceCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersMotionsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 29, 115 S. Ct. 386, 130 L. Ed. 2d 233 (1994)* .

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CHAPTER 6 Voluntary Dismissals and Dismissals for Failure to Prosecute
B. Voluntary Dismissal by Court Order When Dismissal by Notice or Stipulation Unavailable

1-6 Federal Litigation Guide §§ 6.26 through 6.29

[Reserved]

§§ 6.26[Reserved]

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CHAPTER 6 Voluntary Dismissals and Dismissals for Failure to Prosecute
C. Involuntary Dismissal

1-6 Federal Litigation Guide § 6.30

§ 6.30 Grounds for Involuntary Dismissal

A defendant may move for dismissal of an action or of any claim against the defendant on the grounds that the plaintiff has failed to: n1

- Prosecute the case
- Comply with any of the Federal Rules of Civil Procedure
- Comply with court orders n2

Similarly, a plaintiff may move for dismissal of counterclaims, cross-claims, or third-party claims as a result of the defendant's failure to prosecute such claims, or to comply with other rules or court orders. n3

Dismissal with prejudice is a drastic sanction that may be imposed only on a finding of a clear pattern of delay or willful contempt that cannot be remedied by lesser sanctions. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsMotions

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 41(b).*

(n2)Footnote 2. *See Doe v. Cassel, 403 F.3d 986, 990 (8th Cir. 2005) .*

(n3)Footnote 3. *See Fed. R. Civ. P. 41(b), (c).*

(n4)Footnote 4. *See Betty K Agencies, Ltd. v. M/V Monada, 432 F.3d 1333, 1340-1342 (11th Cir. 2005) .*

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CHAPTER 6 Voluntary Dismissals and Dismissals for Failure to Prosecute
C. Involuntary Dismissal

1-6 Federal Litigation Guide § 6.31

§ 6.31 Court May Dismiss Claims on Motion or Sua Sponte

Involuntary dismissal may be granted on motion. n1 Likewise, the court may dismiss claims sua sponte based on the claimant's failure to prosecute. Under appropriate circumstances, the claims may be dismissed by the court without prior notice of its intent to do so, and without a hearing. n2 While a district court may dismiss a suit sua sponte for lack of venue, it may not do so without first giving the parties an opportunity to present their views on the issue. This rule gives defendants an opportunity to waive the venue defense and plaintiffs an opportunity to present arguments as to why venue is proper before the case is dismissed. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotions

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 41(b), (c).*

(n2)Footnote 2. *Link v. Wabash R.R. Co., 370 U.S. 626, 629-632, 82 S. Ct. 1386, 8 L. Ed. 2d 734 , reh'g denied, 371 U.S. 873 (1962)* ; *see also Rogers v. Andrus Transp. Services, 502 F.3d 1147, 1151-1152 (10th Cir. 2007) .*

(n3)Footnote 3. *See Algodonera de las Cabezas, S.A. v. American Suisse Capital, Inc., 432 F.3d 1343, 1345 (11th Cir. 2005) .*

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CHAPTER 6 Voluntary Dismissals and Dismissals for Failure to Prosecute
C. Involuntary Dismissal

1-6 Federal Litigation Guide § 6.32

§ 6.32 Effect of Involuntary Dismissal

[1] Involuntary Dismissal Generally *With* Prejudice

Unless the court in its dismissal order specifies otherwise, an involuntary dismissal under Rule 41(b) operates as an adjudication *on the merits*, barring further litigation of the claims asserted under principles of res judicata. n1

A dismissal *with* prejudice also precludes further litigation of claims between the parties based on the same cause of action that *could have been* litigated in the initial action. Accordingly, a dismissal by court order *with prejudice* of a federal claim also precludes subsequent litigation of an unasserted state claim arising out of a common nucleus of operative fact, unless the court granting the dismissal clearly indicates a contrary intention, or it is clear that the court would not have considered the state claim on the merits if it had been asserted. n2

[2] Involuntary Dismissal *Without* Prejudice for Lack of Jurisdiction, Improper Venue, or Failure to Join a Party

Dismissals for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 are *without prejudice,* and do not preclude a subsequent suit on the dismissed claim. n3 Thus, the preclusive effect afforded dismissals under Rule 41(b) n4 applies only to situations in which a defendant must incur the inconvenience of preparing to meet the merits of the plaintiff's claims because there is no initial bar to the court reaching the merits, as there would be, for example, if the defect was with the pleadings or parties. n5 Just as an involuntary dismissal for lack of jurisdiction or improper venue must be without prejudice, a dismissal for lack of standing must be without prejudice since standing is a jurisdictional mandate. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotionsCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes Judicata

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 41(b)*; *see Payne v. Brake, 439 F.3d 198, 204 (4th Cir. 2006)* ; *Luney v. SGS Auto. Servs., Inc., 432 F.3d 866, 867 (8th Cir. 2005)* ; *Styskal v. Weld County Bd. of County Comm'rs, 365 F.3d 855, 859*

(10th Cir. 2004) .

(n2)Footnote 2. *See Styskal v. Weld County Bd. of County Comm'rs, 365 F.3d 855, 859 (10th Cir. 2004)* ; *Fitzgerald v. Alleghany Corp., 882 F. Supp. 1433, 1435-1437 (S.D.N.Y. 1995)* .

(n3)Footnote 3. *See Fed. R. Civ. P. 41(b)*; *County of Mille Lacs v. Benjamin, 361 F.3d 460, 464 (8th Cir. 2004)* .

(n4)Footnote 4. *See* [1], *above*.

(n5)Footnote 5. *See Costello v. United States, 365 U.S. 265, 284, 81 S. Ct. 534, 544, 5 L. Ed. 2d 551 (1961)* ; *Leaf v. Supreme Court of State of Wis., 979 F.2d 589, 595 (7th Cir. 1992)* .

(n6)Footnote 6. *See Brereton v. Bountiful City Corp., 434 F.3d 1213, 1216 (10th Cir. 2006)* .

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CHAPTER 6 Voluntary Dismissals and Dismissals for Failure to Prosecute
C. Involuntary Dismissal

1-6 Federal Litigation Guide § 6.33

§ 6.33 Factors Governing Involuntary Dismissal

Though involuntary dismissal under Rule 41(b) is a matter within the court's discretion, dismissal is a harsh remedy to be utilized only in extreme situations. n1

Factors that a district court may consider in deciding a Rule 41(b) motion include: n2

- The duration of the claimant's failure to prosecute
- Whether the claimant was on notice that the failure would result in dismissal
- Whether the opposing party is likely to be prejudiced by further delay in the proceedings n3
- A balancing of the court's interest in managing its docket with the claimant's interest in receiving a fair chance to be heard
- Whether the judge has adequately considered a sanction less drastic than dismissal n4

Not all of the factors mentioned above need be found for a district court to conclude that a dismissal is warranted. n5

A delay of a particular duration will not alone be determinative, although prejudice to the defendants resulting from an unreasonable delay may be presumed. In cases in which the delay is more moderate or excusable, the need to show actual prejudice is proportionately greater. n6

In one case, the Sixth Circuit found that the district court abused its discretion in dismissing the action for failure to prosecute after plaintiffs failed to appear for a pretrial conference, because this was the only time plaintiffs missed an appearance and the court failed to give notice that it was considering an involuntary dismissal. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil

ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotions

FOOTNOTES:

(n1)Footnote 1. *Dodson v. Runyon, 86 F. 3d 37, 39 (2d Cir. 1996)* ; *see also Ferdik v. Bonzelet, 963 F. 2d 1258 (9th Cir. 1992)* .

(n2)Footnote 2. *See e.g., Lucas v. Miles, 84 F.3d 532, 535 (2d Cir. 1996)* ; *Ferdik v. Bonzelet, 963 F.2d 1258 (9th Cir. 1992)* ; *Poulis v. State Farm Fire & Casualty Co., 747 F.2d 863 (3d Cir. 1984)* ; *Samman v. Conyers, 231 F.R.D. 163, 165-167 (S.D.N.Y. 2005)* .

(n3)Footnote 3. *See § 6.34*.

(n4)Footnote 4. *See § 6.35*.

(n5)Footnote 5. *See Windward Agency v. Cologne Life Reinsurance Co., 353 F. Supp. 2d 538, 540 (E.D. Pa. 2003)* ; *Burns v. Glick, 158 F.R.D. 354, 356 (E.D. Pa. 1994)* .

(n6)Footnote 6. *Lyell Theatre Corp. v. Loews Corp., 682 F.2d 37, 43 (2d Cir. 1982)* .

(n7)Footnote 7. *See Nader v. Land, 433 F.3d 496, 502 (6th Cir. 2006)* .

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CHAPTER 6 Voluntary Dismissals and Dismissals for Failure to Prosecute
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1-6 Federal Litigation Guide § 6.34

§ 6.34 Likelihood of Prejudice to Opposing Party

[1] Prejudice Must Be Considered by Court

In determining whether to dismiss a claim involuntarily, the court must consider, among other factors, whether the opposing party is likely to be prejudiced by further delay in the proceedings. n1

[2] Prejudice May Be Presumed as Matter of Law

Prejudice resulting from unreasonable delay may be presumed as a matter of law from the length of the delay. n2

[3] Need to Show *Actual* Prejudice Increases Where Delay Is More Moderate

In cases where delay is more moderate or excusable, the need to show *actual* prejudice is proportionally greater. n3 Actual prejudice refers not to the stigma of being a defendant in a civil action, but to those situations in which a plaintiff's delay hinders the defendant's opportunity to adequately defend the claim. n4

Examples of
such prejudice may include:

- Difficulty in locating witnesses due to death or relocation
- Destruction of important documents
- Dulling of witness memories through time
- Expenses incurred as a result of delay

FOOTNOTES:
(n1)Footnote 1. *Lucas v. Miles, 84 F.3d 532, 535 (2d Cir. 1996)* ; *Poulis v. State Farm Fire & Casualty, 747 F. 2d 863 (3d Cir. 1984)* .

(n2)Footnote 2. *Peart v. City of New York, 992 F.2d 458, 462 (2d Cir. 1993)* .

(n3)Footnote 3. *Lyell Theatre Corp. v. Loews Corp., 682 F.2d 37, 43 (2d Cir. 1982)* .

(n4)Footnote 4. *Giuliano v. Everything Yogurt, Inc., 152 F.R.D. 449, 453 (E.D.N.Y. 1994)* .

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CHAPTER 6 Voluntary Dismissals and Dismissals for Failure to Prosecute
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1-6 Federal Litigation Guide § 6.35

§ 6.35 Consideration of Less Drastic Sanctions

In view of the drastic nature of a dismissal sanction, it should be employed only when the judge is sure of the impotence of lesser sanctions. n1

In deciding the suitability of lesser sanctions, courts should assess the relative roles of attorney and client in causing the delay, as well as whether a tactical benefit was sought by the delay. If the delay was occasioned by the attorney's disregard of his or her obligation toward the client, a sanction against the attorney might be more appropriate. n2

Alternative sanctions that might be considered are assessments of fines, costs, or damages against the plaintiff or its counsel, attorney disciplinary measures, conditional dismissal, dismissal without prejudice, and explicit warnings. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Colon v. Mack, 56 F.3d 5, 7 (2d Cir. 1995)* ; *In re Bluestein & Co., 68 F.3d 1022, 1025 (7th Cir. 1995)* ; *World Thrust Films, Inc. v. International Family Entertainment, Inc., 41 F.3d 1454, 1456 (11th Cir. 1995)* ; *Berry v. CIGNA/RSI-CIGNA, 975 F.2d 1188, 1191 (5th Cir. 1992)* ; *Johnson v. United States Dep't of Treasury, 939 F.2d 820, 825 (9th Cir. 1991)* .

(n2)Footnote 2. *Dodson v. Runyon, 86 F.3d 37, 40 (2d Cir. 1996)* .

(n3)Footnote 3. *See Boudwin v. Graystone Ins. Co., Ltd., 756 F.2d 399, 401 (5th Cir. 1985)* ; *Rogers v. Kroger Co., 669 F.2d 317, 321 (5th Cir. 1982)* ; *Schenck v. Bear, Stearns & Co., 583 F.2d 58, 60 (2d Cir. 1978)* ; *Giuliano v. Everything Yogurt, Inc., 152 F.R.D. 449, 454 n.3 (E.D.N.Y. 1994)* .

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CHAPTER 6 Voluntary Dismissals and Dismissals for Failure to Prosecute
C. Involuntary Dismissal

1-6 Federal Litigation Guide § 6.36

§ 6.36 Procedure for Filing or Opposing Motion for Involuntary Dismissal

A claimant seeking an order of involuntary dismissal under Rule 41(b) must make a formal motion to the court. n1 Likewise, the opposing party may file opposing papers.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotions

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 41(c).*

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CHAPTER 6 Voluntary Dismissals and Dismissals for Failure to Prosecute
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1-6 Federal Litigation Guide § 6.37

§ 6.37 CHECKLIST: Obtaining or Opposing Involuntary Dismissal

☐ A claim opponent may move for involuntary dismissal of the claimant's action or claim based on the claimant's failure to: n1

- ☐ Prosecute case.
- ☐ Comply with Federal Rules of Civil Procedure.
- ☐ Comply with court orders.
- ☐ Motion for involuntary dismissal should:
  - ☐ Be in writing. n2
  - ☐ Request order dismissing claimant's action or claim pursuant to Rule 41(b).
  - ☐ Specify type of delay for which dismissal is sought.
  - ☐ Describe manner and duration of claimant's failure.
  - ☐ State, if accurate, that claimant was on notice that failure would result in dismissal.
  - ☐ Describe actual prejudice resulting to movant as result of delay.
  - ☐ Describe manner in which balancing court's interest in managing docket with

claimant's interest in receiving due process tips in favor of dismissal.

☐ State that sanctions less drastic than dismissal would be ineffective.

☐ Include supporting authority.

☐ Order of dismissal operates as adjudication on merits barring further litigation of claims unless order states otherwise. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsAppellate ReviewCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotions

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 41(b), (c).*

(n2)Footnote 2. *See Fed. R. Civ. P. 7(b)(1).*

(n3)Footnote 3. *Fed. R. Civ. P. 41(b).*

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CHAPTER 6 Voluntary Dismissals and Dismissals for Failure to Prosecute
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1-6 Federal Litigation Guide §§ 6.38 through 6.99

[Reserved]

§§ 6.38[Reserved]

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CHAPTER 6 Voluntary Dismissals and Dismissals for Failure to Prosecute
D. Forms

1-6 Federal Litigation Guide § 6.100

§ 6.100 Notice of Voluntary Dismissal

[1] Form

Notice of Voluntary Dismissal

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

PLEASE TAKE NOTICE that pursuant to *Federal Rules of Civil Procedure, Rule 41(a)(1)*, plaintiff [*insert name of plaintiff*] dismisses this action, in its entirety, without prejudice.

Defendant [*insert name of defendant, e.g., John Doe Company*] [*has/has not*] been served with service of process, and has not filed an answer or motion for summary judgment. Plaintiff has not dismissed any other action based on or including the same claim or claims as those presented in this action.

[*Date*]

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for Plaintiff [*name of plaintiff*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

TO: [*Name of opposing counsel*], Attorney for [*name of party*]

[2] Use of Form

This is a form of notice of voluntary dismissal pursuant to *Fed. R. Civ. P. 41(a)(1)*. The form may be modified for use

by a claimant who has asserted a counterclaim, cross-claim, or third-party claim.

A notice of voluntary dismissal may be used to dismiss either entire actions, or specific parties from an action. n1

[3] Deadline for Filing of Notice of Voluntary Dismissal

A notice of dismissal may be filed by the plaintiff at any time before the defendant has served an answer or a motion for summary judgment. Two dismissals of actions on the same claim, however, operate as an adjudication on the merits, even if the first action was in state court. n2

A notice of dismissal may also be filed by a claimant who has asserted a counterclaim, cross-claim, or third-party claim at any time before a responsive pleading is served, or if there is no responsive pleading, at any time before the introduction of evidence at the trial or hearing. n3

For discussion of types of actions that may not be voluntarily dismissed, see *§ 6.05*.

[4] Content of Notice of Voluntary Dismissal

If the notice of dismissal pertains to dismissal of claims, the notice should state, as appropriate, that the claims, counterclaims, cross-claims, or third party claims are dismissed. If the notice of dismissal pertains to dismissal of parties, the notice should identify the parties being dismissed.

The notice of dismissal should specify that dismissal is without prejudice, unless there is some reason for dismissing with prejudice. n4

[5] Notice of Voluntary Dismissal Must Be Served and Filed

Filing the notice of voluntary dismissal effects the dismissal. No court order is required. n5

Counsel for the claimant serve a copy of the notice of voluntary dismissal on each of the parties. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsMotions

FOOTNOTES:
(n1)Footnote 1. *See § 6.01[3].*

(n2)Footnote 2. *Fed. R. Civ. P. 41(a)(1).*

(n3)Footnote 3. *Fed. R. Civ. P. 41(a)(1), (c).*

(n4)Footnote 4. *See § 6.02[2].*

(n5)Footnote 5. *See Fed. R. Civ. P. 41(a)(1).*

(n6)Footnote 6. *See Fed. R. Civ. P. 41(a)(1), 5(a).*

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CHAPTER 6 Voluntary Dismissals and Dismissals for Failure to Prosecute
D. Forms

1-6 Federal Litigation Guide § 6.101

§ 6.101 Stipulation of Voluntary Dismissal

[1] Form

Stipulation of Voluntary Dismissal

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

IT IS HEREBY STIPULATED AND AGREED, pursuant to *Federal Rules of Civil Procedure, Rule 41(a)(1)*, by and between plaintiff [*name of plaintiff*] and all defendants who have appeared in this action, as follows:

1. This action was commenced on _____[*date action filed*].

2. The action is not a class action, a receiver has not been appointed, and the action is not governed by any statute of the United States that requires an order of the court for dismissal.

3. This action is hereby dismissed, in its entirety, without prejudice.

[*Date*]

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for Plaintiff [*name of plaintiff*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

[*Repeat date and signature line for each signatory*]

[2] Use of Form

This is a form of stipulation of voluntary dismissal pursuant to *Fed. R. Civ. P. 41(a)(1)*. A stipulation of voluntary dismissal may be used to dismiss either entire actions, or specific parties from an action. n1

[3] Stipulation of Voluntary Dismissal Requires Signatures of All Parties Who Have Appeared

A stipulation of voluntary dismissal is typically used when the time for filing a notice of dismissal has lapsed; for example, either the defendant has filed an answer or motion for summary judgment, or with respect to a counterclaim, cross-claim, or third-party claim, a responsive pleading has been served, or evidence has already been introduced at the trial or hearing. n2

A stipulation of dismissal must be signed by all parties who have appeared in the action. n3

For discussion of types of actions that may not be voluntarily dismissed, see *§ 6.05*.

[4] Stipulation of Voluntary Dismissal Must Be Filed

A stipulation of dismissal is not self-executing. Rather, the stipulation must be filed with the court clerk to effectuate the dismissal, though an oral stipulation in open court may effectuate dismissal. n4

FOOTNOTES:
(n1)Footnote 1. *See § 6.01[3].*

(n2)Footnote 2. *See § 6.04[1].*

(n3)Footnote 3. *See Fed. R. Civ. P. 41(a)(1), (c).*

(n4)Footnote 4. *See § 6.04[3].*

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CHAPTER 6 Voluntary Dismissals and Dismissals for Failure to Prosecute
D. Forms

1-6 Federal Litigation Guide § 6.102

§ 6.102 Notice of Motion for Voluntary Dismissal

[1] Form

Notice of Motion for Voluntary Dismissal

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

NOTICE IS HEREBY GIVEN that on _____[*date*] at [*time of day (specify a.m. or p.m.)*], or as soon thereafter as counsel may be heard, [*party designation and name of moving party*] will move this Court at the United States Courthouse located at [*address of Court*], Courtroom [*courtroom number*], for an order pursuant to *Federal Rules of Civil Procedure, Rule 41(a)(2)* [*state with particularity any other legal basis for motion including any applicable local rules*]:

(a) dismissing this action in its entirety; and

(b) granting [*moving party*] such other relief as may be appropriate.

This motion is based on this Notice of Motion, the accompanying Declaration (or affidavit or other affidavit substitute; generally required) of [*name of signatory*] dated (or sworn to) _____[*date*], the accompanying Memorandum of Law (if required) dated _____[*date*], and upon all of the pleadings and papers on file in this action.

[*Date*]

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for Plaintiff [*name of plaintiff*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

TO: [*Name of opposing counsel*], Attorney for [*name of party*]

[2] Use of Form

This is a form of motion for voluntary dismissal pursuant to *Fed. R. Civ. P. 41(a)(2)*. This form may be modified to dismiss only a particular party from the action. n1

[3] Situations in Which Court Order Is Required for Voluntary Dismissal

A court order is required any time a claimant seeks to dismiss a claim or party, but the time within which a notice of dismissal may be filed has expired, and the claimant is unable to obtain a stipulation of dismissal from all parties. n2

Thus, a court order is required if: n3

- The plaintiff seeks to dismiss the action or a defendant, but another defendant has already filed an answer or motion for summary judgment, and the plaintiff is unable to obtain a stipulation of dismissal from all parties

- The claimant seeks to dismiss a counterclaim, cross-claim, or third-party claim, but a responsive pleading has been served, or evidence has already been introduced at the trial or hearing, and the claimant is unable to obtain a stipulation of dismissal from all parties

- The action is of a type that may not be dismissed without court order

If a defendant has plead a counterclaim prior to service on the defendant of the plaintiff's motion to voluntarily dismiss, the court is not permitted to dismiss the action over the defendant's objection, unless the counterclaim can remain pending for independent adjudication by the court. n4

[4] Motion Granted Only If No Undue Prejudice to Opposing Party

Voluntary dismissal by court order pursuant to Rule 41(a)(2) is not a matter of right, but rather is at the court's discretion. A district court may only grant such dismissal if the opposing party will not be unduly prejudiced, and then only on terms and conditions that protect the opposing party from any unfairness. This rule applies even when the party seeking dismissal seeks to dismiss with prejudice. n5

For discussion of terms and conditions that the court may impose, see *§ 6.22*.

[5] Voluntary Dismissal by Court Order Generally Without Prejudice

Unless otherwise specified in the order, a dismissal pursuant to a motion for voluntary dismissal is without prejudice, which does not preclude the claimant from raising the claim in subsequent litigation. n6

If the district judge proposes to convert a voluntary dismissal to one with prejudice, fundamental fairness requires the court to afford the claimant an opportunity to withdraw the motion for dismissal, and to proceed with the litigation. n7

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 41(a)(2).*

(n2)Footnote 2. *See Fed. R. Civ. P. 41(a)(2)*; *see also § 6.20*.

(n3)Footnote 3. *See Fed. R. Civ. P. 41(a)(1), (2)*.

(n4)Footnote 4. *Fed. R. Civ. P. 41(a)(2)*.

(n5)Footnote 5. *See § 6.21[1]*.

(n6)Footnote 6. *Fed. R. Civ. P. 41(a)(2)*.

(n7)Footnote 7. *See § 6.24[3]*.

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CHAPTER 6 Voluntary Dismissals and Dismissals for Failure to Prosecute
D. Forms

1-6 Federal Litigation Guide § 6.103

§ 6.103 Notice of Motion to Dismiss for Failure to Prosecute, or Failure to Comply With Court Order or Federal Rules

[1] Form

Notice of Motion to Dismiss for Failure to Prosecute, or Failure to Comply With Court Order or Federal Rules

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

NOTICE IS HEREBY GIVEN that on _____[*date*] at [*time of day (specify a.m. or p.m.)*], or as soon thereafter as counsel may be heard, [*party designation and name of moving party*] will move this Court at the United States Courthouse located at [*address of Court*], Courtroom [*courtroom number*], for an order pursuant to *Federal Rules of Civil Procedure, Rule 41(b)* [*state with particularity any other legal basis for motion including any applicable local rules*]:

(a) dismissing this action with prejudice [*insert if appropriate: and with costs to defendant*] on the ground that _____[*choose one of the following: Plaintiff has failed to prosecute the action with due diligence; or Plaintiff has failed to comply with the order of this court, dated* [*date of order*], *requiring plaintiff to* [*set forth requirements of court order*]; *or Plaintiff has failed to comply with Fed. R. Civ. P. [set forth Rule violated by plaintiff and facts showing failure to comply with Rule*]; and

(b) granting [*moving party*] such other relief as may be appropriate.

This motion is based on this Notice of Motion, the accompanying Declaration (or affidavit or other affidavit substitute; generally required) of [*name of signatory*] dated (or sworn to) _____[*date*], the accompanying Memorandum of Law (if required) dated _____[*date*], and upon all of the pleadings and papers on file in this action.

[*Date*]

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for Plaintiff [*name of plaintiff*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

TO: [*Name of opposing counsel*], Attorney for [*name of party*]

[2] Use of Form

This is a form of notice of motion to dismiss, filed pursuant to *Fed. R. Civ. P. 41(b)*.

[3] Grounds for Involuntary Dismissal

A defendant may move for dismissal of an action or of any claim against the defendant on the grounds that the plaintiff has failed to: n1

- Prosecute the case
- Comply with the Federal Rules of Civil Procedure
- Comply with court orders

Similarly, a plaintiff may move for dismissal of counterclaims, cross-claims, or third-party claims as a result of the defendant's failure to prosecute such claims, or to comply with other rules or court orders. n2

[4] Court May Dismiss Claims on Motion or Sua Sponte

Involuntary dismissal may be granted on motion. n3 Likewise, the court possesses an inherent power to dismiss claims sua sponte (on the court's own motion) based on the claimant's failure to prosecute. Under appropriate circumstances, the claims may be dismissed by the court without prior notice of its intent to do so, and without a hearing. n4

[5] Involuntary Dismissal Generally With Prejudice

Unless the court in its dismissal order specifies otherwise, an involuntary dismissal under Rule 41(b) operates as an adjudication on the merits, barring further litigation of the claims asserted under principles of res judicata. n5

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 41(b).*

(n2)Footnote 2. *See Fed. R. Civ. P. 41(b), (c).*

(n3)Footnote 3. *See Fed. R. Civ. P. 41(b), (c).*

(n4)Footnote 4. *See § 6.31.*

(n5)Footnote 5. *See § 6.32.*

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CHAPTER 7 Injunctions

1-7 Federal Litigation Guide 7.syn

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§ 7.02 Characteristics of Permanent Injunction

§ 7.03 Characteristics of Preliminary Injunction

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§§ 7.82. through 7.89 [Reserved]

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Scope

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Scope

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CHAPTER 7 Injunctions

1-7 Federal Litigation Guide Scope

Scope

SCOPE

This chapter discusses the manner by which injunctive relief is obtained in federal court. The chapter includes procedures for obtaining permanent injunctions, preliminary injunctions, and temporary restraining orders. Rule 65 governs injunctions and sets forth the procedural parameters for invoking injunctive relief while simultaneously guarding against abuse of the injunction remedy.

The section on permanent injunctions covers pleading requirements, and the standards for granting relief.

The section on preliminary injunctions covers arranging for the noticed hearing, the standards for granting relief, preparing the motion, and the use of oral testimony. It also discusses consolidating preliminary injunction hearings with the trial on the merits, and appealing preliminary injunction orders.

The section on temporary restraining orders discusses the procedure for obtaining a temporary restraining order, the standards for granting relief, preparing the application, and rules concerning the duration of temporary restraining orders.

The chapter discusses defenses that may be raised to oppose an application for injunctive relief. It also discusses drafting proposed orders, security requirements, and the court's power of contempt to enforce injunctions and restraining orders.

For expanded coverage of injunctions, *see* Moore's Federal Practice, Ch. 65, *Injunctions* (Matthew Bender 3d ed.).

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CHAPTER 7 Injunctions
A. Nature of Injunctive Relief

1-7 Federal Litigation Guide § 7.01

§ 7.01 Injunction Prevents Irreparable Injuryn*

An injunction is an equitable remedy ordering a party to do some act or refrain from doing some act to prevent irreparable future harm to the applicant. n1 Another broad definition of injunction is any equitable decree that compels obedience under threat of the court's coercive power of contempt. n1.1 Thus, if the harmful conduct sought to be enjoined has been discontinued, injunctive relief will not be granted. n2 The three types of injunctive relief are: n3

- Permanent injunctions [*see §§ 7.20 -7.23*]
- Preliminary injunctions [*see §§ 7.30 -7.35*]
- Temporary restraining orders [*see §§ 7.40 -7.50*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPermanent InjunctionsCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

FOOTNOTES:
(n1)Footnote *. *See* Moore's Federal Practice, *§ 65.02* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Nken v. Holder, ___ U.S. ___, 129 S. Ct. 1749, 1757, 173 L. Ed. 2d 550 (2009)* ; *Shain v. Ellison, 356 F.3d 211, 215 (2d Cir. 2004)* .

(n3)Footnote 1.1. *Westar Energy, Inc. v. Lake, 552 F.3d 1215, 1222 (10th Cir. 2009)* .

(n4)Footnote 2. *See Brown v. Bartholomew Consol. Sch. Corp., 442 F.3d 588, 596 (7th Cir. 2006)* .

(n5)Footnote 3. *See Fed. R. Civ. P. 65.*

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CHAPTER 7 Injunctions
A. Nature of Injunctive Relief

1-7 Federal Litigation Guide § 7.02

§ 7.02 Characteristics of Permanent Injunctionn*

A permanent injunction is a means of finally settling a dispute, and may constitute part or all of the final judgment in a civil action. A permanent injunction is granted at the conclusion of a trial on the merits, and remains in force unless reversed or vacated by another court; it does not expire after a prescribed period of time. n1

For discussion of obtaining permanent injunctive relief, *see §§ 7.20 -7.23*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPermanent Injunctions

FOOTNOTES:
(n1)Footnote *. *See* Moore's Federal Practice, §§ *65.05[2], [3]* (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 546 n.12, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987)* .

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CHAPTER 7 Injunctions
A. Nature of Injunctive Relief

1-7 Federal Litigation Guide § 7.03

§ 7.03 Characteristics of Preliminary Injunctionn*

A preliminary injunction is issued as an interlocutory order, and is intended to protect a party from irreparable harm during the pendency of litigation. n1

A preliminary injunction: n2

- Is granted after a hearing, typically held on short notice, during the course of a pending action
- Remains in force until final determination of the merits of the action, unless modified
- May not be issued without notice to the adverse party

For discussion of obtaining preliminary injunctive relief, *see §§ 7.30 -7.35*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions

FOOTNOTES:
(n1)Footnote *. *See* Moore's Federal Practice, *§§ 65.20-65.24* (Matthew Bender 3d ed.).

(n2)Footnote 1. *See University of Tx. v. Camenisch, 451 U.S. 390, 395, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981)* ; *Arthur Guinness & Sons, PLC v. Sterling Publishing Co., 732 F.2d 1095, 1099 (2d Cir. 1984)* .

(n3)Footnote 2. *See Fed. R. Civ. P. 65(a).*

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CHAPTER 7 Injunctions
A. Nature of Injunctive Relief

1-7 Federal Litigation Guide § 7.04

§ 7.04 Characteristics of Temporary Restraining Order (TRO)n*

A temporary restraining order (TRO) is a short term device used to restrain the actions of a party until the court holds a hearing to determine whether to issue a preliminary injunction. n1

A TRO should be sought when it appears that preliminary injunctive relief will not be granted in time to prevent imminent harm. In some circumstances, a temporary restraining order may be granted ex parte (without written or oral notice to the adverse party), but most judges insist on the best available notice.

A TRO granted ex parte may not exceed 14 days in duration, although the TRO may be extended on consent, or for good cause. n2

For discussion of obtaining a temporary restraining order, *see §§ 7.40 -7.50*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

FOOTNOTES:
(n1)Footnote *. *See* Moore's Federal Practice, *§§ 65.30-65.41* (Matthew Bender 3d ed.).

(n2)Footnote 1. *United States v. United Mine Workers, 330 U.S. 258, 293, 67 S. Ct. 677, 91 L. Ed. 884, 19 L.R.R.M. (BNA) 2346 (1947)* .

(n3)Footnote 2. *Fed. R. Civ. P. 65(b)(2)*.

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CHAPTER 7 Injunctions
A. Nature of Injunctive Relief

1-7 Federal Litigation Guide § 7.05

§ 7.05 Distinguishing Prohibitory From Mandatory Injunctionsn*

Prohibitory injunctions prohibit a party from engaging in specified conduct harmful to the applicant. n1

Mandatory injunctions require a party to engage in specific conduct to remedy harm to the applicant. n2

Courts are reluctant to issue mandatory injunctions because they disturb the status quo prior to adjudication on the merits, and they can be difficult to enforce. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesGeneral OverviewCivil ProcedureRemediesInjunctionsMandatory InjunctionsCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

FOOTNOTES:
(n1)Footnote *. *See* Moore's Federal Practice, *§ 65.04* (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Texas & N.O.R.R. v. Northside Belt Ry., 276 U.S. 475, 479, 48 S. Ct. 361, 72 L. Ed. 661 (1928)* .

(n3)Footnote 2. *See United States v. Criminal Sheriff, 19 F.3d 238, 240 (5th Cir. 1994)* ; *United States v. Bedford Assocs., 618 F.2d 904, 914 (2d Cir. 1980)* .

(n4)Footnote 3. *See Clune v. Publishers' Ass'n, 214 F. Supp. 520, 531 (S.D.N.Y.)* , *aff'd, 314 F.2d 343 (2d Cir. 1963)* .

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CHAPTER 7 Injunctions
A. Nature of Injunctive Relief

1-7 Federal Litigation Guide §§ 7.06 through 7.09

[Reserved]

§§ 7.06[Reserved]

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CHAPTER 7 Injunctions
B. Seeking Injunctive Relief
1. Governing Law, Acquiring Jurisdiction, and Limitations on Injunctive Relief

1-7 Federal Litigation Guide § 7.10

§ 7.10 Rule 65 Sets Forth Procedure for Obtaining Injunctive Reliefn*

Rule 65 sets forth the procedure for obtaining injunctive relief. Its requirements must be strictly followed. n1 The Rule also applies to copyright impoundment proceedings. n2

FOOTNOTES:
(n1)Footnote *. *See* Moore's Federal Practice, *§ 65.05* (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 65*; *see also Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70, 415 U.S. 423, 438-439, 94 S. Ct. 1113, 39 L. Ed. 2d 435 (1974)* .

(n3)Footnote 2. *Fed. R. Civ. P. 65(f)*.

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CHAPTER 7 Injunctions
B. Seeking Injunctive Relief
1. Governing Law, Acquiring Jurisdiction, and Limitations on Injunctive Relief

1-7 Federal Litigation Guide § 7.11

§ 7.11 Federal Law Governs Procedure for Seeking Injunctive Reliefn*

Federal law governs the procedure for seeking injunctive relief. n1

In assessing the merits of a request for injunctive relief in a diversity case, the court will apply the substantive law of the forum state. n2

For discussion of the factors considered in determining whether injunctive relief is appropriate, *see § 7.23*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsGeneral OverviewCivil ProcedureFederal & State InterrelationshipsErie DoctrineCivil ProcedureRemediesInjunctionsGeneral Overview

FOOTNOTES:
(n1)Footnote *. *See* Moore's Federal Practice, *§ 65.07* (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 65.*

(n3)Footnote 2. *See Erie R.R. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188, 11 Ohio Op. 246 (1938)* .

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CHAPTER 7 Injunctions
B. Seeking Injunctive Relief
1. Governing Law, Acquiring Jurisdiction, and Limitations on Injunctive Relief

1-7 Federal Litigation Guide § 7.12

§ 7.12 Acquiring Personal and Subject Matter Jurisdictionn*

The court must have personal and subject matter jurisdiction to grant injunctive relief. n1

A complaint seeking injunctive relief must allege the basis for the court's subject matter jurisdiction. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral Overview

FOOTNOTES:
(n1)Footnote *. *See* Moore's Federal Practice, *§ 65.05[1]* (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 234-235, 38 S. Ct. 65, 62 L. Ed. 260 (1916)* ; *Weitzman v. Stein, 897 F.2d 653, 658-659 (2d Cir. 1990)* , aff'd, *963 F.2d 1521 (1992)* .

(n3)Footnote 2. *See, e.g., Lauf v. E.G. Shinner & Co., 303 U.S. 323, 327-328, 58 S. Ct. 578, 82 L. Ed. 872 (1938)* ; *Arkansas Peace Ctr. v. Department of Pollution Control, 999 F.2d 1212, 1216-1219 (8th Cir. 1993)* .

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CHAPTER 7 Injunctions
B. Seeking Injunctive Relief
1. Governing Law, Acquiring Jurisdiction, and Limitations on Injunctive Relief

1-7 Federal Litigation Guide § 7.13

§ 7.13 Injunctive Relief Available Only in Context of Pending Actionn*

Injunctive relief may be granted only in the context of a pending action, which generally means that a complaint has been filed either prior to or contemporaneously with the application for injunctive relief. n1 The district court lacks authority to issue injunctive relief after remanding the case to state court. n2

The purpose of injunctive relief is to prevent future harm. n2.1 Therefore, if the harmful conduct sought to be enjoined has been discontinued, injunctive relief will not be granted. n2.2

FOOTNOTES:
(n1)Footnote *. *See* Moore's Federal Practice, *§ 65.05* (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Stewart v. INS, 762 F.2d 193, 198 (2d Cir. 1985)* ; *James Luterbach Constr. Co. v. Adamkus, 781 F.2d 599, 601 (7th Cir. 1986)* .

(n3)Footnote 2. *Covanta Onondaga Ltd. Partnership v. Onondaga County Res. Recovery Agency, 318 F.3d 392, 400 (2d. Cir. 2003)* .

(n4)Footnote 2.1. *Shain v. Ellison, 356 F.3d 211, 215 (2d Cir. 2004)* .

(n5)Footnote 2.2. *Crown Media, LLC v. Gwinnett County, 380 F.3d 1317, 1324-1325 (11th Cir. 2004)* .

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CHAPTER 7 Injunctions
B. Seeking Injunctive Relief
1. Governing Law, Acquiring Jurisdiction, and Limitations on Injunctive Relief

1-7 Federal Litigation Guide § 7.14

§ 7.14 Anti-Injunction Act Limits Power of Federal Court to Enjoin State Proceedingsn*

The Anti-Injunction Act n1 prohibits a federal court from enjoining state court proceedings, except:

- As expressly authorized by Act of Congress
- When necessary in aid of the federal court's jurisdiction
- To protect or effectuate a federal court's judgment

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsAnti-Injunction ActsGeneral OverviewCivil ProcedureFederal & State InterrelationshipsAnti-Injunction ActsAnti-Injunction ActCivil ProcedureRemediesInjunctionsGeneral Overview

FOOTNOTES:
(n1)Footnote *. *See* Moore's Federal Practice, *§§ 65.07[1]*, *121.02*, *121.04*, *121.06* (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 2283*.

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CHAPTER 7 Injunctions
B. Seeking Injunctive Relief
1. Governing Law, Acquiring Jurisdiction, and Limitations on Injunctive Relief

1-7 Federal Litigation Guide §§ 7.15. through 7.19

[Reserved]

§§ 7.15.[Reserved]

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CHAPTER 7 Injunctions
B. Seeking Injunctive Relief
2. Seeking Permanent Injunction

1-7 Federal Litigation Guide § 7.20

§ 7.20 Permanent Injunction Must Be Requested in Complaintn*

A party seeks a permanent injunction by praying in a complaint for a permanent modification of the defendant's behavior. n1

There are no special pleading rules governing complaints which seek injunctive relief. The complaint must include a short and plain statement of the claim showing that the plaintiff is entitled to a permanent injunction. n2

For discussion of drafting the complaint, *see* Ch. 1, *Pleadings*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPermanent Injunctions

FOOTNOTES:
(n1)Footnote *. *See* Moore's Federal Practice, *§§ 65.05[2]*, [3] (Matthew Bender 3d ed.).

(n2)Footnote 1. *See*, e.g., *Hishon v. King & Spalding, 467 U.S. 69, 72, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)* .

(n3)Footnote 2. *See Fed. R. Civ. P. 8(a)*.

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CHAPTER 7 Injunctions
B. Seeking Injunctive Relief
2. Seeking Permanent Injunction

1-7 Federal Litigation Guide § 7.21

§ 7.21 Permanent Injunction Available Only After Trial on Meritsn*

Unlike preliminary injunctions, permanent injunctions may be rendered as part of the final relief in the case after an adjudication of the merits of the action. n1

The court may order the trial on the merits to be advanced and consolidated with the preliminary injunction hearing. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPermanent Injunctions

FOOTNOTES:
(n1)Footnote *. *See* Moore's Federal Practice, *§ 65.05[3]* (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 546 n.12, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987)* .

(n3)Footnote 2. *Fed. R. Civ. P. 65(a)(2)*.

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CHAPTER 7 Injunctions
B. Seeking Injunctive Relief
2. Seeking Permanent Injunction

1-7 Federal Litigation Guide § 7.22

§ 7.22 Action Seeking Permanent Injunction Treated Like Any Other Action

Rules governing pleadings, discovery, motion practice, pretrial conferences, and other matters apply equally to actions seeking permanent injunctive relief.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPermanent Injunctions

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CHAPTER 7 Injunctions
B. Seeking Injunctive Relief
2. Seeking Permanent Injunction

1-7 Federal Litigation Guide § 7.23

§ 7.23 Factors Considered in Granting or Denying Permanent Injunctionn*

[1] Injunctive Relief Available Only If No Adequate Remedy at Law

Injunctive relief ordinarily will be denied if an adequate remedy at law is available. The injury must be one requiring a remedy of more than money damages. A monetary loss will not suffice unless the movant provides evidence of damage that cannot be rectified by financial compensation. n1

Although injuries compensable by monetary damages ordinarily do not justify the granting of injunctive relief, a preliminary injunction may issue to preserve assets as security for a potential monetary judgment where the evidence shows that a party intends to frustrate any judgment on the merits by making it uncollectible. n2

[2] Irreparable Injury

The applicant for injunctive relief must demonstrate that the respondent's conduct will cause irreparable harm if the injunction is not granted. n3

The finding of irreparable harm is sometimes the most important factor indetermining whether to issue an injunction. n4

The applicant must demonstrate the specific nature of the harm that will be suffered if injunctive relief is denied. n5

[3] Balancing of Hardships

In determining whether to grant injunctive relief, the court must balance the hardship faced by the applicant resulting from the conduct sought to be enjoined against the hardship the defendant would suffer if the relief were granted. Essentially, this factor weighs in favor of an injunction if the hardship experienced by the applicant exceeds the hardship experienced by the defendant. n6

[4] Considering Effect on Public Interest

The court may consider the impact of the requested injunction on the public interest, particularly in an action implicating government policy or regulation, or other matters of public concern. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsElementsGeneral OverviewCivil ProcedureRemediesInjunctionsPermanent Injunctions

FOOTNOTES:
(n1)Footnote *. *See* Moore's Federal Practice, *§ 65.06* (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Morales v. TWA, 504 U.S. 374, 381, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992)* ; *Crane v. Indiana High Sch. Athletic Ass'n, 975 F.2d 1315, 1326 (7th Cir. 1992)* ; *Tucker Anthony Realty Corp. v. Schlesinger, 888 F.2d 969, 975 (2d Cir. 1989)* .

(n3)Footnote 2. *E.g., Pashaian v. Eccelston Props., Ltd., 88 F.3d 77, 85 (2d Cir. 1996)* ; *but see Rosen v. Cascade Int'l, Inc., 21 F.3d 1520, 1529-1530 (11th Cir. 1994)* .

(n4)Footnote 3. *See Dominion Video Satellite, Inc. v. Echostar Satellite Corp., 356 F.3d 1256, 1261-1266 (10th Cir. 2004)* ; *Chemical Bank v. Haseotes, 13 F.3d 569, 573 (2d Cir. 1994)* ; *Basicomputer Corp. v. Scott, 973 F.2d 507, 511-512 (6th Cir. 1992)* .

(n5)Footnote 4. *Reuters Ltd. v. United Press Int'l, Inc., 903 F. 2d 904, 907 (2d Cir. 1990)* .

(n6)Footnote 5. *See, e.g., International Bhd. of Teamsters v. Local Union No. 810, 19 F.3d 786, 794 (2d Cir. 1994)* ; *Basicomputer Corp. v. Scott, 973 F.2d 507, 511 (6th Cir. 1992)* .

(n7)Footnote 6. *See Honig v. Doe, 484 U.S. 305, 328 n.10, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)* ; *Acumed LLC v. Stryker Corp., 551 F.3d 1323, 1330 (Fed. Cir. 2008)* .

(n8)Footnote 7. *See Yakus v. United States, 321 U.S. 414, 441, 64 S. Ct. 660, 88 L. Ed. 834, 28 Ohio Op. 220 (1944)* ; *Carey v. Klutznick, 637 F. 2d 834, 839 (2d Cir. 1980)* .

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CHAPTER 7 Injunctions
B. Seeking Injunctive Relief
2. Seeking Permanent Injunction

1-7 Federal Litigation Guide §§ 7.24. through 7.29

[Reserved]

§§ 7.24.[Reserved]

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CHAPTER 7 Injunctions
B. Seeking Injunctive Relief
3. Seeking Preliminary Injunction

1-7 Federal Litigation Guide § 7.30

§ 7.30 Preliminary Injunction Preserves Status Quo Pending Final Determination of Meritsn1

A preliminary injunction is an interlocutory order issued as a means of preserving the status quo between the parties pending a final determination of the merits of an action. n2

A preliminary injunction may be sought only in connection with a pending action in which a permanent injunction is sought. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsElementsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions

FOOTNOTES:
(n1)Footnote 1. *See* Moore's Federal Practice, *§ 65.20* (Matthew Bender 3d ed.).

(n2)Footnote 2. *See Golden Gate Rest. Ass'n v. City of San Francisco, 512 F.3d 1112, 1116 (9th Cir. 2008)* .

(n3)Footnote 3. *See James Luterbach Constr. Co. v. Adamkus, 781 F.2d 599, 603 (7th Cir. 1986)* ; *Stewart v. INS, 762 F. 2d 193, 198 (2d Cir. 1985)* .

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CHAPTER 7 Injunctions
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1-7 Federal Litigation Guide § 7.31

§ 7.31 Factors Considered in Granting or Denying Preliminary Injunctionn1

In determining whether to grant a preliminary injunction, the movant must demonstrate both of the following elements: n2

- Irreparable harm
- Likelihood of success on the merits

A party seeking a preliminary injunction must demonstrate a likelihood of success on the merits and also establish that irreparable injury is likely in the absence of an injunction; a possibility of such injury is not sufficient. n3 Courts should pay particular regard to public consequences in employing the extraordinary remedy of injunction. n4 A preliminary injunction is an extraordinary remedy never awarded as of right. n5 In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsElementsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions

FOOTNOTES:
(n1)Footnote 1. *See* Moore's Federal Practice, *§§ 65.22*, *65.23* (Matthew Bender 3d ed.).

(n2)Footnote 2. *Doran v. Salem Inn, Inc., 422 U.S. 922, 931, 95 S. Ct. 2561, 45 L. Ed. 2d 648 (1975)* .

(n3)Footnote 3. *See Winter v. NRDC, Inc., ___ U.S. ___, 129 S. Ct. 365, 172 L. Ed. 2d 249, 261 (2009)* .

(n4)Footnote 4. *See Winter v. NRDC, Inc., ___ U.S. ___, 129 S. Ct. 365, 172 L. Ed. 2d 249, 261 (2009)* .

(n5)Footnote 5. *See Munaf v. Omar, 553 U.S. 674, 128 S. Ct. 2207, 2218, 171 L. Ed. 2d (2008)* .

(n6)Footnote 6. *See Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 542, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987)* .

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CHAPTER 7 Injunctions
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1-7 Federal Litigation Guide § 7.32

§ 7.32 Preparing Papers in Support of Motion for Preliminary Injunctionn1

[1] Providing Adequate Notice

The party seeking preliminary injunctive relief must provide notice to all adverse parties to afford a fair opportunity to oppose the motion. n2 The notice requirement also applies to any modification of a preliminary injunction that substantially affects a party's property interest. n3

The court has discretion to determine whether the notice provided by the applicant is adequate. n3.1

For discussion of notice requirements for motions, *see* Ch. 2, *The Mechanics of Motion Practice*. Consult the local district court rules, as well as the rules and procedures of the assigned judge for notice requirements.

[2] Importance of Supporting Affidavits

Affidavits in support of a motion for preliminary injunction should set forth the evidence demonstrating the need for injunctive relief, and may serve as the sole basis for the court's ruling if the parties waive a hearing, or if the court concludes that there are no critical issues of fact necessitating a hearing. n4

Supporting affidavits should address each of the factors for injunctive relief [*see § 7.31*]. It is critical that the supporting papers be as detailed and credible as possible. Every affidavit should explain the basis for the affiant's knowledge, and should give sufficient personal information to make the affiant credible as a person. When drafting an affidavit, it is helpful to present the information to the court in the same fashion as if the affiant were testifying on the witness stand. But, be as concise as the facts permit, as the papers may be read hurriedly. They should be well organized, with headings and indices that will assist the court in understanding the facts justifying the injunction. All relevant documents should be submitted as exhibits.

For discussion of supporting affidavits, including formatting requirements, *see* Ch.2, *The Mechanics of Motion Practice*. The rules of the assigned judge should also be consulted.

[3] Submitting Supporting Memorandum of Law

Generally, and consistent with local practice, a memorandum of law must be submitted in support of a motion for a preliminary injunction. The memorandum should be as complete as possible, integrating the facts and the law justifying the relief, with citations to the supporting affidavits and exhibits.

For discussion of memoranda of law, *see* Ch. 1, *The Mechanics of Motion Practice*. The rules of the assigned judge should also be consulted for memorandum of law requirements.

[4] Submitting Proposed Order

Consult the local district court rules, as well as the rules of the assigned judge, with respect to submitting proposed orders. For discussion of proposed orders, *see* Ch. 1, *The Mechanics of Motion Practice*.

[5] Filing Complaint Contemporaneously With Preliminary Injunction Motion

Injunctive relief may be granted only in the context of a pending action, which generally means that a complaint has been filed either prior to or contemporaneously with the application for injunctive relief. n5

If the motion for a preliminary injunction is filed "contemporaneously" with the complaint, the movant should first file the complaint so that the docket number assigned can be included on the motion, thereby confirming to the assigned judge that the injunctive relief is indeed being sought in the context of a "pending" action.

[6] Submitting Other Papers in Support of Motion

[6.--1] Verified Pleadings

Allegations contained in a verified complaint may be used to support a motion for a preliminary injunction. n6

[6.--2] Deposition Transcripts

Transcripts of depositions taken under oath may be used to support a motion for a preliminary injunction. n7 Indeed, deposition testimony may be more persuasive than an affidavit, particularly if the deponent was subjected to cross-examination.

Typically, the expedited nature of a preliminary injunction motion inhibits the movant's ability to take depositions, obtain the transcripts, and submit them prior to argument on the motion, but the transcripts may supplement the motion.

[6.--3] Transcripts of Prior Hearings

Transcripts of prior hearings may be used to support a motion for preliminary injunction. n8

[6.--4] Affidavits

A party typically submits one or more affidavits in support of a motion for a preliminary injunction. n9 Although arguments on a motion for a preliminary injunction often must be prepared in haste, great care should be taken in preparation of affidavits, since the weight given to affidavits is within the court's discretion.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsEvidenceTestimonyLay WitnessesPersonal

Knowledge

FOOTNOTES:

(n1)Footnote 1. *See* Moore's Federal Practice, *§ 65.23* (Matthew Bender 3d ed.).

(n2)Footnote 2. *See Fed. R. Civ. P. 65(a)(1)*; *see also Wyandotte Nation v. Sebelius, 443 F.3d 1247, 1252-1253 (10th Cir. 2006)* .

(n3)Footnote 3. *See Dr. Jose S. Belaval, Inc. v. Perez-Perdomo, 465 F.3d 33, 37 (1st Cir. 2006)* .

(n4)Footnote 3.1. *See Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, SA, 875 F.2d 1174, 1177-1178 (5th Cir. 1989)* ; *People ex rel. Hartigan v. Peters, 871 F.2d 1336, 1339-1341 (7th Cir. 1989)* .

(n5)Footnote 4. *See Consolidated Gold Fields PLC v. Minorco S.A., 871 F.2d 252, 256 (2d Cir. 1989)* ; *Guardians Ass'n v. Civil Serv. Comm'n, 490 F.2d 400, 403 (2d Cir. 1973)* .

(n6)Footnote 5. *See James Luterbach Constr. Co. v. Adamkus, 781 F.2d 599, 601 (7th Cir. 1986)* ; *Stewart v. INS, 762 F.2d 193, 198 (2d Cir. 1985)* .

(n7)Footnote 6. *See Bascom Food Prods. Corp. v. Reese Finer Foods, Inc., 715 F. Supp. 616, 624 (D. N.J. 1989)* (movant may not rely upon allegations in unverified pleadings); *Huk-A-Poo Sportswear, Inc. v. Little Lisa, Ltd., 74 F.R.D. 621, 624 n.1 (S.D.N.Y. 1977)* .

(n8)Footnote 7. *Cf. Hoover v. Switlik Parachute Co., 663 F.2d 964, 967 (9th Cir. 1981)* .

(n9)Footnote 8. *See Redac Project 6426, Inc. v. Allstate Ins. Co., 402 F.2d 789, 790 (2d Cir. 1968)* .

(n10)Footnote 9. *See Federal Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 558 (5th Cir. 1987)* .

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CHAPTER 7 Injunctions
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1-7 Federal Litigation Guide § 7.33

§ 7.33 Hearing on Motion for Preliminary Injunctionn*

[1] Hearing Required If Essential Facts in Dispute

A hearing on a motion for a preliminary injunction is required if there is a dispute as to essential facts. n1 No hearing is required when the issues are primarily questions of law. n2

[2] Adverse Party May Waive Preliminary Injunction Hearing

A party against whom an injunction is sought will be found to have waived its right to a hearing where that party was demonstrably "content to rest" on affidavits submitted to the court. n3

[3] Conduct of Hearing on Motion for Preliminary Injunction

If the court sets a hearing on the motion for preliminary injunctive relief [*see* [1], [2], *above*], the opposing party must be afforded an opportunity to cross-examine the moving party's witnesses, and to present evidence. n4

[4] Consolidating Hearing on Motion for Preliminary Injunction With Trial

The court may order the trial on the merits to be advanced and consolidated with the preliminary injunction hearing. The court may make this determination before or after the commencement of the preliminary injunction hearing, but generally will require that the parties have clear notice that a consolidated hearing will be held. n5

Consolidation is discretionary, and the trial judge may order advancement and consolidation either on motion of a party, stipulation by all parties, or sua sponte. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCriminal Law & ProcedurePreliminary ProceedingsPreliminary HearingsWaiver

FOOTNOTES:

(n1)Footnote *. *See* Moore's Federal Practice, *§ 65.21* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Cobell v. Norton, 391 F.3d 251, 261 (D.C. Cir. 2004)* ; *Rosario-Urdaz v. Rivera-Hernandez, 350 F.3d 219, 222-224 (1st Cir. 2003)* ; *Feld v. Zale Corp., 62 F.3d 746, 763-766 (5th Cir. 1995)* .

(n3)Footnote 2. *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp., 511 F.3d 535, 552 (6th Cir. 2007)* .

(n4)Footnote 3. *Fengler v. Numismatic Americana, Inc., 832 F. 2d 745, 748 (2d Cir. 1987)* ; *see also International Molders' & Allied Workers' Local U. v. Nelson, 799 F.2d 547, 555 (9th Cir. 1986)* .

(n5)Footnote 4. *See Visual Sciences, Inc. v. Integrated Communications, Inc., 660 F. 2d 56, 58 (2d Cir. 1981)* .

(n6)Footnote 5. *See Fed. R. Civ. P. 65(a)(2)*; *Able v. United States, 44 F.3d 128, 132 (2d Cir. 1995)* , *vacated on other grounds*, *88 F.3d 1280 (2d Cir. 1996)* ; *K-Mart Corp. v. Davis, 756 F. Supp. 62, 66 (D. P.R. 1991)* .

(n7)Footnote 6. *See Cronin v. United States Dep't of Agriculture, 919 F.2d 439, 445 (7th Cir. 1990)* ; *John v. Louisiana, 757 F.2d 698, 704 (5th Cir. 1985)* ; *Glacier Park Found. v. Watt, 663 F.2d 882 886 (9th Cir. 1980)* .

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CHAPTER 7 Injunctions
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1-7 Federal Litigation Guide § 7.34

§ 7.34 Requirements of Order Granting or Denying Preliminary Injunctionn*

[1] Form of Injunction Order

Rule 65(d) governs the form and scope of injunction and restraining orders. n1

For discussion of those requirements, *see §§ 7.70 -7.73*.

[2] Security Must Be Posted by Applicant

Every preliminary injunction must require the applicant to post security to be used to compensate the enjoined party for the costs and damages resulting from wrongful enjoinment. The amount of the security, generally in the form of a bond or undertaking, is determined by the court. n2 Nevertheless, the movant should supply the factual predicate for the dollar amount of the security it proposes.

For discussion of security requirements, including exceptions to the general rule requiring security, *see §§ 7.73-7.74*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsElementsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions

FOOTNOTES:
(n1)Footnote *. *See* Moore's Federal Practice, *§§ 65.60, 65.61* (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 65(d).*

(n3)Footnote 2. *Fed. R. Civ. P. 65(c)*; *see Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 910 F.2d 1049, 1056 (2d Cir. 1990)* .

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1-7 Federal Litigation Guide § 7.35

§ 7.35 Appealing Grant or Denial of Preliminary Injunctionn*

[1] Appealability of Preliminary Injunction Order

An order granting or denying a preliminary injunction is immediately appealable. n1

[2] Standard of Appellate Review

As a general rule, a district court's grant or denial of a preliminary injunction will not be disturbed absent an abuse of its discretion. n2 However, if the district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, that ruling may be reviewed de novo on interlocutory appeal. n3

De novo review may be appropriate if the district court made its decision without a hearing, and failed to set forth those portions of the record that it thought obviated the necessity of such a hearing. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsStandards of ReviewDe Novo Review

FOOTNOTES:
(n1)Footnote *. *See* Moore's Federal Practice, *§ 65.24* (Matthew Bender 3d ed.).

(n2)Footnote 1. *28 U.S.C. § 1292(a)(1).*

(n3)Footnote 2. *See Ashcroft v. ACLU, 542 U.S. 656, 664-666 124 S. Ct. 2783, 159 L. Ed. 2d 690, (2004)* ; *Shire US Inc. v. Barr Labs. Inc., 329 F.3d 348, 352 (3d Cir. 2003)* .

(n4)Footnote 3. *See Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 755-757, 106 S. Ct. 2169, 90 L. Ed. 2d 779 (1986)* .

(n5)Footnote 4. *See Fireman's Fund Ins. Co. v. Leslie & Elliott Co., 867 F.2d 150, 151 (2d Cir. 1989)* .

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CHAPTER 7 Injunctions
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1-7 Federal Litigation Guide §§ 7.36. through 7.39

[Reserved]

§§ 7.36.[Reserved]

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CHAPTER 7 Injunctions
B. Seeking Injunctive Relief
4. Seeking Temporary Restraining Order

1-7 Federal Litigation Guide § 7.40

§ 7.40 Temporary Restraining Order Preserves Status Quo Until Hearing on Preliminary Injunctionn*

A temporary restraining order (TRO) is a short term device used to restrain the actions of a party until the court holds a hearing to determine whether to issue a preliminary injunction. n1

A TRO is generally granted only in the most urgent of cases where irreparable harm appears imminent, and the court concludes that there is insufficient time to conduct a hearing to consider a preliminary injunction. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

FOOTNOTES:
(n1)Footnote *. *See* Moore's Federal Practice, *§ 65.30* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Garcia v. Yonkers Sch. Dist., 561 F.3d 97, 106 (2d Cir. 2009)* .

(n3)Footnote 2. *See United States v. United Mine Workers, 330 U.S. 258, 293, 67 S. Ct. 677, 91 L. Ed. 884 (1947)* .

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CHAPTER 7 Injunctions
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1-7 Federal Litigation Guide § 7.41

§ 7.41 Comparing Temporary Restraining Orders and Preliminary Injunctionsn*

A temporary restraining order is an extraordinary remedy that differs from a preliminary injunction in terms of:

- **Procedural requirements.** A temporary restraining order may be issued ex parte upon a showing of the need for immediate relief, while a preliminary injunction generally will not be issued without noticed motion. n1 However, most judges will not entertain an application for a TRO without notice, or a diligent attempt to provide notice.

- **Duration.** A temporary restraining order typically remains in effect until a noticed motion can be heard, while a preliminary injunction generally remains in effect until a final adjudication on the merits. n2 A TRO granted ex parte may not exceed 14 days in duration, although the TRO may be extended on consent, or for good cause [*see § 7.48*].

- **Appealability.** A temporary restraining order is not appealable, while a preliminary injunction order is appealable. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

FOOTNOTES:
(n1)Footnote *. *See* Moore's Federal Practice, *§ 65.31* (Matthew Bender 3d ed.).

(n2)Footnote 1. *See EEOC v. Steamship Clerks Union, Local 1066, 48 F.3d 594, 608 (1st Cir. 1995)* ; *Little Tor Auto Ctr. v. Exxon Co., USA, 822 F. Supp. 141, 143 (S.D.N.Y. 1993)* ; *see also § 7.43*.

(n3)Footnote 2. *See Warner Bros., Inc. v. Dae Rim Trading, Inc., 877 F.2d 1120, 1124-1125 (2d Cir. 1989)* ; *see also § 7.48*.

(n4)Footnote 3. *See Geneva Assurance Syndicate, Inc. v. Medical Emergency Servs. Assocs., 964 F.2d 599, 600 (7th Cir. 1992)* ; *SEC v. Unifund SAL, 910 F.2d 1028, 1034 (2d Cir.)* , *reh'g denied*, *917 F.2d 98 (1990)* .

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CHAPTER 7 Injunctions
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1-7 Federal Litigation Guide § 7.42

§ 7.42 Similar Factors for Temporary Restraining Order as for Preliminary Injunctionn*

The factors considered by the court in assessing whether to grant a request for atemporary restraining order are similar to the factors considered on a motion for a preliminary injunction. n1

Specifically, the moving party must demonstrate that irreparable harm will be suffered absent a TRO. n2

The moving party is also required to show a likelihood of success on the merits of the action. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

FOOTNOTES:
(n1)Footnote *. *See* Moore's Federal Practice, *§ 65.36* (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Towers Fin. Corp. v. Dun & Bradstreet, Inc., 803 F. Supp. 820, 822 (S.D.N.Y. 1992)* ; *National Football League Properties, Inc. v. Coniglio, 554 F. Supp. 1224, 1226 (D. D.C. 1983)* ; *see also § 7.42*.

(n3)Footnote 2. *See United States v. Jenkins, 974 F.2d 32, 35 (5th Cir. 1992)* , *cert. denied, 113 S. Ct. 1580 (1993)* ; *Merrill Lynch, Pierce, Fenner & Smith v. Bishop, 839 F. Supp. 68, 72-73 (D. Me. 1993)* .

(n4)Footnote 3. *See Merrill Lynch, Pierce, Fenner & Smith v. Bishop, 839 F. Supp. 68, 72 (D. Me. 1993)* ; *see also Natural Resources Defense Council v. EPA, 806 F. Supp. 275, 277 (D. D.C. 1992)* .

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CHAPTER 7 Injunctions
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1-7 Federal Litigation Guide § 7.43

§ 7.43 Providing Adequate Notice of Application for Temporary Restraining Ordern*

[1] Notice to Adverse Parties Generally Required

The party seeking a temporary restraining order generally must provide to the adverse party whatever notice of the application is feasible given the emergency. n1

For discussion of notice requirements for motions, *see* Ch. 2, *The Mechanics of Motion Practice*. Local district court rules, as well as the rules of the assigned judge, should also be consulted for notice requirements.

[2] Obtaining Temporary Restraining Order Without Notice

A temporary restraining order may be granted ex parte in urgent circumstances if both of the following requirements are met: n2

- It clearly appears from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or the adverse party's attorney can be heard in opposition

- The applicant's attorney certifies to the court in writing the efforts, if any, that have been made to give notice, and the reasons supporting the claim that notice should not be required

A TRO may be granted ex parte if advance notice of the application would itself be likely to trigger irreparable injury. n3

Attorneys have ethical obligations regarding ex parte communications with judges. If ex parte action is not clearly required under the circumstances, notice is an ethical obligation. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary

InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersGovernmentsCourtsRule Application & Interpretation

FOOTNOTES:

(n1)Footnote *. *See* Moore's Federal Practice, *§§ 65.32*-65.34 (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Fed. R. Civ. P. 65(b).*

(n3)Footnote 2. *Fed. R. Civ. P. 65(b).*

(n4)Footnote 3. *See Little Tor Auto Center v. Exxon Co. USA, 822 F. Supp. 141, 143 (S.D.N.Y. 1993)* .

(n5)Footnote 4. *See* A.B.A. Code of Judicial Conduct Canon 3, § A(4); Model Code of Professional Responsibility EC 7-35 (1980).

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CHAPTER 7 Injunctions
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1-7 Federal Litigation Guide § 7.44

§ 7.44 Preparing Papers in Support of Application for Temporary Restraining Ordern*

[1] Same Papers Typically Support Application for TRO and Motion for Preliminary Injunction

An application for a temporary restraining order typically is filed contemporaneously with the motion for a preliminary injunction. In fact, in most cases, the request for a temporary restraining order is made in the motion or order show cause for preliminary injunctive relief. The same papers typically support both applications.

For discussion of preparing papers in support of the motion for preliminary injunctive relief, *see § 7.32*.

[2] Certificate of Applicant's Attorney If TRO Is Sought Ex Parte

If a temporary restraining order is sought ex parte [*see § 7.43[2]*], the applicant's attorney must certify to the court in writing the efforts, if any, that have been made to give notice, and the reasons supporting the claim that notice should not be required. n1 The chances of procuring a TRO are diminished if the judge is not confident that the applicant has been diligent in providing adequate notice of the application.

Any time an attorney signs a paper and submits it to the court, the attorney is certifying that the paper is not being submitted for any improper purpose, the legal contentions are warranted by existing law, the arguments are not frivolous, and the factual contentions and denial of factual contentions are warranted by the evidence. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

FOOTNOTES:
(n1)Footnote *. *See* Moore's Federal Practice, *§ 65.33* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 65(b).*

(n3)Footnote 2. *Fed. R. Civ. P. 11(b).*

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CHAPTER 7 Injunctions
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1-7 Federal Litigation Guide § 7.45

§ 7.45 Expedited Argument on Motion for Preliminary Injunction If TRO Granted Ex Parten*

If a temporary restraining order is granted ex parte [*see § 7.43[2]*], the preliminary injunction motion must be set for argument or hearing at the earliest possible time. The argument or hearing on the preliminary injunction takes precedence over all matters, except older motions of the same character. n1

When the motion for a preliminary injunction comes on for argument or hearing, the party who obtained the TRO must proceed with the application for a preliminary injunction, or the court must dissolve the TRO, absent consent to an extension. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

FOOTNOTES:
(n1)Footnote *. *See* Moore's Federal Practice, *§ 65.39* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 65(b).*

(n3)Footnote 2. *Fed. R. Civ. P. 65(b)*; *Hudson v. Barr, 35 F.3d 970, 975-976 (6th Cir. 1993)* .

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CHAPTER 7 Injunctions
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1-7 Federal Litigation Guide § 7.46

§ 7.46 Content and Filing Requirements of Ex Parte Temporary Restraining Ordersn*

A temporary restraining order granted without notice must: n1

- Be indorsed with the date and hour of issuance
- Be filed immediately in the clerk's office
- Define the injury, and state why it is irreparable
- State why the order was granted without notice
- Expire within 14 days, unless extended on consent or for good cause

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsElementsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

FOOTNOTES:
(n1)Footnote *. *See* Moore's Federal Practice, *§ 65.37* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 65(b).*

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CHAPTER 7 Injunctions
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1-7 Federal Litigation Guide § 7.47

§ 7.47 Security Must Be Posted by Applicantn*

A temporary restraining order must require the applicant to post security, generally in the form of a bond. The security is used to compensate the enjoined party for the costs and damages resulting from wrongful enjoinment. The amount of the security is determined by the court. n1 Nevertheless, the movant should supply the factual predicate for the dollar amount of the security it proposes.

For discussion of security for injunctions, including exceptions to the general rule requiring security, *see §§ 7.73*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

FOOTNOTES:
(n1)Footnote *. *See* Moore's Federal Practice, *§§ 65.50-65.53* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 65(c)*; *see District 17 U.M.W.A. v. A&M Trucking, 991 F.2d 108, 110 (4th Cir. 1993)* ; *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 910 F.2d 1049, 1056 (2d Cir. 1990)* ; *Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 209-211 (3d Cir. 1990)* .

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CHAPTER 7 Injunctions
B. Seeking Injunctive Relief
4. Seeking Temporary Restraining Order

1-7 Federal Litigation Guide § 7.48

§ 7.48 Limited Duration of Temporary Restraining Order Issued Ex Parten*

[1] TRO Granted Ex Parte May Not Exceed 14 Days

A temporary restraining order granted ex parte may not exceed 14 days in duration, subject to an extension on consent or for good cause. n1

[2] Extension of TRO Granted Ex Parte

[2.--1] Extension for Good Cause

A temporary restraining order granted ex parte may be extended beyond its 14-day limit for good cause shown, for no longer than one additional period of not longer than 14 days. The reasons for the extension must be entered of record. n2

A showing of good cause for an extension might include the unavailability of a hearing date for the preliminary injunction motion within the 14-day period, the inability to serve adverse parties within the 14-day period, or the need for additional expedited discovery.

[2.--2] Extension on Consent

A temporary restraining order granted ex parte may be extended on consent of the enjoined party. n3 Frequently, the enjoined party will need additional time to prepare its defense, particularly if expedited discovery has been ordered.

[2.--3] Deadline for Requesting Extension

A request for extension of a temporary restraining order granted ex parte must be made prior to the expiration of the existing TRO. n4

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

FOOTNOTES:

(n1)Footnote *. *See* Moore's Federal Practice, *§ 65.38* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 65(b).*

(n3)Footnote 2. *Fed. R. Civ. P. 65(b).*

(n4)Footnote 3. *Fed. R. Civ. P. 65(b).*

(n5)Footnote 4. *See SEC v. Unifund Sal, 910 F.2d 1028, 1034-1035 (2d Cir.)* , reh'g denied, *917 F.2d 98 (1990)* .

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CHAPTER 7 Injunctions
B. Seeking Injunctive Relief
4. Seeking Temporary Restraining Order

1-7 Federal Litigation Guide § 7.49

§ 7.49 Grant or Denial of Temporary Restraining Order Not Appealablen*

An order granting or denying a temporary restraining order is generally not appealable. n1

However, if the court extends a temporary restraining order granted ex parte beyond 28 days from its entry date without the consent of the enjoined party [*see § 7.48*], the TRO becomes a preliminary injunction, and is immediately appealable. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersCivil ProcedureAppealsAppellate JurisdictionInterlocutory Orders

FOOTNOTES:
(n1)Footnote *. *See* Moore's Federal Practice, *§ 65.41* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Geneva Assurance v. Medical Emergency Servs., 964 F.2d 599, 600 (7th Cir. 1992)* ; *Hoh v. Pepsico, Inc., 491 F.2d 556, 560 (2d Cir. 1974)* .

(n3)Footnote 2. *See Sampson v. Murray, 415 U.S. 61, 86-88, 94 S. Ct. 937, 39 L. Ed. 2d 166 (1974)* ; *United States v. Crawford, 329 F.3d 131, 136-138 (2d Cir. 2003)* .

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CHAPTER 7 Injunctions
B. Seeking Injunctive Relief
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1-7 Federal Litigation Guide § 7.50

§ 7.50 Dissolving or Modifying Temporary Restraining Ordern*

[1] Motion on Two Days' Notice

A party affected by a temporary restraining order may move for dissolution or modification of the TRO on two days' notice, or such shorter notice as the court may prescribe. The court must hear and determine the motion expeditiously. n1

A motion for dissolution or modification of the TRO may be a wise tactical maneuver, as the defendant will be provided with an early opportunity to present facts to the court.

For discussion of motion practice in the federal courts, *see* Ch. 1, *The Mechanics of Motion Practice*. Local district court rules, as well as the rules and procedures of the assigned judge, should also be consulted for motion requirements and procedures.

[2] Factors Considered on Motion

In assessing whether to dissolve or modify a temporary restraining order, the court must consider whether the original purpose of the TRO would be facilitated. n2

A dissolution or modification may be granted if the restrained party demonstrates that the circumstances of the case have changed, or that it would be severely injured by the temporary restraining order. n3

Likewise, the court may modify or dissolve a TRO if the underlying law supporting the original TRO has been amended or repealed. n4

Of course, if the defendant can demonstrate that the TRO was improvidently granted on the facts, the TRO should be dissolved or modified.

[3] Order Dissolving or Modifying Injunction Immediately Appealable

An order dissolving or modifying a preliminary injunction is immediately appealable. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

FOOTNOTES:
(n1)Footnote *. *See* Moore's Federal Practice, *§ 65.40* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 65(b)(4).*

(n3)Footnote 2. *See Patterson v. Newspaper & Mail Deliverers' Union, 13 F.3d 33, 38-39 (2d Cir. 1993)* ; *Consumer Advisory Bd. v. Glover, 989 F.2d 65, 67 (1st Cir. 1993)* ; *American Can Co. v. Mansukhani, 742 F.2d 314, 322-323 (7th Cir. 1984)* .

(n4)Footnote 3. *See New York State Ass'n for Retarded Children v. Carey, 706 F.2d 956, 967 (2d Cir.)* , *cert. denied*, *464 U.S. 915 (1983)* ; *but see Transgo, Inc. v. AJAC Transp. Parts Corp., 911 F.2d 363, 365 (9th Cir. 1990)* .

(n5)Footnote 4. *See Protectoseal Co. v. Barancik, 23 F.3d 1184, 1187 (7th Cir. 1994)* ; *United States v. Snepp, 897 F.2d 138, 141 (4th Cir.)* , cert. denied, *498 U.S. 816 (1990)* ; *Wyatt v. King, 803 F. Supp. 377, 384-385 (M.D. Ala. 1992)* .

(n6)Footnote 5. *28 U.S.C. § 1292(a)(1).*

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CHAPTER 7 Injunctions
B. Seeking Injunctive Relief
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1-7 Federal Litigation Guide §§ 7.51. through 7.59

[Reserved]

§§ 7.51.[Reserved]

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CHAPTER 7 Injunctions
C. Opposing Application for Injunctive Relief

1-7 Federal Litigation Guide § 7.60

§ 7.60 Considering Equitable Defensesn*

[1] Traditional Equitable Defenses May Be Raised

Traditional equitable defenses [*see* [2], [3], *below*] may be raised in opposition to an application for provisional or permanent injunctive relief. n1

[2] Unclean Hands

The doctrine of unclean hands may be raised as a defense to an application for provisional or permanent injunctive relief. An applicant has unclean hands if he or she engaged in acts of bad faith directly related to the issues in the underlying action. n2

[3] Laches, Estoppel, and Waiver

Laches, estoppel, and waiver are available as defenses to oppose the applicant's unreasonable delay in applying for provisional or permanent injunctive relief. n3

If the movant has unreasonably delayed its application for injunctive relief, the opposing party should highlight any change in its position during the delay.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsMandatory InjunctionsCivil ProcedureRemediesInjunctionsPermanent InjunctionsCivil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions

FOOTNOTES:
(n1)Footnote *. *See* Moore's Federal Practice, *§ 65.06[5]* (Matthew Bender 3d ed.).

(n2)Footnote 1. *See*, e.g., *Members of Bridgeport Hous. Auth. Police Force v. City of Bridgeport, 646 F.2d 55, 63*

(2d Cir.) , cert. denied, *454 U.S. 897 (1981)* .

(n3)Footnote 2. *See Jeffries v. Harleston, 828 F. Supp. 1066, 1096 (S.D.N.Y. 1993)* , aff'd in part, vacated in part on other grounds, *21 F.3d 1238 (2d Cir.)* , *vacated on other grounds*, *513 U.S. 996 (1994)* ; *Houston Oilers v. Neely, 361 F.2d 36, 42 (10th Cir. 1966)* .

(n4)Footnote 3. *See*, e.g., *Citizens & Landowners Against the Miles City/New Underwood Powerline v. Secretary, U.S. Dept. of Energy, 683 F.2d 1171, 1176 (8th Cir. 1982)* ; *Kay v. Austin, 621 F.2d 809, 813 (6th Cir. 1980)* ; *Jeffries v. Harleston, 828 F. Supp. 1066, 1095 (S.D.N.Y. 1993)* , *aff'd in part, vacated in part on other grounds*, *21 F.3d 1238 (2d Cir.)* , *vacated on other grounds*, *513 U.S. 996 (1994)* .

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CHAPTER 7 Injunctions
C. Opposing Application for Injunctive Relief

1-7 Federal Litigation Guide § 7.61

§ 7.61 Failure to Exhaust Administrative Remediesn*

Failure to exhaust administrative remedies required by statute may be raised as a defense to an application for provisional or permanent injunctive relief. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityExhaustion of RemediesGeneral OverviewCivil ProcedureJusticiabilityExhaustion of RemediesAdministrative RemediesCivil ProcedureJusticiabilityExhaustion of RemediesFailure to ExhaustCivil ProcedureRemediesInjunctionsGeneral Overview

FOOTNOTES:
(n1)Footnote *. *See* Moore's Federal Practice, *§ 65.06[4]* (Matthew Bender 3d ed.).

(n2)Footnote 1. *See*, e.g., *Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 24, 94 S. Ct. 1028, 39 L. Ed. 2d 123 (1974)* ; *Rockland Physician Assocs., P.C. v. Grodin, 616 F. Supp. 958, 962 (S.D.N.Y. 1985)* .

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CHAPTER 7 Injunctions
C. Opposing Application for Injunctive Relief

1-7 Federal Litigation Guide § 7.62

§ 7.62 Adequate Remedy at Lawn*

Availability of an adequate remedy at law may be raised as a defense to an application for provisional or permanent injunctive relief. n1 Frequently, money damages will compensate for the harm claimed.

FOOTNOTES:
(n1)Footnote *. *See* Moore's Federal Practice, *§ 65.06[1]* (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Northern Cal. Power Agency v. Grace Geothermal Corp., 469 U.S. 1306, 1306, 105 S. Ct. 459, 83 L. Ed. 2d 388 (1984)* .

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CHAPTER 7 Injunctions
C. Opposing Application for Injunctive Relief

1-7 Federal Litigation Guide § 7.63

§ 7.63 Legal Defenses

Legal defenses based on the adequacy of the plaintiff's complaint, the papers supporting the motion, or the court's jurisdiction may be raised in opposition to an application for provisional or permanent injunctive relief. n1

FOOTNOTES:
(n1)Footnote 1. *See*, e.g., *Cook v. Peter Kiewit Sons Co., 775 F.2d 1030, 1034 (9th Cir. 1985)* , *cert. denied*, *476 U.S. 1183 (1986)* ; *Visual Sciences, Inc. v. Integrated Communications, Inc., 660 F. 2d 56, 58 (2d Cir. 1981)* .

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CHAPTER 7 Injunctions
C. Opposing Application for Injunctive Relief

1-7 Federal Litigation Guide §§ 7.64. through 7.69

[Reserved]

§§ 7.64.[Reserved]

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CHAPTER 7 Injunctions
D. Drafting Injunction Order; Security Requirements

1-7 Federal Litigation Guide § 7.70

§ 7.70 Importance of Local District Court Rules and Rules of Assigned Judge

The practitioner should consult the local district court rules, as well as the rules of the assigned judge, with respect to submitting proposed orders. Some districts require the moving party to submit a proposed order together with the motion, and other districts require submission of a proposed order after the motion has been decided. Still other districts do not welcome, or may even prohibit, submission of proposed orders altogether.

For general discussion of proposed orders in the federal courts, *see* Ch. 1, *The Mechanics of Motion Practice*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsMandatory InjunctionsCivil ProcedureRemediesInjunctionsPermanent InjunctionsCivil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions

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CHAPTER 7 Injunctions
D. Drafting Injunction Order; Security Requirements

1-7 Federal Litigation Guide § 7.71

§ 7.71 Requirements of Injunction Ordern*

[1] Rule 65(d) Requirements

An injunction or temporary restraining order must: n1

- Set forth the reasons for its issuance [*see* [2], *below*]
- Be specific in its terms [*see* [3], *below*]
- Describe in reasonable detail the acts to be restrained [*see* [4], *below*]

Ambiguities in the order generally will be resolved in favor of the enjoined party. n2

[2] Findings of Fact and Conclusions of Law

Every order granting an injunction, and every temporary restraining order, must set forth the findings of fact and conclusions of law that are the basis of the court's decision. n3

[3] Injunction Order Must Be Specific in Terms

Every injunction and temporary restraining order must be specific in its terms. n4

The specificity requirement serves to prevent uncertainty and confusion in complying with the order, and to facilitate informed appellate review. n5

[4] Description of Acts Prohibited or Required

Every injunction and temporary restraining order must describe in reasonable detail, and not by reference to the complaint or other document, the act or acts restrained. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsMandatory InjunctionsCivil ProcedureRemediesInjunctionsPermanent InjunctionsCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

FOOTNOTES:
(n1)Footnote *. *See* Moore's Federal Practice, *§ 65.60* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 65(d)(1).*

(n3)Footnote 2. *New York Tel. Co. v. Communications Workers of America, AFL-CIO, 445 F. 2d 39, 48 (2d Cir. 1971) .*

(n4)Footnote 3. *See Fed. R. Civ. P. 52(a)(2)*; *Fed. R. Civ. P. 65(d)(1)(A)*; e360 *Insight v. Spamhaus Project, 500 F.3d 594, 604 (7th Cir. 2007) .*

(n5)Footnote 4. *Fed. R. Civ. P. 65(d)(1)(B)*; *see JTH Tax, Inc. v. H & R Block E. Tax Servs., 359 F.3d 699, 706 (4th Cir. 2004) .*

(n6)Footnote 5. *Schmidt v. Lessard, 414 U.S. 473, 475-476, 94 S. Ct. 713, 38 L. Ed. 2d 661 (1974) .*

(n7)Footnote 6. *Fed. R. Civ. P. 65(d)(1)(C)*; *see Schmidt v. Lessard, 414 U.S. 473, 475-476, 94 S. Ct. 713, 38 L. Ed. 2d 661 (1974) .*

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CHAPTER 7 Injunctions
D. Drafting Injunction Order; Security Requirements

1-7 Federal Litigation Guide § 7.72

§ 7.72 Persons Bound by Injunction or Restraining Ordern1

An injunction or restraining order is binding upon the parties to the action. Additionally, an injunction or restraining order is binding upon the parties' officers, agents, servants, employees, and attorneys, and upon persons in active concert or participation with the parties who receive actual notice of the order. Notice may be given by personal service or otherwise. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsMandatory InjunctionsCivil ProcedureRemediesInjunctionsPermanent InjunctionsCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

FOOTNOTES:
(n1)Footnote 1. *See* Moore's Federal Practice, *§ 65.61* (Matthew Bender 3d ed.).

(n2)Footnote 2. *Fed. R. Civ. P. 65(d)(2).*

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CHAPTER 7 Injunctions
D. Drafting Injunction Order; Security Requirements

1-7 Federal Litigation Guide § 7.73

§ 7.73 Security Requirementsn*

[1] Security Required for Temporary Restraining Orders and Preliminary Injunctions

Temporary restraining orders and preliminary injunctions may be not granted unless the applicant posts security, generally in the form of a bond. The security is used to compensate the enjoined party for the costs and damages resulting from a wrongful injunction. n1

The amount of the security is determined by the court. n2 Nevertheless, the movant should supply the factual predicate for the dollar amount of the security it proposes.

[2] Exceptions to Security Requirement

Security for a TRO or preliminary injunction [*see* [1], *above*] will not be required of the United States, or any officer or agency of the United States. n3

In addition, statutes may exempt particular actions from the requirement of injunction security. n4 However, Rule 65(c) does not facially recognize these exemptions.

[3] Court Has Discretion to Dispense With Security in Limited Circumstances

A district court issuing an injunction or a restraining order has the discretion to dispense with the security requirement under limited circumstances, including the following:

- The security requirement might discourage the initiation of a suit to enforce important federal rights or public interests n5
- There is no risk of monetary loss to the enjoined party n6
- The movant has "considerable assets" to pay damages n7
- A continuing relationship of the parties affords the enjoined party anopportunity to recover damages at a later time n8

[4] Importance of Value of Security

The amount of the security required to be posted generally is the maximum amount that may be recovered by a wrongfully enjoined party in the absence of proof that the movant sought to enjoin with malicious intent and without probable cause. n9

If it becomes clear during the hearing on the motion for injunctive relief that the court intends to grant the injunction, the respondent should shift its focus to obtaining the largest possible security to protect against damages resulting from wrongful enjoinment. Tactically, justifying a large amount of security may bear on whether the injunction is even granted.

If security for the injunction has not been posted, a wrongfully enjoined party generally will not be able to recover damages. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPermanent InjunctionsCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

FOOTNOTES:
(n1)Footnote *. *See* Moore's Federal Practice, *§§ 65.50-65.53* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Fed. R. Civ. P. 65(c)*; *see Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc., 16 F.3d 1032, 1036 (9th Cir. 1994)* ; *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 910 F.2d 1049, 1056 (2d Cir. 1990)* ; *Continuum Co. v. Incepts, Inc., 873 F.2d 801 803 (5th Cir. 1989)* .

(n3)Footnote 2. *Fed. R. Civ. P. 65(c)*; *Save Our Sonoran, Inc. v. Flowers, 408 F.3d 1113, 1126 (9th Cir. 2005)* .

(n4)Footnote 3. *Fed. R. Civ. P. 65(c)*.

(n5)Footnote 4. *See People ex rel. Van de Kamp v. Tahoe Regional Planning Agency, 766 F.2d 1319, 1325-1326 (9th Cir. 1985)* ; *Reinders Bros., Inc. v. Rain Bird E. Sales Corp., 627 F.2d 44, 54 (7th Cir. 1980)* .

(n6)Footnote 5. *See People ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency, 766 F.2d 1319, 1325-1326 (9th Cir. 1985)* ; *Crowley v. Local No. 82, 679 F.2d 978, 1000-1001 (1st Cir. 1982)* , *rev'd on other grounds*, *467 U.S. 526 (1984)* .

(n7)Footnote 6. *Doctor's Assocs., Inc. v. Stuart, 85 F.3d 975, 985 (2d Cir. 1996)* ; Coquina Oil Corp. v. Transwestern Pipeline co., *825 F.2d 1461, 1462 (10th Cir. 1987)* .

(n8)Footnote 7. *See Continental Oil Co. v. Frontier Ref. Co., 338 F.2d 780, 782-783 (10th Cir. 1964)* .

(n9)Footnote 8. *See United States v. Bedford Assocs., 618 F.2d 904, 916-917 n.23 (2d Cir. 1980)* , *cert. denied*, *456 U.S. 914 (1982)* .

(n10)Footnote 9. *See Blumenthal v. Merrill Lynch, 910 F.2d 1049, 1056 (2d Cir. 1990)* ; *Continuum Co. v. Incepts, Inc., 873 F.2d 801 803 (5th Cir. 1989)* ; *Lucsik v. Board of Educ., 621 F.2d 841, 842 (6th Cir. 1980)* .

(n11)Footnote 10. *See W.R. Grace & Co. v. Local Union 759, 461 U.S. 757, 770 n.14, 103 S. Ct. 2177, 76 L. Ed. 2d 298 (1983)* .

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CHAPTER 7 Injunctions
D. Drafting Injunction Order; Security Requirements

1-7 Federal Litigation Guide § 7.74

§ 7.74 Increasing or Decreasing Amount of Securityn*

A party may move the court to increase or decrease the amount of the security for the injunction as long as the restraining order or injunction is in effect. n1

FOOTNOTES:
(n1)Footnote *. *See* Moore's Federal Practice, *§ 65.50[1]* (Matthew Bender 3d ed.).

(n2)Footnote 1. *See Continuum Co. v. Incepts, Inc., 873 F.2d 801, 804 (5th Cir. 1989)* .

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CHAPTER 7 Injunctions
D. Drafting Injunction Order; Security Requirements

1-7 Federal Litigation Guide § 7.75

§ 7.75 Collecting Security When Final Judgment Favors Wrongfully Enjoined Partyn*

Collection on injunction security may be had when a final judgment favors a wrongfully enjoined party that suffered damages as a result of the injunction or restraining order. n1

Rule 65.1 permits enforcement of a surety's liability on motion, without the necessity of an independent action. n2 Federal law determines what costs and damages are recoverable under an injunction bond. n3 Attorney's fees are generally not recoverable under an injunction bond. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesLiabilityCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPermanent InjunctionsCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

FOOTNOTES:
(n1)Footnote *. *See* Moore's Federal Practice, *§ 65.53* (Matthew Bender 3d ed.).

(n2)Footnote 1. *Polymer Tech. Corp. v. Mimran, 975 F.2d 58, 65 (2d Cir. 1992)* .

(n3)Footnote 2. *See Fed. R. Civ. P. 65.1.*

(n4)Footnote 3. *Fireman's Fund Ins. Co. v. S.E.K. Constr. Co., 436 F.2d 1345, 1351 (10th Cir. 1971)* .

(n5)Footnote 4. *See Matek v. Murat, 862 F.2d 720, 734 (9th Cir. 1988)* .

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CHAPTER 7 Injunctions
D. Drafting Injunction Order; Security Requirements

1-7 Federal Litigation Guide §§ 7.76. through 7.79

[Reserved]

§§ 7.76.[Reserved]

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CHAPTER 7 Injunctions
E. Enforcing Injunction

1-7 Federal Litigation Guide § 7.80

§ 7.80 Court May Utilize Power of Contemptn*

A court may enforce an injunction or temporary restraining order through civil or criminal contempt. n1

Civil contempt is remedial in nature and designed to coerce obedience and to compensate the complainant for losses sustained. Criminal contempt is designed to vindicate the court's authority. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPermanent InjunctionsCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersCivil ProcedureSanctionsContemptGeneral OverviewCivil ProcedureSanctionsContemptCivil ContemptCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesContemptGeneral Overview

FOOTNOTES:
(n1)Footnote *. *See* Moore's Federal Practice, *§ 65.80* (Matthew Bender 3d ed.).

(n2)Footnote 1. *See United States v. United Mine Workers, 330 U.S. 258, 293-294, 67 S. Ct. 677, 91 L. Ed. 884 (1947)* .

(n3)Footnote 2. *See International Union, United Mine Workers v. Bagwell, 512 U.S. 821, 824-826, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994)* .

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CHAPTER 7 Injunctions
E. Enforcing Injunction

1-7 Federal Litigation Guide § 7.81

§ 7.81 Effect of Reversal of Injunctionn*

A prosecution of civil contempt collapses if an injunction is reversed. A prosecution of criminal contempt is not affected by a reversal of the underlying order or by the mootness of the underlying action. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPermanent InjunctionsCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersCivil ProcedureSanctionsContemptGeneral Overview

FOOTNOTES:
(n1)Footnote *. *See* Moore's Federal Practice, *§ 65.80* (Matthew Bender 3d ed.).

(n2)Footnote 1. *See United States v. United Mine Workers, 330 U.S. 258, 294-295, 67 S. Ct. 677, 91 L. Ed. 884 (1947)* .

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CHAPTER 7 Injunctions
E. Enforcing Injunction

1-7 Federal Litigation Guide §§ 7.82. through 7.89

[Reserved]

§§ 7.82.[Reserved]

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CHAPTER 7 Injunctions
F. Forms 2

1-7 Federal Litigation Guide § 7.90

§ 7.90 FORM: Emergency Motion for Temporary Restraining Order

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

BOSTON CLOTHING, LTD.,	)	
Plaintiff,	)	
v.	)	Civil No. .....
PHOENIX, INC., CREST, INC., SAM JONES and MARCY DAY,	)	
Defendants.	)	
	)	

EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

BOSTON CLOTHING, LTD. ("Boston"), by its attorneys, hereby moves this Court for entry of a temporary restraining order against defendants Phoenix, Inc. ("Phoenix"), Crest, Inc. ("Crest"), Sam Jones and Marcy Day (collectively, the "Defendants"), and in support thereof states as follows:

1. On ....., defendants Phoenix, Inc. and Crest, Inc. entered into a letter agreement with Boston (the "Agreement") whereby Boston sold and assigned to Phoenix and Crest its retail clothing business and certain assets, including without limitation Boston's clothing inventory (the "Inventory"), equipment, furnishings, fixtures and leasehold interests in Boston's Dayton store (the "Dayton Store") and Boston's Portland Store (collectively the "Assets").

2. Pursuant to Section 3(b) of the Agreement, Phoenix and Crest were to pay Boston on or before ....., thirty percent (30%) of the Base Purchase Price as defined in the Agreement ($150,000).

3. In violation of Section 3(b) of the Agreement, Phoenix and Crest failed to pay to Boston on or before ....., the second installment of the Base Purchase Price.

4. Pursuant to Section 11 of the Agreement and in order to secure the payment of their obligations under the Agreement, Phoenix and Crest granted to Boston a security interest in the Assets. Boston properly perfected its security interest in the Assets as evidenced by the copy of UCC-1 Financing Statement which is attached hereto.

5. Also pursuant to Section 11 of the Agreement, Defendants agreed that, in the event they failed to make any payment due or contemplated under the Agreement, Defendants would permit Boston to have access to the Dayton Store for the purpose of protecting and enforcing Boston's rights as a secured party in and to the Assets.

6. Since ....., Defendants have conducted a "going out of business sale" at the Stores. Upon failing to make the second payment contemplated by the Agreement, Defendants dramatically reduced the prices of merchandise in the Stores in an apparent attempt to liquidate rapidly the remaining Inventory before Boston could seek to enforce its security interest. In addition Defendants have distributed a 500,000-piece mailer advertising the sale of men's suits for the sum of $99.00 and $109.00, which at wholesale cost Boston in excess of $125.00 per item.

7. On the basis of previous payments made to Boston by Defendants, Boston estimates that Defendants are selling approximately $10,000 to $15,000 worth of merchandise per day at the Stores. Boston further estimates that Defendants will sell at an absolute minimum $50,000 worth of merchandise over the coming weekend.

8. Subsequent to execution of the Agreement, Defendants have transferred a considerable portion of the remaining Inventory out of the Stores into Defendants' other business locations. Within the last several weeks, Defendants have closed the bank account into which sales proceeds from the Portland Store had been deposited.

9. Defendants' continued sale of the Inventory will transform Boston from a secured to an unsecured creditor of Phoenix and Crest. Moreover, Defendants' recent actions, such as reducing prices, transferring the Inventory out of the Stores and closing the Portland Store bank account, will create tracing problems of enormous magnitude.

10. Boston has no adequate remedy at law, because the failure of Defendants to make the payments required by the Agreement raises serious doubts as to the ability of Phoenix and Crest to satisfy any judgment which is entered by this Court.

11. Boston will be irreparably harmed if Phoenix and Crest are not enjoined from further dissipating Boston's security.

12. Phoenix and Crest have continued to utilize Boston's corporate name in the conduct of a going-out-of-business sale.

13. Defendants' breach of the Agreement and repudiation of any future obligations under the Agreement renders it virtually certain that Boston will be forced to reoccupy the Dayton Store and operate its business in order to comply with the terms of the Dayton Lease on which Boston remains liable by virtue of a guarantee agreement with the Dayton Store's landlord.

14. Defendants' conduct of the going-out-of-business sale under Boston's name has destroyed much of the good will which Boston had established with its clientele and has dramatically reduced the going concern value of Boston's business. The damage to Boston's good will will be exacerbated with each additional day that Defendants are permitted to misuse Boston's name.

15. Boston has no adequate remedy at law, because the continued utilization of Boston's corporate name by Defendants in the context of the going-out-of-business sale and in a manner which is destructive of Boston's client base is not compensable by monetary damages.

16. Boston will be irreparably harmed if Defendants are not enjoined from their continuing use of Boston's corporate

name.

WHEREFORE, Boston prays that this Court enter an order:

A. Temporarily enjoining Defendants from selling any additional items of Inventory;

B. Temporarily enjoining Defendants from continuing to utilize Boston's corporate name;

C. Directing Defendants to segregate the Inventory from merchandise belonging to Phoenix, Inc. and Crest, Inc.;

D. Directing Defendants to transfer to Boston the remaining Inventory; and

E. Granting such other and further relief as this Court deems equitable and just.

Respectfully submitted,

BOSTON CLOTHING, LTD.By: .....

2 Both of the following forms were provided courtesy of Robert L. Byman of Jenner & Block, Chicago, Illinois.

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CHAPTER 7 Injunctions
F. Forms 2

1-7 Federal Litigation Guide § 7.91

§ 7.91 FORM: Complaint for Injunctive Relief

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

BOSTON CLOTHING, LTD.,	)	
Plaintiff,	)	
v.	)	Civil No. .....
PHOENIX, INC., CREST, INC., SAM JONES and MARCY DAY,	)	
Defendants.	)	
	)	

COMPLAINT FOR INJUNCTION AND OTHER RELIEF

BOSTON CLOTHING, LTD. ("Boston"), by its attorneys, hereby complains against defendants Phoenix, Inc. ("Phoenix"), Crest, Inc. ("Crest"), Sam Jones and Marcy Day (collectively, the "Defendants") as follows:

JURISDICTION AND VENUE

1. This is an action for an injunction and for replevin, forcible entry and detainer, fraud and breach of contract. Jurisdiction is based upon diversity of citizenship pursuant to *28 U.S.C. § 1332* and upon principles of pendent jurisdiction. The matter in controversy exceeds $75,000.00, exclusive of interest and costs.

2. Defendants Phoenix, Crest, Jones and Day all reside in the Northern District of Illinois. In addition, defendants Phoenix and Crest, each a corporation, are subject to personal jurisdiction in the Northern District of Illinois. In addition, upon information and belief, certain of the acts and events complained of in this Complaint occurred within the Northern District of Illinois. Venue is proper in this Court pursuant to *28 U.S.C. § 1391(a)* and *(c)*.

THE PARTIES

3. Boston is a corporation organized and existing under the laws of the State of Massachusetts with its principal place of business at ..... Avenue, Boston, Massachusetts. Until ....., Boston conducted a retail clothing business in Illinois at ..... Street, Dayton, Illinois (the "Dayton Store") and at ..... Mall, Portland, Illinois (the "Portland Store") (collectively, the "Stores").

4. Defendant Phoenix is a corporation organized and existing under the laws of the State of Illinois with its sole office and principal place of business at ..... Street, Chicago, Illinois.

5. Defendant Crest is a corporation organized and existing under the laws of the State of Illinois with its sole office and principal place of business at ..... Street, Chicago, Illinois.

6. Defendant Sam Jones is a resident of the Northern District of Illinois and is the Secretary of Phoenix and the President of Crest.

7. Defendant Marcy Day is a resident of the Northern District of Illinois and is the President of Phoenix and the Secretary of Crest.

FACTUAL ALLEGATIONS

8. On ....., defendants Phoenix and Crest entered into a letter agreement with Boston (the "Agreement") whereby Boston sold and assigned to Phoenix and Crest its retail clothing business and certain assets, including without limitation Plaintiff's clothing inventory (the "Inventory"), equipment, furnishings, fixtures and leasehold interests in the Dayton Store and the Portland Store (collectively, the "Assets"). A copy of the executed Agreement is attached hereto as Exhibit A and is incorporated herein by reference.

9. As of the date of the Agreement, the value of the Inventory equaled $551,085, as evidenced by a Certificate of Valuation executed by the parties to the Agreement on ..... A copy of the Certificate of Valuation is attached hereto as Exhibit B and is incorporated herein by reference.

10. Pursuant to Section 3 of the Agreement, the purchase price of Boston's business, inventory and leasehold interests was to be the sum of (a) the value of the Inventory as evidenced by the Certificate of Valuation; (b) $1 to be allocated to Boston's equipment, furnishings and fixtures; and (c) $100,000. The sum of the first two items ($551,086) is defined in Section 2(c) of the Agreement as the "Base Purchase Price." The Base Purchase Price plus the sum of $100,000 is defined in Section 3(c) of the Agreement as the "Guaranteed Purchase Price" ($651,086). In addition, Section 3(d) of the Agreement provides that the Guaranteed Purchase Price shall be increased by certain stated sums and percentages in the event that sales by Phoenix and Crest at the Stores during the period from ..... until ..... (the "Sale Period"), exceed $1,400,000.

11. Pursuant to Section 3(b) of the Agreement, Phoenix and Crest were to pay to Boston 40% of the Base Purchase Price on or before ..... ($551,086 x.40 = $220,434.40), 30% of the Base Purchase Price on or before ..... ($551,086 x.30 = $165,325.80) and the final 30% of the Base Purchase Price ($165,325.80) on or before ..... In addition, pursuant to Section 3(c) of the Agreement, Phoenix and Crest were to pay to Boston no later than ....., the sum of $100,000 as the remaining portion of the Guaranteed Purchase Price.

12. Pursuant to Section 11 of the Agreement and in order to secure the payment of their obligations under the Agreement, Phoenix and Crest granted to Boston a security interest in the Assets. Boston properly perfected its security interest in the Assets as evidenced by the copy of the UCC-1 financing statement which is attached hereto as Exhibit C.

13. Pursuant to Section 5 of the Agreement, Phoenix and Crest agreed to accept an assignment of Boston's leasehold interest in the Dayton Store (the "Dayton Lease"), subject to the consent of the Dayton Store's landlord (the "Landlord"). A copy of the Assignment of Lease and Acceptance of Assignment by Assignees and Attornment which was executed by Marcy Day on behalf of Phoenix and Crest on or about ..... is attached hereto as Exhibit D.

14. A revised Assignment of Lease was delivered to Phoenix and Crest for execution on or about ..... The revised Assignment was virtually identical to the original Assignment executed by Marcy Day and in no material way affected the rights or potential liabilities of Phoenix or Crest. Copies of the original Assignment of Lease and the revised Assignment of Lease are attached hereto as Exhibits E and F, respectively.

15. With full knowledge that the Landlord had not accepted the Assignment of Lease at the time the Agreement was executed, Marcy Day, on behalf of Phoenix and Crest, nonetheless insisted on taking possession of the Stores on ..... Since ....., Phoenix and Crest have (a) occupied the Dayton Store, (b) utilized the Assets in the conduct of their business, (c) used Boston's name and good will to conduct business, and (d) sold a substantial portion of the Inventory. Upon information and belief, Boston alleges that Defendants have paid directly to the Landlord the rental payments due under the Dayton Lease.

16. On or before ....., Boston received from Phoenix and Crest the approximate amount of $145,000. This sum represented 40% of the Base Purchase Price, less the sum of $75,000 pursuant to a Bulk Sale Stop Order issued by the Illinois Department of Revenue. The Defendants have represented that the sum of $75,000 is being held in an escrow account at the ..... Bank in Chicago.

17. Shortly after the revised Assignment of Lease was delivered to Defendants, Boston's counsel received a letter from an attorney for Phoenix and Crest in which it was claimed that Phoenix and Crest had been damaged by Boston's alleged failure to assign to Phoenix and Crest the Dayton Lease. Despite receipt of the revised Assignment and their expressed desire to have an executed assignment, Phoenix and Crest have refused to execute the revised Assignment of Lease and return it to Boston for execution by the Landlord.

18. In violation of Section 3(b) of the Agreement, Phoenix and Crest failed to make the second installment payment of the Base Purchase Price on or before ..... On ....., counsel for Phoenix and Crest verbally informed Boston's counsel that Phoenix and Crest did not intend to make any further payments pursuant to the Agreement and did not intend to execute the Assignment of Lease.

19. As of ....., Phoenix and Crest continue (a) to occupy the Stores, (b) to conduct business at the Stores, (c) to use Boston's name and good will, and (d) to sell the Inventory in which Boston has a valid and properly perfected security interest.

COUNT I

Injunctive Relief

20. Boston realleges and restates paragraphs 1-19 as though fully set forth herein.

21. By virtue of the UCC-1 Financing Statement, which is attached hereto as Exhibit C, Boston has a valid and properly perfected security interest in the Inventory.

22. Phoenix and Crest have recently reduced dramatically the prices of the merchandise in the Stores in an apparent attempt to liquidate rapidly the remaining Inventory.

23. Phoenix and Crest have transferred a significant portion of the Inventory out of the Stores and into Defendants' other business locations.

24. On information and belief, Defendants have closed the bank account into which sales proceeds from the Portland Store had been deposited.

25. The continued sale of the Inventory by Phoenix and Crest will transform Boston from a secured creditor to an unsecured creditor of Phoenix and Crest. Moreover, on information and belief, Defendants' recent actions, such as reducing prices, transferring the Inventory out of the Stores and closing the Portland Store bank account, will create tracing problems of enormous magnitude.

26. Boston has no adequate remedy at law, because the failure of Phoenix and Crest to make the payments required by the Agreement raises serious doubts as to the ability of Phoenix and Crest to satisfy any judgment that is entered by this Court.

27. Boston will be irreparably harmed if Phoenix and Crest are not enjoined from further dissipating Boston's security.

28. During the Sale Period, Phoenix and Crest have continued to utilize Boston's corporate name in the conduct of the going-out-of-business sale.

29. The repudiation of the Agreement by Phoenix and Crest and their refusal to execute the Assignment of Lease renders it virtually certain that Boston will be forced to reoccupy the Dayton Store and operate its business in order to comply with the terms of the Dayton Lease on which Boston remains liable by virtue of a guarantee agreement.

30. The conduct of the going-out-of-business sale under Boston's name by Phoenix and Crest has destroyed much of the good will which Boston had established with its clientele and has dramatically reduced the going-concern value of Boston's business. The damage to Boston's good will will be exacerbated with each additional day that Defendants are permitted to misuse Boston's name.

31. Boston has no adequate remedy at law, because the continued utilization of Boston's corporate name by Phoenix and Crest in the context of a going-out-of-business sale and in a manner that is destructive of Boston's client base is not compensable by monetary damages.

32. Boston will be irreparably harmed if Phoenix and Crest are not enjoined from their continuing use of Boston's corporate name.

WHEREFORE, Boston prays that this Court enter an order:

A. Temporarily and permanently enjoining Phoenix and Crest from selling any additional items of the Inventory;

B. Temporarily and permanently enjoining Phoenix and Crest from continuing to use Boston's corporate name;

C. Directing Phoenix and Crest to segregate the Inventory from merchandise belonging to Phoenix and Crest;

D. Directing Phoenix and Crest to transfer the remaining Inventory to Boston; and

E. Granting such other and further relief as this Court deems equitable and just.

COUNT II

Replevin

33. Boston realleges and restates paragraphs 1-19 as though fully set forth herein.

34. Boston is lawfully entitled to possession of the Assets by virtue of the unlawful refusal of Phoenix and Crest to make the payments required by the Agreement.

35. The Assets are unlawfully detained by Defendants in the Northern District of Illinois.

36. The Assets have not been taken for any tax, assessment or fine levied by virtue of any law of the State of Illinois against the property of Boston or against Boston individually, nor seized under any lawful process against the Assets, nor held by virtue of any order for replevin against Boston.

WHEREFORE, Boston prays that this Court enter an order:

A. Directing Defendants to transfer immediately to Boston the Assets, including but not limited to the remaining Inventory;

B. In the event Defendants fail to deliver the Assets to Boston, entering judgment against Defendants for the value of the remaining Assets;

C. Entering judgment against Defendants in the amount of $100,000 for Defendants' wrongful detention of the Assets; and

D. Granting such other and further relief as this Court deems equitable and just.

COUNT III

Forcible Entry and Detainer

37. Boston realleges and restates paragraphs 1-19 as though fully set forth herein.

38. By virtue of Section 5(d) of the Agreement, Boston was to assign to Phoenix and Crest the Dayton Lease.

39. On or about ....., Boston delivered to Phoenix and Crest an Assignment of Lease which had been executed by Boston and which had been verbally assented to by the Landlord.

40. Despite repeated requests for return of the executed Assignment of Lease, Phoenix and Crest have refused to execute the Assignment.

41. The continued occupation of the Dayton Store by Phoenix and Crest without a valid, executed assignment of lease is unlawful.

42. Boston is entitled to possession of the Dayton Store and defendants Phoenix and Crest are unlawfully withholding such possession from Boston.

WHEREFORE, Boston prays that this Court enter an order:

A. Directing Phoenix and Crest to vacate the Dayton Store;

B. Finding that Boston is entitled to possession of the Dayton Store;

C. Directing Phoenix and Crest to pay to Boston two times the rental payments for the Dayton Store for the period during which Phoenix and Crest have occupied the Dayton Store in violation of the Agreement; and

D. Granting such other and further relief as this Court deems equitable and just.

COUNT IV

Fraud

43. Boston realleges and restates paragraphs 1-19 as though fully set forth herein.

44. During the period from ..... until on or about ....., Phoenix and Crest had in their possession for execution the original Assignment of Lease but failed to execute and return the Assignment to Boston for forwarding to the Landlord.

45. On ....., Phoenix and Crest received copies of the revised Assignment of Lease which had previously been executed by Boston and verbally assented to by the Landlord.

46. The revised Assignment of Lease is virtually identical to the original Assignment executed by Marcy Day and does not affect materially the rights or potential liabilities of the Defendants.

47. From ....., until ....., Phoenix and Crest refused to execute the Assignment of Lease and return it to Boston for forwarding to the Landlord.

48. On information and belief, Phoenix and Crest actually raised the prices of merchandise in the Stores, including the Inventory, during the Sale Period, thereby diminishing the volume of sales at the Stores. Only after the Defendants had refused to make any further payments required by the Agreement did Defendants reduce the prices of the Inventory. On information and belief, this reduction in the prices of the Inventory was motivated by a desire to increase the volume of sales at the Stores and liquidate the remaining Inventory before Boston had an opportunity to enforce its security agreement against the Inventory.

49. During the Sale Period, Phoenix and Crest either fired or forced the resignation of the majority of Boston's previous employees.

50. On information and belief, Phoenix and Crest have closed the bank account into which Phoenix and Crest had deposited proceeds from sales at the Portland Store.

51. On information and belief, Defendants have failed to initiate any action to further the formation of the new corporate entity which was to commence operations at the Dayton Store after the Sale Period.

52. On information and belief, Defendants have failed to purchase any merchandise in order to conduct business at the Dayton Store after the Sale Period.

53. On information and belief, Defendants entered into the Agreement without any intention of performing the Agreement and with the intent to work a fraud upon Boston.

WHEREFORE, Boston prays that this Court enter an order:

A. Finding that Defendants have willfully breached the terms of the Agreement;

B. Awarding compensatory damages to Boston for Defendants' willful breach of the Agreement;

C. Awarding Boston exemplary damages in the amount of $5 million for Defendants' willful breach of the Agreement; and

D. Granting such other and further relief as this Court deems equitable and just.

COUNT V

Breach of Contract

54. Boston realleges and restates paragraphs 1-19 as though fully set forth herein.

55. Phoenix and Crest entered into a valid and enforceable agreement with Boston on .....

56. Phoenix and Crest breached the Agreement by failing to make the second installment payment of the Base Purchase Price and by anticipatorily repudiating their obligation to make the additional payments required by the Agreement.

57. Boston has been damaged by the breach of the Agreement by Phoenix and Crest in that (a) virtually all of Boston's employees have been fired or forced to resign, (b) Boston's business reputation has been damaged by virtue of Defendants having conducted a going-out-of-business sale at the Stores, (c) the failure of Phoenix and Crest to execute the Assignment of Lease has activated Boston's contingent liability as guarantor of the payments under the Dayton Lease, (d) Defendants' breach of the Agreement will require Boston to reestablish its business at the Dayton Store accompanied by substantial start-up costs which it would not have incurred but for Defendants' entering into and subsequently breaching the Agreement, and (e) the breach of the Agreement by Phoenix and Crest has forced Boston to incur substantial legal fees in order to enforce the Agreement and protect Boston's rights pursuant thereto.

58. The sole reason advanced by Defendants for their refusal to honor the terms of the Agreement is the failure of Boston to deliver an executed Assignment of Lease. In actuality, it is Defendants themselves who have refused to execute the Assignment of Lease. Defendants' breach of the Agreement, therefore, is willful.

WHEREFORE, Boston prays that this Court enter an order:

A. Awarding Boston compensatory damages, the amount of which have not yet been determined, for the breach of the Agreement by Phoenix and Crest;

B. Awarding Boston exemplary damages for Defendants' willful misconduct; and

C. Granting such other and further relief as this Court deems equitable and just.

..... BOSTON CLOTHING, LTD.
..... By: .....
.....

2 Both of the following forms were provided courtesy of Robert L. Byman of Jenner & Block, Chicago, Illinois.

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CHAPTER 8 Provisional Remedies *

1-8 Federal Litigation Guide 8.syn

§ 8.syn Synopsis to Chapter 8: Provisional Remedies *

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CHAPTER 8 Provisional Remedies *

1-8 Federal Litigation Guide Scope

Scope

SCOPE

This chapter deals with provisional remedies, other than preliminary injunctions, and includes discussion of receivers. Provisional remedies involve the prejudgment seizure of property of the defendant in order to safeguard the ability of the claimant to collect a money judgment if the claim is successful.

The chapter first deals with prejudgment seizure as governed by Rule 64, which provides generally that prejudgment seizure remedies for the purpose of satisfying the judgment ultimately to be entered are governed by the law of the state in which the district court sits. The prejudgment seizure remedies available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated by the forum state.

After an overview of the basic types of provisional remedies, the chapter addresses the strategic goals that can be served by the use of these remedies, as well as their potential disadvantages. In addition to providing protection against the debtor's bankruptcy, the inconveniences engendered by the use of a provisional remedy may provide incentive to settlement and may deter dilatory defense tactics. Because the hearing on the provisional remedy may be the first opportunity to impress the court with the merits of the action, thorough preparation for the hearing is vital.

The chapter then covers federal receivership under Rule 66. Since its principal use is likewise to preserve property pending the outcome of the litigation, it is related to the provisional remedies; however, since a receivership places the entirety of the defendant's property in the custody of the court, it is a considerably more drastic form of relief than the provisional remedies.

The chapter discusses the nature of receivership, appointing receivers, the role of receivers, proceedings by and against receivers, as well as termination of receiverships. The chapter also provides procedural checklists for use in determining whether appointment of a receiver is appropriate and whether ex parte relief is available.

The chapter also sets forth a sample Notice of Motion for Appointment of Receiver and a sample Notice of Motion for Discharge of Receiver, as well as comments for use of these forms.

For expanded coverage of provisional remedies, ***see*** MOORE'S Federal Practice, Ch. 64, ***Seizure of Person or Property*** (Matthew Bender 3d ed.).

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CHAPTER 8 Provisional Remedies *
A. Provisional Remedies

1-8 Federal Litigation Guide § 8.01

§ 8.01 Understanding Provisional Remedies

Rule 64 provides that forum state remedies which permit prejudgment seizure of persons or property for the purpose of securing a judgment ultimately to be entered in the action may used in federal court, unless an existing statute of the United States provides otherwise. n1 The remedies available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent forum state remedies. n2 State law determines the use of the provisional remedy but does not affect the underlying action, which continues to be prosecuted pursuant to the Federal Rules of Civil Procedure. n3

The purpose of provisional remedies is to secure the payment of any judgment that ultimately might be entered in favor of the claimant. Provisional remedies are generally available only in cases in which part of the relief sought is a money judgment. n4

The use of state provisional remedies is available only upon the commencement and prosecution of the action. n5 Under Rule 3, an action commences upon the filing of a complaint. n6 Thus, in an action instituted in a federal court, a state practice allowing seizure of person or property before the filing of the complaint is not available. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesProvisional RemediesGarnishmentsCivil ProcedureRemediesProvisional RemediesReplevinsCivil ProcedureRemediesProvisional RemediesSequestrations

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 64(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 64(b).*

(n3)Footnote 3. *United States v. St. Paul Mercury Ins. Co., 361 F.2d 838 (5th Cir.) , cert. denied, 385 U.S. 971 (1966)* (Rule 4(c), not Florida rule, should have governed service of writ of garnishment).

(n4)Footnote 4. *See, e.g., DeBeers Consol. Mines Ltd. v. United States, 325 U.S. 212, 65 S. Ct. 1130, 89 L. Ed.*

1566 (1945) .

(n5)Footnote 5. *Fed. R. Civ. P. 64(a).*

(n6)Footnote 6. *Fed. R. Civ. P. 3.*

(n7)Footnote 7. *Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044 (N.D. Cal. 1977)* .

* Chapter 8 revised in 1999 by Peter Kearns, Esq., San Francisco, California.

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CHAPTER 8 Provisional Remedies *
A. Provisional Remedies

1-8 Federal Litigation Guide § 8.02

§ 8.02 Understanding Due Process Requirements for Prejudgment Seizure Remedies

Because prejudgment seizure remedies are sought prior to full adjudication on the merits, they are subject to constitutional due process limitations. n1

Prejudgment garnishment and attachment are permitted only when, at a minimum, a judge is involved in issuing the writ for good cause, a bond is posted to protect the party whose property is seized, and there is an early hearing to determine whether the order of seizure should continue until trial. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesProvisional RemediesGarnishmentsCivil ProcedureRemediesReceivershipsGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fuentes v. Shevin, 407 U.S. 67, 80, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972)* ; *Sniadach v. Family Fin. Corp., 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969)* .

(n2)Footnote 2. *North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975)* .

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CHAPTER 8 Provisional Remedies *
A. Provisional Remedies

1-8 Federal Litigation Guide § 8.03

§ 8.03 Evaluating Whether Federal Statutes Govern Prejudgment Seizure

Rule 64 provides that "a Federal statute governs to the extent it applies." n1

The following statutes limit the use of prejudgment seizure remedies in certain types of actions:

- *28 U.S.C. § 2463* (property taken under any revenue law of the United States is not obtainable by replevin).
- *28 U.S.C. § 2713* (limits third party claim of ownership of property attached by the United States).
- *40 U.S.C. § 308* (United States property is not subject to attachment or seizure by other judicial process).
- *12 U.S.C. § 91* (national bank is immune from attachment and other provisional seizure of its property).
- *12 U.S.C. § 632* (federal reserve bank is immune from attachment and other provisional seizures of property).
- *12 U.S.C. § 1819* (FDIC is immune from provisional seizures of property).

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 64(a).*

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CHAPTER 8 Provisional Remedies *
A. Provisional Remedies

1-8 Federal Litigation Guide § 8.04

§ 8.04 Applying Rule 64 to Removed Actions

Rule 64 applies to actions removed from state court to federal court. However, for provisional remedies to be authorized, the Rule requires an action removed from state court to be prosecuted after removal pursuant to the Federal Rules of Civil Procedure. The federal removal statute provides that all injunctions, orders, and other proceedings occurring in the state court prior to removal shall remain in effect upon removal to the district court. Any attachment or garnishment made by the state court will continue in force in order to secure the final judgment. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalPrior State Court OrdersCivil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesProvisional RemediesGarnishmentsCivil ProcedureRemediesReceivershipsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1450.*

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CHAPTER 8 Provisional Remedies *
A. Provisional Remedies

1-8 Federal Litigation Guide § 8.05

§ 8.05 Distinguishing Between Forms of Provisional Relief

[1] Civil Arrest

Civil arrest is obsolete in most jurisdictions; however, some states still provide for civil arrest of defendants in some limited circumstances to secure their presence in the jurisdiction until final judgment. n1

The remedy of arrest, where available, is an alternative to attachment. The arrested defendant may secure release by posting bail or a bond, to which a successful plaintiff may look to recover its judgment.

[2] Prejudgment Attachment

Attachment is the seizure of defendant's property before judgment. It is designed to provide plaintiff with security that the judgment will ultimately be collectible. n2

If the property is seized under an order of attachment or sequestration, either it is held by the marshal as security for a later judgment, or it is released when the defendant posts a bond that will serve the same purpose. n3

[3] Sequestration

Sequestration is the act of seizing the property of a party pending the outcome of litigation or that party's compliance. n4

[4] Garnishment

Many states permit the remedy of garnishment, which attaches property of the debtor held by third parties as security for a judgment. In a garnishment proceeding, the levying officer collects and holds the property that is owed or belongs to the defendant. n5

[5] Replevin

The provisional remedy of replevin permits a court to compel an individual having wrongful possession of the goods of another to surrender and deliver the property to the rightful owner. n6

Replevied property is delivered to the plaintiff or, upon the posting of a bond for security, released back to the defendant. n7

[6] Other Provisional Remedies

Rule 64 also permits "other corresponding or equivalent remedies." These include the following:

- Writ of ne exeat, an order which restrains a person from leaving the jurisdiction or removing property from beyond the jurisdiction.
- Trustee writ, the process of garnishment of intangibles.
- Impoundment, the seizure and taking into the custody of the law or a court.
- Distringas, a mostly obsolete writ by which a defendant is compelled to appear by seizure of defendant's property.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesProvisional RemediesGarnishmentsCivil ProcedureRemediesProvisional RemediesReplevinsCivil ProcedureRemediesProvisional RemediesSequestrationsCivil ProcedureRemediesReceivershipsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See, e.g.*, N.J. Stat. Ann. §§ 2A:15-41-15-47. Illinois also permits arrest in limited circumstances under a writ of ne exeat. Ill. Comp. Stat. Ann. ch. 735, §§ 5/16-101-111.

(n2)Footnote 2. *North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975)* ; *Ross v. Peck Iron & Metal Co., 264 F.2d 262, 268 (4th Cir. 1959)* .

(n3)Footnote 3. *See, e.g.,* N.D. Cent. Code § 32-08.1-14; N.Y. Civ. Prac. Laws & Rules § 6222.

(n4)Footnote 4. *Altherr v. Swiss Am. of Miss., Inc., 446 F. Supp. 17, 18 (D. Miss. 1977)* .

(n5)Footnote 5. *United States v. Schuermann, 106 F. Supp. 86, 88 (E.D. Mo. 1952)* .

(n6)Footnote 6. *Commonwealth Trust Co. of Pittsburgh v. Reconstruction Fin. Corp., 28 F. Supp. 586, 587-588 (W.D. Pa. 1939)* .

(n7)Footnote 7. *See, e.g.,* N.C. Gen. Stat. § 1-230; Ariz. Rev. Stat. Ann. § 12-1578(C).

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CHAPTER 8 Provisional Remedies *
A. Provisional Remedies

1-8 Federal Litigation Guide § 8.06

§ 8.06 Notice of Lis Pendens Governed by State Law

State law often provides that a party asserting a right to real property in an action where the title of property is in litigation may record a notice of pendency or lis pendens where the property is situated. The implication of recording a notice of pendency is that a person who acquires interest in the property is bound by all proceedings that take place after the notice is recorded. Notices of pendency or lis pendens are governed by state law. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensNoticesReal Property LawPriorities & RecordingLis Pendens

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 64* advisory committee's note (1937).

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CHAPTER 8 Provisional Remedies *
A. Provisional Remedies

1-8 Federal Litigation Guide § 8.07

§ 8.07 Comparing Rule 64 to Other Federal Rules

[1] Rule 65 Provides for Provisional Remedy of Temporary Restraining Order

Rule 64 was not intended to embrace all provisional remedies. Rule 65, for example, deals with the practice applicable to the equitable injunctive remedy. Under Rule 65, the court will issue, upon a sufficient showing of urgency, a temporary restraining order without a hearing, and in matters of exigency, even without notice to the adverse party. Such an order should be followed promptly by an application for a preliminary injunction, requiring notice and a hearing. n1

[2] Rules 69 and 70 Determine Remedies After Judgment

Rule 64 governs the use of provisional remedies prior to judgment. Other rules determine the availability of remedies after judgment. Rule 69 regulates execution to enforce a judgment. n2 Rule 70 regulates judgment for specific acts and vesting title. n3

[3] Rule 4(n) Allows Assertion of Jurisdiction Over Property

Under Rule 4(n), if personal jurisdiction over the defendant cannot be effected under Rule 4, a court may obtain jurisdiction over assets belonging to the defendant. n4 In order to effect service, the defendant's assets must be located within the court's jurisdiction. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersCivil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesProvisional RemediesGarnishmentsCivil ProcedureRemediesReceivershipsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 65.*

(n2)Footnote 2. *Fed. R. Civ. P. 69.*

(n3)Footnote 3. *Fed. R. Civ. P. 70.*

(n4)Footnote 4. *Fed. R. Civ. P. 4(n).*

(n5)Footnote 5. *Fed. R. Civ. P. 4(n)(2).*

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CHAPTER 8 Provisional Remedies *
A. Provisional Remedies

1-8 Federal Litigation Guide § 8.08

§ 8.08 Using Provisional Remedies Strategically

[1] Settlement Leverage

Provisional remedies provide settlement leverage because they encumber the defendant's assets. A provisional remedy may do more than hasten settlement negotiations; it may also lead to settlement on more favorable terms. A defendant subject to an attachment may be willing to pay more to dispose of the attachment and the underlying lawsuit than to dispose of the lawsuit alone.

[2] Deterring Dilatory Tactics

Although the Federal Rules of Civil Procedure proscribe litigation tactics that are designed simply to delay a lawsuit, n1 such tactics unfortunately are still commonly employed. Prejudgment remedies offer a claimant some of the best counters to dilatory defense tactics. If a defendant's "active" assets (*i.e.,* those that the defendant needs from day to day) can be tied up through attachment, garnishment, or other prejudgment remedy, delay will become as unwelcome to the defendant as to the claimant.

It may be a mistake, however, for a creditor's attorney to resort to prejudgment remedies automatically in order to guard against delaying tactics. Provisional remedies have their risks and costs and may not be needed for this purpose. Most federal courts now assign all matters in an action to a single judge, and the speed with which federal judges move their dockets is commonly known among the lawyers who frequently appear in federal court.

[3] Protection Against Bankruptcy

A defendant's bankruptcy can have a devastating effect on the prevailing plaintiff's ability to recover a judgment. A judgment debtor may seek the protection of the Bankruptcy Court in order to avoid, delay, or reduce payment on a judgment. Perhaps more common than an actual bankruptcy filing is the tactic of *threatening* a filing in order to gain leverage in post-trial settlement negotiations. Filing a bankruptcy petition invokes an automatic stay of all legal proceedings against the filer, including any efforts to collect a judgment entered before the bankruptcy filing. n2

A judgment creditor without any preexisting lien on the defendant's assets is relegated to standing in line with other unsecured creditors. If, however, a provisional remedy is selected to create a lien on the defendant's property, and at least 90 days lapse before the defendant files for bankruptcy, it may be impossible for the debtor to block enforcement

via the Bankruptcy Code. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesProvisional RemediesGarnishments

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 11.*

(n2)Footnote 2. *11 U.S.C. § 362(a).*

(n3)Footnote 3. *See In re Gurs, 34 B.R. 755 (B. App. 9th Cir. 1983) .*

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CHAPTER 8 Provisional Remedies *
A. Provisional Remedies

1-8 Federal Litigation Guide § 8.09

§ 8.09 Evaluating Risks Associated With Provisional Remedies

[1] Risking Bond

Commonly, state law requires the posting of a bond or undertaking in order to obtain an attachment or other prejudgment remedy. If a remedy is granted, a claimant risks incurring liability and forfeiting the bond to the defendant if the claimant ultimately does not prevail in the action, or if it exercises a provisional remedy wrongfully. n1

[2] Risking Tort Liability

A plaintiff who utilizes a provisional remedy may face a tort claim for improper use of a provisional remedy. Abuse of process is one tort available to a defendant in such cases. n2 The abuse is usually that the claimant has sought to extort payment from the defendant through the misuse of a provisional remedy. For example, in states that do not allow provisional remedies in all civil actions, a creditor might commit an abuse of process by obtaining an attachment in an action in which its use is not authorized, or when the statutory requirements for attachment are not met. n3 Liability may also result from attaching property worth far more than the amount of the debt to be collected. n4 Excessive attachment is tortious because the claimant is not merely seeking to secure a later judgment; the claimant is really trying to extort payment by tying up the defendant's assets. Claimants are jointly liable with the attaching officer if they direct unlawful acts or subsequently ratify them. n5

Other torts that might be stated as a result of the improper use of provisional remedies include conversion, n6 intentional infliction of emotional distress, n7 and negligent infliction of emotional distress. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesProvisional RemediesGarnishments

FOOTNOTES:
(n1)Footnote 1. *See HMG Property Investors, Inc. v. Parque Indus. Rio Canus, Inc., 847 F.2d 908 (1st Cir. 1988) .*

(n2)Footnote 2. *See, e.g., Tyler v. Central Charge Serv., Inc., 444 A.2d 965 (D.C. App. 1982) .*

(n3)Footnote 3. *See, e.g., Washington Bldg. Servs., Inc. v. United Janitorial Servs., Inc., 352 F.2d 678 (D.C. Cir. 1965)* (if plaintiff is not entitled to attachment, defendant may recover damages even though plaintiff prevails on merits).

(n4)Footnote 4. *See, e.g., American Credit Bureau, Inc. v. Bel-Aire Interiors, Inc., 105 Ariz. 590, 469 P.2d 75, 76 (1970)* .

(n5)Footnote 5. *Woodring v. Jennings State Bank, 603 F. Supp. 1060 (D. Neb. 1985)* .

(n6)Footnote 6. *See, e.g., Langley Fed. Credit Union v. Harp, 471 F. Supp. 565 (D.D.C. 1979)* .

(n7)Footnote 7. *See, e.g., Martin v. Municipal Publications, 510 F. Supp. 255 (E.D. Pa. 1981)* .

(n8)Footnote 8. *See, e.g., Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916 (1980)* .

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CHAPTER 8 Provisional Remedies *
A. Provisional Remedies

1-8 Federal Litigation Guide § 8.10

§ 8.10 Obtaining the Writ--Considerations for Claimant

[1] Showing Likelihood of Prevailing on the Merits

Most states require that the claimant seeking a provisional remedy establish a likelihood of success on the merits. The stronger the case appears to be on the merits, the stronger the chance that the court will grant the provisional remedy. In addition, the judge will carry over this first impression to later pretrial motions and to the trial itself. Thorough preparation of the application for a provisional remedy is essential, since it will affect the court's view of the case until it is concluded. The standard that must be met to obtain the provisional remedy under the governing law should serve as a checklist for drafting papers in favor of the remedy.

[2] Determining Whether to Seek Relief on Noticed Motion or Ex Parte

Most states have some procedure whereby if there is danger that the property sought to be attached will be hidden or fraudulently conveyed, provisional remedies may be obtained ex parte, subject to the defendant's later right to move to dissolve or set aside the remedy. n1

Seeking relief by noticed motion is often preferred because the standard for getting relief ex parte is usually more strict and may be more difficult to meet than the standard for a noticed hearing. n2 Additionally, a victory in a contested hearing more vividly demonstrates the strength of a case than does a victory obtained without opposition. When, for example, a prerequisite of a provisional remedy is a showing of probable success on the merits, a judge is more likely to decide that the plaintiff will be successful if there is weak opposition than if the debtor has no chance to present its case.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesProvisional RemediesGarnishments

FOOTNOTES:
(n1)Footnote 1. *E.g.,* Maine provides for an ex parte attachment order where, among other requirements, it is shown that there is an "imminent danger" that the debtor will damage the property, or a "clear danger" of removal or concealment of the property. Maine Rule of Civ. Pro. 4A(g). *See also* Utah Rule of Civ. Pro. 64A(2).

(n2)Footnote 2. Conn. Gen. Stat. § 52-278(e).

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CHAPTER 8 Provisional Remedies *
A. Provisional Remedies

1-8 Federal Litigation Guide § 8.11

§ 8.11 Opposing the Writ--Considerations for Defendants

[1] Evaluating Whether to Oppose Provisional Remedy

The decision whether to contest a provisional remedy involves some different factors if the remedy has already been granted without the defendant's knowledge. The defendant's remedy in this case is a motion to dissolve, vacate, or quash, depending upon the terminology employed by the particular state. This motion is, in essence, a request that the court reverse its earlier ruling. As a result, considerable tact is required. It is not likely to be productive to tell the court that its earlier ruling was erroneous unless, under state law, the error is absolutely clear. A better strategy might be to convince the court that, having now heard both sides of the story, it should find against the propriety of the provisional remedy previously granted ex parte. Many courts will be receptive to this approach if the evidence supports it. Some judges take a liberal approach to issuing ex parte writs, because the debtor's defenses can be presented later via a motion to quash or vacate. These judges reason that, in the meanwhile, however, the plaintiff needs to be protected against the immediate risk it claims to be facing.

It always is a good idea to carefully examine the opponent's moving papers for conformity with requisite standards for obtaining provisional relief. If an ex parte writ has been issued and there are defects in the opponent's papers, it may be possible to get the writ vacated or quashed. If the plaintiff has moved under a procedure involving a hearing, defects in moving papers may be used in opposing issuance of the writ at that hearing.

Usually, to institute a federal case, the plaintiff must merely state a claim for relief. n1 To obtain a provisional remedy, however, the plaintiff often must go further and demonstrate the probable success of its claim on the merits. n2

[2] Challenging the Amount of the Bond

A debtor without viable defenses to a provisional remedy on the merits can sometimes focus instead on important collateral issues. For instance, in some jurisdictions, the plaintiff must post a bond in order to obtain a provisional remedy, and the amount of that bond is discretionary with the court. n3 It may be possible to convince the court that the damage the defendant will suffer from the issuance of the writ would be substantial. The more substantial the injury, the larger the bond must be that protects against the injury. At some point (which will depend in part on the plaintiff's finances, commitment to its case, and willingness to take risks), the price of the bond will become too large for the plaintiff to swallow. By "bidding up" the required bond, it may be possible to make the writ expensive enough that the plaintiff considers an early settlement instead.

[3] Stipulating to the Requested Relief

If it appears certain that the remedy sought will be granted, the client has nothing to gain by actively opposing it, but does stand to lose credibility in the eyes of the district court by doing so. Thus, if the plaintiff has noticed a hearing and seems certain to win, the defendant might offer to stipulate to the requested relief. The stipulation would deprive the plaintiff of its chance to give the court an early preview of the substantial merits of its case.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesProvisional RemediesGarnishments

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 8(a).*

(n2)Footnote 2. *See, e.g., Aetna Casualty & Surety Co. v. Rodco Autobody, 138 F.R.D. 328 (D. Mass. 1991)* ; *Diane Holly Corp. v. Bruno & Stillman Yacht Co., Inc., 559 F. Supp. 559 (D.N.H. 1983)* .

(n3)Footnote 3. *See, e.g., Wash. Rev. Code Ann. §§ 6.25.080, 6.25.090.*

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CHAPTER 8 Provisional Remedies *
A. Provisional Remedies

1-8 Federal Litigation Guide § 8.12

§ 8.12 Evaluating Bonds and Other Expenses

[1] Posting Bond

Most states require the party seeking the remedy to post bond before any levy will issue. Once it has issued, the defendant may then normally remove the levy by posting an adequate bond. Local rules should be consulted regarding the proper posting of bonds. Some districts have rules about what sureties are acceptable. n1 Most bonds are written by insurance companies, and insurance brokers can obtain quotations. In addition to the initial bond premium and other security that the bonding company may require, there will also be substantial annual premiums that will have to be paid while the litigation is pending.

[2] Paying Storage Fees

The attachment of personal property generally requires that the property be continuously maintained under custody of the levying officer. This can be expensive. When the asset attached is a truck, for example, the marshal will garage it somewhere, and storage charges will accrue. When the marshal must levy upon the inventory of a going business, the costs can be substantial and must be paid to the marshal in advance. n2 Attachments of different assets generate different expenses. For some types of property (*e.g.*, real estate), an inexpensive filing will suffice.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesProvisional RemediesGarnishments

FOOTNOTES:
(n1)Footnote 1. *See, e.g.,* N.D. Cal. Local Rule 290; W. D. Pa. Local Rule 67.1; S. D. Ohio Local Rule 67.1; N.D.N.Y. Local Rule 65.1.1.

(n2)Footnote 2. *See 28 U.S.C. § 1921(a)(1)(E).*

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CHAPTER 8 Provisional Remedies *
A. Provisional Remedies

1-8 Federal Litigation Guide § 8.13

§ 8.13 Appealing Order Regarding Provisional Remedy

[1] Order Regarding Provisional Remedy Is Not Usually Appealable as Final Judgment

An order permitting or denying a provisional remedy, the purpose of which is to secure satisfaction of the final judgment, is itself generally not appealable as a final judgment. However, if the court denies a provisional remedy and also dismisses the action, the dismissal is a final judgment and the ruling on the provisional remedy can be reviewed on appeal. Also, an order granting or denying an equitable attachment effected by an injunction order is probably appealable under *28 U.S.C. § 1292(a)*, which in certain cases allows an interlocutory appeal of some orders including those granting or denying an interlocutory injunction. n1 There is also the possibility of review by prerogative writ.

[2] Certain Collateral Orders Are Appealable as Final Judgments

A small category of collateral orders are appealable as final judgments under the collateral order doctrine. n2 If an action is still pending, an interlocutory order vacating or discharging a provisional remedy is considered final and appealable if it conclusively determines the disputed issue, resolves this issue completely and independently of the merits of the action, and is effectively unreviewable on appeal from a final judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesProvisional RemediesGarnishmentsCivil ProcedureAppealsAppellate JurisdictionCollateral Order DoctrineCivil ProcedureAppealsReviewabilityGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1292(a)(1).*

(n2)Footnote 2. *See Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949) .*

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CHAPTER 8 Provisional Remedies *
A. Provisional Remedies

1-8 Federal Litigation Guide §§ 8.14through 8.19

[Reserved]

§§ 8.14[Reserved]

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CHAPTER 8 Provisional Remedies *
B. Receivers and Receivership

1-8 Federal Litigation Guide § 8.20

§ 8.20 Understanding Receivership

[1] Defining *Receivership*

A receiver is a person appointed by the court to be an officer of the court to receive, collect, care for, administer, and dispose of the property or the fruits of the property of another or others brought under the orders of the court by the institution of a proper action or actions. n1

[2] Distinguishing Equity Receivers and Bankruptcy Receivers

Rule 66 applies to receivers who are appointed pursuant to the general equitable powers of the court, and does not apply to receivers (trustees) in bankruptcy cases. n2 Trustees appointed in bankruptcy cases are governed by the Bankruptcy Act. n3

[3] Evaluating Types of Receivers Authorized by Federal Statute

Certain types of receivers are authorized by federal statute. For example:

- The Federal Deposit Insurance Corporation Act grants to the F.D.I.C. various receivership powers. n4

- The federal RICO Act empowers the district courts to prevent violations of the Act by issuing appropriate orders, and taking appropriate actions as the court deems proper. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesReceivershipsGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointments

FOOTNOTES:
(n1)Footnote 1. *See Booth v. Clark, 58 U.S. (17 How.) 322, 331, 15 L. Ed. 164 (1854)* ("A receiver is an indifferent person between parties, appointed by the court to receive the rents, issues, or profits of land, or other thing in question

in this court, pending the suit, where it does not seem reasonable to the court that either party should do it.").

(n2)Footnote 2. *See Fed. R. Civ. P. 66* advisory committee's note.

(n3)Footnote 3. *See, e.g., 11 U.S.C. §§ 321-323.*

(n4)Footnote 4. *See 12 U.S.C. § 1821(d)(2).*

(n5)Footnote 5. *See 18 U.S.C. § 1964.*

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CHAPTER 8 Provisional Remedies *
B. Receivers and Receivership

1-8 Federal Litigation Guide § 8.21

§ 8.21 Understanding Role of Receiver

[1] Promoting Efficient Management of Property in Dispute

One of the primary reasons a court will appoint a receiver is to promote orderly and efficient management of any property involved in a dispute for the benefit of the creditors. Generally, any reasonable method the district court chooses to carry out this process will be acceptable. Any actions which the district court deems appropriate in the administration of the receivership may be properly exercised since the district court has broad discretion in the supervision of these matters. n1

[2] Acting as Officer of Court

The district court that appoints the receiver establishes the extent of the receiver's authority. The receiver is not an agent of the plaintiff, but actually is considered an extension of the court. n2 It is the order of appointment and the succeeding orders from the court that control the receiver's course of action. n3 As a result, the receiver's authority is wholly determined by the orders of the appointing court. n4

[3] Achieving Final Equitable Relief

The action which concludes with the appointment of a receiver is the main or primary action, and any other action that the receiver brings in the appointing court is an ancillary suit to the main action. n5 Therefore, while the district court has the power to appoint a receiver, the appointment is merely an attempt to provide equitable relief on the road to some form of full and final relief. A receivership is merely a step in the process to achieve a particular remedial outcome. Thus, "[a] receivership is only a means to reach some legitimate end sought through the exercise of the power of a court of equity. It is not an end in itself." n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesReceivershipsGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointmentsCivil ProcedureRemediesReceivershipsReceiversDuties

FOOTNOTES:

(n1)Footnote 1. *See SEC v. Hardy, 803 F.2d 1034, 1038-1039 (9th Cir. 1986)* .

(n2)Footnote 2. *Federal Home Loan Mortgage Corp. v. Tsinos, 854 F. Supp. 113, 115 (E.D.N.Y. 1994)* .

(n3)Footnote 3. *Resolution Trust Corp. v. Bayside Developers, 43 F.3d 1230, 1241 n. 8 (9th Cir. 1995)* .

(n4)Footnote 4. *Federal Home Loan Mortgage Corp. v. Spark Tarrytown, Inc., 829 F. Supp. 82, 85 (S.D.N.Y. 1993)* .

(n5)Footnote 5. *Haile v. Henderson Nat'l Bank, 657 F.2d 816, 822 (6th Cir. 1981)* , *cert. denied sub. nom. First Nat'l Bank v. Halie, 455 U.S. 949 (1982)* .

(n6)Footnote 6. *Gordon v. Washington, 295 U.S. 30, 37, 55 S. Ct. 584, 79 L. Ed. 1282 (1935)* .

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CHAPTER 8 Provisional Remedies *
B. Receivers and Receivership

1-8 Federal Litigation Guide § 8.22

§ 8.22 Determining Whether Appointment Is Appropriate

[1] Appointing Receiver Is Extraordinary Remedy

Courts consider the appointment of a receiver to be an extraordinary equitable remedy. A court, therefore, will appoint a receiver only when clearly necessary. n1

A plaintiff must make a clear showing that appointment is necessary to prevent irreparable injury. n2

[2] Appointing Receiver Is Discretionary

The district court has broad discretion to decide whether it is appropriate to appoint a receiver. Under appropriate circumstances, a court may deny the request for a receiver, even if the parties agree to the appointment. n3 The receiver's authority is defined solely by the order of the appointing court. n4

[3] Evaluating Criteria to Determine Appointment of Receiver

Courts have identified many factors that are relevant when determining if a receiver should be appointed. These include: n5

- Whether fraudulent conduct (or the probability of fraudulent conduct) on the part of the property owner exists.
- Whether property is in immediate danger of being harmed or lost.
- Whether legal remedies are adequate.
- Whether the harm to the proponent by denying the appointment will be greater than the injury to parties opposing the appointment.
- The probable success in the underlying action of the proponent of the appointment.
- The possibility of irreparable injury to the applicant's interests in property.

- Whether the interests of the applicant and others sought to be protected will in fact be well served by receivership.

Courts may use some or all of these general factors to determine whether the appointment of a receiver is appropriate. The court's inquiry should include consideration of the facts of the particular case.

[4] Evaluating Circumstances in Which Appointment Held Appropriate

Examples of circumstances in which appointment of a receiver has been held to be appropriate include the following:

- When a secured creditor with an interest in real property seeks a receiver pending the foreclosure of a mortgage. n6

- When the Securities and Exchange Commission seeks to enjoin violations of the Securities and Exchange Act. n7

- When a minority shareholder seeks a receivership to protect corporate assets from dominant shareholders, officers, and directors. n8

- When the holder of deed to a trust seeks the conservation and management of the property. n9

- When an insolvent bank requires assistance in the management of its affairs or an insolvent federal savings and loan association needs to set aside an alleged preference. n10

- When a mortgage company needs assistance in the collection of rent from properties that are part of a foreclosure action. n11

- When a judgment creditor seeks to acquire and preserve the assets of the litigation prior to its destruction or demise. n12

[5] Evaluating Alternatives to Appointment of Receiver

A motion for appointment of a receiver may be denied if less drastic remedies are available.

For example, as an alternative to appointment of a receiver, the court may require a property owner to: n13

- Post a payment bond.

- Deposit funds in an escrow fund with the court.

- Submit a letter of credit to the clerk of the court to establish a payment fund.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesReceivershipsGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointmentsCivil ProcedureRemediesReceivershipsReceiversDuties

FOOTNOTES:
(n1)Footnote 1. *Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc., 999 F.2d 314, 316-317 (8th Cir. 1993)* .

(n2)Footnote 2. *New York Life Ins. Co. v. Watt West Inv. Corp., 755 F. Supp. 287, 292-293 (E.D. Cal. 1991)* (creditor made sufficient showing of imminent loss and probability of success).

(n3)Footnote 3. *See Security Pacific Mortgage and Real Estate Servs. v. Philippines, 962 F.2d 204, 211-212 (2d Cir. 1992)* .

(n4)Footnote 4. *Citibank, N.A. v. Nyland (CF8) Ltd., 839 F.2d 93, 98 (2d Cir. 1988)* .

(n5)Footnote 5. *Consolidated Rail Corp. v. Fore River Ry., 861 F.2d 322, 326-327 (1st Cir. 1988)* .

(n6)Footnote 6. *Brill & Harrington Invs. v. Vernon Sav. & Loan Ass'n, 787 F. Supp. 250, 253-254 (D.D.C. 1992)* .

(n7)Footnote 7. *SEC v. Elliott, 953 F.2d 1560, 1564-1565 (11th Cir. 1992)* , *rev'd in part on other grounds*, *998 F.2d 922 (11th Cir. 1993)* .

(n8)Footnote 8. *Lyman v. Spain, 774 F.2d 495, 497-498 (D.C. Cir. 1985)* .

(n9)Footnote 9. *Resolution Trust Corp. v. Bayside Developers, 43 F.3d 1230, 1242 (9th Cir. 1995)* .

(n10)Footnote 10. *In re Still, 963 F.2d 75, 77 (5th Cir. 1992)* ; *Biscayne Fed. Sav. & Loan Ass'n v. Federal Home Loan Bank Bd., 572 F. Supp. 997, 1034 (S.D. Fla.)* , *rev'd in part on other grounds*, *720 F.2d 1499 (11th Cir. 1983)* , *cert. denied*, *467 U.S. 1215 (1984)* .

(n11)Footnote 11. *Resolution Trust Corp. v. Fountain Circle Assocs., 799 F. Supp. 48, 52 (N.D. Ohio 1992)* .

(n12)Footnote 12. *Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc., 999 F.2d 314, 316-317 (8th Cir. 1993)* .

(n13)Footnote 13. *See New York v. Financial Servs. Network, 930 F. Supp. 865, 871-872 (W.D.N.Y. 1996)* .

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CHAPTER 8 Provisional Remedies *
B. Receivers and Receivership

1-8 Federal Litigation Guide § 8.23

§ 8.23 Complying With Notice and Bond Requirements

[1] Notice Generally Required

Unless notice is impractical, notice of an application for appointment of a receiver must be given to all parties. n1

Rule 66, however, does not require a formal *hearing* before a receiver is appointed. n2

[2] Ex Parte Appointments

Under exceptional circumstances, appointment of a receiver without notice (ex parte) may be justified. Lack of notice, however, deprives the opposing party of the opportunity to object to the appointment or to propose an alternative way of dealing with the situation giving rise to the application. Therefore, if ex parte relief is sought, the applicant must provide appropriate documentation to support the claim that appointment should be granted without notice. n3

Careful review of the terms of an order authorizing a receivership is important when ex parte relief is requested. Deficiencies in the ex parte order that require specific scrutiny include:

- Imposition of obligations enforceable by contempt on parties not shown by the papers submitted to have engaged in any wrongdoing, extending beyond mere recognition of the receiver as custodian of the property involved.

- Establishment of a low threshold for routine expenditure approval by the applicant or by the court in the event of a disagreement, risking unnecessary delay, expense, and consumption of resources.

- Failure to permit uninterrupted services to nonparties and action necessary in the ordinary course of business of supervision of the property.

- Requiring the production of large amounts of documents in the possession of parties not shown to have engaged in any wrongdoing without pursuing ordinary discovery or subpoena proceedings under the Federal Rules of Civil Procedure.

- Requesting identical relief against all defendants, rather than relief pertaining specifically to each defendant.

- Failure to allege more than cursory efforts to serve the property owner.

[3] Bond Requirements

If a bond is not required by statute, the district court has the discretion to order the posting of the bond, and to determine the terms and conditions of the bond. n4

In cases in which a receiver is appointed to protect property, if requiring a bond would cause further depletion of property, a bond is not required unless it is essential to protect the interest in the property. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesReceivershipsGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointments

FOOTNOTES:
(n1)Footnote 1. *Connecticut v. Doehr, 501 U.S. 1, 12, 111 S. Ct. 2105, 115 L. Ed. 2d 1 (1991)* .

(n2)Footnote 2. *See Fed. R. Civ. P. 66*; *see also Citronelle-Mobile Gathering, Inc. v. Watkins, 934 F.2d 1180, 1188-1189 (11th Cir. 1991)* .

(n3)Footnote 3. *See, e.g., United States v. Ianniello, 824 F.2d 203, 207 (2d Cir. 1987)* .

(n4)Footnote 4. *See FTC v. World Wide Factors, Ltd., 882 F.2d 344, 348 (9th Cir. 1989)* ; *28 U.S.C. § 754*.

(n5)Footnote 5. *See SEC v. Universal Fin., 760 F.2d 1034, 1039 (9th Cir. 1985)* .

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CHAPTER 8 Provisional Remedies *
B. Receivers and Receivership

1-8 Federal Litigation Guide § 8.24

§ 8.24 Meeting Subject Matter Jurisdiction Requirements

[1] Alleging Subject Matter Jurisdiction

The court must have subject matter jurisdiction of the action at the time the receiver is appointed. Subject matter jurisdiction may be established by any of the following:

- A federal question in the complaint. n1
- Diversity of citizenship and a claim in excess of $75,000. n2
- A statute setting forth a specific jurisdictional basis. n3

[2] Determining Whether Supplemental Jurisdiction Exists

If the court has subject matter jurisdiction over the underlying action in which the receiver was appointed, it has supplemental jurisdiction over all actions commenced by the receiver. n4

If the receiver seeks to commence an action in a different district, jurisdiction over the property in that district must still be established.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesReceivershipsGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointments

FOOTNOTES:
(n1)Footnote 1. *See 28 U.S.C. § 1331.*

(n2)Footnote 2. *See 28 U.S.C. § 1332.*

(n3)Footnote 3. *See 28 U.S.C. § 1345*.

(n4)Footnote 4. *See 28 U.S.C. § 1367*; *O'Neal v. General Motors Corp., 841 F. Supp. 391, 395 (M.D. Fla. 1993)* .

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CHAPTER 8 Provisional Remedies *
B. Receivers and Receivership

1-8 Federal Litigation Guide § 8.25

§ 8.25 CHECKLISTS: Appointment of Receiver

[1] CHECKLIST: Considering Grounds for Appointment of Receiver

In view of the fact that the appointment of a receiver is an extraordinary remedy, the applicant must make a clear showing that appointment is necessary to prevent irreparable injury. The following checklist may be used as a guide to the most commonly used factors considered in considering an application for appointment of a receiver.

☐ **Fraudulent conduct.** Fraudulent conduct or the probability of fraudulent conduct on the part of a property owner is often determinative.

☐ **Danger to property.** Courts consider whether property in dispute is in immediate danger of being harmed or lost.

☐ **Inadequacy of legal remedies.** Equitable relief is available if legal remedies are inadequate.

☐ **Harm to applicant.** Courts consider whether the harm to the applicant if the appointment is denied will be greater than injury to the property owner.

☐ **Applicant's likelihood of success in the action.** Courts consider whether the applicant is likely to succeed in the underlying action.

☐ **Irreparable injury.** The possibility of irreparable injury to the applicant's interests in the property is an important determinative factor.

☐ **Value of receivership.** A receivership is likely only if the interests of the applicant and others sought to be protected will be well served by the receivership.

☐ **Other specific facts.** Specific facts relevant to the particular case should be considered.

[2] CHECKLIST: Considering Alternatives to Appointment of Receiver

When appointment of a receiver is sought, counsel should determine whether any of the following alternatives may be appropriate:

☐ **Payment bond.** A property owner may be required to post a payment bond.

☐ **Escrow fund.** A property owner may be required to deposit money in an escrow fund with the court.

☐ **Letter of credit.** A property owner may be required to submit a letter of credit to the clerk of the court to establish a payment fund.

[3] CHECKLIST: Considering Ex Parte Appointment of Receiver

If ex parte appointment of a receiver is sought, the court generally will view the following factors as deficiencies:

☐ **Cursory efforts at service.** The applicant must allege more than cursory efforts to serve a property owner with notice of the application.

☐ **Documents requested of nonparties.** Requiring the production of large amounts of documents from parties not shown to have engaged in wrongdoing is discouraged when ordinary discovery or subpoena proceedings under the Federal Rules was not pursued.

☐ **Foreseeable "emergency."** If the need for ex parte relief is traceable to the applicant's failure to anticipate the emergency, the doctrine of laches will apply.

☐ **Identical relief requested.** Relief pertaining specifically to each affected party, rather than identical relief against all affected parties, should be requested.

☐ **Insufficient documentation.** The applicant must supply appropriate documentation to support the claim.

☐ **Interruption of ordinary business.** Failure to permit uninterrupted routine provision of services to nonparties and action necessary to supervise the property is unduly disruptive.

☐ **Low expenditure limits.** Establishment of a low threshold for routine expenditure approval by the applicant or by the court in the event of a disagreement should be avoided.

☐ **Obligations imposed on innocent parties.** Courts negatively view imposing obligations on parties not shown to have engaged in wrongdoing.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesReceivershipsGeneral

OverviewCivil ProcedureRemediesReceivershipsReceiversGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointmentsCivil ProcedureRemediesReceivershipsTerminations

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CHAPTER 8 Provisional Remedies *
B. Receivers and Receivership

1-8 Federal Litigation Guide § 8.26

§ 8.26 Determining Appealability of Order

[1] Order Appointing Receiver

An interlocutory order is an order of the court which is not final. The appointment of a receiver is considered an interlocutory order because a receiver is appointed in the midst of another proceeding in order to further prevent any harm to the property. Generally, interlocutory orders are not appealable because only final orders are appealable. n1 However, the order of appointment of a receiver is expressly made appealable by statute. n2 This provision means that these otherwise interlocutory orders can be appealed as a matter of right.

This statute applies specifically to those issues listed in the statute itself. It does not apply to all appeals in cases dealing with receivers. Therefore, the appellate court does not have jurisdiction under this particular statute when the issue on appeal regards something other than the appointment of the receiver or refusing to wind up a receivership or refusing to order steps necessary to accomplish the purposes of the receivership. n3

[2] District Court Supervision of Receivership

Most litigation concerning receivers surrounds the appointment of the receiver and other matters related to the appointment. In contrast, litigation regarding the court's supervision of a receivership is rare, and each case must be decided on the merits by a careful examination of the facts. n4

The district court has great discretion in supervising the receivership and in determining the appropriate steps to be taken in the administration of the receivership. n5

[3] Abuse of Discretion Is Standard of Review

The appellate court is limited to determining whether the appointing court abused its discretion, either in the appointment of the receiver or in the administration of the receivership. Thus, the standard of review used by the courts of appeal is an abuse of discretion standard. n6

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesReceivershipsGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointmentsCivil ProcedureAppealsAppellate JurisdictionFinal Judgment RuleCivil ProcedureAppealsAppellate JurisdictionInterlocutory OrdersCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

FOOTNOTES:

(n1)Footnote 1. *28 U.S.C. § 1291.*

(n2)Footnote 2. *28 U.S.C. § 1292(a)(2).*

(n3)Footnote 3. See *28 U.S.C. § 1292(a)(2)*; *Towers Hotel Corp. v. Rimmel, 871 F.2d 766, 769 (8th Cir. 1989)* (*28 U.S.C. § 1292(a)(2)* did not provide appropriate basis for jurisdiction where appellant appealed district court's denial of its motion to enforce agreement).

(n4)Footnote 4. *See SEC v. Hardy, 803 F.2d 1034, 1037 (9th Cir. 1986)* .

(n5)Footnote 5. *See SEC v. Safety Fin. Serv. Inc., 674 F.2d 368, 372-373 (5th Cir. 1982)* .

(n6)Footnote 6. *Lyman v. Spain, 774 F.2d 495, 497-498 (D.C. Cir. 1985)* .

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CHAPTER 8 Provisional Remedies *
B. Receivers and Receivership

1-8 Federal Litigation Guide § 8.27

§ 8.27 Use of Summary Proceedings

Summary proceedings are appropriate and proper to protect equity receivership assets. n1

As with any summary proceeding, however, the procedural due process rights of the parties must be respected. Therefore, all participants in the action must have a full and fair opportunity to present their arguments, and all creditors must receive adequate notice and an opportunity to respond. n2

FOOTNOTES:
(n1)Footnote 1. *United States v. Arizona Fuels Corp., 739 F.2d 455, 458 (9th Cir. 1984)* .

(n2)Footnote 2. *See SEC v. Wencke, 783 F.2d 829, 838 (9th Cir.)* , *cert. denied sub nom. DeLusignan v. Gould, 479 U.S. 818 (1986)* .

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CHAPTER 8 Provisional Remedies *
B. Receivers and Receivership

1-8 Federal Litigation Guide § 8.28

§ 8.28 Determining Receiver's Capacity to Sue

[1] Capacity to Sue Depends on State Law

Once appointed, the capacity of a receiver to sue in federal court is dependent upon the law of the state in which the federal court is located. n1

The laws of the state in which the property is located govern the substantive responsibilities and duties of the receiver, but federal procedural rules apply to the receivership, including actions which may be maintained by the receiver. n2

An order of appointment grants the receiver exclusive jurisdiction over property in the district in which the appointing court is located. n3

[2] Property Situated in Different Districts

An order of appointment grants the receiver exclusive jurisdiction over property in the district in which the appointing court is located. A receiver may also obtain jurisdiction and control over property in other districts by filing copies of the complaint and the order of appointment in any and all districts where property subject to the dispute is located, within 10 days after entry of the order of appointment. n4

If a receiver fails to file copies of the complaint and the order of appointment within the 10-day period, the receiver will not have jurisdiction and control over the property in that district. n5

However, if the rights of the parties have not been prejudiced, the receiver may file the complaint and order of appointment late, and still retain jurisdiction over the property in that district. The filing requirements are intended to protect the receiver from responsibility for property that the receiver does not know exists. Therefore, to allow a receiver to file the appropriate documents by late filing is not deemed to be inconsistent with the intent of the statute. n6

The appointing court and the receiver have exclusive jurisdiction and control over property surrounding the dispute. If the proper filing requirements are met, jurisdiction of the appointing court extends to property located in all other federal judicial districts, including those located in other judicial circuits. n7

If the proper filing requirements are *not* met, jurisdiction over property located in another district may still be proper

provided the minimum contacts test of *International Shoe* is satisfied. n8

[3] Same Rights as Owner

A receiver has the same rights and powers to sue as the person or entity whose property is in receivership. Court appointed receivers are real parties in interest entitled to sue on behalf of a represented party. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesReceivershipsGeneral OverviewCivil ProcedureRemediesReceivershipsJurisdictionPropertyCivil ProcedureRemediesReceivershipsReceiversAppointmentsCivil ProcedureRemediesReceivershipsReceiversPowers

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 66*; *Fed. R. Civ. P. 17(b)*; *Meyers v. Moody, 693 F.2d 1196, 1206 (5th Cir. 1982)* , *cert. denied*, *464 U.S. 920 (1983)* .

(n2)Footnote 2. *See 28 U.S.C. § 959(b)*; *Fed. R. Civ. P. 66*.

(n3)Footnote 3. *28 U.S.C. § 754*.

(n4)Footnote 4. *28 U.S.C. § 754*.

(n5)Footnote 5. *See 28 U.S.C. § 754*.

(n6)Footnote 6. *See SEC v. Equity Serv. Corp., 632 F.2d 1092, 1095 (3d Cir. 1980)* .

(n7)Footnote 7. *28 U.S.C. § 754*.

(n8)Footnote 8. *American Freedom Train Found. v. Spurney, 747 F.2d 1069, 1073-1074 (1st Cir. 1984)* ; *see International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)* .

(n9)Footnote 9. *See In re Comcoach Corp., 698 F.2d 571, 574-575 (2d Cir. 1983)* .

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CHAPTER 8 Provisional Remedies *
B. Receivers and Receivership

1-8 Federal Litigation Guide § 8.29

§ 8.29 Proceedings Against Receivers

[1] Determining Whether Receiver Exceeded Scope of Authority

Lawsuits in which a receiver is named as a defendant typically are against the receivership or the property in the receivership, and not against the receiver personally. n1

A receiver may be sued in his or her individual capacity only if the receiver has acted outside the scope of the receiver's authority. n2

[2] Determining Whether Court Consent to Sue Receiver Is Required

A receiver appointed to manage property assumes the place of the owner of the property with regard to claims based on the receiver's management and operation of the property. Claims for acts related to the receiver's acts or transactions in connection with the receivership property may be brought *without* the consent or approval of the appointing court. n3

The receiver must manage the property in his or her possession according to the law of the state where the property is situated. State law governs the substantive responsibilities and duties of the receiver, and federal procedural rules apply to the procedural aspects of actions in which a receiver has been appointed by a federal court. n4

Generally, a plaintiff must obtain the express permission of the appointing court to sue a receiver in his or her individual capacity. The court will not grant consent if the receiver has clearly acted within the scope of authority as granted by the appointing court. n5 This rule was devised in order to protect the receiver and the estate against the harassment and expense of possibly unnecessary litigation, and to preserve the estate for the benefit of all creditors equally. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesReceivershipsGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointmentsCivil ProcedureRemediesReceivershipsReceiversLiabilities

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 66.*

(n2)Footnote 2. *In re Still, 963 F.2d 75, 77 (5th Cir. 1992) .*

(n3)Footnote 3. *See Fed. R. Civ. P. 66*; *28 U.S.C. § 959(a).*

(n4)Footnote 4. *See 28 U.S.C. § 959(b)*; *Fed. R. Civ. P. 66*; *see also Meyers v. Moody, 693 F.2d 1196, 1206 (5th Cir. 1982) , cert. denied, 464 U.S. 920 (1983) .*

(n5)Footnote 5. *Strategis Asset Valuation & Management, Inc. v. Pacific Mut. Life Ins. Co., 805 F. Supp. 1544, 1553-1554 (D. Colo. 1992) .*

(n6)Footnote 6. *See Federal Home Loan Mortgage Corp. v. Spark Tarrytown Inc., 829 F. Supp. 82, 88 (S.D.N.Y. 1993) .*

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CHAPTER 8 Provisional Remedies *
B. Receivers and Receivership

1-8 Federal Litigation Guide § 8.30

§ 8.30 Removing Case From State Court to Federal Court

Removal from a state court to a federal court generally is permitted when there is a federal interest in permitting a defendant who has been sued in state court a statutory right of access to a federal forum. n1

If a state action involves a receiver charged with wrongdoing under state law, and liability is not directly based on acts done under color of office or in the performance of the receiver's duties, federal court access is not necessary to protect any federal interest. Thus, removal of the action to federal court will be denied. If the receiver's conduct or activities are questioned or challenged within the scope of the receiver's authority and in the receiver's official capacity, the issues directly involve the performance of duties and obligations ordered by the federal court. Therefore, a strong federal interest exists to provide access to federal court because the orders of the appointing court must be reviewed in order to evaluate the receiver's duties and performance. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisGeneral OverviewCivil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesReceivershipsGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointmentsCivil ProcedureRemediesReceivershipsReceiversLiabilities

FOOTNOTES:
(n1)Footnote 1. *See 28 U.S.C. § 1442(a).*

(n2)Footnote 2. *See 28 U.S.C. § 1442(a).*

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CHAPTER 8 Provisional Remedies *
B. Receivers and Receivership

1-8 Federal Litigation Guide § 8.31

§ 8.31 Terminating Receivership

[1] Effect on Property in Dispute

A receiver appointed to manage property is responsible for the property in dispute, and is subject to the orders of the court until discharged by the appointing court. If the receiver has not yet disposed of the property when discharged, the property itself remains within the jurisdiction and under the supervision of the appointing court. However, if the receiver has disposed of the property as required by the appointing court, the receiver's responsibility and liability for that property cease, and the receivership itself terminates. n1

[2] Determining Court's Jurisdiction After Termination

After a receivership has terminated, the appointing court retains personal jurisdiction over the individual receiver and may hear suits alleging a breach of authority by the receiver toward the receivership assets. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesReceivershipsGeneral OverviewCivil ProcedureRemediesReceivershipsTerminations

FOOTNOTES:
(n1)Footnote 1. *See United States v. Amodeo, 44 F.3d 141, 146 (2d Cir. 1995)* ; *see also In re Still, 963 F.2d 75, 77 (5th Cir. 1992)* .

(n2)Footnote 2. *See Federal Sav. and Loan Ins. Corp. v. PSL Realty Co., 630 F.2d 515, 521 (7th Cir. 1980)* , *cert. denied sub nom. Granite Inv. Co. v. Federal Sav. and Loan Inv. Corp., 452 U.S. 961 (1981)* .

* Chapter 8 revised in 1999 by Peter Kearns, Esq., San Francisco, California.

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CHAPTER 8 Provisional Remedies *
B. Receivers and Receivership

1-8 Federal Litigation Guide § 8.32

§ 8.32 Voluntary Dismissal of Action in Which Receiver Appointed

An action in which a receiver has been appointed may not be voluntarily dismissed without court order. n1 Likewise, it has been held that consolidated actions may not be voluntarily dismissed without court order if a receiver has been appointed in one or more of the actions. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsCourt OrdersGeneral OverviewCivil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesReceivershipsGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointments

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 41(a)(1).*

(n2)Footnote 2. *United States v. Mansion House Cent. N., 95 F.R.D. 515, 518 (E.D. Miss. 1982) .*

* Chapter 8 revised in 1999 by Peter Kearns, Esq., San Francisco, California.

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CHAPTER 8 Provisional Remedies *
B. Receivers and Receivership

1-8 Federal Litigation Guide §§ 8.33through 8.99

[Reserved]

§§ 8.33[Reserved]

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CHAPTER 8 Provisional Remedies *
C. Forms

1-8 Federal Litigation Guide § 8.100

§ 8.100 Notice of Motion for Appointment of Receiver

[1] FORM

Notice of Motion for Appointment of Receiver

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

NOTICE IS HEREBY GIVEN that on [*date*] at [*time of day (specify a.m. or p.m.)*], or as soon thereafter as counsel may be heard, [*party designation and name of moving party*] will move this Court at the United States Courthouse located at [*address of Court*], Courtroom [*courtroom number*], for an order pursuant to *Federal Rules of Civil Procedure, Rule 66* [*and state with particularity any applicable federal statute or local rule*]:

(a) appointing a receiver in this action for the purposes of [*state role of receiver*], and on the grounds that [*state basis of motion e.g., fraudulent conduct of property owner* or *property in imminent danger of being harmed or lost*]; and

(b) granting [*moving party*] such other relief as may be appropriate.

This motion is based on this Notice of Motion, the accompanying Declaration (*or affidavit or other affidavit substitute*) of [*name of signatory*] dated (*or sworn to*) [*date*] , the accompanying Memorandum of Law; and on all of the pleadings and papers on file in this action.

[*Date*]

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for [*name and designation of party*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local*

district court rules]

TO: [*Name of opposing counsel*], Attorney for [*name of party*]

[2] Use of Form

This is a form of notice of motion pursuant to Rule 66 seeking appointment of a receiver.

[3] Determining Whether Appointment Is Appropriate

Courts consider the appointment of a receiver to be an extraordinary equitable remedy. A court, therefore, will appoint a receiver only when clearly necessary.

The appointment of a receiver is discretionary. Under appropriate circumstances, a court may deny the request for a receiver, even if the parties agree to the appointment.

[4] Criteria to Determine Appointment of Receiver

Courts have identified many factors that are relevant when determining if a receiver should be appointed. These include:

- Whether fraudulent conduct (or the probability of fraudulent conduct) on the part of the property owner exists.
- Whether property is in immediate danger of being harmed or lost.
- Whether legal remedies are adequate.
- Whether the harm to the proponent by denying the appointment will be greater than the injury to parties opposing the appointment.
- The probable success in the underlying action of the proponent of the appointment.
- The possibility of irreparable injury to the applicant's interests in property.
- Whether the interests of the applicant and others sought to be protected will in fact be well served by receivership.

Courts may use some or all of these general factors to determine whether the appointment of a receiver is appropriate. The court's inquiry should include consideration of the facts of the particular case.

[5] Bond Requirements

If a bond is not required by statute, the district court has the discretion to order the posting of a bond, and to determine the terms and conditions of the bond.

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CHAPTER 8 Provisional Remedies *
C. Forms

1-8 Federal Litigation Guide § 8.101

§ 8.101 Notice of Motion for Discharge of Receiver

[1] FORM

Notice of Motion for Discharge of Receiver

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

NOTICE IS HEREBY GIVEN that on [*date*] at [*time of day (specify a.m. or p.m.)*], or as soon thereafter as counsel may be heard, [*name of moving party*] will move this Court at the United States Courthouse located at [*address of Court*], Courtroom [*courtroom number*], for an order pursuant to *Federal Rules of Civil Procedure, Rule 66* [*and state with particularity any applicable federal statute or local rule*]:

(a) discharging [*name of receiver*] as Receiver in this action on the ground that [*state factual basis for discharge; e.g., the action has been resolved and a final accounting is filed with this motion*];

(b) fixing the compensation of the Receiver and the fees of Receiver's counsel in accordance with the attached schedule;

(c) discharging the Receiver and the surety on the posted bond;

(d) directing the Receiver to make payment of the balance in Receiver's possession; and

(e) granting [*moving party*] such other relief as may be appropriate.

This motion is based on this Notice of Motion, the accompanying Declaration (*or affidavit or other affidavit substitute*) of [*name of signatory*] dated (*or sworn to*) [*date*], the accompanying Memorandum of Law, and on all of the pleadings and papers on file in this action.

[*Date*]

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for [*name and designation of party*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

TO: [*Name of opposing counsel*], Attorney for [*name of party*]

[2] Use of Form

This form is a motion pursuant to Rule 66 for an order discharging a receiver previously appointed in the action.

[3] Effect of Discharge on Property in Dispute

A receiver appointed to manage property is responsible for the property in dispute, and is subject to the orders of the court until discharged by the appointing court. If the receiver has not yet disposed of the property when discharged, the property itself remains within the jurisdiction and under the supervision of the appointing court. However, if the receiver has disposed of the property as required by the appointing court, the receiver's responsibility and liability for that property cease, and the receivership itself terminates.

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CHAPTER 8A Sanctions *

1-8A Federal Litigation Guide 8A.syn

§ 8A.syn Synopsis to Chapter 8A: Sanctions *

§ 8A.01 Sources of Authority Governing Sanctions

§ 8A.02 Purpose of Sanctions

§ 8A.03 Sanctions in Removal Cases
[1] Sanctions Generally Cannot Be Based Solely on State Filings
[2] Filing Frivolous Removal Petition Is Sanctionable

§ 8A.04 Sanctions Under Rule 11 for Improper Pleadings, Motions, or Other Papers
[1] Purpose of Rule 11 Sanctions
[2] Rule 11 Limited to Pleadings, Motions, or Other Papers
[3] Triggering Liability Under Rule 11
[4] Significance of Signing Pleadings, Motions, or Other Papers
[5] Conduct Is Measured by Objective Standard
[6] Rule 11 Is Not Available to Sanction Generalized Bad Behavior
[7] Moving for Sanctions Under Rule 11
[7.--1] Who May Move for Imposition of Sanctions
[7.--2] "Safe Harbor" Prerequisite to Filing Motion
[7.--3] Timing of Motion
[7.--4] Avoiding Frivolous Sanctions Motion
[7.--5] Considering Discovery on Motion
[7.--6] Awarding Expenses and Attorney's Fees to Party Who Prevails on Motion
[7.--7] No Time Limit for Decision on Motion
[8] Who May Impose Sanctions
[9] Sanctions Are Discretionary
[10] Notice and Opportunity to Be Heard--Due Process Considerations
[11] Lack of Jurisdiction in Underlying Action
[12] Effect of Dismissal of Underlying Action
[13] Determining Who The Court May Sanction
[14] Drafting Motion for Rule 11 Sanctions
[14.--1] Separate Motion Required for Rule 11 Sanctions
[14.--2] Rule 11 Motion Must Comply With General Rules Governing Motions

[14.--3] State Grounds for Sanctions Specifically, and Specify Order Sought
[14.--4] Sign Motion and Supporting Documents

§ 8A.05 Sanctions for Violating Local District Court Rules or Procedures

§ 8A.06 Sanctions Under Rule 16 for Failing to Follow Pretrial Procedures

§ 8A.07 Sanctions Under Rule 37 for Failing to Comply With Discovery Obligations

§ 8A.08 Sanctions Under Rule 41 for Failing to Prosecute Action or Claim

§ 8A.09 Sanctions Under Rule 45 for Failing to Properly Issue or Obey Subpoenas

§ 8A.10 Sanctions Under Rule 56 for Filing Summary Judgment Affidavit or Declaration in Bad Faith or to Delay

§ 8A.11 Sanctions Under 28 U.S.C. § 1927 for Multiplying Proceedings Unreasonably and Vexatiously
[1] Attorney May Be Sanctioned
[2] Client May Not Be Sanctioned
[3] Bad Faith Required
[4] Only Costs and Fees Are Available

§ 8A.12 Sanctions Pursuant to Court's Inherent Power
[1] Understanding Court's Inherent Power to Sanction
[2] Determining Whether Bad Faith Conduct Exists
[3] Relationship Between Inherent Power, Rule 11, and Section 1927
[4] Fashioning Appropriate Sanction

§ 8A.13 Sanctions Orders
[1] Decision May Be Written or on Record
[2] Specifying Source of Sanctioning Authority
[3] Awarding Monetary Sanctions, Costs, and Fees

§ 8A.14 Appealing Sanctions Orders
[1] Timing of Appeal
[2] Standing to Appeal
[3] Notice of Appeal
[4] Standard of Review

§§ 8A.15 through 8A.99 [Reserved]

§ 8A.100 Notice of Motion for Rule 11 Sanctions
[1] Form
Notice of Motion for Rule 11 Sanctions
[2] Use of Form
[3] Time for Moving for Rule 11 Sanctions; 21-Day "Safe Harbor"
[4] Separate Motion Required for Sanctions
[5] Grounds for Sanction
[6] Sanction Discretionary
[7] Deterrence as Purpose of Sanction

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CHAPTER 8A Sanctions *

1-8A Federal Litigation Guide Scope

Scope

SCOPE

This chapter discusses how to seek sanctions in civil actions. Sanctions are designed to procure court intervention regarding impermissible conduct by an adversary party or lawyer. Because of the courts' reluctance to impose sanctions, except in clear and extreme cases of wrongful conduct, sanctions should not be sought lightly. This chapter discusses statutory bases for sanctions motions, most particularly sanctions under Rule 11, as well as the inherent power of courts to impose sanctions for improper conduct.

The chapter begins with an overview of grounds for initiating sanctions proceedings, followed by detailed discussion of moving for sanctions under Rule 11, and responding to such motions. Also covered are hearings, standards governing sanctions orders, and when to appeal from a sanctions order.

Finally, the chapter sets forth a sample motion for sanctions under Rule 11 and includes a discussion on use of the form.

For expanded coverage of sanctions, *see* Moore's Federal Practice, Ch. 11, *Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions* (Matthew Bender 3d ed.).

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CHAPTER 8A Sanctions *
A. Practice Guide

1-8A Federal Litigation Guide § 8A.01

§ 8A.01 Sources of Authority Governing Sanctions

Sanctions may be authorized by any of a number of rules or statutory provisions, or may be permissible on the basis of the court's inherent power. n1 Different standards apply to the various sources of authority governing sanctions. n2 This chapter discusses both statutory and inherent sanctioning power and concentrates on sanctions pursuant to Rule 11.

The following list may be used to determine what authority for sanctions is available when faced with improper behavior or actions by the opposition.

Rule 11. Rule 11 provides for sanctions when a pleading, written motion, or other paper:

- Is presented for an improper purpose; n3
- Contains claims, defenses, or other legal contentions that are not warranted by existing law or by a nonfrivolous argument to change existing law or establish new law; n4
- Contains allegations or factual contentions that do not have or are unlikely to have evidentiary support; or n5
- Contains denials of factual contentions that are not are warranted on the evidence. n6

Rule 16. Sanctions may be imposed under Rule 16 against a party, a party's attorney, or both on any of the following grounds: n7

- Failure to obey a scheduling or pretrial order.
- Failure to appear at a scheduling or pretrial conference.
- Being substantially unprepared to participate in a scheduling or pretrial conference.
- Failure to participate in good faith.

- **Rule 26.** Discovery requests, responses, objections, and mandatory disclosures, other than disclosures of expert testimony, must be certified as required by Rule 26(g). n8 Attorneys and parties who make certifications that violate the rule are subject to mandatory sanctions. n9

- **Rule 37.** Rule 37 permits the court to strike pleadings or dismiss the action when a party fails to obey an order to provide or permit discovery, or fails to appear for his or her deposition. n10

- **Rule 41.** Rule 41(b) allows a defendant to move for dismissal of a claim or the action if the plaintiff fails to prosecute or to comply with a court order. n11 This remedy can be utilized only in extreme situations, n12 and the court must first consider lesser sanctions under Rules 16 and 37. n13

- **Rule 45.** Sanctions may be awarded against an attorney or party who issues and serves a subpoena that imposes undue burden or expense on the recipient. n14 Failure to obey a subpoena can result in a contempt citation. n15

- **Rule 56.** A party who files an affidavit in connection with a motion for summary judgment in bad faith or solely for the purpose of delay is subject to sanction of reasonable expenses and attorney's fees incurred by the opposition in connection with the offending affidavit. n16

- **Local District Court Rules.** Power to sanction under local district court rules derives from the inherent authority of the court. n17

- **Inherent Power of Court.** Under its inherent power the court can assess sanctions against either the client or the attorney for acting "in bad faith, vexatiously, wantonly, or for oppressive reasons." n18

- **Section 1927.** An attorney who "so multiplies the proceedings in any case unreasonably and vexatiously" may be required to pay excess costs, expenses, and attorney's fees reasonably incurred by the other party as a result of the conduct. n19 Counsel should be aware of the following considerations relating to the application of Section 1927: n20

- Violations apply only to counsel.

- Violations do not hinge on the presence of a paper.

- Subjective bad faith by counsel is required.

- A violation results from a course of conduct, and the section imposes a continuing obligation to avoid dilatory tactics.

- There are no counterparts to the safe harbor and separate motion requirements of Rule 11.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsGeneral OverviewCivil ProcedureSanctionsBaseless FilingsGeneral OverviewCivil ProcedureSanctionsContemptCivil ContemptCivil ProcedureSanctionsMisconduct & Unethical BehaviorMisrepresentationsLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Sakon v. Andreo, 119 F.3d 109, 113 (2d Cir. 1997)* ; *see also Zaldivar v. City of Los Angeles, 780*

F.2d 823, 830 (9th Cir. 1986) .

(n2)Footnote 2. *See Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 549, 111 S. Ct. 922, 932, 112 L. Ed. 2d 1140 (1991)* .

(n3)Footnote 3. *Fed. R. Civ. P. 11(b)(1).*

(n4)Footnote 4. *Fed. R. Civ. P. 11(b)(2).*

(n5)Footnote 5. *Fed. R. Civ. P. 11(b)(3).*

(n6)Footnote 6. *Fed. R. Civ. P. 11(b)(4).*

(n7)Footnote 7. *Fed. R. Civ. P. 16(f)(1).*

(n8)Footnote 8. *Fed. R. Civ. P. 26(g)(1).*

(n9)Footnote 9. *Fed. R. Civ. P. 26(g)(3).*

(n10)Footnote 10. *Fed. R. Civ. P. 37(b)(2), (d).*

(n11)Footnote 11. *Fed. R. Civ. P. Rule 41(b).*

(n12)Footnote 12. *Link v. Wabash R.R., 370 U.S. 626, 633, 82 S. Ct. 1386, 8 L. Ed. 2d 734 , reh'g denied, 371 U.S. 873 (1962)* .

(n13)Footnote 13. *See Jackson v. City of New York, 22 F.3d 71, 74-76 (2d Cir. 1994)* .

(n14)Footnote 14. *Fed. R. Civ. P. 45(c)(1).*

(n15)Footnote 15. *Fed. R. Civ. P. 45(e).*

(n16)Footnote 16. *Fed. R. Civ. P. 56(h); see also In re Gioioso, 979 F.2d 956, 962 n.6 (3d Cir. 1992)* .

(n17)Footnote 17. *Roadway Express, Inc. v. Piper, 447 U.S. 752, 764-765, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980)* .

(n18)Footnote 18. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-259, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975)* .

(n19)Footnote 19. *28 U.S.C. § 1927.*

(n20)Footnote 20. *Lapidus v. Vann, 112 F.3d 91, 96 (2d Cir. 1997) , cert. denied, 522 U.S. 932 (1997)* .

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CHAPTER 8A Sanctions *
A. Practice Guide

1-8A Federal Litigation Guide § 8A.02

§ 8A.02 Purpose of Sanctions

When an attorney or party engages in forbidden conduct, sanctions may be used to:

- Deter repetition of the conduct. n1
- Punish the conduct. n2
- Compensate parties for expenses incurred as a result of the conduct. n3

Since the purpose of Rule 11 sanctions is to deter rather than compensate, if a monetary sanction is imposed, it should ordinarily be paid into the court as a penalty. n4 However, under unusual circumstances, particularly for Rule 11(b)(1) violations, deterrence may be ineffective unless the sanction not only requires the person violating the rule to make a monetary payment, but also directs that some or all of this payment be made to those injured by the violation.

Sanctions motions should not be used to intimidate, harass, increase litigation costs, obtain a settlement, test the sufficiency of allegations, emphasize the merits of a claim, create a conflict of interest between attorney and client, reveal privileged information or work-product, nor as a discovery device. n5

Since a motion for sanctions is subject to the certification requirements of Rule 11, an attorney or party may be sanctioned for filing a sanctions motion for an improper purpose. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsGeneral OverviewCivil ProcedureSanctionsBaseless FilingsBad Faith MotionsCivil ProcedureSanctionsBaseless FilingsCertification RequirementsCivil ProcedureSanctionsContemptCivil ContemptLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 11* Committee Note (1993).

(n2)Footnote 2. *See Willy v. Coastal Corp., 503 U.S. 131, 138-139, 112 S. Ct. 1076, 117 L. Ed. 2d 280 , reh'g*

denied, 504 U.S. 935 (1992) .

(n3)Footnote 3. *See, e.g., Fed. R. Civ. P. 16(f)(2).*

(n4)Footnote 4. *Fed. R. Civ. P. 11(c)(4).*

(n5)Footnote 5. *Fed. R. Civ. P. 11* Committee Note (1993).

(n6)Footnote 6. *Fed. R. Civ. P. 11(b)(1).*

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CHAPTER 8A Sanctions *
A. Practice Guide

1-8A Federal Litigation Guide § 8A.03

§ 8A.03 Sanctions in Removal Cases

[1] Sanctions Generally Cannot Be Based Solely on State Filings

Courts are divided on the question of whether Rule 11 may be invoked in a removed action to impose sanctions against a plaintiff solely on the basis of the original complaint. Most of the circuit courts that have addressed the issue have held that papers filed in state court prior to removal are not subject to Rule 11 sanctions. n1

However, an attorney or party who "later advocates" a frivolous position taken in the original complaint may be sanctioned. n2

[2] Filing Frivolous Removal Petition Is Sanctionable

An attorney or party may be sanctioned pursuant to Rule 11(c) for filing a frivolous removal petition. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalGeneral OverviewCivil ProcedureSanctionsGeneral OverviewCivil ProcedureSanctionsBaseless FilingsGeneral OverviewLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Bisciglia v. Kenosha Unified Sch. Dist. No. 1, 45 F.3d 223, 226-227 (7th Cir. 1995)* ; *see also Worldwide Primates, Inc. v. McGreal, 26 F.3d 1089, 1091 (11th Cir. 1994)* ; *Kirby v. Allegheny Beverage Corp., 811 F.2d 253, 257 (4th Cir. 1987)* ; *Stiefvater Real Estate, Inc. v. Hinsdale, 812 F.2d 805, 809 (2d Cir. 1987)* ; *Hurd v. Ralphs Grocery Co., 824 F.2d 806, 808 (9th Cir. 1987)* ; *cf. Herron v. Jupiter Transp. Co. 858 F.2d 332, 335 (6th Cir. 1988)* .

(n2)Footnote 2. *Fed. R. Civ. P.11(b)* Committee Note (1993).

(n3)Footnote 3. *Fed. R. Civ. P. 11(c)*; *see Unanue-Casal v. Unanue-Casal, 898 F.2d 839, 841 (1st Cir. 1990)* ; *see also Hewitt v. City of Stanton, 798 F.2d 1230, 1232-1233 (9th Cir. 1986)* .

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CHAPTER 8A Sanctions *
A. Practice Guide

1-8A Federal Litigation Guide § 8A.04

§ 8A.04 Sanctions Under Rule 11 for Improper Pleadings, Motions, or Other Papers

[1] Purpose of Rule 11 Sanctions

The purpose of sanctions under Rule 11 is to deter frivolous litigation and filings. n1 Thus, when a district court determines that a sanction is warranted for violating Rule 11, the sanction imposed should be the minimum necessary to deter future violations. n2

[2] Rule 11 Limited to Pleadings, Motions, or Other Papers

Rule 11 requires an attorney to sign every pleading, motion, or other paper submitted on behalf of a client, and the attorney is subject to sanctions if the document he or she signs violates the rule. n3 The rule does not apply to appellate proceedings. n3.1 The following points summarize the scope of Rule 11: n4

- Rule 11 sanctions may be imposed on both counsel and client.
- A Rule 11 violation must be based on signed pleadings, motions, or other papers.
- Rule 11 may not be employed to sanction obnoxious conduct during the course of the litigation.
- Rule 11 requires only a showing of objective unreasonableness on the part of the person signing the papers.
- Misconduct under Rule 11 must be judged as of the time the paper was signed.

[3] Triggering Liability Under Rule 11

The operative events for triggering liability under Rule 11 are: n5

- Signing a document. n6
- Filing a document. n7

- Submitting an unfiled document to the court. n8

- Later advocating a position; that is, after a paper is filed, reaffirming to the court positions taken in the paper after learning that they cease to have any merit. n9 The use of the word "advocating" in the text of the rule means that continuing to advocate a position orally after a paper has been signed, filed, or submitted may result in the imposition of sanctions. Sanctions may not be imposed under Rule 11 for statements made for the first time during oral argument. n10

Rule 11 sanctions may not be imposed based on other conduct, such as discovery abuses, misstatements made during oral argument, or conduct in other litigation. n11

[4] Significance of Signing Pleadings, Motions, or Other Papers

Every pleading, written motion, or other paper presented to a federal district court must be signed by an attorney of record or pro se litigant. The paper must state the signer's address, e-mail address, and telephone number. n12 Failure to sign a document is not subject to discretionary sanctions under Rule 11(c). However, if the omission is not promptly corrected after being called to the attention of the person whose signature is required, the paper must be stricken. n13

A document bearing a typewritten signature does not satisfy Rule 11. n14 Similarly, a document bearing a rubber stamped facsimile of a signature has been deemed as not "signed" within the meaning of Rule 11(a). n15

The attorney's signature certifies, among other things, that to the best of the attorney's knowledge, information, and belief after reasonable inquiry, the allegations and facts are or will be supported by the evidence. Likewise, in signing the paper, the attorney or party certifies that the legal contentions have or will have proper evidentiary support, and that the arguments are warranted by existing law or by a nonfrivolous argument to extend, modify, or change the law. n16 Therefore, sanctions may be sought for a filing that contains both frivolous and nonfrivolous material. n17

In signing the paper, the attorney or party certifies that denials of factual contentions are warranted on the evidence or are reasonably based on a lack of information or belief; denials based on a lack of information or belief must be specifically identified. n18

Rule 11 places an affirmative duty on attorneys and litigants to make a investigation of the facts and the law that is reasonable under the circumstances before signing and submitting any pleading, motion, or other paper. n19

The amount of time available to investigate a case may be considered by a court in deciding whether sanctions should be imposed. n20

In the absence of time constraints, an attorney should interview witnesses and any attorneys who represented the client in prior related proceedings. n21 Likewise, all available documents that are relevant to the case should be examined. n22 Counsel for the plaintiff should also check any available public records to verify facts. n23

An attorney may rely on objectively reasonable representations of his or her client. n24 However, information received from other sources should be verified. n25

[5] Conduct Is Measured by Objective Standard

The courts have interpreted Rule 11 as establishing an objective standard of conduct for litigants and attorneys. n26 Although the subjective beliefs of a person who signed or advocated a document are irrelevant in determining whether the certification requirements of the rule have been violated, subjective factors may be considered, since "Rule 11 sanctions are based on 'an objective standard of reasonableness under the circumstances.' " n27

[6] Rule 11 Is Not Available to Sanction Generalized Bad Behavior

Counsel considering moving for Rule 11 sanctions must be aware that Rule 11 addresses specific behavior relating to signed papers; it does not allow the court to sanction any other action by an attorney or party of which it disapproves. n28 However, courts may impose sanctions for generalized bad behavior under *28 U.S.C. § 1927* and the inherent power of the court.

[7] Moving for Sanctions Under Rule 11

[7.--1] Who May Move for Imposition of Sanctions

A district court may impose sanctions under Rule 11 on motion of an aggrieved party. n29 A party may not move for sanctions under Rule 11 against his or her attorney. n30 A nonparty may not intervene to make a motion for sanctions. n31 A court also may initiate a sanctions proceeding on its own motion. n32 The substantive standards for sua sponte sanctions are the same as for sanctions initiated by a party and do not require subjective bad faith. n33 However, Rule 11 provides that a court may impose sanctions ordering an attorney to pay attorney's fees and costs to the opposing party only on motion of the opposing party. n34

[7.--2] "Safe Harbor" Prerequisite to Filing Motion

The "safe harbor" provision, granting a time period between the time of service and the time for filing is designed to allow for the correction of the alleged violation. n35 Accordingly, a motion for sanctions under Rule 11 may 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." n36 Although the 21-day period starts with serving the motion, n37 the intention of the Rule is that counsel will give "informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a Rule 11 motion." n38

This "safe-harbor" provision is a mandatory procedural prerequisite. Sanctions imposed without compliance are subject to reversal. n39 The fact that a court has granted leave to move for sanctions may not be used to circumvent the "safe harbor" prerequisite. n40 However, technical noncompliance with the safe-harbor provision may not always be a bar to the imposition of sanctions, particularly if the sanctioned party had ample notice that sanctions would be requested. n41

The "safe harbor" provision immunizes litigants from Rule 11 sanction motions if they withdraw or correct the challenged paper before the motion is served. n42 Failure to comply with the 21-day service requirement does not, however, shield parties and attorneys from all sanctions under Rule 11, since the "safe harbor" provision does not apply when the court imposes sanctions on its own initiative. n43 However, when a sua sponte Rule 11 sanction denies a lawyer the opportunity to withdraw the offending document under the Rule 11 safe harbor provision, subjective bad faith, rather than objective unreasonableness, is the appropriate standard for imposing sanctions. n44

[7.--3] Timing of Motion

Rule 11 does not impose an explicit deadline for seeking sanctions. n45 The 21-day, safe-harbor service requirement controls not only the earliest date on which a motion may be filed, it also indirectly controls the last date on which the a Rule 11 sanctions motion may be filed. At the very least, a party must serve its Rule 11 motion before the court has ruled on the pleading, and thus before the conclusion of the case. Otherwise, the purpose of the "safe harbor" provision would be nullified. n46

One court has interpreted this to mean that Rule 11 motions must be served at least a full 21 days before the court concludes the case or resolves the offending contention, because if the court disposes of the offending contention within the 21-day safe-harbor period after service, it becomes impossible under the provision of Rule 11(c)(2) to file the

motion or otherwise present it to the court. The Rule permits filing of the motion only after the expiration of the full 21-day "safe-harbor" period following service of the motion. n47

However, it has been found that sanctions may be awarded in response to a motion filed after final judgment, despite the safe-harbor provision of Rule 11, if the party seeking sanctions had previously served a motion seeking sanctions based on the same pleading. n48

[7.--4] Avoiding Frivolous Sanctions Motion

An attorney or party may be sanctioned for filing a frivolous sanctions motion. n49

[7.--5] Considering Discovery on Motion

Discovery should be conducted on a sanctions motion only in unusual circumstances, and then only by leave of court. n50

[7.--6] Awarding Expenses and Attorney's Fees to Party Who Prevails on Motion

The court may award to the party prevailing on a Rule 11 motion reasonable expenses and attorney's fees incurred in making or opposing the motion. n51 This provision eliminates the need for cross-motions under Rule 11. An award of fees and expenses is not automatic, since the Rule provides that the court may make such an award "if warranted." n52 The sanction must be limited to the fees and expenses that directly result from the sanctionable conduct, and the award must be the least severe sanction that is adequate to serve the purposes of deterrence. n53

Expenses and attorney's fees may also be awarded as a sanction for violating the certification requirements of Rule 11. n54

[7.--7] No Time Limit for Decision on Motion

Rule 11 does not specify a time limit for deciding a motion seeking sanctions. The 1993 Committee Note states that the question of when the motion should be decided will be resolved on a case-by-case basis. n55 A court may defer its ruling until the end of the case to prevent conflicts of interest and attorney-client privilege problems, or for other reasons that justify delay. n56

[8] Who May Impose Sanctions

A district judge has the authority to impose sanctions under Rule 11 if an attorney or a party violates Rule 11(b). n57 Case law differs on the issue of whether a magistrate judge assigned to hear pretrial matters has authority to impose Rule 11 sanctions. n58

[9] Sanctions Are Discretionary

When a district court determines that Rule 11(b) has been violated, it "may," but is not required to, impose a sanction. n59

If a court determines that sanctions are warranted under Rule 11, its determination as to the type of sanction to be imposed is also discretionary. n60 However, the court's discretion is not unrestricted. The sanction must be "limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated." n61

The rule does not list other factors that a court should consider in deciding whether to impose a sanction and what sanction to impose. The Committee Note suggests the following factors for the court's consideration: n62

- Whether the improper conduct was willful, or negligent.
- Whether it was part of a pattern of activity, or an isolated event.
- Whether it infected the entire pleading, or only one particular count or defense.
- Whether the person has engaged in similar conduct in other litigation.
- Whether it was intended to injure; what effect it had on the litigation process in time or expense.
- Whether the responsible person is trained in the law.
- What amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case.
- What amount is needed to deter similar activity by other litigants.

Ordinarily, a finding of subjective bad faith is not required before ordering sanctions under Rule 11. n63 The Second Circuit, while agreeing that the objective unreasonableness standard is applicable when sanctions are initiated by motion, has ruled that a subjective bad faith standard does apply to sua sponte sanctions, at least if the sanctions are initiated at a time when the sanctioned person no longer has an opportunity to correct or withdraw the challenged submission. n64 The Second Circuit left open the question of what mental standard would apply when sua sponte sanctions are ordered but the person is afforded an opportunity to avoid the sanction through correction or withdrawal. n65

The First and Fifth Circuits, on the other hand, specifically rejected the Second Circuit's view, ruling that the plain language of Rule 11 imposes the same substantive standard whether the court or an opposing party initiates a sanctions proceeding. n66

[10] Notice and Opportunity to Be Heard--Due Process Considerations

The parties and attorneys must receive both proper notice and a reasonable opportunity to respond before the trial court may impose sanctions under Rule 11. n67

The party against whom sanctions are sought is entitled to particularized notice. n68 At a minimum, he or she must be informed of the following: n69

- Rule 11 sanctions are being considered.
- The reasons why sanctions are being considered.
- The form of sanctions under consideration.

Judges who wish to impose sanctions sua sponte must provide notice by issuing an order describing the specific conduct that appears to violate Rule 11, and commanding the attorney, law firm, or party to show cause why it has not violated the rule. n70 Rule 11 requires that a party or an attorney be given a reasonable opportunity to respond to the alleged violation prior to imposition of sanctions. n71 However, Rule 11 does not require a formal hearing or a jury trial. n72 In the absence of a timely response, a Rule 11 motion may be granted by default as uncontested. n73

[11] Lack of Jurisdiction in Underlying Action

The absence of subject matter jurisdiction over the merits of a case does not prevent a district court from adjudicating the collateral issue of sanctions under Rule 11. n74

A district court also has authority to award sanctions to a defendant over whom it does not have personal jurisdiction but who has been forced to defend a frivolous complaint. n75 However, a court may not impose sanctions against a nonparty over whom it does not have jurisdiction. n76

[12] Effect of Dismissal of Underlying Action

Dismissal of an action does not deprive a district court of its jurisdiction to impose sanctions under Rule 11. n77 However, a court may not impose monetary sanctions sua sponte if it has not issued a show cause order prior to a voluntary dismissal. n78

[13] Determining Who The Court May Sanction

A district court may sanction an attorney who violates or is responsible for a violation of the certification requirements of Rule 11. n79 However, Rule 11 sanctions may not be awarded to a client against its own attorney for a breach of duty to the client. n80

An attorney who at any point certified that a document complied with Rule 11 is subject to the rule's strictures, regardless of whether he or she remains an attorney of record. Thus, a court may assess sanctions against a lawyer who has withdrawn from a case before the opposing party has moved for sanctions or the court has issued a show cause order. n81

Since Rule 11 applies to anyone who presents a document to the court, local counsel may be held liable for filing or submitting a frivolous paper, regardless of who actually signed it. n82

A lawyer's lack of experience or knowledge does not prevent his or her liability under Rule 11. n83 Inexperience may, however, be considered when making a sanctions decision. n84 If an inexperienced attorney works for a law firm, the court may decide to sanction the firm, rather than the individual attorney.

When an attorney is sanctioned, the court may order that the attorney bear the sanction personally and not be reimbursed or indemnified. n85

A represented party who is responsible for a violation of Rule 11 may be sanctioned. n86 Responsibility for a violation will depend on the extent of the client's involvement in the management of litigation and the decisions that resulted in a violation of the rule. n87 Imposition of sanctions against an attorney does not preclude imposition of sanctions against the client. n88

A party who is not represented by counsel may be sanctioned for violating Rule 11. n89 The district court may not decline to impose any sanction when a violation has arguably occurred simply because a plaintiff is proceeding pro se. n90 However, the court may consider the ability of the party to pay monetary sanctions as one factor in assessing sanctions. n91

[14] Drafting Motion for Rule 11 Sanctions

[14.--1] Separate Motion Required for Rule 11 Sanctions

A motion for Rule 11 sanctions must be made separately from any other filing. n92 The request for sanctions may not

be included in a pleading or combined with any other motion. n93

[14.--2] Rule 11 Motion Must Comply With General Rules Governing Motions

A Rule 11 motion seeking sanctions must comply with Rule 7 and Rule 11, as well as with any applicable local district court rules. n94

[14.--3] State Grounds for Sanctions Specifically, and Specify Order Sought

A motion for sanctions must "state with particularity" the grounds for sanctions by indicating the authority under which sanctions are requested (*e.g., 28 U.S.C. § 1927*) and describing the specific conduct alleged to be sanctionable. n95

A motion for sanctions must specify the order sought. If the governing rule or statute specifies the type of sanction that may be imposed, request only that sanction. n96

EXAMPLE:

Unreasonable and vexatious multiplication of proceedings. A motion for sanctions alleging a violation of Section 1927 may only request payment of excess costs, expenses, and attorney's fees incurred. n97 Do not cite Section 1927 and request dismissal.

If the type of sanctions available under the authority specified is discretionary, the motion should request a particular sanction and "appropriate" sanctions.

EXAMPLE:

Representations in pleadings. A motion for sanctions alleging lack of legal and factual basis for a lawsuit may request an order awarding attorney's fees and other sanctions that may be appropriate. n98

[14.--4] Sign Motion and Supporting Documents

A motion for Rule 11 sanctions and each supporting document must be signed by at least one attorney of record or by a party appearing pro se. An unsigned document may be stricken. n99

The signature certifies that:

- The motion or supporting document is not being presented for an improper purpose. n100
- Its legal contentions are warranted by existing law or by a nonfrivolous argument to change existing law or establish new law. n101
- Its factual contentions have, or, if specifically so identified, likely will have, evidentiary support. n102

If the motion, or any supporting document, violates any one of these certification standards, sanctions may be imposed. n103

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsGeneral OverviewCivil ProcedureSanctionsBaseless FilingsBad Faith MotionsCivil ProcedureSanctionsBaseless FilingsCertification RequirementsCivil ProcedureSanctionsBaseless FilingsSigning RequirementsCivil ProcedureSanctionsBaseless FilingsVexatious LitigantsLegal EthicsSanctionsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 11* Committee Note (1993).

(n2)Footnote 2. *Waltz v. County of Lycoming, 974 F.2d 387, 390 (3d Cir. 1992)* ; *In re Kunstler, 914 F.2d 505, 523 (4th Cir. 1990)* , *cert. denied, 499 U.S. 969 (1991)* ; *Smith Int'l, Inc. v. Texas Commerce Bank, 844 F.2d 1193, 1202 (5th Cir. 1988)* .

(n3)Footnote 3. *Fed. R. Civ. P. 11(a).*

(n4)Footnote 3.1. *Roth v. Green, 466 F.3d 1179, 1187-1188 (10th Cir. 2006)* .

(n5)Footnote 4. *See U.S. v. International Bhd. of Teamsters, 948 F.2d 1338, 1345-1346 (2d Cir. 1991)* .

(n6)Footnote 5. *Fed. R. Civ. P. 11(b).*

(n7)Footnote 6. *See, e.g., Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 544, 111 S. Ct. 922, 112 L. Ed. 2d 1140 (1991)* .

(n8)Footnote 7. *See, e.g., Bryant v. Brooklyn Barbecue Corp., 932 F.2d 697, 699 (8th Cir. 1991)* , *cert. denied, 502 U.S. 1005 (1991)* .

(n9)Footnote 8. *See, e.g., Eisenberg v. University of New Mexico, 936 F.2d 1131, 1133-1134 (10th Cir. 1991)* .

(n10)Footnote 9. *Fed. R. Civ. P. 11(b)* Committee Note (1993).

(n11)Footnote 10. *Fed. R. Civ. P. 11* Committee Note (1993).

(n12)Footnote 11. *Christian v. Mattel, Inc., 286 F.3d 1118, 1129-1131 (9th Cir. 2002)* .

(n13)Footnote 12. *Fed. R. Civ. P. 11(a).*

(n14)Footnote 13. *Fed. R. Civ. P. 11(a)*; *see also Operating Eng'rs Local 139 Health Benefit Fund v. Rawson Plumbing, Inc., 130 F. Supp. 2d 1022, 1023-1024 (E.D. Wis. 2001)* .

(n15)Footnote 14. *Becker v. Montgomery, 532 U.S. 757, 764, 121 S. Ct. 1801, 149 L. Ed. 2d 983 (2001)* .

(n16)Footnote 15. *Jenkins v. Sladkus, 226 F.R.D. 206, 206-207 (S.D.N.Y. 2005)* .

(n17)Footnote 16. *Fed. R. Civ. P. 11(b)*; *see also Coonts v. Potts, 316 F.3d 745, 752-754 (8th Cir. 2003)* .

(n18)Footnote 17. *See Holgate v. Baldwin, 425 F.3d 671, 675-677 (9th Cir. 2005)* (sanctions against attorney could be imposed based on one frivolous claim in complaint, regardless of whether remaining claims were frivolous).

(n19)Footnote 18. *Fed. R. Civ. P. 11(b)(4).*

(n20)Footnote 19. *See Coonts v. Potts, 316 F.3d 745, 753-754 (8th Cir. 2003)* .

(n21)Footnote 20. *Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 401-402, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)* .

(n22)Footnote 21. *See Wigod v. Chicago Mercantile Exch., 981 F.2d 1510, 1523 (7th Cir. 1992)* .

(n23)Footnote 22. *See Insurance Benefit Adm'rs, Inc. v. Martin, 871 F.2d 1354, 1357 (7th Cir. 1989)* .

(n24)Footnote 23. *See Callahan v. Schoppe, 864 F.2d 44, 45-46 (5th Cir. 1989)* .

(n25)Footnote 24. *See Hadges v. Yonkers Racing Corp., 48 F.3d 1320, 1323, 1329-1330 (2d Cir. 1995)* .

(n26)Footnote 25. *See S.A. Auto Lube, Inc. v. Jiffy Lube Int'l, Inc., 842 F.2d 946, 949 (7th Cir. 1988)* .

(n27)Footnote 26. *See Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 549, 111 S. Ct. 922, 112 L. Ed. 2d 1140 (1991)* ; *Margo v. Weiss, 213 F.3d 55, 64-65 (2d Cir. 2000)* .

(n28)Footnote 27. *Martin v. Brown, 63 F.3d 1252, 1264 (3d Cir. 1995)* .

(n29)Footnote 28. *See Trulis v. Barton, 67 F.3d 779, 789 (9th Cir. 1995)* .

(n30)Footnote 29. *Fed. R. Civ. P. 11(c)(2)*.

(n31)Footnote 30. *See Mark Indus., Ltd. v. Sea Captain's Choice, Inc., 50 F.3d 730, 732 (9th Cir. 1995)* .

(n32)Footnote 31. *New York News, Inc. v. Kheel, 972 F.2d 482, 486 (2d Cir. 1992)* .

(n33)Footnote 32. *Fed. R. Civ. P. 11(c)(3)*; *see also MHC Inv. Co. v. Racom Corp., 323 F.3d 620, 623 (8th Cir. 2003)* .

(n34)Footnote 33. *See Jenkins v. Methodist Hosps. of Dallas, Inc., 478 F.3d 255, 264 (5th Cir. 2007)* ; *see also Young v. City of Providence, 404 F.3d 33, 39-40 (1st Cir. 2005)* .

(n35)Footnote 34. *Norsyn, Inc. v. Desai, 351 F.3d 825, 831-832 (8th Cir. 2003)* .

(n36)Footnote 35. *Fed. R. Civ. P. 11* Committee Note (1993).

(n37)Footnote 36. *Fed. R. Civ. P. 11(c)(2)*; *see also Gal v. Viacom Int'l, Inc., 403 F. Supp. 2d 294, 308-309 (S.D.N.Y. 2005)* .

(n38)Footnote 37. *Fed. R. Civ. P. 11(c)(2)*; *see also Roth v. Green, 466 F.3d 1179, 1191-1192 (10th Cir. 2006)* .

(n39)Footnote 38. *Fed. R. Civ. P. 11* Committee Note (1993).

(n40)Footnote 39. *See Radcliffe v. Rainbow Constr. Co., 254 F.3d 772, 788-789 (9th Cir. 2001)* .

(n41)Footnote 40. *Photocircuits Corp. v. Marathon Agents, Inc., 162 F.R.D. 449, 452 (E.D.N.Y. 1995)* .

(n42)Footnote 41. *See Cardillo v. Cardillo, 360 F. Supp. 2d 402, 419-420 (D.R.I. 2005)* .

(n43)Footnote 42. *Brown v. Pierce Mfg., Inc., 169 F.R.D. 118, 119 (E.D. Wis. 1996)* .

(n44)Footnote 43. *In re Pennie & Edmonds LLP, 323 F.3d 86, 89-90 (2d Cir. 2003)* .

(n45)Footnote 44. *See In re Pennie & Edmonds LLP, 323 F.3d 86, 87, 91 (2d Cir. 2003)* .

(n46)Footnote 45. *See Fed. R. Civ. P. 11*.

(n47)Footnote 46. *Fed. R. Civ. P. 11* Committee Note (1993).

(n48)Footnote 47. *Ridder v. City of Springfield, 109 F.3d 288, 295 (6th Cir. 1997)* .

(n49)Footnote 48. *See Divane v. Krull Elec. Co., 200 F.3d 1020, 1025-1027 (7th Cir. 1999)* .

(n50)Footnote 49. *Fed. R. Civ. P. 11* Committee Note (1993).

(n51)Footnote 50. *Fed. R. Civ. P. 11* Committee Note (1993).

(n52)Footnote 51. *Fed. R. Civ. P. 11(c)(2).*

(n53)Footnote 52. *Fed. R. Civ. P. 11(c)(2).*

(n54)Footnote 53. *See Divane v. Krull Elec. Co., 200 F.3d 1020, 1030-1031 (7th Cir. 1999) .*

(n55)Footnote 54. *Fed. R. Civ. P. 11(c)(4).*

(n56)Footnote 55. *Fed. R. Civ. P. 11* Committee Note (1993).

(n57)Footnote 56. *See Leidholdt v. L.F.P., Inc., 860 F.2d 890, 895 (9th Cir. 1988) .*

(n58)Footnote 57. *Fed. R. Civ. P. 11(c).*

(n59)Footnote 58. *Compare Alpern v. Lieb, 38 F.3d 933, 935 (7th Cir. 1994)* (power to award sanctions belongs in hands of district judge), *with* Maisonville v. F2 *Am., Inc., 902 F.2d 746, 747-748 (9th Cir. 1990)* (magistrate judge may order Rule 11 sanctions because sanctions are non-dispositive).

(n60)Footnote 59. *Fed. R. Civ. P. 11(c)(1)*; *see Corley v. Rosewood Care Ctr., Inc., 388 F.3d 990, 1013 (7th Cir. 2004) .*

(n61)Footnote 60. *Mariani v. Doctors Assocs., Inc., 983 F.2d 5, 7 (1st Cir. 1993) .*

(n62)Footnote 61. *Fed. R. Civ. P. 11(c)(4).*

(n63)Footnote 62. *Fed. R. Civ. P. 11* Committee Note (1993).

(n64)Footnote 63. *See Jenkins v. Methodist Hosps. of Dallas, Inc., 478 F.3d 255, 264 (5th Cir. 2007) .*

(n65)Footnote 64. *In re Pennie & Edmunds LLP, 323 F.3d 86, 90-93 (2d Cir. 2003) .*

(n66)Footnote 65. *In re Pennie & Edmunds LLP, 323 F.3d 86, 90-93 (2d Cir. 2003) .*

(n67)Footnote 66. *Young v. City of Providence, 404 F.3d 33, 39-40 (1st Cir. 2005)* ; *Jenkins v. Methodist Hosps. of Dallas, Inc., 478 F.3d 255, 265 (5th Cir. 2007) .*

(n68)Footnote 67. *Fed. R. Civ. P. 11(c)*; *see Vollmer v. Publishers Clearing House, 248 F.3d 698, 709-711 (7th Cir. 2001) .*

(n69)Footnote 68. *Foster v. Wilson, 504 F.3d 1046, 1052 (9th Cir. 2007) .*

(n70)Footnote 69. *Foster v. Wilson, 504 F.3d 1046, 1052-1053 (9th Cir. 2007) .*

(n71)Footnote 70. *Fed. R. Civ. P. 11(c)(3)*; *see Foster v. Wilson, 504 F.3d 1046, 1052-1053 (9th Cir. 2007)* ; *see also Jones v. UPS, 460 F.3d 1004, 1008-1011 (8th Cir. 2006) .*

(n72)Footnote 71. *Fed. R. Civ. P. 11(c).*

(n73)Footnote 72. *See Childs v. State Farm Mut. Auto. Ins. Co., 29 F.3d 1018, 1027 (5th Cir. 1994)* (hearing not required); *In re Itel Sec. Litig., 596 F. Supp. 226, 232 n.7 (N.D. Cal. 1984) , aff'd, 791 F.2d 672 (9th Cir. 1986)* (jury

trial not required).

(n74)Footnote 73. *See DiPaolo v. Moran, 407 F.3d 140, 144-145 (3d Cir. 2005)* .

(n75)Footnote 74. *Willy v. Coastal Corp., 503 U.S. 131, 133, 112 S. Ct. 1076, 117 L. Ed. 2d 280 (1992)* .

(n76)Footnote 75. *Mareno v. Rowe, 910 F.2d 1043, 1046-1047 (2d Cir. 1990)* .

(n77)Footnote 76. *McGuire v. Sigma Coatings, Inc., 48 F.3d 902, 907 (5th Cir. 1995)* .

(n78)Footnote 77. *Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 396, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)* .

(n79)Footnote 78. *Fed. R. Civ. P. 11(c)(5)(B).*

(n80)Footnote 79. *Fed. R. Civ. P. 11(c).*

(n81)Footnote 80. *Mark Indus., Ltd. v. Sea Captain's Choice, Inc., 50 F.3d 730, 732 (9th Cir. 1995)* .

(n82)Footnote 81. *See In re Itel Sec. Litig., 791 F.2d 672, 675 (9th Cir. 1986)* .

(n83)Footnote 82. *Val-Land Farms, Inc. v. Third Nat'l Bank, 937 F.2d 1110, 1117-1118 (6th Cir. 1991)* .

(n84)Footnote 83. *Hays v. Sony Corp. of Am., 847 F.2d 412, 419 (7th Cir. 1988)* .

(n85)Footnote 84. *Blue v. United States Dep't of the Army, 914 F.2d 525, 546 (4th Cir. 1990)* , *cert. denied, 499 U.S. 959 (1991)* .

(n86)Footnote 85. *Derechin v. State Univ. of New York, 963 F.2d 513, 519 (2d Cir. 1992)* .

(n87)Footnote 86. *Fed. R. Civ. P. 11(c).*

(n88)Footnote 87. *Independent Fire Ins. Co. v. Lea, 979 F.2d 377, 378 (5th Cir. 1992)* .

(n89)Footnote 88. *See Skidmore Energy, Inc. v. KPMG, 455 F.3d 564, 567-568 (5th Cir. 2006)* ; *see also Collins v. Walden, 834 F.2d 961, 965 (11th Cir. 1987)* .

(n90)Footnote 89. *Fed. R. Civ. P. 11(c)*; *see also Warren v. Guelker, 29 F.3d 1386, 1389 (9th Cir. 1994)* .

(n91)Footnote 90. *Warren v. Guelker, 29 F.3d 1386, 1390 (9th Cir. 1994)* .

(n92)Footnote 91. *Warren v. Guelker, 29 F.3d 1386, 1390 (9th Cir. 1994)* .

(n93)Footnote 92. *Fed. R. Civ. P. 11(c)(2).*

(n94)Footnote 93. *See, e.g., Hadges v. Yonkers Racing Corp., 48 F.3d 1320, 1323, 1328 (2d Cir. 1995)* .

(n95)Footnote 94. *Fed. R. Civ. P. 7(b)*; *Fed. R. Civ. P. 11.*

(n96)Footnote 95. *Fed. R. Civ. P. 7(b)(1).*

(n97)Footnote 96. *Fed. R. Civ. P. 7(b)(1).*

(n98)Footnote 97. *28 U.S.C. § 1927.*

(n99)Footnote 98. *Fed. R. Civ. P. 11(c).*

(n100)Footnote 99. *Fed. R. Civ. P. 11(a).*

(n101)Footnote 100. *Fed. R. Civ. P. 11(b)(1).*

(n102)Footnote 101. *Fed. R. Civ. P. 11(b)(2).*

(n103)Footnote 102. *Fed. R. Civ. P. 11(b)(3).*

(n104)Footnote 103. *Fed. R. Civ. P. 11(c).*

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CHAPTER 8A Sanctions *
A. Practice Guide

1-8A Federal Litigation Guide § 8A.05

§ 8A.05 Sanctions for Violating Local District Court Rules or Procedures

The power to sanction under local district court rules derives from the inherent authority of the court. n1 Sanctions generally may not be imposed for failure to comply with any requirement that is not in federal law, federal rules, or local district court rules (*e.g.,* general orders, standing orders, and individual judge's rules) unless the alleged violator has been given actual notice of the requirement in the particular case. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsGeneral OverviewCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral OverviewLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Roadway Express, Inc. v. Piper, 447 U.S. 752, 764-765, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980)* .

(n2)Footnote 2. *Fed. R. Civ. P. 83(b).*

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CHAPTER 8A Sanctions *
A. Practice Guide

1-8A Federal Litigation Guide § 8A.06

§ 8A.06 Sanctions Under Rule 16 for Failing to Follow Pretrial Procedures

Sanctions may be imposed under Rule 16(f) against an attorney or party who: n1

- Fails to obey a scheduling or pretrial order.
- Fails to appear at a scheduling or pretrial conference. n2
- Is substantially unprepared to participate at a scheduling or pretrial conference.
- Fails to participate in good faith.

The range of sanctions available for violations is extremely broad, including reprimand, costs, attorney's fees, dismissal of an action, or entry of a default judgment. The appropriate sanction must be decided on a case-by-case basis. n3

A Rule 16(f) dismissal that does not specify whether it is with or without prejudice is not an adjudication on the merits so as to bar the filing of a subsequent suit. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedurePretrial MattersConferencesSanctionsCivil ProcedureSanctionsGeneral OverviewLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 16(f)(1).*

(n2)Footnote 2. *Lydic v. Bayer, A.G., 219 F.R.D. 114, 115-116 (S.D. Tex. 2003) .*

(n3)Footnote 3. *See Tower Ventures, Inc. v. City of Westfield, 296 F.3d 43, 46 (1st Cir. 2002) .*

(n4)Footnote 4. *See Bay Fireworks v. Frenkel & Co., Inc., 359 F. Supp. 2d 257, 262-263 (E.D.N.Y. 2005) .*

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CHAPTER 8A Sanctions *
A. Practice Guide

1-8A Federal Litigation Guide § 8A.07

§ 8A.07 Sanctions Under Rule 37 for Failing to Comply With Discovery Obligations

Sanctions may be imposed for misconduct relating to disclosure or discovery. Rule 37 permits the court to strike pleadings or dismiss the action when a party fails to obey an order to permit or provide discovery, or fails to appear for his or her deposition. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedurePretrial MattersConferencesSanctionsCivil ProcedureSanctionsGeneral OverviewLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 37(b)(2),(d)*; *Bobal v. Rensselaer Polytechnic Inst., 916 F.2d 759, 763-764 (2d. Cir 1990)* .

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CHAPTER 8A Sanctions *
A. Practice Guide

1-8A Federal Litigation Guide § 8A.08

§ 8A.08 Sanctions Under Rule 41 for Failing to Prosecute Action or Claim

Rule 41(b) authorizes involuntary dismissal of an action or claim for plaintiff's failure to prosecute. n1 This remedy may be utilized only in extreme situations. n2

Rule 41(c) makes the involuntary dismissal provisions of Rule 41(b) applicable to counterclaims, cross-claims, and third-party claims. n3

Failure to prosecute may be evidenced by either simple inaction or a pattern of delaying tactics. Factors that the court may consider include: n4

- The duration of the claimant's failure to prosecute.
- Whether the claimant received notice that further delays would result in dismissal.
- Whether the defendant is likely to be prejudiced by further delay.
- Whether the trial judge has taken care to strike a balance between alleviating court calendar congestion and protecting a party's right to due process and a fair chance to be heard.
- The efficacy of lesser sanctions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureSanctionsGeneral OverviewCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral OverviewLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 41(b).*

(n2)Footnote 2. *Link v. Wabash R.R., 370 U.S. 626, 633, 82 S. Ct. 1386, 8 L. Ed. 2d 734 .*

(n3)Footnote 3. *Fed. R. Civ. P. 41(c).*

(n4)Footnote 4. *Lucas v. Miles, 84 F.3d 532, 535 (2d Cir. 1996)* .

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CHAPTER 8A Sanctions *
A. Practice Guide

1-8A Federal Litigation Guide § 8A.09

§ 8A.09 Sanctions Under Rule 45 for Failing to Properly Issue or Obey Subpoenas

An attorney or party who is responsible for issuance and service of a subpoena that imposes undue burden or expense on the recipient shall be sanctioned by the court on behalf of which the subpoena was issued. Determination of an appropriate sanction is discretionary, and may include the recipient's lost earnings and reasonable attorney's fees. n1

Failure to obey a subpoena without adequate excuse may be deemed contempt of court. n2

The court should analyze a violation of Rule 45 in the same manner as a violation of Rule 11. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesSanctionsCivil ProcedurePretrial MattersSubpoenasCivil ProcedureSanctionsGeneral OverviewCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral OverviewLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 45(c)(1)*; *see also Dravo Corp. v. Liberty Mut. Ins. Co., 160 F.R.D. 123, 128 (D. Neb. 1995)* .

(n2)Footnote 2. *Fed. R. Civ. P. 45(e)*.

(n3)Footnote 3. *Dravo Corp. v. Liberty Mut. Ins. Co., 160 F.R.D. 123, 128 (D. Neb. 1995)* .

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CHAPTER 8A Sanctions *
A. Practice Guide

1-8A Federal Litigation Guide § 8A.10

§ 8A.10 Sanctions Under Rule 56 for Filing Summary Judgment Affidavit or Declaration in Bad Faith or to Delay

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, that party incurred as a result. n1 An offending party or attorney also may be held in contempt or subjected to other appropriate sanctions. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentGeneral OverviewCivil ProcedurePretrial MattersConferencesSanctionsCivil ProcedureSanctionsGeneral OverviewCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral OverviewLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 56(h).*

(n2)Footnote 2. *Fed. R. Civ. P. 56(h).*

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CHAPTER 8A Sanctions *
A. Practice Guide

1-8A Federal Litigation Guide § 8A.11

§ 8A.11 Sanctions Under 28 U.S.C. § 1927 for Multiplying Proceedings Unreasonably and Vexatiously

[1] Attorney May Be Sanctioned

An attorney or other person admitted to conduct cases in a federal court may be sanctioned for unreasonably and vexatiously multiplying the proceedings in a case. n1 Section 1927 does not apply to a pro se litigant who is not an attorney. n2

The filing of a complaint may be sanctioned under Rule 11 or a court's inherent authority; Section 1927, on the other hand, applies only to unnecessary filings and tactics after the filing of the complaint. n3

[2] Client May Not Be Sanctioned

Represented parties may not be sanctioned under Section 1927. n4

[3] Bad Faith Required

An award of sanctions under Section 1927 generally must be accompanied by a finding of bad faith. n5 However, the decision to impose a sanction under Section 1927 is discretionary. n6

[4] Only Costs and Fees Are Available

Only "the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct" may be awarded under Section 1927. n7

A voluntary dismissal does not remove jurisdiction from the district court with respect to a motion for fees and costs pursuant to Section 1927. However, a motion for fees should be granted following a voluntary dismissal only in exceptional circumstances. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsGeneral OverviewCivil ProcedureSanctionsBaseless FilingsVexatious LitigantsCivil

ProcedureSanctionsMisconduct & Unethical BehaviorGeneral OverviewLegal EthicsSanctionsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *28 U.S.C. § 1927.*

(n2)Footnote 2. *See Browning v. Kramer, 931 F.2d 340, 344 (5th Cir. 1991)* .

(n3)Footnote 3. *See Zaldivar v City of Los Angeles, 780 F2d 823, 831 (9th Cir 1986)* ; *see also Willis v. City of Oakland, 231 F.R.D. 597, 598 (N.D. Cal. 2005)* .

(n4)Footnote 4. *28 U.S.C. § 1927*; *see United States v. International Bhd. of Teamsters, 948 F.2d 1338, 1345 (2d Cir. 1991)* .

(n5)Footnote 5. *See Schwartz v. Millon Air, Inc., 341 F.3d 1220, 1225-1226 (11th Cir. 2003)* .

(n6)Footnote 6. *28 U.S.C. § 1927.*

(n7)Footnote 7. *28 U.S.C. § 1927*; *see Lee v. First Lenders Ins. Servs., Inc., 236 F.3d 443, 445-446 (8th Cir. 2001)* ; *see also Manion v. American Airlines, Inc., 395 F.3d 428, 431-434 (D.C. Cir. 2004)* (the district court could not award sanctions compensating the opposing party for time spent in attending court proceedings or for costs relating to an interlocutory appeal).

(n8)Footnote 8. *Macheska v. Thomson Learning, 347 F. Supp. 2d 169, 178-180 (M.D. Pa. 2004)* .

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CHAPTER 8A Sanctions *
A. Practice Guide

1-8A Federal Litigation Guide § 8A.12

§ 8A.12 Sanctions Pursuant to Court's Inherent Power

[1] Understanding Court's Inherent Power to Sanction

Federal courts have inherent power to sanction bad faith conduct that occurs in the course of litigation. n1 However, when the district court invokes its inherent power to sanction misconduct by an attorney for violation of a court order or other misconduct that is not undertaken for the client's benefit, the district court need not find bad faith. n2

The court's inherent power has not been displaced by rules and statutes authorizing sanctions. However, if bad faith conduct can be sanctioned under a rule or statute, the court should ordinarily rely on the specific rule or statute to impose sanctions. n3

[2] Determining Whether Bad Faith Conduct Exists

There is no simple definition of "bad-faith conduct." In discussing the court's invocation of inherent power to punish conduct, the Supreme Court has spoken of:

- Disobeying judicial orders. n4
- Fraud. n5
- Abuse of judicial process. n6
- Acting vexatiously, wantonly, or for oppressive purpose. n7

[3] Relationship Between Inherent Power, Rule 11, and Section 1927

The inherent power of federal courts to impose sanctions for bad-faith conduct in the course of litigation is not displaced by the sanctioning provision of Section 1927 or Rule 11. Moreover, the district court is not required to apply other sanctions provisions first. When much of the bad-faith conduct is beyond the reach of the rules, but a party's entire course of conduct evidences bad faith, and the conduct sanctionable under the rules is intertwined with conduct that can only be reached by the inherent power, application of the rules before resort to inherent power would only delay litigation further. n8

[4] Fashioning Appropriate Sanction

A primary aspect of the court's discretion to exercise its inherent powers is the ability to fashion an appropriate sanction for conduct which abuses the judicial process. n9 Thus, counsel should approach the relief sought creatively.

Sanctions that may be imposed pursuant to the court's inherent power include:

- Attorney's fees. n10
- Dismissing the action. n11
- Entering a default judgment against the offending party. n12
- Vacating a judgment. n13
- Citing for contempt. n14
- Disqualifying or suspending counsel. n15
- Enjoining further litigation. n16
- Precluding admission of evidence. n17

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsGeneral OverviewCivil ProcedureSanctionsBaseless FilingsGeneral OverviewCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral OverviewLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Roadway Express, Inc. v. Piper, 447 U.S. 752, 766-767, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980)* ; *see also Toon v. Wackenhut Corrections Corp., 250 F.3d 950, 952-954 (5th Cir. 2001)* .

(n2)Footnote 2. *See United States v. Seltzer, 227 F.3d 36, 39-42 (2d Cir. 2000)* .

(n3)Footnote 3. *Chambers v. NASCO, Inc., 501 U.S. 32, 46, 50, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)* .

(n4)Footnote 4. *Young v. United States, 481 U.S. 787, 798, 107 S. Ct. 2124, 95 L. Ed. 2d 740 (1987)* .

(n5)Footnote 5. *See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244, 64 S. Ct. 997* .

(n6)Footnote 6. *See Roadway Express, Inc. v. Piper, 447 U.S. 752, 766-767, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980)* .

(n7)Footnote 7. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-259, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975)* .

(n8)Footnote 8. *Chambers v. NASCO, Inc., 501 U.S. 32, 38-39, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)* .

(n9)Footnote 9. *Chambers v. NASCO, Inc., 501 U.S. 32, 44-45, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)* .

(n10)Footnote 10. *Corder v. Howard Johnson & Co., 53 F.3d 225, 232 (9th Cir. 1994)* .

(n11)Footnote 11. *Chambers v. NASCO, Inc., 501 U.S. 32, 44, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)* .

(n12)Footnote 12. *Shepherd v. ABC, 62 F.3d 1469, 1475 (D.C. Cir. 1995)* .

(n13)Footnote 13. *Chambers v. NASCO, Inc., 501 U.S. 32, 44, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)* .

(n14)Footnote 14. *See, e.g., Chambers v. NASCO, Inc., 501 U.S. 32, 51, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)* .

(n15)Footnote 15. *Shepherd v. ABC, 62 F.3d 1469, 1475 (D.C. Cir. 1995)* .

(n16)Footnote 16. *Shafii v. British Airways 83 F.3d 566, 571 (2d Cir. 1996)* .

(n17)Footnote 17. *Shepherd v. ABC, 62 F.3d 1469, 1475 (D.C. Cir. 1995)* .

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CHAPTER 8A Sanctions *
A. Practice Guide

1-8A Federal Litigation Guide § 8A.13

§ 8A.13 Sanctions Orders

[1] Decision May Be Written or on Record

A decision to impose sanctions may be set forth in a written order or on the record. n1 An order imposing sanctions under Rule 11 must describe the conduct that violated the rule, and explain the basis for the court's selection of the sanction. n2

[2] Specifying Source of Sanctioning Authority

Because the various sources of the court's authority are governed by different standards, the court must explain its sanctions order with care, specificity and attention to the source. n3 Thus, the order must cite either:

- A Federal Rule of Civil Procedure.
- A law enacted by Congress.
- A local rule.
- The court's inherent power to sanction.

If a judgment includes an award of sanctions under Rule 11, the district court's order must specify what portion of the award is attributable to the violation of the Rule. n4

[3] Awarding Monetary Sanctions, Costs, and Fees

A monetary sanction may consist of an order to pay a fine to the court. n5

Fees that are assessed should be limited to amounts incurred as a result of the rule violation; in the case of Rule 11, a violation could warrant an imposition of fees covering the entire litigation. n6

A sanction or shifting of fees and costs need not reflect actual expenditures. n7

In making its decision, the court will consider whether the party requesting fees and costs has acted reasonably in attempting to mitigate the damages caused by the violation. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsGeneral OverviewCivil ProcedureSanctionsBaseless FilingsGeneral OverviewCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral OverviewLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 11* Committee Note (1993).

(n2)Footnote 2. *Fed. R. Civ. P. 11(c)(6).*

(n3)Footnote 3. *Sakon v. Andreo, 119 F.3d 109, 113 (2d Cir. 1997)* .

(n4)Footnote 4. *Wigod v. Chicago Mercantile Exch., 981 F.2d 1510, 1523 (7th Cir. 1992)* .

(n5)Footnote 5. *Fed. R. Civ. P. 11(c)(5).*

(n6)Footnote 6. *See Chambers v. NASCO, 501 U.S. 32, 56-57, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)* .

(n7)Footnote 7. *U.S. v. Meridian Construction Corp., 95 F.3d 153, 171 (2d Cir. 1996)* .

(n8)Footnote 8. *See Oliveri v. Thompson, 803 F.2d 1265, 1280 (2d Cir. 1986)* , *cert. denied sub nom. Suffolk County v. Graseck, 480 U.S. 918 (1987)* .

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CHAPTER 8A Sanctions *
A. Practice Guide

1-8A Federal Litigation Guide § 8A.14

§ 8A.14 Appealing Sanctions Orders

[1] Timing of Appeal

An order imposing sanctions under Rule 11 ordinarily will be reviewed on appeal from the final judgment on the merits in the action. If a motion for sanctions is made or remains pending after entry of final judgment on the merits of the underlying action, deferral of a ruling on the motion does not affect the finality of the judgment for purposes of determining the time for appeal. n1 An order awarding fees that does not include the amount of fees is not appealable. n2

Some courts have held that an award of sanctions prior to final judgment may be immediately appealable as a collateral order, n3 although other courts have held that interlocutory orders imposing sanctions are not immediately appealable. n4

[2] Standing to Appeal

A party or attorney must have standing to appeal an order imposing sanctions. If sanctions have been imposed on an attorney but not on his or her client, courts have held that the attorney has standing to appeal the order, but the client does not. n5

[3] Notice of Appeal

A court of appeals may lack jurisdiction to review an order imposing sanctions against an attorney unless the attorney is specifically named in the notice of appeal pursuant to Appellate Rule 3(c) 9 or the intent to appeal is otherwise clear from the notice. n6

[4] Standard of Review

Rule 11 is to be interpreted on appeal according to its "plain meaning." n7

Every aspect of a court's decision to award or deny sanctions under Rule 11 is reviewed under an abuse of discretion standard. n8 Abuse of discretion is shown if the district court did any of the following:

- Based its ruling on an erroneous view of the law. n9
- Based its ruling on a clearly erroneous assessment of the evidence. n10
- Failed to follow the procedural requirements of Rule 11. n11

However, the court's determination that it has or lacks authority to proceed under Rule 11 may present a pure question of law that is reviewable de novo on appeal. n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsGeneral OverviewCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral OverviewCivil ProcedureAppealsReviewabilityGeneral OverviewCivil ProcedureAppealsReviewabilityAdverse DeterminationsLegal EthicsSanctionsGeneral OverviewLegal EthicsSanctionsDisciplinary ProceedingsAppeals

FOOTNOTES:
(n1)Footnote 1. *Southern Travel Club, Inc. v. Carnival Air Lines, Inc., 986 F.2d 125, 130 (5th Cir. 1993)* .

(n2)Footnote 2. *Southern Travel Club, Inc. v. Carnival Air Lines, Inc., 986 F.2d 125, 131 (5th Cir. 1993)* ; *John v. Barron, 897 F.2d 1387, 1390 (7th Cir. 1990)* , *cert. denied*, *498 U.S. 821 (1990)* ; *Jensen Elec. Co. v. Moore, Caldwell, Rowland & Dodd, Inc., 873 F.2d 1327, 1329 (9th Cir. 1989)* .

(n3)Footnote 3. *See Serritella v. Markum, 119 F.3d 506, 512 (7th Cir. 1997)* ; *see also Triad Sys. Corp. v. Southeastern Express Co., 64 F.3d 1330, 1338 (9th Cir. 1995)* ; *Transamerica Commercial Fin. Corp. v. Banton, Inc., 970 F.2d 810 (11th Cir. 1992)* ; *Crookham v. Crookham, 914 F.2d 1027, 1029 n.4 (8th Cir. 1990)* ; *Eavenson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535, 537 (3d Cir. 1985)* ; *Markwell v. County of Bexar, 878 F.2d 899, 901 (5th Cir. 1989)* .

(n4)Footnote 4. *See Hill v. MacMillan/McGraw-Hill Sch. Co., 102 F.3d 422, 424 (9th Cir. 1996)* ; *see also Sanders Assocs., Inc. v. Summagraphics Corp., 2 F.3d 394, 398 (Fed. Cir. 1993)* ; *G.J.B. Assocs., Inc. v. Singleton, 913 F.2d 824, 827 (10th Cir. 1990)* ; *Haskell v. Washington Township, 891 F.2d 132, 133 (6th Cir. 1989)* .

(n5)Footnote 5. *See, e.g., Harrison v. Dean Witter Reynolds, Inc., 974 F.2d 873, 886 (7th Cir. 1992)* , *cert. denied*, *509 U.S. 904 (1993)* .

(n6)Footnote 6. *Fed. R. App. P. 3(c)*; *see also Miltier v. Downes, 935 F.2d 660, 663 n.1 (4th Cir. 1991)* ; *Aetna Life Ins. Co. v. Alla Med. Servs., Inc., 855 F.2d 1470, 1473 (9th Cir. 1988)* .

(n7)Footnote 7. *Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 540-541, 111 S. Ct. 922, 112 L. Ed. 2d 1140 (1991)* .

(n8)Footnote 8. *Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 401, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)* .

(n9)Footnote 9. *See e.g., In re Keegan Management Co. Sec. Litig., 78 F.3d 431, 435 (9th Cir. 1996)* .

(n10)Footnote 10. *Warren v. City of Carlsbad, 58 F.3d 439, 444 (9th Cir. 1995)* .

(n11)Footnote 11. *Johnson v. Waddell & Reed, Inc., 74 F.3d 147, 151 (7th Cir. 1996)* .

(n12)Footnote 12. *Chase v. Shop'N Save Warehouse Foods, 110 F.3d 424, 430 (7th Cir. 1997)* .

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CHAPTER 8A Sanctions *
A. Practice Guide

1-8A Federal Litigation Guide §§ 8A.15 through 8A.99

[Reserved]

§§ 8A.15[Reserved]

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CHAPTER 8A Sanctions *
B. Forms

1-8A Federal Litigation Guide § 8A.100

§ 8A.100 Notice of Motion for Rule 11 Sanctions

[1] Form

Notice of Motion for Rule 11 Sanctions

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

NOTICE IS HEREBY GIVEN that on [*date*] at [*time of day (specify a.m. or p.m.)*], or as soon thereafter as counsel may be heard, [*party designation and name of moving party*] will move this Court, at the United States Courthouse located at [*address of Court*], Courtroom [*courtroom number*], for an order:

(a) pursuant to *Federal Rules of Civil Procedure, Rule 11(b)*, imposing appropriate sanctions on [*party designation and name of party against whom sanctions are sought*], on [*identify attorney for party, e.g., Joe Smith, Counsel for Plaintiff, Mary Roe Company*], and/or on [*identify law firm, if any, employing attorney for party, e.g., Smith & Jones*], for presenting to this court [*describe allegedly offending pleading, motion or other paper, and provisions of Rule 11 violated, e.g., a Motion for Summary Judgment without any factual evidentiary support*];

(b) granting [*moving party*] such other incidental relief as may be appropriate.

This motion is based on this Notice of Motion, the accompanying Declaration (*or other appropriate affidavit substitute*) of [*name of signatory*] sworn to (*or dated*) [*date*], the accompanying Memorandum of Law dated [*date*], and on all of the pleadings and papers on file in this action.

[*Date*]

Respectfully submitted,

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for [*name and designation of party*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

TO: [*Name of opposing counsel*], Attorney for [*name of party*]

[2] Use of Form

This is a form of notice of motion for use by a party in moving for the imposition of sanctions under *Fed. R. Civ. P. 11*.

[3] Time for Moving for Rule 11 Sanctions; 21-Day "Safe Harbor"

A motion seeking sanctions under *Fed. R. Civ. P. 11* should be served on the persons to be sanctioned soon after the offending conduct occurs. Undue delay in seeking sanctions may constitute a waiver of any violation of the rule. When the motion is made, it should be served, but it may not be filed with the court for a period of 21 days (or such other period as the court has prescribed). n1 This 21-day period is a "safe harbor" within which the party may withdraw or correct the allegedly offending paper and thereby preclude the possibility of any sanction. The failure to give the party the 21 days (or whatever other time the court has ordered) is a ground for denial of the Rule 11 motion.

[4] Separate Motion Required for Sanctions

A motion seeking sanctions under Rule 11 must be separate from any pleading or any other motion presented in the action. n2 The failure to file a separate motion is a ground for denial of the motion.

[5] Grounds for Sanction

The presentation of a paper to the court constitutes a certification that the paper is: n3

- Not submitted for any improper purpose.
- Warranted by existing law or a nonfrivolous argument for changing the law.
- Factually supported or likely to have such support after an opportunity for discovery.

[6] Sanction Discretionary

When Rule 11 is violated, the district court "may" impose an appropriate sanction on a party, attorney, or law firm that committed or is responsible for the violation. n4 Accordingly, the decision to sanction is discretionary, not mandatory.

[7] Deterrence as Purpose of Sanction

Any sanction imposed under Rule 11 is to be tailored to deter repetition of the offending conduct, n5 and is not designed to compensate the party aggrieved by the violation. However, if a motion is brought and an award is justified for effective deterrence, the court may make a compensatory monetary award of expenses and attorney's fees incurred as a result of the violation. n6 If a party is represented by counsel, any monetary sanction imposed for unwarranted legal arguments cannot be imposed on the party, but only on the attorney or law firm. n7

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 11(c)(2).*

(n2)Footnote 2. *Fed. R. Civ. P. 11(c)(2).*

(n3)Footnote 3. *Fed. R. Civ. P. 11(b).*

(n4)Footnote 4. *Fed. R. Civ. P. 11(c).*

(n5)Footnote 5. *Fed. R. Civ. P. 11(c)(4).*

(n6)Footnote 6. *Fed. R. Civ. P. 11(c)(4).*

(n7)Footnote 7. *Fed. R. Civ. P. 11(c)(5)(A).*

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CHAPTER 8B Electronic Case Filing

1-8B Federal Litigation Guide 8B.syn

AUTHOR: by John K. Rabiej John K. Rabiej is Chief of the Rules Committee Support Office, Administrative Office of the United States Courts. His office staffs the Advisory Committees on Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules and the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

§ 8B.syn Synopsis to Chapter 8B: Electronic Case Filing

§ 8B.01 Purposes of CM/ECF
[1] Overhaul Outdated Existing Case Management and Statistical Court System
[2] Benefits of Electronic Case Filing (ECF) System

§ 8B.02 Rules and Statutory Provisions Governing Papers Filed Electronically
[1] Rule 5 Authorizes Electronic Case Filing and Service
[2] Local Rules Required to Implement Electronic Case Filing Authority
[3] Allowing for Reasonable Exceptions to Mandatory Electronic Filing
[4] Rule 5(b) Authorizes Service by Electronic Means
[5] Service by Electronic Means Contingent on Parties' Consent
[6] Rule 5.2 Addresses Privacy Concerns Regarding Electronic Filing
[7] Deadline for Electronic Filing

§ 8B.03 No National Requirements
[1] Significant Uniformity in ECF Procedures
[2] Some Emerging Requirements
[3] ECF Software Program and User's Manual Promote Uniformity
[4] Local Rules Authorizing Electronic Case Filing
[5] Model Local Rules Governing Electronic Case Filing
[6] Local Variation

§ 8B.04 Interface Between Public Access to Court Electronic Records (PACER) and ECF

§§ 8B.05 through 8B.10 [Reserved]

§ 8B.11 Equipment Required to File Papers Electronically

§ 8B.12 ECF Registration

§ 8B.13 PACER Registration

§ 8B.14 Logging on to ECF System to View Court Documents or File Papers with Court

§ 8B.15 Optional Client Code for Billing Purposes

§§ 8B.16 through 8B.19 [Reserved]

§ 8B.20 Navigating in ECF Using Computer Keyboard and Mouseclicking Prompts and Commands

§ 8B.21 Correcting Data Inputting Errors

§ 8B.22 Only Documents in PDF Format Accepted by ECF Courts
[1] PDF Documents Universally Accepted
[2] Methods of Producing a PDF Document

§ 8B.23 General Formatting and Captioning Requirements Apply to PDF Documents Filed Electronically

§ 8B.24 ECF Main Menu Screen

§ 8B.25 Types of Documents That Can Be Filed in Civil Event

§ 8B.26 Types of Documents That Can Be Filed in Criminal Event

§ 8B.27 Delivering Courtesy Copy to Court

§§ 8B.28 through 8B.29 [Reserved]

§ 8B.30 Summary of Instructions on Filing Document

§ 8B.31 Detailed Instructions on Filing Document in ECF
[1] Select Type of Document to be Filed
[2] Enter Case Number
[3] Designate Party Filing Document
[4] Select PDF File to be Entered into ECF
[5] Adding Attachments
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[6] Filing a Reference List of Redacted Information
[7] Waiving Protections Under Rule 5.2
[8] Seeking More or Less Protection Than Specified in Rule

§ 8B.74 Record on Appeal

§ 8B.75 Court Reporter Transcripts

§ 8B.76 Improved Statistics and Data Gathering

§ 8B.77 Training

by John K. Rabiej n*

FOOTNOTES:

(n1)Footnote *.

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CHAPTER 8B Electronic Case Filing

1-8B Federal Litigation Guide Scope

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Scope

by John K. Rabiej n* SCOPE

Electronic case filing (ECF) is now standard in most federal courts. In ECF courts, all documents filed in a case, except the initial complaint and process, must be filed electronically. Service is also accomplished by electronic means. The ECF program works through the Internet and offers significant savings and convenience to the bench and bar. Although the electronic case filing practices have varied from district to district, the differences are largely concentrated in a few discrete areas. This chapter describes the main legal and administrative features of the ECF program and provides instructions on how to file documents electronically in ECF.

Part A describes the purposes of ECF, the implementing authorities, and the emerging uniform electronic-case-filing practices in the courts.

Parts B and C describe the preliminary steps necessary to begin filing documents in ECF. The topics discussed include:

- Necessary equipment and software
- Registering in ECF
- Logging on to ECF
- Navigating in ECF
- Documents must be submitted in PDF format
- General formatting and captioning requirements

Part D provides step-by-step instructions on filing documents electronically in the ECF system. It includes a discussion

of the following topics:

- Summary of filing steps
- Basic case-related information to be input
- Transmitting word-processor document to ECF system
- Docket entry
- Submission of filing and transmitting notice of filing
- Signature on documents electronically filed

Part E provides more details on filing specific types of documents, including the following:

- Complaint
- Service of process
- Answer
- Response and reply to motion

Part F discusses serving documents filed in ECF by electronic means through ECF transmission facilities. Part G notes the various methods case-related information can be searched on the ECF database.

Part H concludes with a discussion of miscellaneous topics, including:

- Electronic entry of court orders and judgments
- Fees
- Sealing documents and limiting their exposure on the Internet
- Electronic Transcripts
- Training

FOOTNOTES:
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CHAPTER 8B Electronic Case Filing
A. Case Management/Electronic Case Filing System (CM/ECF)

1-8B Federal Litigation Guide § 8B.01

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§ 8B.01 Purposes of CM/ECF

[1] Overhaul Outdated Existing Case Management and Statistical Court System

In January 1996, the federal judiciary embarked on an ambitious program to replace its computer-based case management system (Integrated Case Management System or ICMS). n1 Its replacement, the new, substantially more robust Case Management/Electronic Case Filing system (CM/ECF), modernizes statistical gathering and case-management functions of the former system. At the same time, it provides courts with the capability to maintain electronic case files and permits parties to file papers and other documents electronically in accordance with Rule 5(d)(3). n2

The Case Management/Electronic Case Filing system has two main components. The first updates the previous case management and statistical gathering system (ICMS), and the second provides courts with the capability to accept cases and docket entries filed electronically via the Internet.

[2] Benefits of Electronic Case Filing (ECF) System

The benefits of filing documents electronically with the court under an ECF Internet-based system include:

- Documents may be filed at any time.
- A record of documents filed and docketed is made instantaneously.
- Documents can be filed from remote locations.
- The public, including attorneys and individual parties, have immediate access to full case information and may download contents of filed documents at any time from remote locations.
- No limit is imposed on the number of documents that may be electronically filed or viewed at a

single time (although a court may impose local limitations on the size and number of pages in a document transmitted to it).

- Postage, delivery, and other litigation costs, including expenses incurred in storing paper documents, are reduced.

Attorneys, court staff, and judges all benefit from an electronic filing system. Documents stored in a computer database can be better managed than conventional paper files. Electronically filed papers can be easily searched, retrieved, and archived. In a CM/ECF court, multiple court officials can review simultaneously a single electronic document without delay. A judge can also review an electronic document whenever and wherever internet access is available.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedurePretrial MattersConferencesCase ManagementLegal EthicsProfessional ConductElectronic Communications

FOOTNOTES:
(n1)Footnote 1. The Judicial Conference of the United States issued a long-range plan for the federal courts in December 1995. Recommendation No. 70 states that: "[t]he courts must remain current with emerging technologies and how they can be employed to improve the administration of justice generally." The commentary following the recommendation anticipates a future "paperless" or "virtual" courthouse.

(n2)Footnote 2. *Fed. R. Civ. P. 5(d)(3).*

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CHAPTER 8B Electronic Case Filing
A. Case Management/Electronic Case Filing System (CM/ECF)

1-8B Federal Litigation Guide § 8B.02

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§ 8B.02 Rules and Statutory Provisions Governing Papers Filed Electronically

[1] Rule 5 Authorizes Electronic Case Filing and Service

Rule 5(b) and Rule 5(d) are the sole authority for electronic service and filing of papers in civil actions. n1 The provisions of Rule 5 generally apply only to those papers that Rule 5 requires to be filed and served. It does not apply to Rule 4 papers.

Rule 4 alone governs the service and filing of the initial pleadings and summons served on a party who has not yet appeared in the action. Rule 4 does not authorize filing by electronic means. n2 The electronic service and filing provisions of Rule 5 do not apply to the court processes covered by Rules 4, 4.1, 45(b), and 71A(d)(3). n3 Therefore, electronic service and filing become an issue only after the initial papers and process are served on a party.

[2] Local Rules Required to Implement Electronic Case Filing Authority

Under Rule 5(d)(3) no party may file papers in a civil case with a court by electronic means unless that method is approved by a local rule. n4 Similar rules permitting electronic filing are set out in the other sets of procedural rules. n5 A local rule may require filing by electronic means only if reasonable exceptions are allowed. n6

Rule 5 expressly recognizes the equality between electronic filings and written papers filed conventionally. A paper filed electronically in complaince with a local rule is a written paper for purposes of the federal rules. n7 The rule makes clear that an electronically filed paper need not be separately filed in writing. n8

The courts that are operating electronic case filing systems all observe the distinction drawn in the Federal Rules between initial pleadings and process and subsequent papers. They all require initial pleadings and process to be filed with the court by conventional means in paper format. n9 However, it is neither unusual nor impermissible for a court to require an attorney handling a case that is within a court's electronic case filing system to refile initial pleadings that had been originally filed conventionally so that the court can maintain a complete electronic record of the case (*see § 8B.40*).

[3] Allowing for Reasonable Exceptions to Mandatory Electronic Filing

A local rule may require filing by electronic means only if reasonable exceptions are allowed. n10

[4] Rule 5(b) Authorizes Service by Electronic Means

Service of papers, other than the complaint, may be made under Rule 5(b)(2)(E), by electronic means, "if the person consented in writing." n11 The 2001 amendments to Rule 5(b) are designed to ratify the practices of courts that allow electronic service. Service of the summons and complaint, however, may not be made electronically and must be made in the conventional manner (*see § 8B.02[2]*). n12

[5] Service by Electronic Means Contingent on Parties' Consent

Service by electronic means is expressly contingent on consent and cannot be imposed on an unwilling party. The consent requirement was imposed "because it is not yet possible to assume universal entry into the world of electronic communication." n13

A party's consent must be in writing and "cannot be implied from conduct." n14 Written consent to be served electronically may "be provided by electronic means," including by e-mail or facsimile. n15

ECF courts permit a party, on consent, to serve papers on other parties using the court's transmission facilities. n16 One of the main ECF advantages is that it facilitates service by maintaining a computer database that contains an electronic version of every filed document, which can be accessed by the parties via the Internet. Once a document is filed and docketed electronically, the ECF system automatically generates a Notice of Electronic Filing that alerts all parties in the case of the filing. A party is "served" when a Notice of Electronic Filing, which contains a hyperlink to the filed document that can be immediately viewed or downloaded, is sent by e-mail (*see § 8B.50*).

As part of the agreement to participate in the ECF program, parties consent to serve and be served filed documents by electronic means (*see § 8B.50*). The ECF system provides specific safeguards and requirements designed to ensure that service is effected properly. But if electronic service is made outside the ECF system between consenting parties, care should be taken that the electronic service is effective. The consent should specify the person to whom service is to be directed and the address or location of the service, including the e-mail address. The duration of consent and whether consent is limited to a single paper or to all papers filed in the case should be specified.

[6] Rule 5.2 Addresses Privacy Concerns Regarding Electronic Filing

Rule 5.2 was adopted pursuant to the E-Government Act of 2002 to address privacy concerns regarding the electronic filing of documents with personal information, and to address limitations on the public availability of electronically filed documents. The rule also regulates paper filings, even when they are not converted to electronic format. The rule provides for the following: n17

- Redaction of certain personal information from court filings
- Limited remote access to electronic files in social security appeals and immigration cases
- Filing of unredacted papers under seal
- Good-cause issuance of protective orders to further protect private information and electronic access
- Waiver of protection for failure to redact information prior to filing

[7] Deadline for Electronic Filing

To meet a filing deadline, an electronic filing must occur before midnight on the filing cutoff date. n18

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedurePretrial MattersConferencesCase ManagementLegal EthicsProfessional ConductElectronic Communications

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 5(b)* and *(d)(3)*.

(n2)Footnote 2. Fed. R. Civ. 4.

(n3)Footnote 3. *See Fed. R. Civ. P. 5*, Committee Note of 2001; *see* also Local Rules, N.D. Ohio, Gen. Order 97-38 (Oct. 6, 1997) ("filing of the initial papers, issuance and service of the summons, and payment of initial filing fees will be accomplished in the traditional manner on paper").

(n4)Footnote 4. *Fed. R. Civ. P. 5*(d)(3).

(n5)Footnote 5. *Fed. R. App. P. 25(a)(2)(D)*; Fed. R. Bk. P. 5005(a)(2), 7005, 8008(a); and *Fed. R. Crim. P. 49(d)*.

(n6)Footnote 6. *Fed. R. Civ. P. 5*(d)(3).

(n7)Footnote 7. *Fed. R. Civ. P. 5(d)(3)*.

(n8)Footnote 8. *Fed. R. Civ. P. 5(d)(3)* (courts may require, however, that some papers, including the complaint, be filed conventionally in paper while accepting all subsequent filings transmitted electronically).

(n9)Footnote 9. *See* Local Rules, E.D.N.Y., Admin. Order 97-12, § 1 (Oct. 23, 1997).

(n10)Footnote 10. *Fed. R. Civ. P. 5(d)(3)*.

(n11)Footnote 11. *Fed. R. Civ. P. 5(b)(2)(A)* (applies to service of papers after complaint and summons served); *Fed. R. Civ. P. 4* (requires service of complaint and summons in accordance with conventional delivery means).

(n12)Footnote 12. *See Fed. R. Civ. P. 4(c)*.

(n13)Footnote 13. *See Fed. R. Civ. P. 5*, Committee Note of 2001.

(n14)Footnote 14. *Fed. R. Civ. P. 5*, Committee Note of 2001 (expressly rejecting contrary court ruling that held that mere presence of e-mail address on attorney's stationary submitted to court was consent to service by electronic means).

(n15)Footnote 15. *Fed. R. Civ. P. 5(b)*, Committee Note of 2001.

(n16)Footnote 16. *See* W.D. Mo., En Banc Order § 5.b (Nov. 5, 1998); N.D. Ohio, Gen. Order 97-38, § 6.c (Oct. 6, 1997) (parties encouraged to take advantage of electronic service and noticing).

(n17)Footnote 17. *Fed. R. Civ. P. 5.2*; *see also § 8B.73* for additional coverage of Rule 5.2.

(n18)Footnote 18. *Fed. R. Civ. P. 6(a)(4)*.

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CHAPTER 8B Electronic Case Filing
A. Case Management/Electronic Case Filing System (CM/ECF)

1-8B Federal Litigation Guide § 8B.03

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§ 8B.03 No National Requirements

[1] Significant Uniformity in ECF Procedures

The courts have not been required to adopt a uniform ECF system. Instead, individual courts have been allowed to develop different systems and test alternative emerging technologies. This freedom has led to the emergence of non-uniform practices among the federal districts. The long-term advantages of a uniform national process are apparent, however, and the federal judiciary is striving to achieve as much uniformity as possible through voluntary cooperation coupled with financial and equipment incentives. n1

During the transitional phase into ECF systems, a remarkable degree of uniformity has been attained, primarily because courts have modeled their procedures on the local rules and orders issued by other district courts that began early operation of ECF system.

In addition, courts have limited leeway to modify the standard software program used in the ECF system, and as a result, there is a significant degree of uniformity among the courts in electronic case filing procedures. Already, some common, though not universal, requirements have been imposed by courts that accept electronic case filings.

[2] Some Emerging Requirements

Among standard procedures emerging in the courts, two stand out. First, parties are required to file the initial process, i.e., complaint and summons, with the court by conventional means in paper format. n2 The filing of these documents initiates the litigation, marking the time from which many critical time deadlines are fixed. All papers filed after the initial pleadings may be transmitted electronically. To maintain a complete electronic record of the case, however, the initial pleadings are refiled electronically, either by the party or court personnel. Electronic copies of papers in a case that was removed from state court must also be filed.

Second, all documents filed with the court electronically must be in Portable Document Format (PDF). This requirement is the critical component of the system. PDF allows all documents to be viewed in their original, not easy to

alter, formats regardless of whether the document was scanned or created by a word processor and irrespective of the type of computer or word-processing software used by the person creating or viewing it (*see § 8B.22[1]*).

[3] ECF Software Program and User's Manual Promote Uniformity

The new nationally-supported CM/ECF equipment replacing the courts' existing case-management equipment includes a standard software program that handles electronic case filings. All software used in the CM/ECF program was developed by the Administrative Office of the United States Courts. It is expected that all federal courts will eventually use the standard electronic filing system software.

[4] Local Rules Authorizing Electronic Case Filing

No effort has been made to prescribe national rules that would create a uniform system, although national rules may be considered in the future after courts have acquired more experience with electronic case filings and sufficient reasons justifying rules are offered.

In 1997, the Judicial Conference issued non-binding technical standards, which were developed in accordance with the 1991 and 1996 amendments to Rule 5. n3 Courts operating an electronic filing system have continued to rely on these technical standards and have selectively incorporated them in their local rules and other general orders. As for now, local rules of court, as well as standing and administrative orders continue to govern virtually all aspects of electronic filings. n4

Electronic case filing is authorized under Rule 5(e) only if the federal district court prescribes local rules permitting it. It is the practice of most courts that have accepted electronic filing of cases to prescribe a general local rule, relying on cross-references to a general order or administrative order to provide the details. These orders contain extensive procedures governing electronic case filing. n5 Because rules governing electronic filing can be found in a court's local rules, standing orders, or administrative orders, many courts provide hyperlinks to the pertinent ECF rules and procedures on their web sites under a single ECF category as a convenience to the public and bar. n6

[5] Model Local Rules Governing Electronic Case Filing

In September 2001, the Judicial Conference approved twelve model local rules governing electronic filing in civil cases, which were circulated to courts to promote uniformity. The model rules were based on the standards and procedures adopted by the first courts operating an ECF system. In many instances, existing provisions were borrowed verbatim and included in the model rules.

[6] Local Variation

As previously discussed, no nationwide procedures govern electronic case filing. However, within a district court, uniform standards, procedures, and formats for electronic filing are required because a document filed and stored electronically with a court becomes the court's official record. "A paper filed electronically in compliance with a local rule is a written paper for purposes of these rules." n7 The ECF systems must try to assure that the electronic filing system has the same uniform reliability and retrievability characteristics that a paper filing system does. n8

Some courts require that all documents in civil cases be filed electronically. n9 In other courts, certain types of cases are excepted from ECF participation, while electronic filing is mandated in other types of cases, e.g., social security appeals. n10

The use of ECF may vary within a particular district court. Individual judges may decide to participate or decline to participate in the court's ECF program. n11 Moreover, judges participating in ECF may exclude some types of cases while specifying other types of cases that can be filed electronically. n12

The court's local rules or other orders may set out a specific time, ordinarily at the initial scheduling conference attended by the attorneys, when the parties not registered in ECF may consent to electronic filing of papers with the court. n13

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementGovernmentsCourtsRule Application & InterpretationLegal EthicsProfessional ConductElectronic Communications

FOOTNOTES:
(n1)Footnote 1. The Judicial Conference may prescribe national technical standards under Rule 5.

(n2)Footnote 2. *See* E.D.N.Y. Admin. Order 97-12, § 1-2.c (Oct. 23, 1997); N.D. Ohio, Gen. Order 97-38, § 4 (Oct. 6, 1997) (initial papers filed conventionally).

(n3)Footnote 3. *Fed. R. Civ. P. 5*, Committee Note of 1991, Committee Note of 1996.

(n4)Footnote 4. *See* N.D. Ohio, L.R. 5.1, 16.3(b)(2)(B); D. N.M., L.R. 1.5(d), 5.5, 5.6, and 83.6 (local rules authorizing electronic case filing).

(n5)Footnote 5. *See* Local Rules, N.D. Cal., L.R. 5-4 (local rule adopts by reference procedures governing electronic filing set out in Gen. Order No. 45); *see also* Local Rules, D. Neb., Gen. Order No. 02-1 (Jan. 2, 2002) (authorizes clerk to issue Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means, which contain extensive detailed procedures).

(n6)Footnote 6. *See* Local Rules, N.D. Ohio L.R. 5.1, 16.3(b)(2)(B) (local rules authorizing electronic case filing); Local Rules, D.N.M., L. R. 1.5(d), 5.5, 5.6, and 83.6 (administrative order authorizing electronic case filing); W.D. Mo., En Banc Order (Nov. 5, 1998); and E.D.N.Y., Admin. Order 97-12 (Oct. 23, 1997) (en banc orders authorizing electronic case filing).

(n7)Footnote 7. *Fed. R. Civ. P. 5(e)*.

(n8)Footnote 8. *See Fed. R. Civ. P. 5*, Committee Note of 1996 ("[t]he amended rule also makes clear the equality of filing by electronic means with written filings").

(n9)Footnote 9. *See* Local Rules, E.D. Pa., Procedural Order on Electronic Case Filing, § 2(a) (May 16, 2002) ("[a]ll civil and criminal cases filed in this court on or after May 1, 2002, will be entered into the court's Electronic Case Filing ("ECF") System").

(n10)Footnote 10. *See* Local Rules, N.D. Ohio R., L.R. 5.1(b) (local rules authorizing electronic case filing for social security appeals).

(n11)Footnote 11. *See* Local Rules, N.D. Cal., Electronic Case Filing, Users Manual, p. 3 (Oct. 23, 2002) (lists names of individual participating judges); *see also* Local Rules, E.D.N.Y., Admin. Order 97-12 § 2(a) (Oct. 23, 1997) (names of judges participating in ECF posted on court's web site).

(n12)Footnote 12. *See* Local Rules, W.D. Mo., En Banc Order § 1 (Nov. 5, 1998) ("[c]ourt shall select those cases to be designated for ECF and shall notify the parties").

(n13)Footnote 13. *See* Local Rules, E.D.N.Y., Admin. Order 97-12 § 2(a) (Oct. 23, 1997) (parties consent to

electronic filing at initial scheduling conference, or if no scheduling conference is held, within 120 days after first appearance of any defendant); *see also* Local Rules, N.D. Ohio, L.R. 16.3(2)(b) (electronic filing option to be determined at case management conference).

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CHAPTER 8B Electronic Case Filing
A. Case Management/Electronic Case Filing System (CM/ECF)

1-8B Federal Litigation Guide § 8B.04

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§ 8B.04 Interface Between Public Access to Court Electronic Records (PACER) and ECF

PACER is the acronym for Public Access to Court Electronic Records. PACER provides the public access to information about current federal cases, including dockets and case summaries. The system provides internet access to lists of cases in federal district courts, bankruptcy courts, and courts of appeals, which can be searched by party names or filing dates.

ECF enables a registered individual to file documents and create docket entries directly in the court's records. When the individual initiates a search request for a court document or docket entry while in ECF, the system automatically routes the search request to the PACER login screen, which provides access to view court documents filed in ECF (*see § 8B.60*). Separate login numbers and passwords are required to access each system.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedurePretrial MattersConferencesCase ManagementGovernmentsCourtsCourt RecordsLegal EthicsProfessional ConductElectronic Communications

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CHAPTER 8B Electronic Case Filing
A. Case Management/Electronic Case Filing System (CM/ECF)

1-8B Federal Litigation Guide §§ 8B.05 through 8B.10

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[Reserved]

§§ 8B.05[Reserved]

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CHAPTER 8B Electronic Case Filing
B. Logging on to ECF System

1-8B Federal Litigation Guide § 8B.11

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§ 8B.11 Equipment Required to File Papers Electronically

Logging into the ECF system requires a computer with Internet access. Only papers that are transmitted in Portable Document Format (PDF) may be filed with an ECF court. Thus, the word-processing software used to create the document to be filed must be compatible with PDF, such as WordPerfect or Word.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedurePretrial MattersConferencesCase ManagementComputer & Internet LawGeneral OverviewLegal EthicsProfessional ConductElectronic Communications

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CHAPTER 8B Electronic Case Filing
B. Logging on to ECF System

1-8B Federal Litigation Guide § 8B.12

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§ 8B.12 ECF Registration

Participation in the ECF electronic filing system is generally limited, by local rules or a general court order, to an attorney in good standing admitted to practice in the district court. n1 Some local rules also allow for participation by attorneys admitted pro hac vice and by pro se filers. n2 A court may make specific computers and scanning equipment in the courthouse available for pro se filers.

A login number and password identification number are required to access the ECF system. Registration forms also are available at the clerk's office. There is no registration fee.

When an attorney enrolls in the ECF program, user identification and password numbers are assigned. The identification numbers are unique and serve, by agreement, as the attorney's signature on all papers filed electronically (*see § 8B.32*).

Attorneys may change their login or password numbers at any time and are encouraged to do so periodically to promote added security. As part of the agreement, the attorney also agrees to accept and send service of papers filed with the court by electronic means (*see § 8B.50*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedurePartiesSelf-RepresentationGeneral OverviewCivil ProcedureCounselAdmissions Pro Hac ViceCivil ProcedurePretrial MattersConferencesCase ManagementComputer & Internet LawPrivacy & SecurityGeneral OverviewGovernmentsCourtsClerks of CourtLegal EthicsProfessional ConductElectronic Communications

FOOTNOTES:
(n1)Footnote 1. *See* E.D.N.Y., Admin. Order 97-12, § 12 (Oct. 23, 1997); *see also* Local Rules, N.D. Ohio, Electronic

Filing Policies and Procedures Manual, § 12 (Aug. 5, 2002) (participation restricted to attorneys admitted to practice in the U.S. District Court for the Northern District of Ohio).

(n2)Footnote 2. *See* Local Rules, E.D. Pa., Procedural Order on Electronic Case Filing, § 3(a) (May 16, 2002) (attorneys admitted pro hac vice may register in court's ECF system); *see also* Local Rules, D. Neb, Administrative Procedure for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means, I.B.4 (June 2, 2003) ("[a]n attorney admitted pro hac vice must register for a password" in ECF).

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CHAPTER 8B Electronic Case Filing
B. Logging on to ECF System

1-8B Federal Litigation Guide § 8B.13

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§ 8B.13 PACER Registration

A separate registration is required to participate in PACER, which permits a user to retrieve, view, and download documents filed in an ECF system. A registration form is provided online at pacer@psc.uscourts.gov. Each registered participant is given a unique password and login number to access PACER. There is no registration fee.

PACER is available in all district courts for a fee.

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CHAPTER 8B Electronic Case Filing
B. Logging on to ECF System

1-8B Federal Litigation Guide § 8B.14

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§ 8B.14 Logging on to ECF System to View Court Documents or File Papers with Court

Each court maintains an Internet web site that provides a hyperlink to its ECF system. n1 The ECF welcome screen contains a link to its login screen that allows a filing user to enter the system. It also often provides links to ECF information sources, such as ECF tutorials and ECF user's manuals.

After clicking on the login button on a court's ECF welcome screen, n2 a new screen with instructions appears that contains separate dialog boxes to log in to ECF and PACER systems.

Click here to view image.

A user must log on to PACER to view or download a court document or to query the court's database. A user must log on to ECF to file a paper with the court. An authentication box on the screen appears containing space to type in either the PACER or ECF login and password numbers.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedurePretrial MattersConferencesCase ManagementGovernmentsCourtsCourt RecordsLegal EthicsProfessional ConductElectronic Communications

FOOTNOTES:
(n1)Footnote 1. *See* Local Rules, W.D. Mich., CM/ECF User Manual, p. 10 (Oct. 1, 2001); *see also* Local Rules, N.D. Ohio, Electronic Case Files, User Manual, p. 9 (Aug. 2002) (ECF access through court's home page or ECF web site).

(n2)Footnote 2. *See* Local Rules, N.D. Cal., Electronic Case Filing Users Manual, p. 10 (Oct. 23, 2002) (refers to live ECF Login); *see* Local Rules, D.D.C., Electronic Case Filing System User's Manual, p. 7 (Jan. 2003) (refers to "Begin: Electronic Case Filing") (Description of login varies, but easily identified).

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CHAPTER 8B Electronic Case Filing
B. Logging on to ECF System

1-8B Federal Litigation Guide § 8B.15

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§ 8B.15 Optional Client Code for Billing Purposes

An optional client code is included that permits the filing user to track for billing purposes PACER transactions performed on behalf of a particular client. The user may identify particular clients by selecting a maximum of thirty-two alphanumeric characters. The quarterly PACER billing statement will contain charges broken down by client if the client code was input at the time of the transaction (*see § 8B.71[3]*).

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CHAPTER 8B Electronic Case Filing
B. Logging on to ECF System

1-8B Federal Litigation Guide §§ 8B.16 through 8B.19

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§§ 8B.16[Reserved]

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CHAPTER 8B Electronic Case Filing
C. Initiating ECF Filing Process

1-8B Federal Litigation Guide § 8B.20

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§ 8B.20 Navigating in ECF Using Computer Keyboard and Mouseclicking Prompts and Commands

There are three general types of user interactions in the ECF system. Persons with experience using personal computers and the Internet will quickly recognize each of these familiar features.

- First, text boxes appear on the screen as one moves through the process in which non-structured data, for example, addresses and personal identification numbers, can be entered by placing the cursor within the text box and typing in the requested information.

- Second, buttons or squares that indicate a selection or command can be clicked on. Common function buttons used throughout the ECF program are "Next" (opens next screen), "Clear" (eliminates input data), "Back" and "Forward" (opens next screen or returns to previous screen), and "Submit" (accepts data and opens the next screen) buttons.

- Third, hyperlinks are contained in the ECF program that allow quick access to different parts of the program or to filed documents.

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CHAPTER 8B Electronic Case Filing
C. Initiating ECF Filing Process

1-8B Federal Litigation Guide § 8B.21

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§ 8B.21 Correcting Data Inputting Errors

Errors in data inputting can be easily corrected before submission by clicking on the Back or Clear buttons. No corrections or other changes to input data can be madeafter the document has been submitted for filing and docketing. A warning screen appears prior to submitting the document and docket entry, alerting the user to the finality of the transaction (*see § 8B.31[8]*).

If an error is discovered after an electronic filing has been submitted for filing, only the court can make an entry correcting the error. The system does not permit the filer to make corrections in a document filed with the court once the transaction has been accepted. n1 In the event of an error, the user should contact the clerk of court to correct it.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedurePretrial MattersConferencesCase ManagementGovernmentsCourtsClerks of CourtGovernmentsCourtsCourt PersonnelGovernmentsCourtsCourt RecordsLegal EthicsProfessional ConductElectronic Communications

FOOTNOTES:
(n1)Footnote 1. *See* Local Rules, W.D. Mo., Electronic Case Files User Manual, p. 7 (Feb. 7, 2003); *see also* Local Rules, D. Neb., Administrative Procedure for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means, II. G. 1. (June 2, 2003) ("[o]nce a document is submitted and becomes part of the case docket, corrections to the docket are made only by the Clerk's Office").

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CHAPTER 8B Electronic Case Filing
C. Initiating ECF Filing Process

1-8B Federal Litigation Guide § 8B.22

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§ 8B.22 Only Documents in PDF Format Accepted by ECF Courts

[1] PDF Documents Universally Accepted

Only documents in Portable Document Format (PDF) may be filed electronically with a ECF court. n1 This universal requirement is based on several critical PDF characteristics that are crucial to a successful electronic filing system.

PDF documents may be viewed electronically on the Internet without any loss of formatting characteristics, regardless of the type of computer or word-processing software used by the viewer. PDF is widely used. A document can be created in PDF format, or can be converted to PDF format. Although the software to view a PDF document is free, a special software program is required to create PDF documents or to convert documents composed in WordPerfect or Word into PDF.

Adobe is the commercial vendor that invented the PDF format. Their products can be obtained on the Internet at www.adobe.com. Documents generated by Adobe Acrobat PDFWriter are compatible and accepted by all ECF courts.

[2] Methods of Producing a PDF Document

Saving a word-processor document in its native application as a PDF file is easily accomplished. Generally, the word-processor document is opened, saved as a separate pdf file, and stored in a specific file folder.

Although a document rendered in PDF format will always retain its formatting characteristics, converting a word-processor document into PDF format often alters its original formatting characteristics. The changes in the formatting characteristics may require adjustments in the original document to account for the altered formatting. For example, if PDFWriter is used to convert a word-processor document into PDF format, special characters may be inaccurately rendered. Symbols like a "§" or a " • " may be altered on conversion. Converting these symbols into PDF format also expands the file size, reducing the efficiency in retrieving the document. n2

Furthermore, documents that are formatted with an obscure font may be inaccurately rendered in the conversion. If the

selection of fonts contained in a filing user's computer does not contain the document's font, Adobe Acrobat will substitute another font that it considers to be similar, which may introduce unintended errors. n3

Although a WordPerfect or Word document can be converted to PDF format at any time, there is a major advantage in creating the document in PDF format directly from a word-processing application. The key benefit of creating a document is that the appearance and formatting of the document will remain the same when it is later viewed or printed as a PDF document. n4 This practical advantage obviates the need, which otherwise often arises, to revise documents that have been converted into PDF to account for formatting changes introduced in the conversion process.

The ECF system accepts both text and imaged PDF files. A text PDF file is usually produced from a word-processing application using PDFWriter. An imaged PDF file is produced by scanning a paper document in PDF format.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedurePretrial MattersConferencesCase ManagementGovernmentsCourtsRule Application & InterpretationLegal EthicsProfessional ConductElectronic Communications

FOOTNOTES:
(n1)Footnote 1. *See* Local Rules, W.D. Mich., CM/ECF User Manual, p. 5 (Oct. 1, 2001) (all pleadings filed electronically must be in pdf format).

(n2)Footnote 2. *See* Local Rules, D. Or., CM/ECF User Manual, App. B (Aug. 20, 2002) (tables are treated as special characters, and tabs instead of columns may be preferred).

(n3)Footnote 3. *See* Local Rules, D. Or., CM/ECF User Manual, App. B, (Aug. 20, 2002).

(n4)Footnote 4. *See* Local Rules, D. Or., CM/ECF User Manual, App. B (Aug. 20, 2002) ("[a]s you create your document, you are seeing how your document will be formatted in PDF").

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CHAPTER 8B Electronic Case Filing
C. Initiating ECF Filing Process

1-8B Federal Litigation Guide § 8B.23

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§ 8B.23 General Formatting and Captioning Requirements Apply to PDF Documents Filed Electronically

Documents filed electronically must meet any format and page limitations requirements that apply to paper documents filed with the court. The documents also must comply with the form of pleadings requirements set out in Rule 10 and any applicable local rule. n1

Rule 10 requires that every pleading contain a caption setting forth specific information, including the "name of the court, the title of the action, the file number, and a designation as in Rule 7(a)." The requirements extend to all motions and other papers provided for by the rules. n2 Documents filed electronically must also be reasonably broken up into severable components and should not be merged and transmitted as part of a single file. Each distinct component should be filed separately in ECF. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsRule Application & InterpretationCivil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedurePretrial MattersConferencesCase ManagementLegal EthicsProfessional ConductElectronic Communications

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 10*; *see* Local Rules, N.D. Ohio, Electronic Filing Policies and Procedures Manual, § 8 (Aug. 5, 2002).

(n2)Footnote 2. *Fed. R. Civ. P. 7(b).*

(n3)Footnote 3. *See* Local Rules, N.D. Ohio, Electronic Filing Policies and Procedures Manual, § 14 (Aug. 5, 2002) (motion, supporting memoranda, and exhibits all filed as separate components).

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CHAPTER 8B Electronic Case Filing
C. Initiating ECF Filing Process

1-8B Federal Litigation Guide § 8B.24

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§ 8B.24 ECF Main Menu Screen

After inputting the password and login numbers, clicking on the "login" button at the bottom of the login screen prompts the system to display the "Main Menu" screen. The image of the screen varies among the courts. However, most of the information on the Main Menu screen is designed to welcome the user to ECF. The function bar, located at the top of the screen in a relatively narrow and inconspicuous banner, is used by all district courts. It is the screen's most important feature. The bar contains hyperlinks that engage the ECF system's applications.

The function bar is colored blue and sets out six major functions of ECF:

- Civil,
- Query,
- Reports,
- Utilities,
- Logout, and
- "?" (help informational source).

A limited number of courts include an additional seventh function Criminal. n1 Placing the cursor on any one of the six or seven functions highlights the hyperlink and clicking on it displays the designated function screen.

The Query and Reports functions allow a user to view court documents. These functions can only be accessed through PACER. Clicking on these functions while registered in ECF automatically engages the PACER login screen. The Query function allows a user to retrieve information and documents by specific case number or party name. The Reports

function allows the user to retrieve calendar events, cases-filed reports, and docket sheets (*see § 8B.61*).

The Civil and Utilities functions permit the user to file documents and to docket events in the court's ECF system (*see §§ 8B.61*-62). These functions can only be accessed through ECF and not through PACER. The Civil function allows the user to file case pleadings, motions, and other court documents and to docket events. The Utilities function allows the user to review all ECF transactions.

The Logout function allows the user to exit ECF easily. The help informational source is self explanatory.

The date and time the system was last logged into by any user is noted in the bottom left-hand corner of the screen. The information provides the user with a security check to detect unauthorized access to ECF. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedurePretrial MattersConferencesCase ManagementGovernmentsCourtsCourt RecordsLegal EthicsProfessional ConductElectronic Communications

FOOTNOTES:
(n1)Footnote 1. *See* Local Rules, D.Neb., Electronic Case Filing CM/ECF: User's Manual, p. 12 (Jan 2003).

(n2)Footnote 2. *See* Local Rules, W.D. Mich., CM/ECF User Manual, p. 13 (Oct. 1, 2001) (suspected misuse should be immediately reported to court).

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CHAPTER 8B Electronic Case Filing
C. Initiating ECF Filing Process

1-8B Federal Litigation Guide § 8B.25

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§ 8B.25 Types of Documents That Can Be Filed in Civil Event

The Civil Event screen identifies all the types of documents that can be filed in the court's ECF system. The listing of types of documents is exclusive and any document not included in the listing may not be entered into the ECF system. If a particular type of document is not listed in the court's ECF system, the filing user must notify the court. Recognizing that the title of the document to be filed may not exactly reflect a title included in the exclusive list of document types maintained by a court, one court expressly permits a filing user to file the document notwithstanding the difference. The court does not require the filing user to change the title of the document to match the title set out in the court's list. n1

The Civil Event screen lists different documents that can be filed under various categories such as:

- Initial Pleadings and Service,
- Motions and Related Filings, and
- Other Filings. n2

Under each of the three main categories, an exclusive list of specific types of documents that can be filed with the court is set out. No other filing is permitted. The list is critical to the proper functioning of the ECF system. Because the ECF system often links data contained in one type of document to another type of document, it is essential that the names of the document types be uniform. The linking can be achieved only if the names of the documents match.

Click here to view image.

"Initial Pleadings and Service" includes complaints and other initiating documents (e.g., civil cover sheet), service of process, answers to complaint, and other answers. n3 No court permits the initial filing of the complaint to be done electronically. But several courts require a party later to file the hard-copy complaint electronically in ECF, so that a complete electronic record of the case can be maintained.

In the courts that require a party to file a complaint electronically after the complaint has been filed in the conventional manner, the Initial Pleadings and Service category on the screen includes a hyperlink to "Complaints" (*see § 8B.40*).

"Motions and Related Filings" set out a comprehensive listing of motions. n4 The listing can contain more than one hundred different motions. In addition, responses and replies to motions and supporting documents attached to motions are listed under this category.

A catch-all category, "Other Filings," is usually included that can refer to miscellaneous events. Documents involving ADR, discovery, notices, trial, appeal, and other events may be contained under this category.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansGovernmentsCourtsCourt PersonnelLegal EthicsProfessional ConductElectronic Communications

FOOTNOTES:
(n1)Footnote 1. *See* Local Rules, D. Md., Electronic Filing Requirements and Procedures, p. 6 (Feb. 10, 2003).

(n2)Footnote 2. *See* Local Rules, W.D. Mo., Electronic Case Files User Manual, p. 14 (Feb. 7, 2003) (adds a fourth category under Civil Events captioned "Social Security Events").

(n3)Footnote 3. *See* Local Rules, D.D.C., Electronic Case Filing System User's Manual, p. 37-38 (Jan. 2003) (listing of over 25 separate types of filings).

(n4)Footnote 4. *See* Local Rules, D.D.C., Electronic Case Filing System User's Manual, p. 8 (Jan. 2003) (128 separate motions, including several subgroups, e.g., seven distinct types of judgment motions and five types of motions to extend time).

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CHAPTER 8B Electronic Case Filing
C. Initiating ECF Filing Process

1-8B Federal Litigation Guide § 8B.26

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§ 8B.26 Types of Documents That Can Be Filed in Criminal Event

The Criminal Event function lists much fewer separate events than the Civil Events function. n1 Like the Civil Events function, however, there are three common main categories listed under the general Criminal Events function, including:

- Charging Instruments and Pleas;
- Motions and Related Filings; and
- Other Filings.

"Charging Instruments" includes Plea-Related Documents. "Motions and Related Filings" have an extensive listing. "Other Filings" include Waivers, Service of Process, Notices, Trial Documents, Appeal Documents, and Other Documents.

FOOTNOTES:
(n1)Footnote 1. *See* Local Rules, E.D. Pa., Procedural Order on Electronic Case Filing, Attachment A, p. 13 (May 16, 2002) (lists types of proceedings and documents in criminal cases that are excluded from electronic filing); *see also* Local Rules, D. Neb., Electronic Case Filing User's Manual, p. 25 (Oct. 2002).

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CHAPTER 8B Electronic Case Filing
C. Initiating ECF Filing Process

1-8B Federal Litigation Guide § 8B.27

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§ 8B.27 Delivering Courtesy Copy to Court

As part of the ECF program, court personnel and judge's chambers can access all cases electronically filed. Most judges either view electronic documents on the computer screen or direct court staff to download and print the document for viewing. However, some courts and judges require the filing user to deliver copies of all filed documents and Notices of Electronic Filing to the clerk's office or the chambers of the judge assigned to the case. n1 Delivering paper copies of electronic filings relieves the court of the expense and staff time otherwise consumed in printing electronically filed documents for the judge's review.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementGovernmentsCourtsCourt PersonnelLegal EthicsProfessional ConductElectronic Communications

FOOTNOTES:
(n1)Footnote 1. *See* Local Rules, D. Or., LR 100.5(c) ("[o]ne paper copy for the judge of each electronically filed document must be delivered to the Clerk within three (3) business days of the electronic filing"); *see also* Local Rules, W.D. Mo., Electronic Case Files User's Manual, p. 11-12 (Feb. 7, 2003) (conventional delivery until judge orders otherwise); *see also* Local Rules, E.D.N.Y., Admin. Order 97-12 § 4(j) (Oct. 23, 1997) (delivery of courtesy copies of filed papers to participating ECF judge remains in force until rescinded by the judge).

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CHAPTER 8B Electronic Case Filing
C. Initiating ECF Filing Process

1-8B Federal Litigation Guide §§ 8B.28 through 8B.29

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§§ 8B.28[Reserved]

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CHAPTER 8B Electronic Case Filing
D. Step-by-Step Guide for Filing Document in ECF

1-8B Federal Litigation Guide § 8B.30

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§ 8B.30 Summary of Instructions on Filing Document

There are nine general steps in filing a document in a civil case. Not all steps are required in every case.

- Select type of document to be filed
- Enter case number
- Designate party filing document
- Specify file name of document to be filed
- A attachments, if any
- Designate related filings, if any
- Modify docket description if appropriate
- Submit pleading
- Receive and transmit notification of electronic filing

Although there may be slight variations in filing different documents, the instructions for filing a motion apply to most other documents. The following discussion will focus on a "Motion" filing, unless specifically noted otherwise.

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CHAPTER 8B Electronic Case Filing
D. Step-by-Step Guide for Filing Document in ECF

1-8B Federal Litigation Guide § 8B.31

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§ 8B.31 Detailed Instructions on Filing Document in ECF

[1] Select Type of Document to be Filed

The first step is to select the specific type of document to be filed. After identifying the specific motion or other document type in the pick list, placing the cursor and clicking on the item completes the first step of filing. Pressing the Ctrl key allows selection of multiple types of documents, if more than one document is being filed. Clicking on the Submit or Next button (courts use different nomenclature) opens the next screen.

Click here to view image.

Each court maintains its own exclusive pick list of documents that can be docketed. If the type of the document to be filed is not identified in the court's document list, most of the courts require the filer to contact it. In these circumstances, only the court can input the document and docket it as part of the official record.

[2] Enter Case Number

A text box appears on the screen captioned Case Number. The second step is to type in the number that was assigned by the clerk's office to the case when it was originally filed with the court in the conventional manner. A sample format for typing in the case number is set out in the dialog box for reference purposes. The number is entered in a Year-Number (yy-####) format. A hyphen between the two is required. n1

ECF defaults to the last case in which the user submitted a filing and automatically inserts in the text box the number of the case that was last accessed. n2 A filing user involved in multiple litigation within a particular district court must be aware of this default feature and take necessary precautions to ensure that the proper case number is inserted in the text box.

[3] Designate Party Filing Document

The third step is to designate the party filing the document. If the party's name is not listed in the system's text box, the practice varies among the courts on how new parties are added. Only court personnel may add a new party in some courts. n3 In most courts, however, the ECF system has been modified to permit the filing user to add or create a new party. n4 In ECF systems in these courts, the heading "Add/Create New Party" is located adjacent to the "Select the Party" text box.

Click here to view image.

[4] Select PDF File to be Entered into ECF

In the fourth step, the document in electronic format that will be filed in ECF must be retrieved and copied from the filing user's computer and transmitted to the ECF database. The next screen prompts the user to select and input the pdf file name of the document being filed. The file name may be inserted in the text box beneath the caption "Filename."

Click here to view image.

After locating and highlighting the appropriate pdf document for filing by placing the cursor on it, the document should be viewed to verify that it is the correct one. Right mouseclicking brings up a quick menu, and left clicking on "Open" displays the pdf document for viewing. Opening the document will engage the Adobe Acrobat software program. After verifying that the document is correct, Adobe Acrobat can be exited by closing it and returning to the "File Upload" screen. The "X" in the upper right corner of the screen or the File Close can be clicked on to close the Adobe Acrobat application.

Clicking on the Open button in the "File Upload" screen displays the earlier screen. The pdf file name and location are automatically inserted in the "Filename" text box. The pdf document is now stored in the ECF database and is ready to become part of the official record. The fourth step is completed by clicking on the Next or Submit button at the bottom of the screen.

[5] Adding Attachments

[i] Filing Instructions

Click here to view image.

A party filing a paper electronically must include all documents, including any attachments, that are part of the pleading under one docket number, as required by the court's local rules. n5 Attachments may include exhibits, appendices, or proposed orders. A filing user should also file a memorandum in support of a motion as a separate attachment to the motion. n6

The fifth step describes the process for filing an attachment. Beneath the text box captioned "File Name" described in step four is an "Attachments to Document" heading with an adjacent "Yes or No" selection. Clicking on the "Yes" selection opens the next screen captioned "Select one or more attachments." The process followed in filing an attachment is similar to the process in filing the underlying pleading.

After inserting the name of the pdf file in the appropriate text box, information identifying the type of and describing the attachment more fully may be inserted in two additional text boxes. This information may be inserted in the two text boxes immediately below the "Filename" text box. The information is optional. It is especially useful when multiple attachments are being filed. n7

The local rules and general administrative orders of ECF courts include provisions governing the filing of exhibits and attachments to pleadings or motions, e.g., leases, charts, and contracts. n8 Ordinarily, a court will accept them only if

converted into electronic form, for example, by scanning and converting the material into PDF format.

[ii] Filing Lengthy Attachments

The length of attachments and exhibits may pose problems for ECF systems. Accordingly, most courts require that only relevant portions of any attachment or exhibit may be filed electronically. In these courts, only matters directly relevant and germane to the underlying filed document may be attached. n9 Responding parties may timely file additional excerpts from the attachment to augment the filed excerpt, if necessary. n10

Dividing a lengthy attachment into several smaller attachments may be an option in some courts. n11 Alternatively, one court provides ECF users with the option of submitting a lengthy document on electronic media that will later be filed in the clerk's office by means of a high-bandwidth Internet connection. n12

The local rules of court of some courts exclude certain types of documents from ECF filing, including administrative records, medical records, and demonstrative exhibits. Local rules may also exclude oversized exhibits. n13 If a party is unable to convert an exhibit or attachment to electronic form, it usually can be filed by conventional means.

[iii] Filing Scanned Documents

A scanner images a document and converts it into a digital format. Scanned documents consume more file space than documents transmitted in their native word-processor format. Filing lengthy scanned attachments electronically may raise problems with the court's computer storage capacity. For this reason, some courts disfavor scanned documents. n14

Some courts have imposed size limits on scanned attachments based on pages. In other courts, the limits are based on the number of data "bytes" in the document. n15

If the document to be filed electronically has been scanned, the filing user should verify that it is legible and that all pages have been included before submitting it as an attachment.

[iv] Filing of Paper Attachment

Sometimes an attachment or exhibit cannot be scanned or otherwise converted into an electronic format and can only be filed in paper format. In these cases, a court often requires that the filing user submit a single page pdf notice in the electronic record noting that a paper attachment has been filed with the clerk, which can be viewed and copied at the clerk's office. The court may offer a sample "Notice Regarding Exhibit Attachment" for the convenience of the filing user. n16 The notice is filed in the same way as an attachment. It serves solely to alert the viewer of the existence of a hard-copy attachment. It is designed to ensure that the record is complete. n17

It is important to remember that copies of an exhibit or attachment that is not filed electronically must be served on the parties in the traditional manner. The electronic filing of a notice "Regarding Exhibit Attachment," which merely indicates that a paper copy of the document is being maintained in the clerk's office, is insufficient service. n18 Unlike other notices of electronic filing, there is no hyperlink in the Notice of Electronic Filing to the filed electronic document because no electronic document exists (*see § 8B.54*).

[6] Designating Related Documents

The "Related Documents" screen is used throughout the ECF filing program to establish a link in the current document being filed to documents filed at an earlier time. It also serves as a vehicle to generate and assign deadlines. The screen appears only on a selected basis after certain underlying documents have been submitted for filing. n19 When one of these preselected types of documents is being electronically filed, the Related Filings screen opens.

Clicking on the check box to the left of the question: "Does this filing refer to an existing document in this case?" displays two additional screens. These screens facilitate linking a document with specific documents already docketed.

[7] Recording Filing in Docket

In courts operating under the ECF system, the filing attorney electronically transmits papers and documents to the clerk of court using the Internet. The filing attorney also simultaneously records the event on the court's electronic docket. n20 Basic components of the docket entry are generated automatically by the ECF system for the filing user's review. The filing user may not modify this information. The filing user has the option, however, to add information to the minimum docket entry generated by ECF. In most cases, the docket entry is provisional subject to later review and modification, if necessary, by court staff. n21

The seventh step explains the procedure to enter a docket entry to record the electronic filing of a document. The creation of docket entries is accomplished by the filing user at the same time that the papers and documents are being filed over the Internet. The filing user becomes responsible for the initial creation of the docket entry. n22 This is accomplished by means of a computerized program that requires the filing user to review and refine a docket entry that reflects data pertaining to the specific document being filed that had been earlier retrieved in steps one through six.

Click here to view image.

At a minimum, the basic docket entry generated by ECF will identify the general type of document being filed, e.g., motion for class certification or motion for continuance, and the name of the party filing it. This information is automatically inserted as the docket entry by the ECF system from the data earlier input by the filing user in steps one and two. The system provides the filer with options to elaborate and expand the docket entry.

Filings are stored in a court's computer database, which can be accessed from outside the court by authorized persons. n23 Presently, a few courts restrict access to electronic filings only to participating attorneys who have been issued password identification numbers. Most courts, however, permit the public to view (but not modify) electronic court records. Rule 5.2 was adopted pursuant to the E-Government Act of 2002 to address privacy concerns regarding the electronic filing of documents with personal information, and to address limitations on the public availability of electronically filed documents. The rule also regulates paper filings, even when they are not converted to electronic format.

A document filed and stored electronically with a court is the official record. A paper filed electronically in compliance with a local rule is a written paper for purposes of the Federal Rules of Civil Procedure. n24 The electronic docket is the official court docket record. n25 Unless some obvious problems appear on the face of the record, a lawyer may rely on the electronic record without also reviewing the hard-copy docket sheet. n26

Special procedures govern the filing of sealed documents. Such documents are usually excluded from electronic filing and are submitted conventionally in paper format (*see § 8B.73*). n27 Under Rule 5.2(d), 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. n28

[8] Submit Filing

No further changes may be made to any filing after its submission. However, if the document should be accepted for filing even if there is a problem with its form.

A court's need for consistency and reliability in electronically filed papers must be balanced against the longstanding

judiciary policy not to punish litigants for de minimis procedural errors. The clerk must not refuse to file a paper solely because it is not in the form prescribed by the Federal Rules or by a local rule or practice. n29 Only a judge may reject a filing for these types of defects under the rules. A judicial officer, not the clerk, must make this decision because rejecting a filing for failing to comply with a form requirement exposes litigants to the hazards of time bars. n30

ECF's core concept is that after a paper is filed electronically, it becomes available to all through the ECF system (*see § 8B.50*). If the electronically filed paper does not meet the format requirements of ECF, the electronically filed paper may, in practice, be unreviewable by the court or any party to the action. For example, transmitting a document as an attachment without converting it to PDF format may render it unreadable by the court or opposing parties.

These types of violations of a court's local rules or other court orders should probably be characterized as mere "form" defects, and be received for filing. Only a judge may reject a filing based on a form defect. n31

Every district court is considered always open for the purpose of filing any paper. Courts are presumed to be always open for the purpose of filing pleadings by conventional means involving delivery of a paper filing. n32 The rules recognize, however, that the time for conventional paper filing is extended if the last day on which a paper may be filed is a Saturday, Sunday, or legal holiday, or if the clerk's office is inaccessible. n33

Unless a different time is set by a statute, local rule, or court order, the deadline for electronic filing ends at midnight in the court's time zone. n34

Unless the court orders otherwise, if the clerk's office is inaccessible:

- 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; n35 or

- 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. n36

The text of Rule 6(a)(3) no longer refers to "weather or other conditions" as the reason for inaccessibility of the clerk's office. The reference to weather was deleted from the text to underscore that inaccessibility might occur for reasons unrelated to weather, such as the outage of the electronic filing system. n37 The extensions under Rule 6(a)(3) apply unless the court orders otherwise. In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those circumstances, the court can specify a briefer extension. n38

[9] Serving Electronically Filed Papers (Notification of Electronic Filing)

After the docket entry has been completed, clicking on the Submit or Next button opens the "Notice of Electronic Filing" screen, the ninth step of the process. The Notice of Electronic Filing confirms the successful filing of the document. It also serves as a filing receipt. Among other items, the case name, case number, and docket entry are displayed in the Notice of Electronic Filing screen. A document number is also assigned to the filing in the chronological order that it is entered on the docket. The number facilitates future retrieval of the document. To ensure the integrity of the filing, the document is also given a unique electronic document stamp. n39

Click here to view image.

The time of the document's filing is deemed to be when the Notice of Electronic Filing is generated by the ECF system. At that time, the filed document becomes an official court record. Transmission of the Notice of Electronic Filing constitutes service of the filed document to all parties in the case registered in the ECF system (*see § 8B.02[5]*). n40 In some courts, the Notice of Electronic Filing also represents the certificate of service and is the official notice of service

in accordance with Rule 5 and pertinent local rules (*see § 8B.53*). n41 However, the local rules should be reviewed to ascertain the local practice (*see § 8B.50*).

The ECF system automatically sends the Notice of Electronic Filing by means of an e-mail to every case participant and counsel registered in the ECF case.

It is the responsibility of the filing user to serve hard-copy notices and filed documents on parties and attorneys who are not registered in ECF. n42

The e-mail message transmitting the Notice of Electronic Filing will contain a hyperlink to the filed document, which can be accessed by clicking on the highlighted name. No fee is assessed on the recipient for viewing the filed document for the first time. Subsequent viewing of the same document may be done only through PACER, which will generate costs in accordance with the PACER fee schedule (*see § 8B.71*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedurePretrial MattersConferencesCase ManagementCommunications LawInternet ServicesComputer & Internet LawCivil ActionsGeneral OverviewComputer & Internet LawPrivacy & SecurityGeneral OverviewLegal EthicsProfessional ConductElectronic Communications

FOOTNOTES:
(n1)Footnote 1. *See* Local Rules, D. Or., CM/ECF User Manual, § 5.2(c) (Aug. 21, 2002).

(n2)Footnote 2. *See* Local Rules, D.D.C., Electronic Case Filing System User's Manual, p. 13 (Jan. 2003) (filing user should ensure that the case number is correct, otherwise the document will be filed in the wrong case).

(n3)Footnote 3. *See* Local Rules, D.D.C., Electronic Case Filing System User's Manual, p. 14 (Jan. 2003) ("[o]nly court personnel with pre-approved ECF security permissions can add or create new parties to a case").

(n4)Footnote 4. *See* Local Rules, W.D. Mich., CM/ECF User Manual, p. 20 (Oct. 1, 2001); *see also* Local Rules, N.D. Cal., Electronic Case Filing Users Manual, p. 16 (Oct. 23, 2002).

(n5)Footnote 5. *See* Local Rules, W.D. Mich., CM/ECF User Manual, p. 23 (Oct. 1, 2001).

(n6)Footnote 6. *See* Local Rules, D. Md., Electronic Filing Requirements and Procedures, p. 23 (Feb. 10, 2003).

(n7)Footnote 7. *See* Local Rules, D. Md., Electronic Filing Requirements and Procedures, p. 9 (Feb. 10, 2003).

(n8)Footnote 8. *See* Local Rules, W.D. Mo., En Banc Order § 6.a.(2) (Nov. 5, 1998); E.D. N.Y., Admin. Order 97-12, § 4.g (Oct. 23, 1997) (filing of exhibits and other attachments).

(n9)Footnote 9. *See* Local Rules, E.D. Pa., Procedural Order on Electronic Case Filing, § 5 (May 16, 2002) (only excerpts that are relevant to the matter under consideration may be attached); *see also* Local Rules, D. Or., LR 100.11(a)(1) (party may file only excerpts "that are directly germane to the matter under consideration by the court").

(n10)Footnote 10. *See* Local Rules, D. Or., LR 100.11(a)(2).

(n11)Footnote 11. *See* Local Rules, D. Neb., Electronic Case Filing CM/ECF: User's Manual, p. 21 (Jan. 2003) ("[f]or moderate length paper attachments, consider dividing them into two or more smaller attachments, scanning, and filing them electronically").

(n12)Footnote 12. *See* Local Rules, E.D.N.Y., Admin. Order 97-12 § 4(g) (Oct. 23, 1997).

(n13)Footnote 13. *See* Local Rules, D. Or., CM/ECF User Manual, § 3.4(e) (Sept. 13, 2002).

(n14)Footnote 14. *See* Local Rules, W.D. Mo., Electronic Case Files User's Manual, p. 2 (Feb. 7, 2003) ("[w]e are moving away from the utilization of scanned documents inside the Court and are asking you to do the same when possible").

(n15)Footnote 15. *See*, e.g., Local Rules, N.D. Ohio, Electronic Filing Policies and Procedures Manual § 14 (Apr. 5, 2001) (any scanned PDF file exceeding 1.5 megabytes must be filed manually, not electronically); *see also* Local Rules, W.D. Mich., CM/ECF User Manual, p. 24 (Oct. 1, 2001) (attachment exceeding 25 pages in length may be filed electronically unless it is in digital, not scanned, PDF format); Local Rules, D.D.C., Electronic Case Filing System User's Manual, p. 18 (Jan. 2003) ("*if* document is more than *500 pages* long, you may submit it in paper format").

(n16)Footnote 16. *See* Local Rules, W.D. Mo., Electronic Case Files User's Manual, p. 21 (Feb. 7, 2003) (one page pdf document titled "Notice Regarding Exhibit Attachment"); *see also* Local Rules, N.D. Cal., Electronic Case Filing, Users Manual, p. 20 (Oct. 23, 2002) (one-page pdf document captioned "Notice of Attachment (Exhibit/Document)" must be attached to pleading in the electronic case file indicating that exhibit is being maintained in clerk's office).

(n17)Footnote 17. *See* Local Rules, W.D. Mo., En Banc Order § 6.a.(2) (Nov. 5, 1998) (conventional filing allowed for exhibits not available in electronic format).

(n18)Footnote 18. *See* Local Rules, N.D. Cal., Electronic Case Filing, Users Manual, p. 20 (Oct. 23, 2002).

(n19)Footnote 19. *See* Local Rules, N.D. Ohio, Electronic Case Files, User Manual, p. 20 (Aug. 2002) (screen appears only if there is a likelihood that the document being filed will be linked to an existing document).

(n20)Footnote 20. *See* W.D. Mo., En Banc Order § 3.b, c (Nov. 5, 1998) (filer responsible to make docket entry).

(n21)Footnote 21. *See* Local Rules, N.D. Ohio, Electronic Filing Policies and Procedures Manual, § 10 (Aug. 5, 2002) ("clerk of court will, where necessary and appropriate, modify the docket entry description to comply with quality control standards").

(n22)Footnote 22. *See* Local Rules, W.D. Mo., En Banc Order § 3.b-c (Nov. 5, 1998).

(n23)Footnote 23. *See Fed. R. Civ. P. 79(a)* ("[t]he clerk shall keep a book known as'civil docket' of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States").

(n24)Footnote 24. *Fed. R. Civ. P. 5(d)(3).*

(n25)Footnote 25. *See* Local Rules, E.D.N.Y., Admin. Order 97-12, § 4.c-d. (Oct. 23, 1997) (electronically filed document is the official document of record); *see also* Local Rules, D. Or., LR 10014 ("official record is the electronic recording of the document as stored on the Cm/ECF system, and the filing party is bound by the document as filed").

(n26)Footnote 26. *See Hollins v. Department of Corr., 191 F.3d 1324, 1328-1329 (11th Cir. 1999)* (attorney's failure to file timely appeal was excused because it was based on omission in electronic docket).

(n27)Footnote 27. *See* Local Rules, W.D. Mo., En Banc Order § 6.a.(3) (Nov. 5, 1998) (sealed documents in electronically filed cases).

(n28)Footnote 28. *Fed. R. Civ. P. 5.2(d).*

(n29)Footnote 29. *Fed. R. Civ. P. 5(d)(4)*.

(n30)Footnote 30. *Fed. R. Civ. P. 5(e)*, Committee Note of 1991 (1991 amendments of Rule 5(e) were intended to address non-substantive mistakes when submitting paper documents for filing--former Rule 5(e) is now part of Rule 5(d)).

(n31)Footnote 31. *Fed. R. Civ. P. 5(e)*, Committee Note of 1991--former Rule 5(e) is now part of Rule 5(d).

(n32)Footnote 32. *Fed. R. Civ. P. 77(a)*.

(n33)Footnote 33. *Fed. R. Civ. P. 6(a)*.

(n34)Footnote 34. *Fed. R. Civ. P. 6(a)(4)*.

(n35)Footnote 35. *Fed. R. Civ. P. 6(a)(3)(A)*.

(n36)Footnote 36. *Fed. R. Civ. P. 6(a)(3)(B)*.

(n37)Footnote 37. *Fed. R. Civ. P. 6(a)(3)*, Committee Note of 2008.

(n38)Footnote 38. *Fed. R. Civ. P. 6(a)(3)*, Committee Note of 2008.

(n39)Footnote 39. *See* Local Rules, E.D.N.Y., ECF User's Manual, p. 10 (Feb. 2001).

(n40)Footnote 40. *See* Local Rules, W.D. Mich., CM/ECF User Manual, p. 16 (Oct. 1, 2001).

(n41)Footnote 41. *See* Local Rules, D.D.C., Electronic Case Filing System User's Manual, p. 20 (Jan. 2003).

(n42)Footnote 42. *See* Local Rules, D.D.C., Electronic Case Filing System User's Manual, p. 21-22 (Jan. 2003).

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CHAPTER 8B Electronic Case Filing
D. Step-by-Step Guide for Filing Document in ECF

1-8B Federal Litigation Guide § 8B.32

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§ 8B.32 Understanding Signature Requirements

[1] Password and Login Constitute Signature

A court may allow "papers to be ... signed ... by electronic means." n1 Each ECF court has a local rule or standing order setting out procedures governing signatures. n2 An attorney's login and password identification numbers generally constitute a signature for all pleadings and papers filed electronically with the court for all purposes, including possible sanctions under Rule 11. n3 The password and login numbers assigned to a filing user effectively ensure the genuineness of the filing user's signature. However, signatures of nonfiling users on documents filed electronically pose different issues that are handled differently by the courts.

[2] ECF Filing User's Signature

Under most local practices in ECF courts, documents submitted electronically by an ECF filing user must include a signature block with the name of the attorney preceded by a "/s/" notation where the signature would ordinarily appear. As part of the ECF registration process, the filing user agrees that its password and login identification numbers serve as the filing user's signature for all purposes. There have been no reported problems to date with a filing user or other party disputing the authenticity or validity of the assigned password or login number. n4

When an electronically filed document is printed, the "/s/" notation serves as some indication that the document has been signed. Otherwise, the document, once downloaded and printed, would appear to have never been signed. The signature block may also include other personal identifier information, e.g., address, telephone number, and bar registration number. n5 Rule 11(a) requires every filed paper to include the signer's address, e-mail address, and telephone number. n6

[3] Filing Documents With Non-ECF Filing User or Multiple Signatures

The practices for handling documents containing non-ECF filing user or multiple signatures vary among the courts. There are three principal methods by which courts handle non-filing user or multiple signatures, and a fourth one that

recognizes as valid any of the three methods.

- A filing user may in some courts attest that the signatories consented to the document being filed electronically in a notice contained in the document itself. n7

- A scanned image of the final document containing all signatures may be sufficient in other courts. n8

- Some local rules or other court orders may require the filing of the signatories' endorsement in a written letter as a follow up to the electronic filing. n9

- All three options are available to an ECF filing user in a few courts. n10

Retaining the original document with multiple signatures for at least one year after the final resolution of the action, including any appeal, is a standard practice (*see § 8B.32[4]*). n11 Also, a court may require a non-filing signatory or party to raise any objections to the authenticity of any signature within a designated period. n12 Failure to raise a timely objection may waive any right to later file an objection.

Alternate means of ensuring the integrity of signatures are currently in development.

[4] Retaining Hard Copies of Electronically Filed Documents

A document that contains original, hand-written signatures, other than the signature of an ECF filing user, may be needed as evidence in a later proceeding after the document has been filed electronically. These might include documents that must contain original signatures or that require verification or an unsworn declaration under any rule or statute, especially statements signed under the penalty of perjury, e.g., affidavits. Accordingly, some courts require the attorney filing a document with the ECF system to retain the original executed hard-copy document for a period of time set forth under local rules or other court order. n13 The time periods vary from one year to three years. n14

The responsibility to retain hard-copies of electronically filed documents usually rests with the filing user. A party may change counsel, however. If the case files are transferred to another attorney, arrangements should be made to transfer the retained hard copies of electronically filed documents to counsel of record.

Some courts require the attorney to retain documents only if they are scanned and filed in ECF. n15 This often occurs with documents containing a non-ECF user signature or multiple signatures. In these cases, the original hard-copy document would be retained by the filing attorney. n16

A filing user's login and password are deemed to constitute an original signature. Therefore, there is no need to retain copies of documents signed only by the filing user electronically.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedurePretrial MattersConferencesCase ManagementComputer & Internet LawCivil ActionsStatutes of LimitationsGovernmentsCourtsRule Application & InterpretationLegal EthicsProfessional ConductElectronic Communications

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 5(d)(3).*

(n2)Footnote 2. *See Fed. R. Civ. P. 5(e)*, Committee Note of 1996 ("[a]n electronic filing that complies with the

local rule satisfies all requirements for filing on paper, signature, or verification"--former Rule 5(e) is now part of Rule 5(d)).

(n3)Footnote 3. *See* Local Rules, W.D. Mo., En Banc Order § 4.a (Nov. 5, 1998); Local Rules, E.D.N.Y., Admin. Order 97-12, § 5.a (Oct. 23, 1997); Local Rules, D. N.M., Admin. Order 97-26, § 1 (Feb. 11, 1997); Local Rules, W.D. Mich., CM/ECF User Manual, p. 14 (Oct. 1, 2001); Local Rules, N.D. Ohio, Gen. Or. 97-38, § 7 (Oct. 6, 1997).

(n4)Footnote 4. *See Becker v. Montgomery, 532 U.S. 757, 763 (2001)* (while ruling on signature requirement for appeal purposes, court favorably noted 1996 amendments to Civil Rule 5 authorizing electronic signatures).

(n5)Footnote 5. *See* Local Rules, N.D. Ohio, Electronic Filing Policies and Procedures Manual, § 17 (Aug. 5, 2002).

(n6)Footnote 6. *Fed. R. Civ. P. 11(a).*

(n7)Footnote 7. *See* Local Rules, W.D. Mich., CM/ECF User Manual, p. 14 (Oct. 1, 2001) (filer certifies by submission of multiple signatures that each of the signatories has expressly agreed to the document being filed); *see also* Local Rules, N.D. Cal., Electronic Case Filing, Users Manual, pp. 12-13 (Oct. 23, 2002) (filing party attests that document is acceptable to all signatories and maintains record of original documents for one year); *see also* Local Rules, D. Md., Electronic Filing Requirements and Procedures, p. 31 (Feb. 10, 2003) (endorsement contained in parenthetical immediately below the signature line indicating that it was signed with signatory's permission).

(n8)Footnote 8. *See* Local Rules, N.D. Cal., Electronic Case Filing, Users Manual, p. 13 (Oct. 23, 2002) (alternatively, party may file scanned image of signature page as an attachment to filing); *see also* Local Rules, E.D.N.Y., Admin. Order 97-12 § 5(b) (Oct. 23, 1997).

(n9)Footnote 9. *See* Local Rules, E.D.N.Y., Admin. Order 97-12, § 5.b-e (Oct. 23, 1997); *see also* Local Rules, W.D. Mo., Electronic Case Files User's Manual, p. 12 (Feb. 7, 2003) (notice of endorsement attesting to the authenticity of signature must be filed within one day after the document has been electronically filed--illustrative endorsement notice provided by court at page 55).

(n10)Footnote 10. *See* Local Rules, D. Or., LR 100.8(c) (documents requiring signatures of multiple parties may be electronically filed by: submitting scanned document; attesting to the signatures on the document itself; or submitting a notice of endorsement); *see also* Local Rules, E.D. Pa., Procedural Order on Electronic Case Filing, § 8(c) (May 16, 2002).

(n11)Footnote 11. *See* Local Rules, N.D. Ohio, Electronic Case Files, User Manual, p. 13 (Aug. 2002) (one-year retention required; document subject to production on court order or on party's request for inspection); *see also* Local Rules, N.D. Cal., Gen. Order No. 45, § X (B) (Apr. 8, 2003) (filer required to retain record for one year after final resolution including any appeal); *see also* Local Rules, D. Or., LR 100.12.

(n12)Footnote 12. *See* Local Rules, Electronic Case Filing CM/ECF: User's Manual, D. Neb., p. 14 (Jan. 2003) (objections must be filed within 10 days of receiving Notice of Electronic Filing).

(n13)Footnote 13. *See* Local Rules, E.D.N.Y., Admin. Order 97-12 § 4(f) (Oct. 23, 1997) (filer obligated to make paper and electronic copies of documents filed electronically for a period of one year after final resolution if in paper form and 10 years if in electronic form); *see also* Local Rules, D. Or., LR 100.12 (documents requiring original signatures other than filing user "must be maintained in paper form by the Filing User until either final disposition of the case **plus** the time for appeal; or until the expiration of any relevant statute of limitations, whichever is greater").

(n14)Footnote 14. *See* Local Rules, E.D. Pa., LR 5.1.2, Procedural Order on Electronic Case Filing, § 10 (May 16, 2002) (documents requiring original signature, other than ECF user's signature, "must be maintained in paper form by

the ECF Filing User until three (3) years after the time period for appeal expires").

(n15)Footnote 15. *See* Local Rules, N.D. Ohio, Electronic Filing Policies and Procedures Manual, § 16 (Aug. 5, 2002).

(n16)Footnote 16. *See* Local Rules, E.D. Pa., Procedural Order on Electronic Case Filing, § 10 (May 16, 2002) ("[d]ocuments that are electronically filed and require original signatures other than that of the Filing User must be maintained in paper form by the ECF Filing User until three (3) years after the time period for appeal expires").

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CHAPTER 8B Electronic Case Filing
D. Step-by-Step Guide for Filing Document in ECF

1-8B Federal Litigation Guide §§ 8B.33 through 8B.39

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[Reserved]

§§ 8B.33[Reserved]

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CHAPTER 8B Electronic Case Filing
E. Filing Specific Types of Documents in ECF

1-8B Federal Litigation Guide § 8B.40

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§ 8B.40 Filing a Complaint or Other Initiating Document

All courts follow the same procedures in accepting the initial complaint for filing. A case is opened in the traditional manner using paper documents and physical presentation of the document to the clerk's office. Attorneys tender filing fees, along with an original and copy of the complaint or petition, a civil case cover sheet identifying the complaint, and requested service of process forms. n1 The clerk of court files the papers, accepts filing fees, issues a receipt, assigns the case a number and refers it to a judge, issues process and provides the attorney with case management orders that must be served on the opposing parties. In most courts, the clerk notifies the filing user that the complaint has been filed. n2

Practices vary among the courts, however, on the method in which the hard-copy complaint is converted into an electronic document and filed in the court's ECF system.

- Some courts require the party to submit a copy of the complaint on a floppy disk or CD-ROM simultaneously along with the hard-copy original n3

- Other courts require the party to resubmit a complaint electronically by means of an e-mail after filing a paper version n4

- Some courts require a party to resubmit the original complaint electronically in the ECF system, while other courts prohibit such filing because it will appear in the docket twice with different filing dates, generating confusion n5

In most federal districts, court personnel electronically file complaints that were filed in the conventional manner. In the minority of courts that require the filing user to refile the complaint electronically, the basic steps for filing any document in ECF apply to filing a complaint. The system requires input of relevant information, as well as uploading the complaint with any attachments into the system.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial MattersConferencesCase ManagementGovernmentsCourtsRule Application & InterpretationLegal EthicsProfessional ConductElectronic Communications

FOOTNOTES:
(n1)Footnote 1. *See* Local Rules, D.D.C., Electronic Case Filing System User's Manual, p. 10 (Jan. 2003) (file hard copy of complaint, along with civil cover sheet, and present $150 filing fee in the form of a check or money order to clerk's office).

(n2)Footnote 2. *See* Local Rules, D. Md., Electronic Filing Requirements and Procedures, p. 13 (Feb. 10, 2003).

(n3)Footnote 3. *See* Local Rules, D. Or., CM/ECF User Manual, § 4.1 (Aug. 21, 2002) (copy of original in PDF format required at time of filing); *see also* Local Rules, W.D. Mich., CM/ECF User Manual, p. 16 (Oct. 1, 2001) ("strongly encouraged to accompany your initial filing ... with a diskette or CD-ROM of your papers in PDF format, so that these documents can be added to the electronic case file").

(n4)Footnote 4. *See* Local Rules, N.D. Cal., Electronic Case Filing, Users Manual, p. 3 (Oct. 23, 2002) (electronic copy in PDF format required to be e-mailed); *see also* Local Rules, D.D.C., Electronic Case Filing System User's Manual, p. 11 (Jan. 2003) (clerk's office opens complaint and notifies filer by telephone that case is open, requiring filer to resubmit complaint electronically within 24 hours of notification).

(n5)Footnote 5. Compare Local Rules, E.D.N.Y., Admin. Order 97-12 § 2(c) (Oct. 23, 1997) ("[w]ithin ten days after an action becomes subject to EFP, each party shall refile electronically ... every paper in the action that the party previously filed") with Local Rules, N.D. Cal., Electronic Case Filing, Users Manual, p. 13 (Oct. 23, 2002) (previously filed document must be e-mailed).

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CHAPTER 8B Electronic Case Filing
E. Filing Specific Types of Documents in ECF

1-8B Federal Litigation Guide § 8B.41

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§ 8B.41 Recording Service of Process

Service of process is performed in the conventional manner, with paper copies delivered to the parties and filed with the clerk's office. n1 To ensure a complete electronic record of a case file, the documents used in serving process must be recorded in ECF. These documents may include: request for waiver of service, acknowledgment of service, affidavit of service, waiver of service executed or unexecuted, or summons returned executed or unexecuted. n2

In most courts, court personnel docket the documents dealing with service of process in the traditional manner. In some courts, however, the filing user must record the service of process in the ECF system after service has been attempted or executed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedurePretrial MattersConferencesCase ManagementLegal EthicsProfessional ConductElectronic Communications

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 4.*

(n2)Footnote 2. *See* Local Rules, D. Md., Electronic Filing Requirements and Procedures, App. A (Feb. 10, 2003).

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CHAPTER 8B Electronic Case Filing
E. Filing Specific Types of Documents in ECF

1-8B Federal Litigation Guide § 8B.42

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§ 8B.42 Filing Answer to Complaint

An answer to a complaint may be filed by accessing the "Initial Pleadings and Service" menu from the Civil Events screen. An amended answer must be filed by clicking on "Other Answers" under the Initial Pleadings and Service caption.

The system requires input of the case number, attorney name, and party filer. A new screen appears displaying the complaints filed in a particular case with an adjacent check box that can be checked to designate which complaints are being answered. After inputting this information, the File Upload screen allows the filing user to retrieve and submit the answer. The screen collects the information about third-party complainants. Checking the boxes brings up new screens to add third-party defendants.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansLegal EthicsProfessional ConductElectronic Communications

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CHAPTER 8B Electronic Case Filing
E. Filing Specific Types of Documents in ECF

1-8B Federal Litigation Guide § 8B.43

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§ 8B.43 Responses and Replies to Motions

A list of responses and replies to a motion are contained in a drop down list that appears after clicking on the "Responses and Replies" caption under "Motions and Related Filings" in the Civil Events field. No special filing procedures are required. However, the filing user is always prompted to select the underlying motion responded or replied to in order to establish the link. As a result, the response or reply is always linked to a motion.

Depending on local practices, filings not customarily associated with a motion response or reply may be listed in the category, including objections to findings and recommendations and objections to a bill of costs. Filing users should review all items listed in the category to familiarize themselves with its contents.

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CHAPTER 8B Electronic Case Filing
E. Filing Specific Types of Documents in ECF

1-8B Federal Litigation Guide § 8B.44

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§ 8B.44 Other Filings

A list of miscellaneous filings is set out under the "Other Filings" category in Civil Events. Jury demands, affidavits, stipulations, and notices to take deposition are several examples of documents that may be included in this category. n1 The procedure for filing these documents is similar to the one for filing all other documents in ECF.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedureDiscoveryMethodsStipulationsLegal EthicsProfessional ConductElectronic Communications

FOOTNOTES:
(n1)Footnote 1. *See* Local Rules, D. Md., Electronic Filing Requirements and Procedures, App. A (Feb. 10, 2003).

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CHAPTER 8B Electronic Case Filing
E. Filing Specific Types of Documents in ECF

1-8B Federal Litigation Guide § 8B.45

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§ 8B.45 Proposed Orders and Proposed Documents

Procedures governing filing of proposed orders vary according to local practices.

- In a few courts, the filing of a proposed order is done in accordance with the procedures that apply to all documents, including a docket entry.

- A proposed order may be attached as an exhibit to a motion or stipulation in other courts. n1

- In most courts, the proposed order is not filed in the ECF system because the judge wants the initial opportunity to revise it. In these courts, a party is required to transmit a proposed order directly to the judge's e-mail address, or other designated e-mail address, or to submit a floppy disk or CD-ROM containing the proposed order to the court. n2

- Alternatively, a court may require that a proposed order be filed electronically as an attachment to a filed motion or stipulation and e-mailed to the assigned judge's chambers. n3 The court may adopt or revise the proposed order. Court personnel would then enter the order directly into the ECF system.

If the document to be filed requires leave of court (for example, an amended pleading or a document to be untimely filed), the proposed document may be attached to the motion. n4 If the court later grants the motion, the filing user may be directed to refile the attachment electronically or the clerk of court may refile the document. n5

Additional requirements may apply to the filing of proposed jury instructions and voir dire questions. These documents are often subject to editing by the court. Local practices may require that an electronic version be separately delivered to the judge. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementGovernmentsCourtsClerks of CourtLegal EthicsProfessional ConductElectronic Communications

FOOTNOTES:
(n1)Footnote 1. *See* Local Rules, D. Or., LR 100.10(a) (proposed orders docketed and served as proposed documents); *see also* Local Rules, W.D. Mich., CM/ECF User Manual, p. 28 (Oct. 1, 2001) (submitted electronically as an attachment or submitted separately and identified as "proposed").

(n2)Footnote 2. *See* Local Rules, W.D. Mo., Electronic Case Files User Manual, p. 29 (Feb. 7, 2003) (filer required to transmit proposed order in WordPerfect format to the courtroom deputy assigned to the presiding judge in the case).

(n3)Footnote 3. Local Rules, N.D. Cal., Electronic Case Filing, Users Manual, p. 25 (Oct. 23, 2002).

(n4)Footnote 4. *See* Local Rules, D. Or., LR 100.10(b).

(n5)Footnote 5. Compare, Local Rules, W.D. Mo., Electronic Case Files User Manual, p. 26 (Feb. 7, 2003) (requiring party to refile document) with Local Rules, E.D. N.Y., L.R. 5.7(f) (clerk of court electronically files document without further action by the attorney).

(n6)Footnote 6. *See* Local Rules, D. Or., L.R 100.10(c) (proposed jury instructions and voir dire questions must be filed in ECF, and a copy must be submitted on diskette or CD-ROM in WordPerfect format).

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CHAPTER 8B Electronic Case Filing
E. Filing Specific Types of Documents in ECF

1-8B Federal Litigation Guide §§ 8B.46 through 8B.49

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[Reserved]

§§ 8B.46[Reserved]

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CHAPTER 8B Electronic Case Filing
F. Notification of Filing and Service of Documents Filed in ECF

1-8B Federal Litigation Guide § 8B.50

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§ 8B.50 ECF System Notifies Parties of Filings

A party does not actually deliver or send a copy of papers filed electronically to the opposing party in an ECF court. Instead, the ECF system transmits a Notice of Electronic Filing by e-mail to all individuals who are case participants registered in ECF that have consented to electronic service (*see § 8B.31[9]*).

The Notice of Electronic Filing contains a hyperlink to the filed document, which is contained in the court's computer database. The hyperlinked document may be accessed instantaneously by clicking on it. The document can then be printed or downloaded and saved. In order to constitute service under Rule 5(b)(2)(E), the Notice of Electronic Filing generated by the ECF system must be authorized by a local rule. n1

Service by electronic means is complete on transmission. n2 Electronic service is deemed complete on "transmission" by analogy to service by mail, which is also complete "on mailing." n3 In this context, "transmission" ordinarily occurs when the sender does the last act that must be performed by the sender, that is when a party clicks on the Submit button generating a Notice of Electronic Filing. n4 If an attorney has consented to be served electronically, the Notice of Electronic Filing is deemed service, and once the notice is transmitted on these parties, service is complete. n5

Attorneys participating in the ECF program generally agree to accept electronic service of papers in all future litigation handled by the attorney.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedurePretrial MattersConferencesCase ManagementGovernmentsCourtsRule Application & InterpretationLegal EthicsProfessional ConductElectronic CommunicationsLegal EthicsSanctionsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 5(b)(3).*

(n2)Footnote 2. *Fed. R. Civ. P. 5(b)(2)(E).*

(n3)Footnote 3. *See Fed. R. Civ. P. 5(b)(2)(C).*

(n4)Footnote 4. *See Fed. R. Civ. P. 5*, Committee Note of 2001.

(n5)Footnote 5. *See* Local Rules, W.D. Mich., CM/ECF User Manual, p. 28 (Oct. 1, 2001); *see also* Local Rules, N.D. Cal., Electronic Case Filing, Users Manual, p. 26 (Oct. 23, 2002); Local Rules, N.D. Ohio, Electronic Case Files, User Manual, p. 24 (Aug. 2002) ("transmission of the Notice of Electronic Filing to the registered e-mail address constitutes service of a pleading, paper, order, or notice upon any attorney who is registered").

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CHAPTER 8B Electronic Case Filing
F. Notification of Filing and Service of Documents Filed in ECF

1-8B Federal Litigation Guide § 8B.51

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§ 8B.51 Ineffective Service

Electronic service normally is complete at the time that the filing user pushes the button that sends the Notice of Electronic Filing on its electronic way. n1 There is a significant exception to this general rule, however, that precludes effective service when the sender knows that electronic service has been ineffective. n2 The Rule does acknowledge that, on occasion, electronic transmission of papers and documents fails. n3 A sender may discover, soon after transmission, that the attempt at electronic service did not reach the intended recipient. Electronic service is not effective "if the serving party learns that it did not reach the person to be served." n4

The exception applies only when the sender of the notice knows that the attempt was ineffective. Normally, even if electronic service is ineffective, "the risk of non-receipt falls on the person being served, who has consented to this form of service." n5 Thus, for example, service remains effective at the time of sending if the recipient is merely being uncooperative, simply fails to turn on the receiving computer, or fails to read transmitted e-mail.

In circumstances where the sender knows that electronic service is ineffective, the person attempting electronic service "must either try again or show circumstances that justify dispensing with service". n6

The Eighth Circuit issued an opinion refusing to excuse an untimely appeal based on the excuse that the attorney failed to receive electronic notice of the denial of its motion to amend. The district court found that the party filing the untimely appeal failed to overcome the presumption of delivery and receipt of emails properly dispatched by the court's CM/ECF system. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedurePretrial MattersConferencesCase ManagementCommunications LawInternet ServicesLegal EthicsProfessional ConductElectronic Communications

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 5(b)(2)(E)* (service "is complete upon transmission").

(n2)Footnote 2. *See Fed. R. Civ. P. 5(b)(2)(E).*

(n3)Footnote 3. *Fed. R. Civ. P. 5*, Committee Note of 2001 ("lawyers report continuing failures of transmission, particularly with respect to attachments").

(n4)Footnote 4. *Fed. R. Civ. P. 5(b)(2)(E).*

(n5)Footnote 5. *Fed. R. Civ. P. 5*, Committee Note of 2001.

(n6)Footnote 6. *Fed. R. Civ. P. 5*, Committee Note of 2001.

(n7)Footnote 7. *American Boat Company, Inc. v. Unknown Sunken Barge, 567 F.3d 348, 353, 353 (8th Cir. 2009).*

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CHAPTER 8B Electronic Case Filing
F. Notification of Filing and Service of Documents Filed in ECF

1-8B Federal Litigation Guide § 8B.52

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§ 8B.52 Three-Day Extension

If service is made electronically under Rule 5(b)(2)(E) and the document served requires some action on the part of the recipient, there is a three-day extension of the time period in which the recipient may act. n1 In this matter, electronic service is treated the same as service by mail and service by delivery of papers to the clerk when the recipient has no known address. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedurePretrial MattersConferencesCase ManagementLegal EthicsProfessional ConductElectronic Communications

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 6(d).*

(n2)Footnote 2. *See Fed. R. Civ. P. 6*, Committee Note of 2001.

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CHAPTER 8B Electronic Case Filing
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§ 8B.53 Certificate of Service

Rule 5(d)(1) requires that all papers after the complaint must be filed with the court together with a certificate of service. n1 Practices vary among the courts on whether a separate certificate of service must be filed for documents filed electronically.

The Notice of Electronic Filing serves many of the same purposes as does a certificate of service, including informing a party that a paper has been filed in the case.

- In some courts, the Notice of Electronic Filing represents the filer's Certificate of Service and no separate certificate is required. n2

- Other courts require a separate certificate of service to be delivered to each party. n3 The separate certificate of service may be delivered electronically at the same time that the Notice of Electronic Filing is transmitted. n4

Although seemingly redundant, a separate certificate of service provides an added safeguard reminding the filing user to properly serve all parties in the case. The reminder is especially useful in cases involving multi-parties, some of whom may not be registered in the ECF system and require service by conventional means.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedurePleading & PracticeService of ProcessProofCertificatesLegal EthicsProfessional ConductElectronic Communications

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 5(d)(1).*

(n2)Footnote 2. *See* Local Rules, N.D. Cal., L.R. 5-6, Commentary ("parties are not required to include a certificate or acknowledgment of service upon registered ECF users when a document is filed electronically"); *see also* Local Rules, D. Or., LR 100.13(c) (Notice of Electronic Filing generated by ECF "constitutes proof of service upon a Filing User in accordance with the *Fed. R. Civ. P. 5(d)*".

(n3)Footnote 3. *See* Local Rules, W.D. Mo., Electronic Case Files User's Manual, p. 24 (Feb. 7, 2003) (refers to sample certificate of service that attests that a paper was filed electronically and that a notification was sent electronically to ECF participants or mailed to non-ECF participants); *see also* Local Rules, N.D. Ohio, Electronic Filing Policies and Procedures Manual, § 13 (Aug. 5, 2002) ("certificate of service must be included with all documents filed electronically").

(n4)Footnote 4. *See* Local Rules, E.D.N.Y., Admin. Order 97-12 § 6(a) (Oct. 23, 1997) (filer must send by e-mail Notice of Filing to appropriate parties within one hour following filing); *see also* Local Rules, E.D. Pa., Procedural Order on Electronic Case Filing, § 7(b) (May 16, 2002) (all filed documents must contain certificate of service).

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CHAPTER 8B Electronic Case Filing
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§ 8B.54 Service of Paper Copy Required

The Notice of Electronic Filing generated by the filer of the electronic document lists the individuals receiving the notice electronically. It also specifies the names of parties who will not receive the Notice of Electronic Filing. The filing user must carefully review the recipient list to determine whether all appropriate parties have been notified of the electronic filing.

The filer of the document is responsible to serve a hard-copy of the document on any party in the case that has not been designated or able to receive an electronic notice as indicated in the Notice of Electronic Filing. In such a case, service is done in the traditional manner set out in the Federal Rules of Civil Procedure and the court's local rules.

If service of a paper copy of the electronic filing is required, it is important to print and serve a copy of the pdf document filed in ECF. Serving a copy of the pdf version ensures that the formatting, pagination, and line numbering (if any) is identical to the official record as contained in ECF. n1

Even in cases in which all parties have been registered in ECF, service by conventional means may be necessary on occasion. Under certain circumstances, hard-copy documents are filed with the court in ECF cases in lieu of electronic documents. For example, an attachment or exhibit might not be filed electronically because of length or other reasons. Usually, only a single-page Notice of Exhibit/Attachment filing is posted in the electronic docket. No hyperlink to the underlying attachment is established (*see § 8B.31[5] [iv]*). In these cases, the document must be served on the other parties in the traditional manner. The paper copy must be served not only on all parties in the case, but the original must be delivered to the clerk's office with a copy for the assigned judge. n2

FOOTNOTES:
(n1)Footnote 1. *See* Local Rules, W.D. Mich., CM/ECF User Manual, p. 31 (Oct. 1, 2001).

(n2)Footnote 2. *See* Local Rules, W.D. Mo., Electronic Case Files User Manual, p. 21 (Feb. 7, 2003).

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CHAPTER 8B Electronic Case Filing
F. Notification of Filing and Service of Documents Filed in ECF

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§§ 8B.55[Reserved]

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CHAPTER 8B Electronic Case Filing
G. Retrieving and Viewing Documents Filed in ECF

1-8B Federal Litigation Guide § 8B.60

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§ 8B.60 Searching ECF Database Using Query Function

ECF provides the capability to search for case information by case name or case number. The names of parties and attorneys also can be searched. Name fields are not case sensitive. n1 Retrieval of case information from a search of the ECF database engages PACER, requiring submission of the PACER login and password numbers.

A search for information on a specific case in ECF is conducted by clicking on Query in the blue colored function bar. The first step is to locate and retrieve the specific case. The data fields on the Query screen beneath the caption "Search Clues" permit the user to search the ECF database using known case information, including case number, name of party, and name of attorney. Once a particular case has been selected, an additional list of items is displayed, which can be clicked on for more details about the selected case.

Click here to view image.

To begin a search for a specific case, partial information is sufficient. A wildcard symbol (*) may be used as a prefix or suffix to two known characters contained within the word to be searched, and such a search will retrieve all words containing the known characters. n2 A minimum of two characters (alphabetic or numeric) is required to begin a search.

If two or more items are found to match the search query, the matching items are listed and displayed on the next screen. For instance, all names of parties beginning with the letters "Smit_" will appear on the screen after running a query searching for "Smit*." Clicking on one of the matches displays a Query window that links the specific case in which the selected match was found. The case is displayed with the following identification information: case number, parties, presiding judge, date of filing, and date of last filing.

The same screen also contains additional query searches that can be used to obtain more information about the selected case. The additional information can be retrieved by clicking on one of the query searches located on the screen, including:

- Attorneys,
- Case Summary,
- Deadline/Hearings,
- Docket Report,
- History/Documents,
- Party, and
- Related Transactions.

The response to the attorney query displays the names, addresses, and telephone numbers of the attorneys representing each party in the case. The response to Case Summary is displayed on a single screen and provides key information about the parties, case status, and case history. Deadlines or hearing dates set by the court in the particular case can be found by using the Deadlines/Hearings query, which allows a search of deadlines or hearings by Document Number, Event Filed, Due/Set, Satisfied, and Terminated. n3 The process for selecting and retrieving data by using the other queries is similar.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedurePretrial MattersConferencesCase ManagementLegal EthicsProfessional ConductElectronic Communications

FOOTNOTES:
(n1)Footnote 1. *See* Local Rules, D. Or., CM/ECF User Manual, § 11.1 (Aug. 21, 2002).

(n2)Footnote 2. *See* Local Rules, D. Or., CM/ECF User Manual, § 11.2 (Aug. 21, 2002).

(n3)Footnote 3. *See* Local Rules, D. Neb., Electronic Case Filing CM/ECF: User's Manual, pp. 42-43 (Jan. 2003).

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CHAPTER 8B Electronic Case Filing
G. Retrieving and Viewing Documents Filed in ECF

1-8B Federal Litigation Guide § 8B.61

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§ 8B.61 Reports

The reports menu can be accessed from the blue-colored Reports function bar at the top of the Main ECF screen. The Reports menu includes:

- Calendar Events,
- Cases Filed,
- Docket Sheets,
- E-Mail Info for a Case, and
- AO Statistics Division Reports.

Clicking on any of the reports engages PACER, and access is allowed only after the PACER login and password numbers are input (*see § 8B.04*).

A report can be retrieved after completing a series of prompts initiated by ECF. For example, clicking on Docket Sheet displays a "Docket Sheet" screen with a text box to enter the case number. Instead of displaying the entire docket sheet, which often can run for many pages, ECF provides an option of narrowing the retrieval of docket entries by retrieving only those submitted within a designated range of dates or within a designated range of document numbers. If neither a range of dates nor document numbers is entered, the system will default to print the entire electronic docketing report. Docket entries can be displayed in ascending or descending order and may be sorted by filing or entry date by clicking on the appropriate button.

Click here to view image.

After clicking on the "Run Report" button at the bottom of the screen, the requested docket sheet or portion of docket sheet is displayed on the screen. Each docket entry is set out in three columns. The first column contains the filing date, the second column contains the document number listed in chronological order, and the third column contains a narrative description of the docket entry. Clicking on the document number contained in the middle column displays the specific document.

ECF users may also retrieve a Notice of Electronic Filing from the displayed docket sheet by clicking on the icon or "dot" adjacent to the document number in the middle column. n1 The docket sheet may be printed by clicking on Print on the Netscape tool bar.

The Civil Case report allows the user to retrieve cases electronically filed within a specified range of dates or by Nature of Suit or Cause Code. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedurePretrial MattersConferencesCase ManagementLegal EthicsProfessional ConductElectronic Communications

FOOTNOTES:
(n1)Footnote 1. *See* Local Rules, D. Or., CM/ECF User Manual, § 12.2(b) (Aug. 21, 2002).

(n2)Footnote 2. *See* Local Rules, D. Neb., Electronic Case Filing CM/ECF: User's Manual, p. 47 (Jan. 2003).

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CHAPTER 8B Electronic Case Filing
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§ 8B.62 Utilities Function

The Utilities function has several features that are common to most ECF systems. They include:

- Maintain Your Account,
- View Your Transaction Log,
- Legal Research, and
- Verify a Document.

Individual courts tailor the Utilities function to their own needs and may add different features.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedurePretrial MattersConferencesCase ManagementLegal EthicsProfessional ConductElectronic Communications

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CHAPTER 8B Electronic Case Filing
G. Retrieving and Viewing Documents Filed in ECF

1-8B Federal Litigation Guide §§ 8B.63 through 8B.69

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[Reserved]

§§ 8B.63[Reserved]

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CHAPTER 8B Electronic Case Filing
H. Other Matters

1-8B Federal Litigation Guide § 8B.70

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§ 8B.70 Entry and Notice of Court Orders and Judgments

Click here to view image.

A judge may enter an order electronically, which is filed in the ECF system by court personnel. The ECF system automatically generates and transmits a Notice of Electronic Filing to all Filing Users notifying them that the judge has issued an order or judgment in their case. The electronic transmission of the Notice of Electronic Filing constitutes the notice required under Rule 77(d). n1 The notice contains a hyperlink to the order.

An order filed electronically without the judge's hand-written signature has the same force and effect as a paper order signed by the judge. In some courts, judges authorize "text only" orders that are solely docket entries, which themselves constitute the order. No separate pdf document is required to memorialize the order. A Notice of Electronic Filing is sent electronically to the parties, but unlike other notices, it has no hyperlink to an underlying document. Instead, the notice contains the text of the docket entry recording the judge's order. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementGovernmentsCourtsCourt PersonnelLegal EthicsProfessional ConductElectronic Communications

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 77(d)(1).*

(n2)Footnote 2. *See* Local Rules, D. Md., Electronic Filing Requirements and Procedures, p. 35 (Feb. 10, 2003).

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CHAPTER 8B Electronic Case Filing
H. Other Matters

1-8B Federal Litigation Guide § 8B.71

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§ 8B.71 Fees

[1] No Registration Fees

There are no special or added fees assessed for electronic filing. Of course, the general fees assessed by the courts under the Judicial Conference Schedule of Fees apply to cases filed electronically. n1

[2] Filing Fees

A fee is assessed for the initial filing of a complaint or petition. Payment of the fee is done in the traditional manner along with the initial filing of the complaint or petition.

There is no uniform standard procedure governing the payment of the initial filing fee at the time of electronic filing. ECF courts require payment of fees through the clerk's office, in advance of any electronic filing of a paper requiring payment of a fee. n2 Alternative procedures are under study that would permit an attorney who is enrolled in the ECF system to pay filing fees by credit card or electronic means. At the present time, local rules and administrative court orders either are silent or explicitly require payment of filing fees using conventional means, though some ECF courts do accept payment by credit card. n3

[3] Fees for Viewing or Downloading ECF Documents

The fees governing public access to cases filed electronically are set out in a Judicial Conference "Electronic Public Access Fee Schedule" appended to *section 1914, title 28, United States Code*. n4 The access fee, however, does not apply to the first time that a party views a document after receiving a Notice of Electronic Filing. n5

The Notice of Electronic Filing sent to attorneys of record and parties in a case includes a hyperlink to the filed document. The hyperlink expires after it is opened for the first time. A charge is assessed for all subsequent access to the filed document. Accordingly, counsel will typically download and print copies of the electronically filed documents when they first receive them to prevent incurring the expense for viewing them at a later time.

An ECF document can be retrieved and viewed only by access through PACER. While in ECF, a document can be retrieved by clicking on Query or Report which engages PACER (*see § 8B.04*). Before an ECF document is viewed, a transaction receipt will appear indicating the type and description of the transaction, the number of pages billed, and the cost for that transaction.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsFiling FeesCivil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedurePretrial MattersConferencesCase ManagementLegal EthicsProfessional ConductElectronic Communications

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1914(a).*

(n2)Footnote 2. *See* Local Rules, N.D. Ohio, Electronic Case Files, User Manual, p. 13 (Aug. 2002) (filing fee must be paid prior to filing with clerk's financial officer).

(n3)Footnote 3. *See* W.D.Mo., En Banc Order § 3.e (Nov. 5, 1998) (payment of filing fees by credit card over phone after faxing civil cover sheet and complaint); *See also* Local Rules, D. Neb, Administrative Procedure for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means, II.D. (June 2, 2003).

(n4)Footnote 4. *28 U.S.C. § 1914.*

(n5)Footnote 5. *28 U.S.C. § 1914*, Note, Judicial Conference Electronic Public Access Fee Schedule ("[a]ttorneys of record and parties in a case (including pro se litigants) receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer"); *see* Local Rules, D. Or., CM/ECF User Manual, § 3.5 (Sept. 13, 2002) ("[e]ach e-mail recipient [of Notice of Electronic Filing] receives a 'first free look' at the electronically filed document").

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CHAPTER 8B Electronic Case Filing
H. Other Matters

1-8B Federal Litigation Guide § 8B.72

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§ 8B.72 Security Issues

No computer system is foolproof against outside unauthorized access. Determined "computer hackers" might be able to gain access and compromise a court's electronic records. But courts have taken extensive precautions to ensure that their systems are immune from most attacks.

The ECF system complies with up-to-date security requirements. It employs 40-bit encryption and contains multi-layers of protections. n1 The ECF system has been examined by the National Security Agency and meets the highest government standards.

As part of the ECF system, every document filed with the system is analyzed to ensure that it does not contain any virus. A PDF CHECK software program performs the function automatically.

Like all computer systems, frequent back-ups and archiving of electronic records are performed on a regular basis. A firewall between outside users and the court is maintained to prevent an unauthorized person access to the system. As with other organizations that rely on the Internet, the courts are especially concerned with internal staff who have direct access to the system and have the ability to cause mischief.

As a precaution against loss of data, courts require parties to retain certain paper-based documents that contain original signatures other than the person who files the document for a significant length of time (one to five years) in the event that these documents may be necessary as evidence in future litigation, e.g., prosecution of fraud. n2 Some courts require that both paper and electronic copies of every paper filed electronically be kept by the party filing it. n3 Other courts require the parties to keep copies only of certain types of documents, such as those containing relevant, original signatures. n4

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedurePretrial MattersConferencesCase ManagementComputer & Internet LawCriminal OffensesData Crimes & FraudComputer & Internet LawPrivacy & SecurityGeneral OverviewLegal EthicsProfessional ConductElectronic Communications

FOOTNOTES:

(n1)Footnote 1. *See* Local Rules, D. Or., CM/ECF User Manual, § 3.2(a) (Sept. 13, 2002) (employs technology identical to that used by financial institutions to prevent computer hackers from intercepting confidential information).

(n2)Footnote 2. *See* Local Rules, E.D. N.Y., Admin. Order 97-12, § 4.f (Oct. 23, 1997) (retain document in hard-copy form for one year after case disposition).

(n3)Footnote 3. *See* Local Rules, E.D. N.Y., Admin. Order § 4.f (Oct. 23, 1997) (paper copies must be kept for one year following final resolution, electronic copies must be kept for 10 years).

(n4)Footnote 4. *See* Local Rules, D.N.M., En Banc Order, § 4.b (Oct. 2, 1997).

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CHAPTER 8B Electronic Case Filing
H. Other Matters

1-8B Federal Litigation Guide § 8B.73

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§ 8B.73 Sealing Documents, Including Preventing Document's Posting on Internet

[1] Redacting Private Information

Rule 5.2 was adopted in compliance with the E-Government Act of 2002. n1 This Act requires, among other things, that federal courts make all electronic filings available online, through each court's website. Any paper filings that are scanned into electronic form must be made available to the same extent as any original electronic filings. Electronic filing is becoming the normal mode for filing papers in federal district courts. District courts may adopt, and more and more district courts have adopted, local rules requiring parties to file electronically. n2 Scanning the decreasing number of paper filings still being made into electronic form is common practice in the district courts. n3 Thus, courts must deal with the consequences of having its files available to the public over the internet.

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, 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: n4

- The last four digits of the social-security number and taxpayer-identification number
- The year of the individual's birth
- The minor's initials
- The last four digits of the financial-account number

The redaction requirement does not apply to the following: n5

- The record of an administrative or agency proceeding

- The official record of a state-court proceeding

- The record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed

- A filing covered by Rule 5.2(c) (social security appeals and immigration cases) or Rule 5.2(d) (unredacted filing under seal)

- A financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding

- A pro se filing in an action brought under *28 U.S.C. §§ 2241*, *2254*, or *2255*

While the term "redacted" is used, the rule is intended to govern a filing that is prepared with abbreviated identifying information in the first instance, as well as a filing in which the information is edited after its preparation. n6 The responsibility to prepare or redact filings so that they include only the allowed information rests with counsel and the party or nonparty making the filing. The clerk is not required to review documents filed with the court for compliance with the rule. n7 Further, the advisory committee note indicates that attorneys should consult with their clients as to what personal information is to be included in a document filed with the court. The attorney should make the client aware that any personal information not protected by sealing or redaction will be made available over the internet. n8

[2] Limiting Remote Access to Electronic Files in 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: n9

- The parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record

- Any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to the docket maintained by the court, and an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record

[3] 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. n10

[4] Seeking Protective Order to Limit Access to Private Information

For good cause, the court may require redaction of additional information. n11 The court may also limit or prohibit a nonparty's remote electronic access to a document filed with the court. n12

[5] Filing Unredacted Copy 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. n13

[6] Filing a Reference List of Redacted Information

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. n14

[7] Waiving Protections Under Rule 5.2

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. n15

[8] Seeking More or Less Protection Than Specified in Rule

Rule 5.2 requires the redaction of certain information "unless the court orders otherwise." n16 Accordingly, the court retains authority under the rule to require that information, otherwise subject to redaction, be included in a filing. Alternatively, the rule allows the court, for good cause, to issue protective orders that either: n17

- Require redaction of additional information that would not otherwise need to be redacted
- Limit or prohibit remote electronic access by nonparties to a document filed with the court

While Rule 5.2 provides for the public filing of certain information, such the last four digits of an account number, it does not create a presumption that even this information cannot be protected in an appropriate case. The advisory committee note indicates that it may be necessary in some cases to prevent remote access to any part of an identifying number, or to protect information not referred to in Rule 5.2, such as a driver's license number or alien registration number. n18

The court may also order that records be sealed in an appropriate case. Rule 5.2 neither prevents the sealing of records nor affects the limitations on sealing that are otherwise applicable to the court. n19

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedurePretrial MattersConferencesCase ManagementComputer & Internet LawPrivacy & SecurityGeneral OverviewLegal EthicsClient RelationsConfidentiality of InformationLegal EthicsProfessional ConductElectronic Communications

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 5.2*, Committee Note (2007).

(n2)Footnote 2. *Fed. R. Civ. P. 5(d)(3)*; *See, e.g.*, Local Rule, D. Me., L.R. 5(c) ("Unless exempt or otherwise ordered by the Court, papers shall be filed and served electronically as required by the court's Administrative Procedures Governing the Filing and Service by Electronic Means"); Local Rules, E.D. Cal., L.R. 5-133 ("Unless excused by the court or by the electronic filing procedures set forth in these Rules, attorneys shall file all documents electronically pursuant to those Rules."); Local Rules, D. Ore., L.R. 5.1(a) ("All documents filed with the Court by a Registered User shall be in accordance with the Electronic Filing Procedures set forth in these local rules.").

(n3)Footnote 3. *Fed. R. Civ. P. 5.2*, Committee Note (2007).

(n4)Footnote 4. *Fed. R. Civ. P. 5.2(a)(1)-(4)*.

(n5)Footnote 5. *Fed. R. Civ. P. 5.2(b)(1)-(6)*.

(n6)Footnote 6. *Fed. R. Civ. P. 5.2*, Committee Note (2007).

(n7)Footnote 7. *Fed. R. Civ. P. 5.2*, Committee Note (2007).

(n8)Footnote 8. *Fed. R. Civ. P. 5.2*, Committee Note (2007).

(n9)Footnote 9. *Fed. R. Civ. P. 5.2(c)(1), (2).*

(n10)Footnote 10. *Fed. R. Civ. P. 5.2(d).*

(n11)Footnote 11. *Fed. R. Civ. P. 5.2(e)(1).*

(n12)Footnote 12. *Fed. R. Civ. P. 5.2(e)(2).*

(n13)Footnote 13. *Fed. R. Civ. P. 5.2(f).*

(n14)Footnote 14. *Fed. R. Civ. P. 5.2(g).*

(n15)Footnote 15. *Fed. R. Civ. P. 5.2(h).*

(n16)Footnote 16. *Fed. R. Civ. P. 5.2(a).*

(n17)Footnote 17. *Fed. R. Civ. P. 5.2(e).*

(n18)Footnote 18. *Fed. R. Civ. P. 5.2*, Committee Note (2007).

(n19)Footnote 19. *Fed. R. Civ. P. 5.2*, Committee Note (2007).

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CHAPTER 8B Electronic Case Filing
H. Other Matters

1-8B Federal Litigation Guide § 8B.74

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§ 8B.74 Record on Appeal

Most ECF courts have not addressed issues about the record on appeal in their local rules. The courts that have addressed these issues advise parties to file papers in the traditional manner with the courts of appeals. Paper copies of documents filed with the courts of appeals may need to be filed with the District Court Clerk's Office. n1

Courts of appeals are not yet accepting filings electronically, although a prototype of an appellate version of ECF is being developed and tested (*see § 8B.01[3]*). When the courts of appeals begin to operate electronic case filing systems, they will begin to accept the record on appeal transmitted electronically from lower courts.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedureAppealsRecords on AppealGovernmentsCourtsCourt RecordsLegal EthicsProfessional ConductElectronic Communications

FOOTNOTES:
(n1)Footnote 1. *See* Local Rules, N.D. Cal., Gen. Order No. 45, § XI (Apr. 8, 2003).

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CHAPTER 8B Electronic Case Filing
H. Other Matters

1-8B Federal Litigation Guide § 8B.75

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§ 8B.75 Court Reporter Transcripts

Few courts have provisions governing the electronic filing of transcripts produced by court reporters. In the District of Nebraska, a transcript must be electronically filed. n1 In the Southern District of New York, the contract court reporter retains the transcript of court proceedings for 90 days. Thereafter, the transcript is submitted to the clerk of court to be filed electronically in ECF. Traditionally, parties and others pay court reporters for copies of transcripts of court proceedings. Posting transcripts on the Internet has obvious adverse financial implications for court reporters. n2

The use of digital recordings will likely become more widespread since such recordings can be uploaded into electronic case files for concise record keeping.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersCourt ReportersGeneral OverviewGovernmentsCourtsClerks of CourtGovernmentsCourtsCourt Personnel

FOOTNOTES:
(n1)Footnote 1. *See* Local Rules, D. Neb., Administrative Procedure for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means, II. A. 8. (June 2, 2003) ("official transcriber or contract court reporter must also either file the certified transcript of those proceedings electronically on the System").

(n2)Footnote 2. *See* Local Rules, N.D.Cal., Electronic Case Filing Users Manual, p.3 (October 2002) (transcripts may not be filed electronically).

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CHAPTER 8B Electronic Case Filing
H. Other Matters

1-8B Federal Litigation Guide § 8B.76

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§ 8B.76 Improved Statistics and Data Gathering

The automation of docket entries creates tremendous opportunities for enhanced data collection that are presently unavailable. Ascertaining the number of individual motions filed in federal court, the number of motions for class action certifications or motions for summary judgment, for example, cannot be readily discerned from hand-written docket entries. Automated docket entries create the promise of a data-collection system that will capture valuable data with a rapid retrieval capability enhancing the abilities of future rulemakers and others interested in judicial administration and governance.

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CHAPTER 8B Electronic Case Filing
H. Other Matters

1-8B Federal Litigation Guide § 8B.77

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§ 8B.77 Training

The web site of each ECF court is the initial and primary source of ECF information. The web sites contain instructions on how to register and file documents in the court's ECF system. The site contains the court's ECF user manual, which sets out step-by-step instructions on how to file a document electronically. A link to the court's local rules, administrative orders, or other court orders authorizing electronic filing is also provided on the web site. Most sites include a tutorial that can be operated "on-line" for practice purposes before filing a document in the court's "live" database. n1 In addition, most courts provide online support to ECF users. Questions about, or problems encountered with, an electronic filing may be submitted electronically to the court's Help Desk number. n2

In a minority of courts, training sessions are provided for the public by court personnel. These sessions may take from four to eight hours and are offered to potential filing users. Some courts require that the filing user successfully complete the training session before allowing the user to register in the court's ECF.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsCourt PersonnelGovernmentsCourtsRule Application & InterpretationLegal EthicsProfessional ConductElectronic Communications

FOOTNOTES:
(n1)Footnote 1. *See* Local Rules, W.D. Mo., Electronic Case Files User Manual, p. 3 (Feb. 7, 2003).

(n2)Footnote 2. *See* Local Rules, E.D.N.Y., ECF User's Manual, p. 13 (Feb. 2001); *see also* Local Rules, N.D. Cal., Electronic Case Filing Users Manual, p. 4 (Oct. 23, 2002).

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CHAPTER 9 The Purposes of Discovery

2-9 Federal Litigation Guide 9.syn

§ 9.syn Synopsis to Chapter 9: The Purposes of Discovery

§ 9.01 Obtaining Information to Resolve the Case

§ 9.02 Understanding the Relationship Between Discovery and the Pleadings

§ 9.03 Using Discovery to Prepare for Trial

§ 9.04 Using Discovery to Facilitate Motion Practice
[1] Establishing Facts to Support Motion Practice
[2] Gaining Tactical Advantage Through Discovery
[3] Using Discovery Offensively for Motion Practice

§ 9.05 Using Discovery to Promote Settlement
[1] Establishing Facts to Convince Opponent That Settlement Is Preferable to Trial
[2] Evaluating Likelihood of Success at Trial May Prompt Settlement

§§ 9.06 through 9.09 [Reserved]

§ 9.10 Understanding Mandatory Disclosure Under Rule 26(a)

§ 9.11 Evaluating the Applicability of Rule 26(a)
[1] Opting Out No Longer Authorized Under Rule 26(a)
[2] Determining Whether Case is Exempt From Disclosure Requirements

§ 9.12 Making Initial Mandatory Disclosures Under Rule 26(a)(1)
[1] Exchanging Basic Information in Support of Claims or Defenses
[2] Timing of Initial Disclosures

§ 9.13 CHECKLIST: Initial Disclosures Under Rule 26(a)(1)

§ 9.14 Making Expert Witness Disclosures Under Rule 26(a)(2)
[1] Exchanging Expert Witness Reports
[2] Timing of Disclosure of Expert Witness Reports
[3] Protecting Drafts and Communications of Expert Witnesses

§ 9.15 Making Final Pretrial Disclosures Under Rule 26(a)(3)
[1] Exchanging Information About Fact Witnesses, Evidence, and Exhibits
[2] Timing of Disclosure of Fact Witnesses, Evidence, and Exhibits

§ 9.16 Serving and Filing Mandatory Disclosures

§ 9.17 Supplementing Mandatory Disclosures

§ 9.18 Using Discovery Methods

§ 9.19 Considering Evidentiary Privileges in the Discovery Context

§ 9.20 Evaluating the Advantages of Available Discovery Methods
[1] Evaluating the Advantages of Taking Depositions Under Rule 30
[2] Evaluating the Advantages of Propounding Interrogatories Under Rule 33
[3] Evaluating the Advantages of Requests for Documents and Things and Entry Upon Land for Inspection Under Rule 34
[4] Evaluating the Advantages of Requests for Admission Under Rule 36
[5] Evaluating the Advantages of Physical and Mental Examinations Under Rule 35

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CHAPTER 9 The Purposes of Discovery

2-9 Federal Litigation Guide Scope

Scope

SCOPE

Disclosure and discovery are used to obtain factual information to prove the various claims and defenses asserted in the pleadings of an action. This chapter first provides an overview of the purposes of discovery, with specific focus on planning for trial, participating in motion practice, and settling the case.

The chapter then covers disclosure requirements and discovery methods under the Federal Rules. Under Rule 26(a), all parties are obligated, without awaiting a discovery request, to provide to other parties certain initial disclosures regarding information that the disclosing party may use in support of its claims or defenses. Rule 26(a) also governs the disclosure of information concerning expert witnesses, as well as the exchange of pretrial information regarding fact witnesses, evidence, and exhibits. District courts may no longer opt-out of the disclosure requirements under Rule 26(a). However, the rule specifically excludes certain categories of cases from the disclosure requirements and district courts may order changes in the disclosure requirements on a case-by-case basis. Additionally, parties may stipulate out of some or all of the disclosure requirements under the rule.

In addition to disclosure requirements under Rule 26(a), the Federal Rules govern use of the following methods of discovery, and the advantages of each are briefly described in the chapter:

- Depositions
- Written interrogatories
- Production of documents and things and entry upon land for inspection
- Physical and mental examinations of persons
- Requests for admission

For expanded coverage of the purposes of discovery, *see* Moore's Federal Practice, Ch. 26, *General Provisions Governing Discovery; Duty of Disclosure* (Matthew Bender 3d ed.).

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CHAPTER 9 The Purposes of Discovery
A. Evaluating the Purposes and Uses of Discovery

2-9 Federal Litigation Guide § 9.01

§ 9.01 Obtaining Information to Resolve the Case

The various methods of discovery provided for under the Federal Rules allow the parties to establish the facts alleged in the pleadings. Discovery serves to narrow and clarify the issues and ascertain the facts that are actually in dispute and require trial. n1 The general purpose of discovery is to remove surprise from trial preparation so that parties may obtain the evidence necessary to evaluate and resolve their dispute. n2 By requiring disclosure of relevant information, the discovery rules allow ultimate resolution of disputed issues to be based on full and accurate understanding of true facts. n3

Well-planned discovery allows the parties to obtain information for the following purposes:

- To assist in identifying evidence and witnesses for trial
- To support pre-trial motions
- To promote settlement

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryRelevance

FOOTNOTES:
(n1)Footnote 1. *See Hickman v. Taylor, 329 U.S. 495, 501, 67 S. Ct. 385, 91 L. Ed. 451, 34 Ohio Op. 395 (1947)* .

(n2)Footnote 2. *Ragge v. MCA/Universal Studios, 165 F.R.D. 601, 603 (C.D. Cal. 1995)* .

(n3)Footnote 3. *In re E.I. du Pont de Nemours and Co., 918 F. Supp. 1524, 1542 (M.D. Ga. 1995)* .

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CHAPTER 9 The Purposes of Discovery
A. Evaluating the Purposes and Uses of Discovery

2-9 Federal Litigation Guide § 9.02

§ 9.02 Understanding the Relationship Between Discovery and the Pleadings

Although, traditionally, Rule 8 was interpreted to require parties only to provide notice of claims and defenses in short and plain terms without specific facts, a complaint filed in federal court now must include sufficient factual matter to state a claim to relief that is plausible on its face, and all claims must be accompanied by facts which allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." n1 This "facial plausibility" cannot be supported by "mere conclusory statements," and a reviewing court is required to "draw on its experience and common sense" in its determination of plausibility. n2As such, pretrial discovery may now be required in a greater number of cases to provide access to sufficient factual detail about the alleged claims.

FOOTNOTES:
(n1)Footnote 1. *See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* .

(n2)Footnote 2. *Ashcroft v. Iqbal, __ U.S. __, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 884-885 (2009)* ; *see also* al-*Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009)* (pleaded facts sufficient to state plausible claim); *Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1261-1270 (11th Cir. 2009)* (pleaded facts failed to state plausible claim).

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CHAPTER 9 The Purposes of Discovery
A. Evaluating the Purposes and Uses of Discovery

2-9 Federal Litigation Guide § 9.03

§ 9.03 Using Discovery to Prepare for Trial

A chief purpose of discovery is to enable counsel to present a more coherent and comprehensible case at trial. Specifically, discovery serves the following functions in planning for trial:

- Identifying the existence and location of documents, witnesses, and other forms of evidence
- Narrowing the issues and eliminating the possibility of surprise at trial
- Forcing the opposing party to commit to a particular version of the facts
- Permitting counsel to assess the credibility of witnesses
- Promoting an efficient and economical trial process
- Recording and preserving testimony that may not be available at trial

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsPerpetuation of Testimony

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CHAPTER 9 The Purposes of Discovery
A. Evaluating the Purposes and Uses of Discovery

2-9 Federal Litigation Guide § 9.04

§ 9.04 Using Discovery to Facilitate Motion Practice

[1] Establishing Facts to Support Motion Practice

Discovery may be crucial in developing a basis for a motion that may dispose of all or part of the litigation. For example, *Fed. R. Civ. P. 56(c)* specifically provides that the following discovery devices may support the granting of a summary judgment:

- Depositions
- Answers to interrogatories
- Admissions on file

[2] Gaining Tactical Advantage Through Discovery

Discovery may be used to gain some significant tactical advantage with regard to an issue that, while not dispositive of the entire action, will substantially affect its practical course. For example, the disposition of a motion to dismiss for lack of personal or subject matter jurisdiction may hinge on early discovery directed to those issues. A court's determination that jurisdiction is lacking probably will not prevent the plaintiff from being sued again in another forum. However, the defendant's success on this preliminary issue may shift to the defendant the tactical advantage of the new forum, and may therefore have a significant impact on the case.

[3] Using Discovery Offensively for Motion Practice

Discovery may be used offensively to establish a certain fact by using information in the control of the opposing party. For example:

- ***Establishing personal jurisdiction.*** Plaintiff's counsel may seek documents from a corporate defendant or depose its key officers to determine whether there are sufficient minimum contacts to establish personal jurisdiction.

- ***Establishing notice in support of statute of limitations defense.*** If the running of a statute of

limitations is triggered by the plaintiff's reasonable opportunity to have learned of its cause of action, the defendant may be able to target discovery to uncover the date on which the plaintiff acquired the requisite knowledge, thus possibly disposing of the case without spending time and money developing the merits.

- ***Limiting defendant's damages exposure.*** Effective discovery may permit a defendant to eliminate certain of the plaintiff's claims for damages, such as a claim for punitive or treble damages, or a claim by the plaintiff that a limitation on contract damages is unenforceable. Discovery undertaken by the defendant for this purpose is "offensive," as defendant's counsel will attempt to establish facts to support a motion that will, in turn, shift the tactical balance in the case.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsWritten Depositions

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CHAPTER 9 The Purposes of Discovery
A. Evaluating the Purposes and Uses of Discovery

2-9 Federal Litigation Guide § 9.05

§ 9.05 Using Discovery to Promote Settlement

[1] Establishing Facts to Convince Opponent That Settlement Is Preferable to Trial

Discovery may be important to better understand the factual basis of the dispute so that the parties can adopt realistic settlement postures. Thus, in planning discovery, counsel should strive to obtain the necessary facts to convince the opposing party that settlement is preferable to the uncertainties and expense of trial.

[2] Evaluating Likelihood of Success at Trial May Prompt Settlement

Settlement is a viable option when one party believes that there is a strong possibility that it may not prevail at trial, and that it can cut its losses by settling the case. Settlement is also a viable option when either party determines that it is likely to expend more in litigation costs than it is apt to gain from any verdict. The extensive costs associated with ongoing discovery may even prompt parties to enter into settlement discussions.

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2-9 Federal Litigation Guide §§ 9.06 through 9.09

[Reserved]

§§ 9.06[Reserved]

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CHAPTER 9 The Purposes of Discovery
B. Evaluating Disclosure Requirements and Discovery Methods

2-9 Federal Litigation Guide § 9.10

§ 9.10 Understanding Mandatory Disclosure Under Rule 26(a)

Rule 26(a) requires litigants to disclose certain types of information to opposing parties at specified stages of the pretrial process.

The three basic categories of Rule 26(a) disclosure are: n1

- **Initial Disclosures:** During the early pretrial period, parties are required to exchange information regarding: (1) individuals likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment; (2) documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment; (3) claims and calculations of damages; and (4) insurance coverage [*see §§ 9.12 -9.13*]

- **Expert Disclosures:** Further into the pretrial period the parties are required to share information regarding expert witnesses [*see § 9.14*]

- **Pretrial Disclosures:** As trial approaches, the parties are required to disclose information about fact witnesses, evidence, and exhibits to be used at trial [*see § 9.15*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsOral Depositions

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(a)(1)-(3).*

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CHAPTER 9 The Purposes of Discovery
B. Evaluating Disclosure Requirements and Discovery Methods

2-9 Federal Litigation Guide § 9.11

§ 9.11 Evaluating the Applicability of Rule 26(a)

[1] Opting Out No Longer Authorized Under Rule 26(a)

Although courts generally do not have the discretion to entirely opt-out of disclosure requirements, courts may issue case-specific orders regarding initial disclosure requirements, particularly when a party successfully objects that initial disclosure is not appropriate in the circumstances of the action. Additionally, specified categories of proceedings are entirely excluded from initial disclosure. n1 Parties may also stipulate to forgo the disclosure requirements under Rule 26(a). But even in a case where the parties stipulate to bypass disclosure, or in cases entirely excluded from disclosure requirements under the rule, the court may order exchange of similar information in managing the action under Rule 16.

[2] Determining Whether Case is Exempt From Disclosure Requirements

The following categories of cases are exempt from the disclosure requirements under Rule 26(a): n2

- An action for review on an administrative record
- A forfeiture action in rem arising from a federal statute
- A petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence
- An action brought without counsel by a person in custody of the United States, a state, or a state subdivision
- An action to enforce or quash an administrative summons or subpoena
- An action by the United States to recover benefit payments
- An action by the United States to collect on a student loan guaranteed by the United States
- A proceeding ancillary to proceedings in other courts
- An action to enforce an arbitration award

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(a)(1)(B).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(a)(1)(B).*

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CHAPTER 9 The Purposes of Discovery
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2-9 Federal Litigation Guide § 9.12

§ 9.12 Making Initial Mandatory Disclosures Under Rule 26(a)(1)

[1] Exchanging Basic Information in Support of Claims or Defenses

Except in categories of proceedings specified exempt from disclosure requirements, or to the extent otherwise stipulated or directed by court order, litigants are required to exchange the following information without awaiting a formal discovery request: n1

- **Persons with knowledge in support of claims or defenses.** The name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment

- **Supporting documents.** A copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment

- **Damages information.** Computations of all categories of damages, with copies of supporting documents n2

- **Insurance information.** The contents of any insurance agreement that may be implicated by the judgment in the action

A party who withholds documents subject to initial disclosure requirements on the ground that the documents are to be used solely for impeachment purposes is permitted to use the documents at trial for impeachment purposes only. n3

[2] Timing of Initial Disclosures

Initial disclosures under Rule 26(a)(1) must be made at or within 14 days of the discovery conference held under *Fed. R. Civ. P. 26(f)* 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 the circumstances of the action and states the objection in the Rule 26(f) discovery plan. n4 In ruling on the objection, the court must determine what disclosures, if any, are to be made and set the time for disclosure. Any party first served or otherwise joined after the Rule 26(f) conference must make these

disclosures within 30 days after being served or joined unless a different time is set by stipulation or court order. n5

A party must make the initial disclosures based on the information then reasonably available and a party is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures. n6 However, the parties may move for a stay of the initial disclosures pending the resolution of a motion to dismiss. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(a)(1)(A).*

(n2)Footnote 2. *See Clayman v. Starwood Hotels & Resorts Worldwide, 343 F. Supp. 2d 1037, 1047 (D. Kan. 2004)* .

(n3)Footnote 3. *Lomascolo v. Otto Oldsmobile-Cadillac, Inc., 253 F. Supp. 2d 354, 360-361 (N.D.N.Y. 2003)* .

(n4)Footnote 4. *Fed. R. Civ. P. 26(a)(1)(C).*

(n5)Footnote 5. *Fed. R. Civ. P. 26(a)(1)(D).*

(n6)Footnote 6. *Fed. R. Civ. P. 26(a)(1)(E).*

(n7)Footnote 7. *See* In *Re Lotus Dev. Corp. Sec. Litig., 875 F. Supp. 48, 51-52 (D. Mass. 1995)* .

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2-9 Federal Litigation Guide § 9.13

§ 9.13 CHECKLIST: Initial Disclosures Under Rule 26(a)(1)

The following checklist may be used when the initial disclosure requirements of Rule 26(a)(1) are applicable in the case.

☐ The following categories of cases are exempt from the initial disclosure requirements under Rule 26(a)(1)(B): n1

- ☐ An action for review on an administrative record
- ☐ A forfeiture action in rem arising from a federal statute
- ☐ A petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence
- ☐ An action brought without counsel by a person in custody of the United States, a state, or a state subdivision
- ☐ An action to enforce or quash an administrative summons or subpoena
- ☐ An action by the United States to recover benefit payments
- ☐ An action by the United States to collect on a student loan guaranteed by the United States
- ☐ A proceeding ancillary to proceedings in other courts

☐ An action to enforce an arbitration award

☐ If Rule 26(a)(1) is applicable in the case, prepare and serve initial disclosures within 14 days after discovery planning meeting held pursuant to Rule 26(f). Any party first served or otherwise joined after the Rule 26(f) conference must make these disclosures within 30 days after being served or joined unless a different time is set by stipulation or court order.

☐ 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.

☐ Avoid or modify initial disclosure requirements under *Fed. R. Civ. P. 26(a)(1)* by, either:

☐ Stipulating with other parties.

☐ Asking court for relief from requirements.

☐ Determine matters to which the initial disclosures apply:

☐ Discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment. n2

☐ Readily available information as required under *Fed. R. Civ. P. 26(a)(1)*.

☐ Provide the following information for each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, as required under *Fed. R. Civ. P. 26(a)(1)(A)(i)*:

☐ Name.

☐ Individual's address, if known.

☐ Individual's telephone number, if known.

☐ Subject of person's information.

☐ Provide a copy of, or describe by category and location, all the following materials that the disclosing party may use to support its claims or defenses, unless solely for impeachment, as required under *Fed. R. Civ. P. 26(a)(1)(A)(ii)*:

☐ Documents.

☐ Electronically stored information.

☐ Tangible things.

☐ For each category of damages claimed, provide the following pursuant to *Fed. R. Civ. P. 26(a)(1)(A)(iii)*:

☐ A complete computation of damages.

☐ Make available for inspection and copying as under Rule 34 any non-privileged or otherwise unprotected documents or other evidentiary material on which the computation was based.

☐ Include materials bearing on the nature and extent of injuries suffered.

☐ Parties need not disclose as part of the computation of damages disclosures ofRule 26(a)(1)(A)(iii), the following: n3

☐ Information already possessed by other parties.

☐ Privileged or otherwise protected materials.

☐ As required under *Fed. R. Civ. P. 26(a)(1)(A)(iv)*, make available for inspection and copying as under Rule 34 any liability insurance policies that may be liable to either:

☐ Satisfy a judgment that may be entered.

☐ Indemnify or reimburse payments made to satisfy the judgment.

☐ Do not make available liability insurance information that is inadmissible under *Fed. R. Evid. 411*.

☐ For any privilege or protection claimed, including work product, assert the privilege in the initial disclosure, briefly describing withheld materials.

☐ Prepare initial disclosures in writing pursuant to *Fed. R. Civ. P. 26(a)(4)*.

☐ Pursuant to *Fed. R. Civ. P. 26(g)(1)*, at least one attorney of record must sign initial disclosures and include the signer's address, e-mail address, and telephone number.. The attorney's signature certifies that

to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

☐ Serve initial disclosures on the other parties as required by *Fed. R. Civ. P. 26(a)(4)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(a)(1)(B)*.

(n2)Footnote 2. *Fed. R. Civ. P. 26(a)(1)(A)(i)*.

(n3)Footnote 3. *Fed. R. Civ. P. 26(a)* advisory committee's note (1993).

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CHAPTER 9 The Purposes of Discovery
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2-9 Federal Litigation Guide § 9.14

§ 9.14 Making Expert Witness Disclosures Under Rule 26(a)(2)

[1] Exchanging Expert Witness Reports

In applicable cases, each party is required to disclose the identity of any witness who may be used to present expert testimony and the substance of the expert's testimony. n1 The disclosure must be accompanied by a written report prepared and signed by the witness, which contains the following: n2

- A complete statement of all opinions to be expressed by the expert and the basis and reasons for them
- The facts or data considered by the expert in forming the opinions
- Any exhibits to be used to summarize or support the opinions
- The qualifications of the expert including a list of all publications authored by the expert during the preceding ten years n2.1
- The compensation to be paid to the expert n2.2
- A list of cases in which the expert has testified as an expert at deposition or trial in the last four years

Some courts interpret Rule 26(a)(2)(B) as requiring disclosure of all information, whether privileged or not, that a testifying expert generates, reviews, reflects upon, reads, and/or uses in connection with the formulation of his opinions, even if the testifying expert ultimately rejects the information. n2.3

Unless otherwise stipulated or ordered by the court, if the expert witness is not required to provide a written report, the expert disclosure must include both of the following: n2.4

- The subject matter on which the witness is expected to present evidence under *Federal Rule of Evidence 702*, *703*, or *705*

- A summary of the facts and opinions to which the witness is expected to testify

[2] Timing of Disclosure of Expert Witness Reports

In the absence of other directions from the court or stipulation by the parties, expert witness disclosures must be made at least 90 days before trial, unless the evidence is intended to rebut the opposing party's expert evidence, in which case the disclosure shall be made within 30 days of the opposing party's expert disclosure. n3 When a dispute arises concerning violation of expert disclosure obligations pursuant to a court-approved discovery plan, the court looks to Rule 16(f), and not Rule 26(a)(2), for determining both compliance with the time requirements and sanctions for failure to comply. n3.1 For complete discussion regarding discovery of experts, see Ch. 23, *Discovery of Experts*.

[3] Protecting Drafts and Communications of Expert Witnesses

Effective December 1, 2010, Rules 26(b)(3)(A) and (B) protect drafts of any expert report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded. n4

Additionally, Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any expert 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 do any of the following: n5

- Relate to compensation for the expert's study or testimony

- Identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed

- Identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsExpert Witness Discovery

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(a)(2).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(a)(2)(B).*

(n3)Footnote 2.1. *See Rivera Pomales v. Bridgestone Firestone, Inc., 217 F.R.D. 290, 293 (D.P.R. 2003)* (district court excluded defendant's expert witness for failure to include a copy of the expert's curriculum vitae with the expert witness report).

(n4)Footnote 2.2. *See Cary Oil Co. v. MG Ref. & Mktg., Inc., 257 F. Supp. 2d 751, 756 (S.D.N.Y. 2003)* (disclosure of hourly rate on its own is insufficient).

(n5)Footnote 2.3. *See Synthes Spine Co., L.P. v. Walden, 232 F.R.D. 460, 464 (E.D. Pa. 2005)* .

(n6)Footnote 2.4. *Fed. R. Civ. P. 26(b)(2)(C).*

(n7)Footnote 3. *Fed. R. Civ. P. 26(a)(2)(D).*

(n8)Footnote 3.1. *Akeva L.L.C. v. Mizuno Corp., 212 F.R.D. 306, 309 (M.D.N.C. 2002)* .

(n9)Footnote 4. *Fed. R. Civ. P. 26(b)(4)(B)*.

(n10)Footnote 5. *Fed. R. Civ. P. 26(b)(4)(C)*.

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CHAPTER 9 The Purposes of Discovery
B. Evaluating Disclosure Requirements and Discovery Methods

2-9 Federal Litigation Guide § 9.15

§ 9.15 Making Final Pretrial Disclosures Under Rule 26(a)(3)

[1] Exchanging Information About Fact Witnesses, Evidence, and Exhibits

In applicable cases, each party is required to designate those factual witnesses who will be called at the trial or whose testimony will be presented by deposition, and identify each document or other exhibit that will or may be offered into evidence at trial. However, evidence that is to be offered solely for impeachment purposes need not be disclosed in advance. n1

[2] Timing of Disclosure of Fact Witnesses, Evidence, and Exhibits

Disclosures regarding factual witnesses, evidence, and exhibits must be made at least 30 days before trial and must be promptly filed with the court. An opposing party may then file objections to the use of deposition testimony or a document or exhibit within 14 days of the pretrial disclosure. Failure to raise a timely objection, with theexception of an objection to relevancy, generally results in waiver. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory Disclosures

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(a)(3)*; *DeBiasio v. Illinois Central R.R., 52 F.3d 678 (7th Cir. 1995)* .

(n2)Footnote 2. *Fed. R. Civ. P. 26(a)(3)*.

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CHAPTER 9 The Purposes of Discovery
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2-9 Federal Litigation Guide § 9.16

§ 9.16 Serving and Filing Mandatory Disclosures

Unless otherwise directed by order or local rule, disclosures made under *Fed. R. Civ. P. 26(a)* must be:

- Made in writing n1
- Signed by at least one attorney of record with the attorney's address, e-mail address, and telephone number n2
- Served on the other parties n3

Only pretrial disclosures made under Rule 26(a)(3) must be filed with the court. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory Disclosures

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(a)(4).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(g)(1).*

(n3)Footnote 3. *Fed. R. Civ. P. 26(a)(4).*

(n4)Footnote 4. *Fed. R. Civ. P. 26(a)(3).*

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2-9 Federal Litigation Guide § 9.17

§ 9.17 Supplementing Mandatory Disclosures

Parties making mandatory disclosures have a duty to supplement them on learning that the information disclosed 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. n1

A party that without substantial justification fails to disclose or supplement information required by Rule 26(a), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. n2 In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include informing the jury of the failure to make the disclosure. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconduct

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(e)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 37(c).*

(n3)Footnote 3. *Fed. R. Civ. P. 37(c).*

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CHAPTER 9 The Purposes of Discovery
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2-9 Federal Litigation Guide § 9.18

§ 9.18 Using Discovery Methods

When discovery is sought from a party, the process is governed by *Rules 26 through 37 of the Federal Rules of Civil Procedure*. n1 Under the Federal Rules, parties may obtain discovery by one or more of the following methods:

- Depositions upon oral examination under *Fed. R. Civ. P. 30*
- Depositions upon written questions under *Fed. R. Civ. P. 31*
- Written interrogatories under *Fed. R. Civ. P. 33*
- Production of documents and things and entry upon land for inspection and other purposes under *Fed. R. Civ. P. 34*
- Physical and mental examinations of persons under *Fed. R. Civ. P. 35*
- Requests for admission under *Fed. R. Civ. P. 36*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMethodsWritten Depositions

FOOTNOTES:
(n1)Footnote 1. *See Etienne v. Oyake, 347 F. Supp. 2d 215, 220-221 (D.V.I. 2004)* .

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CHAPTER 9 The Purposes of Discovery
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2-9 Federal Litigation Guide § 9.19

§ 9.19 Considering Evidentiary Privileges in the Discovery Context

Fed. R. Civ. P. 26(a)(1) recognizes that the duty of disclosure and theopportunity to discover information is limited to information that is not privileged. This language refers to common-law evidentiary privileges n1

When a party withholds information otherwise discoverable by claiming that it is privileged, the party must make the claim expressly and shall describe the nature of the privileged material in a manner that, without revealing privileged information, will enable opposing parties to assess the applicability of the privilege. n2

If information that has been 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 and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved. n2.1

The evidentiary privileges most frequently encountered in the context of disclosure and discovery are the attorney-client privilege and attorney work product privilege. However, other federal statutory privileges may be asserted. n3

For further discussion of the attorney-client privilege and the work product doctrine in the context of discovery, see Ch. 10, *Planning and Preparation for Discovery*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersAttorney-Client PrivilegeCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewEvidencePrivilegesGovernment PrivilegesProcedures to Claim PrivilegesEvidencePrivilegesGovernment PrivilegesState Secrets Privilege

FOOTNOTES:

(n1)Footnote 1. *United States v. Reynolds, 345 U.S. 1, 6, 73 S.Ct. 528, 97 L. Ed. 727 (1953)* (federal common-law evidentiary privilege for military and state secrets).

(n2)Footnote 2. *Fed. R. Civ. P. 26(b)(5)(A).*

(n3)Footnote 2.1. *Fed. R. Civ. P. 26(b)(5)(B).*

(n4)Footnote 3. *See, e.g., Pierce County v. Guillen, 537 U.S. 129, 142* ; *123 S. Ct. 720, 154 L. Ed. 2d 610 (2003)* (federal statutory privilege under *23 U.S.C. § 409* for reports compiled or collected for purposes of the Federal Hazard Elimination Program).

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CHAPTER 9 The Purposes of Discovery
B. Evaluating Disclosure Requirements and Discovery Methods

2-9 Federal Litigation Guide § 9.20

§ 9.20 Evaluating the Advantages of Available Discovery Methods

[1] Evaluating the Advantages of Taking Depositions Under Rule 30

Although depositions are considerably more expensive than other methods of discovery, depositions are often the most effective discovery tool for the following reasons:

- Depositions provide an opportunity to evaluate potential parties and witnesses
- Depositions allow for discovery of nonparty witnesses
- Deposition testimony may be used by an adverse party for any reason at trial, even if the party is present and testifies
- Deposition testimony provides the most effective means to impeach testimony at trial
- Deposition testimony may be used in susequent actions
- Deposition testimony may be used at trial if a witness has died or is otherwise unavailable

[2] Evaluating the Advantages of Propounding Interrogatories Under Rule 33

Interrogatories may only be served on parties to the action and only 25 interrogatories may be propounded, absent court order or stipulation. n1 Although the importance of interrogatories has arguably declined with the advent of mandatory intial disclosures under Rule 26(a)(1), interrogatories have the following advantages:

- Propounding interrogatories is generally inexpensive and takes little time
- Interrogatory answers may be used to ascertain the existence of relevant documents and key witnesses
- Interrogatory answers may be concisely introduced at trial

- Interrogatories may require opposing counsel to supply information or legal contentions unknown by the parties

- Interrogatories may be used to seek "all available" information from an opposing party

[3] Evaluating the Advantages of Requests for Documents and Things and Entry Upon Land for Inspection Under Rule 34

Inspection demands are a critical discovery method that offer the following advantages:

- There is no limit on the number of demands that may be made

- Responses provide the opportunity to review documents and physical evidence prior to taking depositions

- The demand for inspection allows for access to land or other property

- The method allows for photographing, testing, and sampling

- Requests may specify the form or forms in which electronically stored information is to be produced

[4] Evaluating the Advantages of Requests for Admission Under Rule 36

Requests for admission are effective for the following reasons:

- There is no limit on the number of requests that may be made

- If a party does not file a timely response to one or more requests for admission, the matters are deemed admitted

- Once a matter is admitted, it is conclusively established for the purposes of the action, unless withdrawn or amended by permission of the court

[5] Evaluating the Advantages of Physical and Mental Examinations Under Rule 35

The use of physical and mental examinations under *Fed. R. Civ. P. 35* may be used only when the physical or mental condition of a party or a person in the legal custody or under the legal control of a party is in controversy. An order of examination must be sought on motion for good cause shown. Physical and mental examinations provide the following advantages:

- Physical and mental examinations document the physical or mental condition at a specific time before trial

- Physical and mental examinations may be used for expert consultation and testimony

- Physical and mental examinations allow for a broader scope of inquiry than depositions

- Physical or mental examinations may provide an opportunity to obtain privileged medical reports

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 33(a).*

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CHAPTER 10 Planning and Preparation for Discovery

2-10 Federal Litigation Guide 10.syn

§ 10.syn Synopsis to Chapter 10: Planning and Preparation for Discovery

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§ 10.02 Establishing a Discovery Plan at the Onset of Litigation

§ 10.03 Conducting Legal Research to Create Discovery Plan

§ 10.04 Conducting Client Interviews to Establish the Basic Facts
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[2] Meeting With the Client to Prepare Pleadings
[3] Eliciting Necessary Facts Through the Client Interview
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§ 10.05 Reviewing Relevant Documents in the Client's Possession, Custody, or Control
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§§ 10.06 through 10.09 [Reserved]

§ 10.10 Understanding the Value of Early Investigation of the Case

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§ 10.12 Investigating Personal Injury Actions

§ 10.13 Conducting Site Investigations

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§ 10.35 Filing of Discovery

§ 10.36 Supplementing Discovery Responses

§ 10.37 Seeking Protective Orders to Preclude Abusive Discovery

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§ 10.39 Evaluating the Potential Cost of Discovery

§ 10.40 Taking Depositions Under Rule 30
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[2] Determining When Depositions May Be Taken
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[2] Obtaining Basic Information Regarding the Parties and Evidence

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[2] Responding to Inspection Demands

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CHAPTER 10 Planning and Preparation for Discovery

2-10 Federal Litigation Guide Scope

Scope

SCOPE

This chapter deals with planning and preparation for discovery and includes discussion of the following pre-discovery considerations:

- Conducting research and developing the theory of the case prior to establishing a discovery plan
- Preparing a preliminary trial outline to aid in discovery
- Interviewing clients and reviewing client documents in preparation of discovery

The chapter also covers various forms and techniques of "informal" discovery including the following:

- Interviewing third parties and obtaining witness statements
- Reviewing public records
- Conducting site inspections

In addition, the chapter discusses the protection of informal discovery through the attorney-client privilege and the attorney work product doctrine.

The chapter also covers pre-discovery conferences and other pre-discovery requirements. An overview of the scope and limitations of discovery in general and the various discovery methods in particular is also provided. The chapter concludes with a discussion of factors that may be considered in selecting the most appropriate discovery methods for a particular case.

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CHAPTER 10 Planning and Preparation for Discovery
A. Implementing a Discovery Plan

2-10 Federal Litigation Guide § 10.01

§ 10.01 Understanding the Importance of Planning for Discovery

Planning for discovery begins with an understanding of the issues in the case. Otherwise, it is impossible to know what information must be obtained to prove a case or defense at trial. Before a complaint is filed, the plaintiff's lawyer must attempt to identify the key issues and facts underlying the case. The duty of prefiling investigation imposed by Rule 11 n1 requires diligent inquiry before the lawsuit begins. The same duty applies to defense counsel before filing an answer or any pre-answer motions.

The effort to conduct discovery with continuing reference to the issues and the facts necessary to prove or disprove them is beneficial for a number of reasons:

- It permits discovery to be conducted with a clear purpose, saving both time and money
- It makes the most of limited discovery--limited by the press of time, the strictures of the court, or cost constraints
- It assures that discovery will be completed well in advance of trial

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 11.*

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CHAPTER 10 Planning and Preparation for Discovery
A. Implementing a Discovery Plan

2-10 Federal Litigation Guide § 10.02

§ 10.02 Establishing a Discovery Plan at the Onset of Litigation

A litigation plan, including a discovery plan, should be established at the earliest possible time and updated periodically as the litigation progresses. In view of the obvious importance of discovery, careful planning is crucial. Discovery methods should not be used merely because they are available. Rather, discovery methods should be used for specified reasons and with clear objectives in mind. A comprehensive discovery plan will serve as the ultimate roadmap of what needs to be established or accomplished at trial.

In most cases the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider, among other issues, a detailed discovery plan. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(f).*

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CHAPTER 10 Planning and Preparation for Discovery
A. Implementing a Discovery Plan

2-10 Federal Litigation Guide § 10.03

§ 10.03 Conducting Legal Research to Create Discovery Plan

The first step in creating a discovery plan is to conduct legal research and to review relevant jury instructions to determine:

- Elements of the claims and defenses
- Fact patterns supporting liability or that may be used as a defense
- Types of damages recoverable

Because the extent of discovery undertaken is likely to hinge on the value of the case, it may also be useful to research jury verdicts for similar cases in the district where the case is filed. Services that publish jury verdict information generally provide settlement information for various types of cases that have recently settled, which may even be more useful than jury verdicts.

Once the basic research has been completed, a list of the facts needed to successfully prosecute or to defend the action may be generated. The process of establishing requisite facts often begins with information in the custody or control of the client or others with whom informal access may be sought.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral Overview

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CHAPTER 10 Planning and Preparation for Discovery
A. Implementing a Discovery Plan

2-10 Federal Litigation Guide § 10.04

§ 10.04 Conducting Client Interviews to Establish the Basic Facts

[1] Setting Up the Interview

Client interviews are a critical component of discovery planning. In most circumstances, the disputants are apprized of the factual background, potential witnesses, and key documents that will serve as the core of the overall discovery plan.

If possible, contact the person to be interviewed in advance of the interview. Advance notice will make the interview more efficient and may eliminate the need for follow-up interviews. During that initial contact, give a general summary of the nature of the action and mention the matters to be covered in the interview. To the extent possible, identify the significant disputed issues in the suit, in particular, those on which the interviewee is expected to shed some light. This will help the interviewee to recollect pertinent information and to begin collecting the documents or evidence that otherwise would have to be located after the interview.

[2] Meeting With the Client to Prepare Pleadings

Whether representing a plaintiff or a defendant, development of the facts of a case will likely begin with an interview with the client, the client's survivor, or (in the case of an organization) with knowledgeable members of the organization. When representing the plaintiff, this interview will be a necessary prelude to the preparation of the complaint. When representing a defendant, the complaint should be promptly reviewed with the client in order to become familiar with the underlying facts and to prepare an answer or pre-answer motion. During the initial meeting with the client, it is critical to begin formulating a discovery plan to assure evidentiary support of the allegations in the pleadings.

[3] Eliciting Necessary Facts Through the Client Interview

The typical course of eliciting facts from one's own client resembles in many respects the subsequent conduct of discovery from the adversary. Difficulty may be encountered in assembling a body of facts that are sufficiently particular, and sufficiently well founded, to constitute potential evidence. Even a cooperative individual may have to be prodded in his or her recollection, and will in many instances have to be refreshed with documents. In the course of client interviews, it generally is helpful to use any pleadings on file and all relevant documents to structure the interview.

[4] Limiting Note Taking By Client During Interview

There is no reason for the client or any employees to take notes or make memoranda about the substance of attorney-client interviews. At most, they need to keep track of the kinds of documents to search for after the interview. Even if the client takes notes during attorney-client meetings, the notes may be protected from discovery as work product that reflects the opinions and theories of counsel. While the client should be careful to keep interview notes confidential, it has been held that inadvertent disclosure of such notes will not necessarily waive the workproduct protection afforded by Rule 26(b)(3). n1

[5] Establishing List of Potential Witnesses Through Initial Interviews

The initial interviewing and fact-collecting process is the first step in establishing who should be deposed, who should be asked to give written statements, and who should be subjected to only informal discovery. In the early stages of the interviewing process it is critical to learn the names of people likely to have first-hand knowledge of the events giving rise to the lawsuit, and the location and nature of documents which bear on the issues. This information can be used to prepare a list of potential deponents, which may be refined through the use of interrogatories and document requests.

[6] Preparing the Client for Future Discovery During the Initial Interview

During the course of interviews with the client or the client's agents, it is important to begin to lay the groundwork for later preparation of those individuals for future discovery, including their own depositions. To the extent that the themes of the case have been identified, the client can be informed about questions they may be expected to answer and documents they may be expected to produce.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. In *Bush Dev. Corp. v. Harbour Place Assoc., 632 F. Supp. 1359 (E.D. Va. 1986)* , plaintiff inadvertently gave defendant a copy of an annotated draft of the complaint. The draft complaint had marginal notes made by plaintiff's vice president during an interview with plaintiff's attorney. During the interview, the attorney had advised the vice president of his opinion as to the likelihood of success in court and the consequences if plaintiff did not prevail. The court found that since the notes contained the mental impressions of counsel, they were subject to the nearly absolute protection from discovery afforded by Rule 26(b)(3).

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CHAPTER 10 Planning and Preparation for Discovery
A. Implementing a Discovery Plan

2-10 Federal Litigation Guide § 10.05

§ 10.05 Reviewing Relevant Documents in the Client's Possession, Custody, or Control

[1] Preparing for Mandatory Initial Disclosure of Documents Under Rule 26(a)

An early evaluation of the client's documents and electronically stored information is an essential component of planning for discovery. In applicable cases, even before any formal discovery demands are made, the parties are required to exchange documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment. n1

For complete discussion of mandatory disclosure under Rule 26(a), see Ch. 10, *Purposes of Discovery*.

[2] Developing an Understanding of the Key Facts Underlying the Case Theory

An early review of the client's documents provides a critical opportunity to begin developing the theory of the case, which in turn facilitates efficient use of discovery. Document review supports the development of a coherent narrative which will later be substantiated with evidence.

A thorough review of the client's documents and files may even suggest additional theories of liability or potential defenses to develop in the course of discovery. While it may be true that the documents that are most damaging to a case are often those in the client's files, often some of the most helpful documents are also in the client's control.

[3] Evaluating Client Expectations

A review of the client's documents will also provide a cross-check on the client's perspective of the case. While the job of an advocate is to put the best light possible on the facts at hand, lawyers in the early stages of a case sometimes may find themselves misled by their client's accounts of the facts. Although client reactions to involvement in litigation vary widely, there is often a tendency to overstate the strength of one's own position. While the process of lowering the client's expectations is delicate, seeking explanations of apparent inconsistencies between the documentary record and the client's version of events affords one way to approach the job.

[4] Preparing for Depositions

Reviewing the client's files helps to identify the principal actors in the events leading to the lawsuit, and thus to develop a list of potential persons to be interviewed or deposed.

Additionally, reviewing documents in the possession, custody, or control of the client may ultimately help to prepare the client to be deposed by an adversary. The client should not see a damaging document for the first time at the deposition.

[5] Conducting "Reasonable Inquiry" for Discovery

Rule 26(g) imposes a duty of "reasonable inquiry" on the attorney and the client with respect to discovery. Breach of this duty can result in the imposition of substantial sanctions.

An early review of the client's documents will save time when the adverse party serves a document request under Rule 34. Some lawyers, acting on the assumption that the contents of their client's files typically will do their case more harm than good, prefer to let the client search for responsive documents in the expectation that the job may be done less rigorously. However, as noted above, the duty of "reasonable inquiry" requires a diligent search by the client when responding to a document request from an adversary. n2

While there are certainly circumstances in which counsel may consider refraining from examining a client's relevant files, this should be a carefully considered decision. While lawyers are under a duty to maximize the client's resources and avoid wasteful expenditures, the practice of defensive law suggests that it is better to fully prepare by reviewing all the files rather than risk a later claim of malpractice stemming from the failure to do so.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(a)(1).*

(n2)Footnote 2. The "reasonable inquiry" duty mandated by Rule 11, which applies to signed pleadings, has been specifically extended to responses to discovery under Rule 26(g) as well. Failure to diligently search for responsive documents, whether by the attorney or the client, can result in substantial sanctions. *Thomas v. Capital Sec. Servs., 836 F.2d 866 (5th Cir. 1988)* ; *Jennings v. Joshua Indep. School Dist., 948 F.2d 194 (5th Cir. 1991)* .

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CHAPTER 10 Planning and Preparation for Discovery
A. Implementing a Discovery Plan

2-10 Federal Litigation Guide §§ 10.06 through 10.09

[Reserved]

§§ 10.06[Reserved]

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CHAPTER 10 Planning and Preparation for Discovery
B. Conducting Factual Investigation and "Informal" Discovery

2-10 Federal Litigation Guide § 10.10

§ 10.10 Understanding the Value of Early Investigation of the Case

Delay in investigating a case will often mean that some evidence will disappear and that the value or content of other evidence will be diminished. Recollections fade over time and documents are mislaid or destroyed. The physical condition of an injured or mentally disturbed party will inevitably change. Physical evidence will disappear: skid marks on a highway will be worn away by use and weather; a faulty machine will be repaired; a dangerous stairway will be replaced.

The early investigation of facts will enable proper planning for the case, including an outline for formal discovery, at the earliest possible time. The early compilation of potential evidence helps in the preparation of factual investigation and legal research.

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CHAPTER 10 Planning and Preparation for Discovery
B. Conducting Factual Investigation and "Informal" Discovery

2-10 Federal Litigation Guide § 10.11

§ 10.11 Gathering Evidence on an Informal Basis

If the circumstances of the case do not require early or aggressive formal discovery, and the client's knowledge of the case has been exhausted, it may be advantageous to gather as much evidence or information concerning the case as possible from independent, or third-party, sources in ways that do not require use of formal discovery methods. This is true for the following reasons:

- Formal discovery is almost always more time-consuming and more expensive than informal investigation
- Formal discovery involves disclosure of the matters discovered to opposing counsel
- Formal discovery often involves disclosure of theories of the case

Of course, it is unlikely that all these benefits or objectives of informal discovery will be achieved or preserved to the time of trial. Although opposing counsel will undoubtedly discover what is found through informal investigation, the temporary advantage of knowing more about a case than one's adversary knows, and the luxury of being able to evaluate and refine the legal and factual theories before witnesses, documents, and contentions are disclosed, will almost always be significant.

The informal investigation of the case should be made as early as possible, in some cases within days of the events which gave rise to the controversy. Plaintiff's counsel will often begin this investigation before filing a lawsuit. A defense attorney may get a similar chance at prefiling investigation if the client notifies the attorney that a lawsuit is threatened or expected.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryUndue Burdens

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CHAPTER 10 Planning and Preparation for Discovery
B. Conducting Factual Investigation and "Informal" Discovery

2-10 Federal Litigation Guide § 10.12

§ 10.12 Investigating Personal Injury Actions

Informal investigation of the facts is particularly important in personal injury cases. The accident itself generally will have happened abruptly. The recollections of witnesses and participants will be fleeting and often colored by the trauma of the event. Even investigating officers have the memory of a particular incident more firmly in their mind if they are asked about it shortly after their involvement. If they have investigated another 100 accidents since the one at issue, the chances are that details which may not have been in the writtenreport will have faded from their memories. Unlike a commercial case which is more likely based primarily on documents, the investigation of a personal injury case is more likely to require on-site inspection and more interviews with witnesses who are not connected to the parties.

Personal injury cases will often call for early investigation of one or more (and frequently all) of the following subjects:

- The accident scene
- Other relevant physical objects, such as equipment
- Medical and hospital records

The investigation should include:

- A visit to the scene as soon as possible
- If the client is available, he or she should be "walked through" the accident
- The client's and other witnesses' versions of the accident should be critically examined at the scene
- Photographs of evidentiary quality should almost always be taken by a professional or expert photographer
- The accident scene should be measured, diagramed, or surveyed
- The accident scene and its vicinity should be investigated for the availability of witnesses who have

not yet come forward

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CHAPTER 10 Planning and Preparation for Discovery
B. Conducting Factual Investigation and "Informal" Discovery

2-10 Federal Litigation Guide § 10.13

§ 10.13 Conducting Site Investigations

Investigating the site where the events underlying a lawsuit occurred may be a critical part of early informal investigation. Faulty structures or equipment will normally be corrected or repaired within a few days or weeks of the accident. Evidence, including photographs, of their condition at the time of the accident will be important and should be obtained promptly. In addition, it may be necessary to conduct follow-up inspections after any subsequent repairs to learn the nature of the repair. Investigation about the cost and nature of the repair may suggest what a reasonable owner or landlord should have done before the accident.

Where cause and origin is in issue (*e.g.,* an insurance claim where arson or fraud is raised as a defense, or a negligence case where the fault of the defendant in causing the fire or explosion is in dispute), a determination of cause and origin must be made promptly, because physical evidence may disappear with the passage of time and the condition of the premises may change. An inspection of this nature must be done by an expert. Few lawyers would be qualified to identify the cause of a fire or other physical event. Even if they were qualified, they would not be permitted to testify as an expert witness under the ethical rules forbidding a lawyer to be a witness.

Land does not disappear; therefore, at least in theory, land or other property involved in a case can be inspected and photographed at any time prior to trial. However, depending on the circumstances, buildings may be destroyed or the condition of the land altered mechanically or by the passage of time or the effects of major storms. Accordingly, it is critical to quickly obtain photographs or other evidence that will show the property in its true, or original, condition.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryRelevance

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CHAPTER 10 Planning and Preparation for Discovery
B. Conducting Factual Investigation and "Informal" Discovery

2-10 Federal Litigation Guide § 10.14

§ 10.14 Inspecting Medical and Hospital Records at the Treating Facility

In any case where plaintiff's medical treatment is in issue, prompt investigation of the original medical records by plaintiff's counsel is essential. Review of the original record, either before or during litigation, may be critical because writings which appear to be in the same ink on a copy, may actually have been made in different colors on the original, thereby indicating that they were made at different times. Records often have marginal notes made after a copy has been sent to the patient or an attorney. Discharge summaries often contain damaging comments about the treatment.

A motion to preserve medical evidence may be necessary if the evidence is not routinely maintained for a long period of time. Some records and test results (*e.g.,* videotapes of vascular or cardiac surgery) are kept only for a short time. Also, when requesting access to or copies of medical or hospital records, great specificity should be used. Many hospitals consider certain records as "outpatient records" (*e.g.,* emergency room records) or not part of the hospital record at all (*e.g.,* pathology slides, EKG monitor tapes, billing statements, the folders in which records are kept, etc.).

Another valuable record is a list of all hospital personnel, including nurses and volunteers, who were involved in the patient's care or assigned to the ward or unit where the patient was treated. Even if their names do not appear on the chart, they may be familiar with the care received or may have witnessed treatment. In summary, every conceivable document or thing which might shed light on the plaintiff's treatment or condition should be requested and reviewed at the treating facility.

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CHAPTER 10 Planning and Preparation for Discovery
B. Conducting Factual Investigation and "Informal" Discovery

2-10 Federal Litigation Guide § 10.15

§ 10.15 Reviewing Public or Other Accessible Records

In commercial cases, a variety of public records, such as SEC or similar filings, can be obtained directly from the public body, without resort to formal discovery procedures. The same is true of a wide variety of documents potentially relevant in other types of cases:

- **Agency Filings.** County, state, and federal agencies often have critical information that is public in nature. For instance, the county recorder has records regarding property ownership; the Secretary of State has records regarding the structure and ownership of corporations; and the federal Patent and Trademark Office has patent and trademark filings available to the public. Agency websites and internet services specializing in public records may be used to expedite searches of public information.

- **Court Records.** Court records will identify pending and past litigation involving the adverse party, which may indicate similar lawsuits and those records may speed up your work in investigating the current case.

- **Police Reports.** Police reports will contain a near contemporaneous reconstruction of an accident or other events, the names and addresses of witnesses and, usually, a written account or accounts of the accident either as given by different witnesses or as interpreted by the police officer.

- **Fire Department Reports.** Fire department reports will contain information similar to that found in police reports but, in addition, will usually contain at least a preliminary assessment of the cause and place of origin of the fire as well as the number of points of origin.

- **Transportation Authority Reports.** Accidents involving public carriers (buses, trains and aircraft) will normally be investigated by a public transportation authority in addition to police departments, and the records of such investigations will often be available without the necessity of a subpoena.

- **Weather Reports.** Weather reports and records may provide significant information.

- **Certain Hospital Reports.** Hospital records will not normally be released without the consent of the patient and thus will usually require resort to formal discovery measures. However, some types of

information available from hospitals are deemed "public" and might provide information concerning the fact, time, or duration of a patient's admission or treatment at the hospital or in its emergency ward.

- **Newspaper and Television News Accounts.** Newspaper accounts of pertinent events will often include the names of potential witnesses, as well as first- or second-hand accounts of the event itself. Local television stations will often have, and allow access to, videotape of news coverage of local events.

- **Consumer Reports.** Industry associations or consumer watchdog groups frequently collect reports which are not otherwise cataloged, as well as serving as a nationwide clipping service for companies or issues which they follow.

- **Trial Attorney Association Reports.** Local, state, and national trial attorney associations organize data about particular products or companies, in addition to specific doctors or expert witnesses.

This list is clearly not exhaustive. The realm of publicly available information which may be helpful will depend on the nature and facts of the particular case. Freedom of Information Act requests and similar state laws may be used to obtain publicly available information.

Locating public records is extremely valuable since the information in them is generally admissible as evidence-in-chief. n1 Thus, these informal discovery devices can lead to evidence which can, in and of itself, be used to prove or disprove a key issue at trial. You must expect that your adversary will be as thorough in his or her preparation as you have been and will find this information as well. Thus, if these public records are harmful to the case, you must be prepared, in advance, to address them at trial.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryRelevance

FOOTNOTES:
(n1)Footnote 1. The Supreme Court has resolved any dispute that may have existed concerning the use of public records. Public records are admissible at trial, even if they contain opinions or conclusions, so long as those opinions or conclusions are based on a factual investigation. *Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 109 S. Ct. 439, 102 L. Ed. 2d 445 (1988)* .

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2-10 Federal Litigation Guide § 10.16

§ 10.16 Interviewing Witnesses

[1] Conducting Witness Interviews as Soon as Possible

Direct interviews with anyone not represented by counsel who might possess information concerning events involved in the case should always be contemplated in advance of formal discovery. Witness interviews generally should be conducted as soon as possible. Few individuals have either photographic memories or the capacity for total recall. Most people tend to forget unimportant events, especially those that do not involve themselves, and also to compress their recollection of important events. This is especially true of sudden or sensational physical events, which, after being reviewed in both recollection and conversation, are reduced or synthesized to the point where the more traumatic elements of the incident are preserved and peripheral details are lost.

[2] Determining Who to Interview

From the standpoint of case development, "witnesses" who can or should be interviewed are, of course, not limited to eyewitnesses, but include individuals or entities who have obtained second- or even third-hand information concerning relevant events.

For instance, newspaper reporters are often a fertile source for second-hand information. They will invariably have collected more names or facts than they included in their report of the event, and the articles which they submitted to their editor may have been substantially edited prior to publication. Newspaper reporters are usually very cooperative. Reporters deal in factual information and appreciate its importance and may even keep apprized of evolving facts in the hopes of writing a follow-up story.

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2-10 Federal Litigation Guide § 10.17

§ 10.17 Arranging Witness Interviews

The best way to conduct a witness interview will depend on a variety of considerations, including:

- The personality of the witness
- The age of the witness
- The physical or mental condition of the witness
- Possible bias of the witness
- The relationship of the witness to the parties and facts in the case

For obvious reasons, the time and place of the interview should suit the convenience of the witness. At the same time, the interview should be conducted at a time, and in surroundings, where the witness can tell, and if necessary, reflect on, his or her entire story. Oftentimes, a neutral meeting place, free of interruption, allows for the most productive interview.

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2-10 Federal Litigation Guide § 10.18

§ 10.18 Taping Witness Interviews

If the witness does not object, tape the interview. If the witness does object, offer a copy of the tape. If the witness still objects, forego the taping, but try to get an immediate written statement since this witness may be more likely to change his or her story later. Never tape an interview surreptitiously. Even though it is not illegal to record a conversation to which you are a party, it may be unethical to do so.

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2-10 Federal Litigation Guide § 10.19

§ 10.19 Interviewing Difficult Witnesses

Special consideration should be given to the witness who is reluctant or adverse. The reasons for reluctance or adversity can range from a feeling of not wanting to get involved at one extreme to outright antagonism (or strong sympathy for the adverse party) at the other. In some situations, the witness may already have talked to the adversary's lawyer, who may have urged or instructed the witness not to talk to anyone else. It may be helpful to ask at the beginning of the interview whether anyone has informed the witness not to cooperate. If the other side has interfered, contact them and suggest that it would be better for both sides to make their witnesses freely available for informal interviews. If they do not agree, you can give the same advice about interviews with opposing counsel or insurance adjusters to those witnesses friendly to you.

The possible solutions to witness reluctance or antagonism cover a wide range. If the witness has no particular view of the case but simply does not want to be inconvenienced, it may help to appeal to the witness's sense of civic duty to provide important information. Ask the witness, for example, to imagine how he or she would feel if they were involved in an accident and some third party was reluctant to provide important information. It is certainly permissible, and usually effective, to tell the witness that, if he or she is not willing to discuss the case informally, a deposition will be necessary.

If the witness is antagonistic, point out that you don't want to change the witness's story, but simply to understand it. You may also point out that the fact that the case or dispute has not been settled does not mean that it will not be settled; that, indeed, a settlement is not likely to be reached until both sides know all of the facts; and that, once again, you are only trying to learn what the witness has to say. Aconcern that one party will be ruined by having to pay damages may be alleviated by telling the witness that the party has insurance and will not have to pay money out of its own pocket. The following techniques may be helpful when interviewing antagonistic witnesses:

- Critically question the witness's story on the basis of known or likely facts
- Suggest different interpretations of ambiguous events
- Suggest, or argue limitations on, the witness's ability to know or to have seen the facts or events in question

- Attack the witness's bias if one appears to exist
- Urge the witness to view the events as an impartial observer

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsEvidenceTestimonyCredibilityGeneral OverviewEvidenceTestimonyCredibilityImpeachmentGeneral Overview

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2-10 Federal Litigation Guide § 10.20

§ 10.20 Obtaining Witness Statements

Generally, in accident or similar cases, if the witness is worth interviewing and has knowledge of significant facts, it is important to obtain a witness statement. If there is any reasonable chance that the witness might change his or her story under the pressure of the adversarial process, it is even more important to obtain a statement.

Two problems are typically presented in connection with obtaining a witness statement. The first is whether the statement should be prepared during the interview or whether it should be prepared later and then submitted to the witness for review. The factors most likely to determine this question are:

- Whether the witness's story is simple or complex

- Whether there is any material risk that the witness will change the story (or grow reluctant to review or sign the statement) in the few days required to prepare the statement

The second problem commonly encountered is whether the witness should be asked to sign the statement. If the statement is worth getting, it is worth having it signed. When the statement is written on the spot, it should be read to or by the witness, who should be asked to sign or initial each page. Any corrections which are made should also be initialed by the witness. If the witness, after speaking with the other side, is persuaded to change his or her story, this will obviate a later claim that the statement was not read or understood by him and is not true.

A third, and relatively unimportant question is whether the statement should be written in the first person or the third person. Views on this issue vary, but in general it would seem that a short statement, prepared by counsel and signed by the witness "on the spot" is best written in the first person, while a longer, more complex statement prepared by counsel is best written in the third person. When jurors hear the statement, or part of it, read in court, they will think that a shorter statement in the first person is more credible. They will naturally assume that a longer statement was drafted by someone other than the witness and then signed.

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2-10 Federal Litigation Guide § 10.21

§ 10.21 Searching For Witnesses

Sometimes, third-party witnesses cannot be located or will not be forthcoming. Once again, the "I don't want to get involved" syndrome is typically at work. Under such circumstances, an active search for witnesses may be necessary. This might be done by door-to-door inquiry; it is sometimes done through newspaper advertisements or television appeals; it may even be effectively done by posting printed material in prominent locations near the scene of an accident.

Once the identities of witnesses are determined, it may be necessary to determine their whereabouts. Internet search sites or other publicly available computerized databases, as well as private investigators, may be used to locate hard-to-find witnesses.

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2-10 Federal Litigation Guide § 10.22

§ 10.22 Using Investigators and Other Technical Consultants

[1] Evaluating Types of Cases Where Investigators and Technical Consultants May Be Useful

Private investigators and other technical consultants (fingerprint, handwriting, questioned-document, or similar experts) may be of use in a variety of situations, from the mundane "witness search" to cases involving, for example:

- Forgeries
- Employee theft
- Misuse of customer lists and trade secrets
- Private, commercial and public fraud
- Kickbacks
- Feigned injuries and disabilities
- Missing persons
- Commercial or industrial "espionage" (*e.g.*, wire-tapping and other bugging)
- Explosions
- Fires, including arson

In hiring and using handwriting, fingerprint, document-analysis and similar experts, the primary concern will be to engage a competent professional who can be an effective witness.

[2] Ensuring Ethical Behavior of Investigators

Of paramount importance is the risk that a private investigator will use improper or illegal methods of investigation.

These methods include, but are by no means limited to, entrapment, illegal wiretapping, or the use of force or other coercion to obtain statements or confessions. Any engagement letter to the private investigator should state in no uncertain terms that the use of any illegal or unethical means of conducting the investigation is forbidden.

It is possible that a party's use of an investigator will not be discovered by the adversary and will not be made known to the court or the jury. Among other possibilities, the investigator's work may be protected by the work product privilege. However, if the purpose of the investigator's work is to generate trial evidence, and if that work is successful, the manner in which the evidence was obtained will almost certainly become known. No matter how small the chance that your adversary will learn of the investigator and his or her work, the consequences of that possibility should be carefully evaluated.

[3] Evaluating the Effective Use of Investigators

Counsel should carefully consider the pros and cons of using investigators to develop a case. The use of a private investigator to follow, observe and photograph "lapses" on the part of a plaintiff feigning a permanent disability is common practice and is clearly within ethical guidelines. It might, however, be viewed by some jurors as unfair. Where, however, photographs or videotapes show an allegedly disabled plaintiff engaging in vigorous physical activity (*e.g.*, where the witness has been videotaped playing baseball or changing a tire, or photographed atop a ladder painting a house), the jury is more likely to be offended by plaintiff's bogus contentions than by the intrusiveness of the investigator's surveillance.

On the other hand, the use of a private detective to develop "background information" on the plaintiff in a libel case, particularly if the information sought is unrelated to the subject matter of the defamatory statement, is likely to be viewed by the jury as fundamentally unfair. Generally, "digging up dirt" concerning a party or witness on subjects clearly unrelated to the merits of the case will be viewed as improper by most judges and jurors.

In general, private investigations are more likely to be viewed as improper when:

- The relevance of their work strays from the merits of the case
- The investigator's activities encroach on traditional concepts of privacy

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral Overview

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2-10 Federal Litigation Guide § 10.23

§ 10.23 Protecting the Results of "Informal" Discovery Through the Attorney-Client Privilege

[1] Protecting Communications Regarding Legal Advice

Federal law recognizes an attorney-client privilege that protects from formal discovery communications from a client to an attorney for the purpose of obtaining legal advice, provided the communications were intended to be confidential. n1 Such communications include client interviews, including those conducted in preparation of formal discovery. The burden is on the party asserting the attorney-client privilege to demonstrate its applicability. n2

The attorney-client privilege extends to initial interviews and consultations between attorneys and their prospective clients, even if the attorney decides not to take the case, or the client decides not to retain the attorney. n3

[2] Evaluating the Attorney-Client Privilege in the Corporate Setting

Corporate in-house counsel are treated in the same manner as counsel retained from the outside. n4 However, a company may not shield itself from formal discovery simply by filtering business information through staff counsel. To be entitled to the protection of the attorney-client privilege, a corporate lawyer must not only be functioning as a lawyer, but the advice given must be predominantly legal, as opposed to business, in nature. n5

Five criteria are used to determine whether *Upjohn* protects particular communications by corporate employees to the lawyer for the company:

- The communication is one that would not have been made except for the rendering of legal services;
- The content of the communication must relate to the subject matter of the legal services;
- The statement must be made by an employee, agent, or independent contractor with a significant relationship to both the corporation and its involvement in the subject matter of the legal services;
- The statement must be made in confidence; and
- The privilege must be asserted by either the corporation or the person who made the statement. n6

[3] Understanding the Limits of the Attorney-Client Privilege

A client may not push a document under the umbrella of privilege merely by turning it over to an attorney during the pre-discovery phase of litigation. n7 The underlying facts of an action are not protected by the attorney-client privilege. n8 The attorney-client privilege applies only to communications between the attorney and the client. It does not apply to correspondence from others that may be in the attorney's possession. n9 However, communications between a client and an agent of the attorney are privileged, provided they are intended to be confidential. n10

The attorney-client privilege applies to entries in a client's diary that describe communications from the attorney to the client or memorialize confidential communications made by the client to the attorney in furtherance of seeking legal advice. n11

[4] Waiving the Attorney-Client Privilege

The attorney-client privilege may be waived by the client either expressly, as when a client voluntarily turns over privileged documents, n12 or implicitly, as when the client places otherwise privileged matters in controversy. n13 Discussing the underlying facts of a privileged communication does not by itself waive the privilege. n14

If it is clear that the attorney-client privilege will be waived at trial, the court should permit pretrial discovery of the privileged communication. n15

[5] Limitations on Waiver of Attorney-Client Privilege

Any waiver is limited to actual material disclosed and does not extend to other material on the same subject, unless the disclosure is done intentionally to gain tactical advantage, in which case waiver would be extended to all related material. n16

When made in a federal proceeding, a disclosure does not operate as a waiver if: n17

- The disclosure is inadvertent
- The holder of the privilege or protection took reasonable steps to prevent disclosure; and
- The holder promptly took reasonable steps to rectify the error, including (if applicable) following *Fed. R. Civ. P. 26(b)(5)(B)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersAttorney-Client PrivilegeEvidencePrivilegesAttorney-Client PrivilegeGeneral OverviewEvidencePrivilegesAttorney-Client PrivilegeExceptionsEvidencePrivilegesAttorney-Client PrivilegeScopeLegal EthicsClient RelationsConfidentiality of Information

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Evid. 502(g)*; *see also Montgomery v. Leftwich, Moore & Douglas, 161 F.R.D. 224, 226 (D.D.C. 1995)* .

(n2)Footnote 2. *See Savoy v. Richard A. Carrier Trucking, Inc., 178 F.R.D. 346, 351 (D. Mass. 1998)* .

(n3)Footnote 3. *See Diversified Group, Inc. v. Daugerdas, 304 F. Supp. 2d 507, 513 (S.D.N.Y. 2003)* ;

Montgomery v. Leftwich, Moore & Douglas, 161 F.R.D. 224, 225-226 (D.D.C. 1995) .

(n4)Footnote 4. *See Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)* .

(n5)Footnote 5. *See United States v. Rowe, 96 F.3d 1294, 1297 (9th Cir. 1996)* .

(n6)Footnote 6. Sexton, *A Post*-Upjohn *Consideration of the Corporate Attorney-Client Privilege, 57 N.Y.U. L. Rev. 443 (1982).*

(n7)Footnote 7. *See Guzzino v. Felterman, 174 F.R.D. 59, 61 (W.D. La. 1997)* .

(n8)Footnote 8. *See Simon v. G.D. Searle & Co., 816 F.2d 397, 403 (8th Cir. 1987)* , *cert. denied, 484 U.S. 917 (1987)* .

(n9)Footnote 9. *See Sobol v. E.P. Dutton, Inc., 112 F.R.D. 99, 102-103 (S.D.N.Y. 1986)* .

(n10)Footnote 10. *See United States v. Schwimmer, 892 F.2d 237, 244 (2d Cir. 1989)* .

(n11)Footnote 11. *See Alexander v. FBI, 186 F.R.D. 154, 161 (D.D.C. 1999)* .

(n12)Footnote 12. *See In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989)* .

(n13)Footnote 13. *See Conkling v. Turner, 883 F.2d 431, 434-435 (5th Cir. 1989)* ; *Sedillos v. Board of Educ. of Sch. Dist. No. 1, 313 F. Supp. 2d 1091, 1094 (D. Colo. 2004)* .

(n14)Footnote 14. *See Charles Woods Television Corp. v. Capital Cities/ABC, Inc., 869 F.2d 1155, 1162 (8th Cir.)* , *cert. denied, 493 U.S. 848 (1989)* .

(n15)Footnote 15. *See Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 929 (N.D. Cal. 1976)* .

(n16)Footnote 16. *Fed. R. Evid. 502(a).*

(n17)Footnote 17. *Fed. R. Evid. 502(b).*

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CHAPTER 10 Planning and Preparation for Discovery
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2-10 Federal Litigation Guide § 10.24

§ 10.24 Protecting the Results of "Informal" Discovery Through the Work Product Doctrine

[1] Protecting Documents and Things Prepared in Anticipation of Litigation or Trial

Work-product protection means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

The work product doctrine, as codified in Rule 26(b)(3), n1 provides that a party may not obtain discovery of documents or other tangible things prepared in anticipation of litigation or trial by or for another party or that other party's representative, unless the following conditions are met:

- The party seeking discovery has substantial need of the materials in the preparation of his or her case, and

- The party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Moreover, in ordering discovery of such materials when the required showing has been made, the court must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. n2 The purpose of the work product doctrine is to protect an attorney's mental processes so that the attorney can analyze and prepare for the client's case without interference from an opponent. n3 The language of Rule 26(b)(3) attempts to strike a balance between the necessity of protecting an attorney's preparation under the adversary system, and the policy of full and open discovery underlying the Federal Rules of Civil Procedure. n4

The party asserting work product protection has the burden of establishing that the doctrine applies. n5

[2] Understanding the Scope of Work Product Doctrine

By its own terms, the work product doctrine, as codified in Rule Rule 26(b)(3) n6 applies only to requests for production of documents and tangible things. However, because the doctrine is intended only to guard against divulging an attorney's strategies and legal impressions, it does not protect facts concerning the creation of work product, or facts contained within work product. n7 Likewise, facts are not protected from disclosure by virtue of having been gathered

by an attorney. n8 Nevertheless, the courts do afford work product protection to documents in which an attorney collates or categorizes the facts. Thus, while the facts themselves are not privileged, a chart or other compilation of facts may be protected as work product. n9

There is no preset limitation on what constitutes a "document or tangible thing" within the meaning of the work product doctrine, provided the item was prepared in anticipation of litigation. Items that have been held within the protection include letters, n10 interview notes, n11 interview transcripts, n12 surveillance tapes, n13 and studies. n14

[3] Protecting Attorney's Thoughts, Mental Processes, Strategy, and Opinions

Although some cases have held that the work product doctrine protects only documentary evidence, n15 other courts have protected an attorney's thoughts, mental processes, strategy, and opinions from disclosure, regardless of the discovery method employed. In *Hickman v. Taylor*, n16 the case from which Rule 26(b)(3) is derived, the Supreme Court articulated the work product doctrine in terms that spanned the entire scope of discovery. Courts have continued to prevent parties from circumventing the work product doctrine by attempting to elicit an attorney's thought processes through depositions or interrogatories. n17

[4] Protecting Tape Recorded Conversations

A number of courts have ruled that tape recorded conversations may constitute work product material. n18 On the other hand, courts have ruled that unprofessional attorney conduct may constitute grounds to vitiate work product protection, and a number of courts have applied that rule to secret taping of conversations. n19

[5] Preparing Material in Preparation of Litigation or Trial is Critical

The work product doctrine, as codified in Rule Rule 26(b)(3) n20 applies to documents or things prepared in anticipation of litigation or for trial. Courts have devised various formulations regarding just how concrete the prospect of litigation must be before protection will attach to a given document.

For example, some courts require "more than a remote possibility of litigation" when the document is prepared. n21 Others state that there must be "an identifiable prospect of litigation" and require that specific claims must have already arisen when the document is prepared. n22 Still others require that at the time the document is created, the party or its representative must have in mind a "specific claim supported by concrete facts which would likely lead to litigation." n23 Some courts require that the primary motivating purpose behind the creation of the document be to aid in possible litigation. n24

Because Rule 26(b)(3) work product protection extends only to documents prepared in anticipation of litigation or trial, n25 it follows that documents prepared in the regular course of a party's business are not protected by the doctrine. n26 The crucial factor in determining whether a document was prepared in the regular course of business or in anticipation of litigation is the party's purpose in preparing the document, or causing its preparation. n27 If there was an ordinary business purpose behind the document's preparation, it is unprotected, even if litigation was imminent. n28 Merely placing a stamp that reads "attorney work product" on a document prepared in the ordinary course of business is not sufficient to turn it into work product. n29

[6] Waiving Work Product Protection

Unlike the attorney-client privilege, which is designed to protect the client's confidences, the work product doctrine is designed to protect the adversary process. n30 Therefore, not every disclosure of work product waives the doctrine. n31

Failure to assert the work product rule waives any work product immunity for the documents produced. n32 A common issue is whether work product protection is waived by disclosing the document to a third party. If the disclosure to the

third party is deliberate, the test for determining whether the work product rule has been waived is whether, at the time of disclosure, there was a substantial danger that the documents would be disclosed to an adversary. n33 However, if the disclosure to the third party is inadvertent, the court considers the following: n34

- Whether the party seeking discovery of the documents was misled by the disclosure, or relied on the disclosure to its detriment
- The reasonableness of the precautions the party claiming the privilege took to prevent accidental disclosure
- The amount of time it took that party to notice its error
- The overriding interest of fairness and justice.

A party also impliedly waives work product protection if it places the substance of the documents for which the protection is claimed at issue. n35 Similarly, if a party uses the substance of the documents in testimony, any work product protection is waived. n36

[7] Limitations on Waiver of Work-Product Protection

Any waiver is limited to actual material disclosed and does not extend to other material on the same subject, unless the disclosure is done intentionally to gain tactical advantage, in which case waiver would be extended to all related material. n37

When made in a federal proceeding, a disclosure does not operate as a waiver if: n38

- The disclosure is inadvertent
- The holder of the privilege or protection took reasonable steps to prevent disclosure; and
- The holder promptly took reasonable steps to rectify the error, including (if applicable) following *Fed.R.Civ.P. 26(b)(5)(B)*

[8] Protecting Drafts and Communications of Expert Witnesses

Effective December 1, 2010, Rules 26(b)(3)(A) and (B) protect drafts of any expert report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded. n39

Additionally, Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any expert 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 do any of the following: n40

- Relate to compensation for the expert's study or testimony
- Identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed
- Identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersWork ProductFact Work ProductCivil ProcedureDiscoveryPrivileged MattersWork ProductOpinion Work ProductCivil ProcedureDiscoveryPrivileged MattersWork ProductScopeCivil ProcedureDiscoveryPrivileged MattersWork ProductWaivers

FOOTNOTES:

(n1)Footnote 1. *See Fed. R. Civ. P. 26(b)(3).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(b)(3).*

(n3)Footnote 3. *See United States v. Adlman, 68 F.3d 1495, 1501 (2d Cir. 1995) .*

(n4)Footnote 4. *See Loustalet v. Refco, Inc., 154 F.R.D. 243, 246 (C.D. Cal. 1993) .*

(n5)Footnote 5. *See Resolution Trust Corp. v. Dabney, 73 F.3d 262, 266 (10th Cir. 1995) .*

(n6)Footnote 6. *Fed. R. Civ. P. 26(b)(3).*

(n7)Footnote 7. *See Resolution Trust Corp. v. Dabney, 73 F.3d 262, 266 (10th Cir. 1995) .*

(n8)Footnote 8. *See Audiotext Communications Network v. U.S. Telecom, Inc., 164 F.R.D. 250, 254 (D. Kan. 1996) .*

(n9)Footnote 9. *See In re Grand Casinos, Inc., 181 F.R.D. 615, 622 (D. Minn. 1998) .*

(n10)Footnote 10. *See Rail Intermodal Specialists, Inc. v. General Elec. Capital Corp., 154 F.R.D. 218, 219 (N.D. Iowa 1994) .*

(n11)Footnote 11. *See Ryall v. Appleton Elec. Co., 153 F.R.D. 660, 662-663 (D. Colo. 1994) .*

(n12)Footnote 12. *See American Standard Inc. v. Bendix Corp., 71 F.R.D. 443, 446 (W.D. Mo. 1976) .*

(n13)Footnote 13. *See Marchello v. Chase Manhattan Auto Fin. Corp., 219 F.R.D. 217, 219 (D. Conn. 2004)* ; *Ford v. CSX Transp., Inc., 162 F.R.D. 108, 111-112 (E.D.N.C. 1995) .*

(n14)Footnote 14. *See Martin v. Monfort, Inc., 150 F.R.D. 172, 173 (D. Colo. 1993) .*

(n15)Footnote 15. *See Boyer v. Board of County Comm'rs, 162 F.R.D. 687, 689 (D. Kan. 1995) .*

(n16)Footnote 16. *Hickman v. Taylor, 329 U.S. 495, 505, 67 S. Ct. 385, 91 L. Ed. 451, 34 Ohio Op. 395 (1947) .*

(n17)Footnote 17. *See, e.g., United States v. 266 Tonawanda Trail, 95 F.3d 422, 428 n.10 (6th Cir. 1996) .*

(n18)Footnote 18. *See, e.g., Suggs v. Whitaker, 152 F.R.D. 501, 506 (M.D.N.C. 1993) .*

(n19)Footnote 19. *See, e.g., Ward v. Maritz, Inc., 156 F.R.D. 592, 597 (D.N.J. 1994) .*

(n20)Footnote 20. *Fed. R. Civ. P. 26(b)(3).*

(n21)Footnote 21. *See, e.g., Fox v. California Sierra Fin. Servs., 120 F.R.D. 520, 524 (N.D. Cal. 1988) .*

(n22)Footnote 22. *See, e.g., Panter v. Marshall Field & Co., 80 F.R.D. 718, 725 n.6 (N.D. Ill. 1978)* .

(n23)Footnote 23. *See, e.g., Linde Thomson Langworthy Kohn & Van Dyke v. Resolution Trust Co., 5 F.3d 1508, 1515 (D.C. Cir. 1993)* .

(n24)Footnote 24. *See, e.g., Navigant Consulting, Inc. v. Wilkinson, 220 F.R.D. 467, 477 (N.D. Tex. 2004)* ; *Hugley v. The Art Inst. of Chicago, 981 F. Supp. 1123, 1128-1129 (N.D. Ill. 1997)* .

(n25)Footnote 25. *Fed. R. Civ. P. 26(b)(3).*

(n26)Footnote 26. *See Martin v. Bally's Park Place Hotel & Casino, 983 F.2d 1252, 1260 (3d Cir. 1993)* ; *In re Raytheon Secs. Litig., 218 F.R.D. 354, 359 (D. Mass. 2003)* .

(n27)Footnote 27. *See United States v. Ernstoff, 183 F.R.D. 148, 156 (D.N.J. 1998)* .

(n28)Footnote 28. *See Allendale Mut. Ins. Co. v. Bull Data Sys., 145 F.R.D. 84, 87 (N.D. Ill. 1992)* .

(n29)Footnote 29. *See Ledgin v. Blue Cross and Blue Shield of Kansas City, 166 F.R.D. 496, 498-499 (D. Kan. 1996)* .

(n30)Footnote 30. *See Shields v. Sturm, Ruger & Co., 864 F.2d 379, 382 (5th Cir. 1989)* .

(n31)Footnote 31. *See In re Grand Jury Proceedings, 43 F.3d 966, 970 (5th Cir. 1994)* .

(n32)Footnote 32. *See Carte Blanche (Singapore) PTE, Ltd. v. Diners Club Int'l, Inc., 130 F.R.D. 28, 32 (S.D.N.Y. 1990)* .

(n33)Footnote 33. *See Samuels v. Mitchell, 155 F.R.D. 195, 200-201 (N.D. Cal. 1994)* .

(n34)Footnote 34. *See City of Worcester v. HCA Mgmt. Co., 839 F. Supp. 86, 89 (D. Mass. 1993)* .

(n35)Footnote 35. *See Harding v. Dana Transp., Inc., 914 F. Supp. 1084, 1098-1099 (D.N.J. 1996)* .

(n36)Footnote 36. *See Remington Arms Co. v. Liberty Mut. Ins. Co., 142 F.R.D. 408, 419-420 (D. Del. 1992)* .

(n37)Footnote 37. *Fed. R. Evid.502(a).*

(n38)Footnote 38. *Fed. R. Evid. 502(b).*

(n39)Footnote 39. *Fed. R. Civ. P. 26(b)(4)(B).*

(n40)Footnote 40. *Fed. R. Civ. P. 26(b)(4)(C).*

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CHAPTER 10 Planning and Preparation for Discovery
B. Conducting Factual Investigation and "Informal" Discovery

2-10 Federal Litigation Guide §§ 10.25 through 10.29

[Reserved]

§§ 10.25[Reserved]

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CHAPTER 10 Planning and Preparation for Discovery
C. Preparing for Formal Discovery

2-10 Federal Litigation Guide § 10.30

§ 10.30 Making Initial Disclosures Under Rule 26(a)(1) Before Participating in Formal Discovery

Initial disclosures under Rule 26(a)(1) must be made at or within 14 days of the discovery conference held under *Fed. R. Civ. P. 26(f)* 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 the circumstances of the action and states the objection in the Rule 26(f) discovery plan. n1

Initial mandatory disclosure under Rule 26(a) requires parties to exchange information regarding the following:

- Individuals likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment

- Documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment

- Claims and calculations of damages

- Insurance coverage

For complete discussion of initial disclosure requirements under Rule 26(a)(1), see Ch. 9, *The Purposes of Discovery*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(a)(1)(E).*

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CHAPTER 10 Planning and Preparation for Discovery
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2-10 Federal Litigation Guide § 10.31

§ 10.31 Conference to Discuss Case and Possible Settlement Before Beginning Formal Discovery

Except in categories of proceedings exempted from disclosure under Rule 26(a), or when authorized under the Federal Rules or by order or agreement of the parties, a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f). n1

Under Rule 26(f), the parties are obligated to confer, at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), for the purpose of:

- Discussing the nature and basis of their claims and defenses
- Discussing the possibility for a prompt settlement or resolution of the case
- Making or arranging for the initial mandatory disclosures required by Rule 26(a)
- Developing a proposed discovery plan

The proposed discovery plan must indicate the parties' views and proposals concerning the following:

- What changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when initial disclosures were made or will be made
- 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
- Any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced
- Any issues relating to claims of privilege or of protection as trial-preparation material, including-if the parties agree on a procedure to assert such claims after production-whether to ask the court to include their agreement in an order

- 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

- Any other discovery orders that should be entered by the court

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. A court may by order require that the parties or attorneys attend the conference in person. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule require that the conference between the parties occur fewer than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b), and require that the written report outlining the discovery plan be filed fewer than 14 days after the conference between the parties, 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. n2

The federal courts have taken two common approaches to determining whether expedited discovery is appropriate. The first approach is called the "good cause standard" and the second more "liberal" test is called the "reasonableness test." n3 Under the more stringent "good cause standard" approach, the courts require the plaintiff to demonstrate:

- Irreparable injury

- Some probability of success on the merits

- Some connection between the expedited discovery and the avoidance of irreparable injury

- Some evidence that the injury that will result without expedited discovery is greater than the injury that the defendant will suffer if the expedited relief is granted

The "reasonableness test," requires the court to decide the motion based on the reasonableness of the request in light of all of the surrounding circumstances. Among the factors to be considered by the court are:

- Whether a preliminary injunction is pending

- The breadth of the discovery requests

- The purpose for requesting the expedited discovery

- The burden on the defendants of complying with the requests

- How far in advance of the typical discovery process the request was made

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 26(d)*; *see also El Pollo Loco, S.A. de C.V. v. El Pollo Loco, Inc., 344 F. Supp. 2d 986, 991 (S.D. Tex. 2004)* .

(n2)Footnote 2. *Fed. R. Civ. P. 26(f)*.

(n3)Footnote 3. *See In re Fannie Mae Derivative Litig., 227 F.R.D. 142, 143 (D.D.C. 2005)* .

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CHAPTER 10 Planning and Preparation for Discovery
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2-10 Federal Litigation Guide § 10.32

§ 10.32 Understanding the Scope and Limits of Discovery

[1] Obtaining Discoverable Information

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party. n1 Parties may not seek to discover information that has no possible bearing on the case and is unlikely to lead to discoverable evidence. n2 Relevance is broadly construed, and a request for discovery should be considered relevant if there is any possibility that the information sought may be relevant to the claim or defense of any party. n2.1

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. n3

[2] Limiting the Scope of Discovery

By order, the court may alter the limits on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36. n4

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. n5

The frequency or extent of use of the discovery methods otherwise permitted under the Federal Rules of Civil Procedure and by any local rule shall be limited by the court if it determines any of the following: n6

- The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive, or

- The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought, or

- The burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues

The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c). n7

In general, district courts have broad discretion in structuring discovery, and an appellate court will not interfere with a trial court's exercise of its discretion to control its docket and dispatch its business except on the clearest showing that the procedures have resulted in actual and substantial prejudice to the complaining party. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryUndue Burdens

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(b)(1).*

(n2)Footnote 2. *Lewis v. ACB Bus. Servs., Inc., 135 F.3d 389, 402-403 (6th Cir. 1998) .*

(n3)Footnote 2.1. *See Breon v. Coca-Cola Bottling Co. of New England, 232 F.R.D. 49, 52 (D. Conn. 2005)* (citing **Moore's Federal Practice**).

(n4)Footnote 3. *Fed. R. Civ. P. 26(b)(1).*

(n5)Footnote 4. *Fed. R. Civ. P. 26(b)(2)(A).*

(n6)Footnote 5. *Fed. R. Civ. P. 26(b)(2)(B).*

(n7)Footnote 6. *Fed. R. Civ. P. 26(b)(2)(C).*

(n8)Footnote 7. *Fed. R. Civ. P. 26(b)(2)(C).*

(n9)Footnote 8. *See Hussain v. Nicholson, 435 F.3d 359, 363 (D.C. Cir. 2006) .*

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2-10 Federal Litigation Guide § 10.33

§ 10.33 Stipulating Around the Limitations of Discovery

Unless otherwise directed by the court, the parties may stipulate around the limitations of the various discovery rules. n1 In most cases, these stipulations do not require court approval.

However, advance approval is always necessary if a stipulation is to extend the 30-day period for responding to interrogatories, requests for production, or requests for admissions, or if the extension would interfere with dates set by the court for completing discovery, for hearing of a motion, or for trial. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsStipulations

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 29*; *Bobrosky v. Vickers, 170 F.R.D. 411, 416 (W.D. Va. 1997)* .

(n2)Footnote 2. *Fed. R. Civ. P. 29.*

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2-10 Federal Litigation Guide § 10.34

§ 10.34 Certifying Discovery Requests and Responses

Every discovery request or response must be signed by counsel, whose signature constitutes a certification of the merits of the signed document. n1 If a certification is made in violation of Rule 26 without substantial justification, the court shall impose an appropriate sanction on the person who made the certification, the party represented by the person who made the certification, or both. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(g)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(g)(3).*

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2-10 Federal Litigation Guide § 10.35

§ 10.35 Filing of Discovery

The following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: n1

- Depositions
- Interrogatories
- Requests for documents or to permit entry upon land, and
- Requests for admission

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 5(d).*

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2-10 Federal Litigation Guide § 10.36

§ 10.36 Supplementing Discovery Responses

Every discovery response must be supplemented or corrected whenever the party learns that the prior response was in some sense incomplete or incorrect, and that new information is not otherwise already made known to the other parties in the action. n1

For purposes of the duty to supplement, information is incomplete or incorrect in "some material respect" if there is an objectively reasonable likelihood that the additional or corrective information could substantially affect or alter the opposing party's discovery plan or trial preparation. n1.1

A party that without substantial justification fails to supplement discovery, is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. n2 In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include informing the jury of the failure to make the disclosure. n3 The Federal Rules of Civil Procedure do not create the right to a separate negligence action based on a party's prior litigation conduct in another case, including the defendant's violations of Rule 26(e). n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsGeneral OverviewLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(e)(1)*; *see also Sender v. Mann, 225 F.R.D. 645, 654 (D. Colo. 2004)* .

(n2)Footnote 1.1. *See Sender v. Mann, 225 F.R.D. 645, 654 (D. Colo. 2004)* .

(n3)Footnote 2. *Fed. R. Civ. P. 37(c)*.

(n4)Footnote 3. *Fed. R. Civ. P. 37(c)*.

(n5)Footnote 4. *See Living Designs, Inc. v. E.I. Dupont de Nemours & Co., 431 F.3d 353, 372 (9th Cir. 2005)* .

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2-10 Federal Litigation Guide § 10.37

§ 10.37 Seeking Protective Orders to Preclude Abusive Discovery

The discovery rules are designed to operate subject to a minimum of court supervision. However, if a party's pursuit of discovery becomes overzealous the court may issue a protective order precluding or limiting discovery in order to protect any person subject to abusive discovery practices. n1

Rule 26(c) requires a showing of good cause to justify the issuance of a protective order. A frequently asserted ground for a protective order is the allegation that the sought discovery involves privileged materials or information. The moving party has the burden of establishing good cause. n2

As a general rule, any party or representative of a party, or witness with information relevant to the claims or defenses, or any investigator or expertwitness, can attend depositions in the case, but they may be excluded on a specific showing that some harm or prejudice might occur to a party or the deponent through the disclosure of secret or sensitive information, and can also be excluded on a specific showing that they might act coercively or disruptively. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryProtective Orders

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(c).*

(n2)Footnote 2. *See In re Terra Int'l, Inc., 134 F.3d 302, 306-307 (5th Cir. 1998) .*

(n3)Footnote 3. *See Estate of Bell v. Board of Educ. of Fayette County, 225 F.R.D. 186, 196 (S.D. W. Va. 2004) .*

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2-10 Federal Litigation Guide § 10.38

§ 10.38 Evaluating the Sequence in Which Available Discovery Procedures Should Be Used

Parties may conduct discovery in any sequence, unless the court ordersotherwise. n1 The court may issue an order prescribing the sequence of discovery on motion, for the convenience of parties and witnesses and in the interests of justice. n2 Typically, a party wishing to establish a particular sequence of discovery will proceed by motion for a protective order. n3 Both parties may conduct discovery at the same time. The fact that one party is conducting discovery shall not operate to delay any other party's discovery. n4

Each of the methods of discovery provide different strategic advantages and selection of the proper method or combination of methods is critical to efficient litigation. For example, if the availability of a key witness is limited, it is advisable to depose the witness early in litigation to preserve critical testimony. Likewise, if the opposing party is known to be careless in thought or rash in expression, it might be advisable to depose first, rather than after that party's counsel has had the opportunity to craft interrogatory responses that will have the effect of diminishing the spontaneity of deposition testimony.

On the other hand, interrogatories demanding precise information regarding damages may provide a fertile ground for deposition questioning. Similarly, document demands may serve as the basis for strategic interrogation during deposition.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureDiscoveryProtective Orders

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(d).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(d).*

(n3)Footnote 3. *Fed. R. Civ. P. 26(c)(2).*

(n4)Footnote 4. *Fed. R. Civ. P. 26(d).*

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2-10 Federal Litigation Guide § 10.39

§ 10.39 Evaluating the Potential Cost of Discovery

One of the most important factors to be considered in drafting a discovery plan is the likely cost to the client. In formulating a discovery plan, the following costs need to be considered:

- Attorney's fees associated with drafting the particular discovery device, or preparing for and attending a deposition

- Attorney's fees associated with opposing objections to the discovery, including possible motion practice

- Stenographic fees associated with a deposition

While the review and designation for copying of documents in a suit in which hundreds of thousands or millions of pages of material are produced can involve enormous expense attributable to lawyer and paralegal time, copying costs, and travel and living expenses, the largest expense associated with discovery in the more typical civil action is that of preparing for and taking depositions. This is true even when there is no travel out of town because the deponents are local. Attorney time and court reporter costs will be the major expenditures. Accordingly, determining who to depose and planning for efficient depositions is one of the most critical components of preparing for discovery.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryUndue BurdensCivil ProcedureRemediesCosts & Attorney FeesCostsDepositions & TranscriptsCivil ProcedureRemediesCosts & Attorney FeesCostsReproduction Costs

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2-10 Federal Litigation Guide § 10.40

§ 10.40 Taking Depositions Under Rule 30

[1] Using Depositions to Evaluate Witnesses and to Preserve Testimony

The deposition is perhaps the most important and effective discovery tool. In addition to providing a procedure for in-depth examination of the factual underpinning of the claims, the deposition can be used to evaluate the credibility, presence, and demeanor of the witness. A witness's voice characteristics, predominant body language traits, and idiosyncratic tendencies all factor into an analysis of the likely credibility of the witness.

Depositions are also critical to preserve necessary testimony of witnesses that may not be available for trial due to death, illness, or other causes.

[2] Determining When Depositions May Be Taken

A party may take the oral deposition of any person, including a party, without leave of court unless the person to be examined is confined in prison, or if, without the written stipulation of the parties: n1

- The proposed deposition would result in more than ten depositions being taken
- The person to be deposed has already been deposed in the case
- The deposition is scheduled before the time specified in Rule 26(d), unless the deposition notice properly states that the person to be examined is expected to leave the United States and will be unavailable for examination

[3] Videotaping Depositions

Consideration should be given to videotaping the deposition. There may be great advantage to videotaping if there is concern that the witness may not be available at trial, and videotaped testimony will be much more effective than reading the transcript. Any party may, by providing prior written notice to the deponent and other parties, designate that the deposition will be taken byvideotape as well as stenographically. n2

For a complete discussion of depositions, see Ch. 16, *Preparation for Depositions*, Ch. 17, *Taking Depositions*, and Ch.

18, *Defense of Depositions*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsPerpetuation of TestimonyEvidenceTestimonyGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 30(a)(2).*

(n2)Footnote 2. *See Fed. R. Civ. P. 30(b)(2).*

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2-10 Federal Litigation Guide § 10.41

§ 10.41 Propounding Interrogatories Under Rule 33

[1] Seeking Information From Other Parties

Unlike many of the other discovery tools, interrogatories may be employed only to seek information from another party, and not from nonparty witnesses. n1 Under Rule 33 no more than 25 interrogatories may be served, including all discrete subparts, without leave of court or stipulation.

[2] Obtaining Basic Information Regarding the Parties and Evidence

Much of the information generally sought through interrogatories must be disclosed without any discovery request under Rule 26(a). However, where court order or stipulation has varied the disclosures required, interrogatories may be used for the following purposes:

- To identify persons with knowledge of relevant information
- To discover relevant documents
- To discover the factual basis for positions taken in the pleadings
- To discover the basis and method of computation of claimed damages
- To identify insurance information

If properly and thoughtfully prepared, written interrogatories can be an extremely useful discovery tool. They may be used to hold the opposing party to particular factual claims and legal contentions at an early stage of the case and serve as the basis for subsequent document demands and depositions.

For a complete discussion of interrogatories, see Ch. 12, *Interrogatories*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See Fed. R. Civ. P. 33*; *United States v. Lot 41, Berryhill Farm Estates, 128 F.3d 1386, 1397 (10th Cir. 1997)* .

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2-10 Federal Litigation Guide § 10.42

§ 10.42 Inspecting Documents and Property Under Rule 34

[1] Obtaining Disclosure and Demanding Inspection of Documents and Property

The right of a party to obtain disclosure of documents, electronically stored information, or things, and to inspect premises or personal property, is an important discovery tool. Because there are no specified limitations on the number of demands for production that can be made, n1 the procedure provides a fruitful means of obtaining documentary insight into the issues and available proof, and an important basis for deposing both parties and nonparty witnesses.

The demanding party is entitled to have disclosure and discovery of all items that are relevant to the issues or that may lead to the ascertainment or disclosure of relevant evidence, which are in the possession, custody, or control of the respondent, control being defined to include items to which the respondent has a legal right of access, or a practical ability to obtain possession. n2

The request must set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced. n2.1

A properly drafted demand for production may succeed in providing access to computer derived compilations, and if circumstances warrant, to computer software and hardware, including direct access into a computer system.

[2] Responding to Inspection Demands

From the respondent's standpoint, care should be taken in preparing the written response to each production demand to insure that the response is complete, accurate, and specific. If there is objection to any demand, the objection must be explicitly stated. When a privilege is claimed, there must be a specific and adequate description of the withheld item, without intruding on the privileged content of the item. n3

The response must state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless an objection is raised and the reason for the objection is stated. A responding party must also state the reason for objection when objecting to the form or forms for producing electronically stored information and it must state the form it intends to use. If objection is made to part of an item or category, the part shall be specified and

inspection permitted of the remaining parts. n4

While the responding party may bring a motion for a protective order against a demand for production, n4 generally speaking it is better practice to respond to the demand, stating specific reasons for inability or refusal to produce. Following the latter course will have the effect of placing the burden on the demanding party to move to compel responses, and may often lead to an accommodation between the parties as to production without court intervention.

For a complete discussion of production of documents and things, and entry upon land for inspection and other purposes, see Ch. 13, *Production of Documents*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryProtective Orders

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 34.*

(n2)Footnote 2. *See Fed. R. Civ. P. 26(b)(1)*; *Fed. R. Civ. P. 34.*

(n3)Footnote 2.1. *Fed. R. Civ. P. 34(b).*

(n4)Footnote 3. *Fed. R. Civ. P. 26(b)(5).*

(n5)Footnote 4. *See Fed. R. Civ. P. 34(b).*

(n6)Footnote 4. *Fed. R. Civ. P. 26(c).*

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CHAPTER 10 Planning and Preparation for Discovery
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2-10 Federal Litigation Guide § 10.43

§ 10.43 Conducting Physical and Mental Examinations Under Rule 35

[1] Seeking Physical or Mental Examinations

Physical or mental examinations are available only if both of the following conditions are met: n1

- The mental or physical condition of a party or a person in a party's custody is "in controversy"
- There is "good cause" for the examination

The decision to grant or deny a physical or mental examination is within the court's discretion. n2

The order may be made on notice to the person to be examined and to all parties and must specify the following: n3

- The time of the examination
- The place of the examination
- The manner of the examination
- The conditions of the examination
- The scope of the examination
- The person who will conduct the examination

[2] Providing the Examiner's Report to the Examined Party

If the examined party requests a copy of the examiner's report, the party requesting the examination must deliver to the examined party a copy of the detailed written report of the examiner setting out the following: n4

- The examiner's findings including the results of all tests

- The examiner's diagnoses and conclusions
- Reports of all earlier examinations of the same condition

By requesting and obtaining a report of the examination or by taking the deposition of the examiner, the party examined waives any privilege the party may have regarding the testimony of every other person who has examined or who may thereafter examine the party regarding the same mental or physical condition. n5

For a complete discussion of physical and mental examinations, see Ch. 21, *Physical and Mental Examinations*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsMental & Physical Examinations

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 35*; *Schlagenhauf v. Holder, 379 U.S. 104, 118-119, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964)* .

(n2)Footnote 2. *O'Quinn v. New York Univ. Med. Center, 163 F.R.D. 226, 227 (S.D.N.Y. 1995)* .

(n3)Footnote 3. *Fed. R. Civ. P. 35(a)*.

(n4)Footnote 4. *Fed. R. Civ. P. 35(b)(1)*.

(n5)Footnote 5. *Fed. R. Civ. P. 35(b)(2)*.

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CHAPTER 10 Planning and Preparation for Discovery
C. Preparing for Formal Discovery

2-10 Federal Litigation Guide § 10.44

§ 10.44 Making Requests for Admission Under Rule 36

A party may serve a written request on any other party for the admission of any matter relevant to the litigation. The recipient must respond by admitting, denying, or setting forth reasons why the request may be neither admitted nor denied. n1 Thus, for example, a request may be submitted for an admission that:

- A particular person signed a contract with authority
- The amount of actual damages is a certain figure
- Attached documents are genuine

Requests for admission are a valuable discovery tool. Early in the discovery process, they may be used to limit the amount of necessary discovery. Late in the discovery process, they may sharply limit the need for trial witnesses.

At the onset of discovery, every important document as to which authentication will be necessary should be identified, as should every important fact that is apparently not in dispute. To the extent thatadmissions of authenticity and facts are procured, no further discovery will be necessary.

For a complete discussion of requests for admissions, see Ch. 19, *Requests to Admit*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 36(a).*

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CHAPTER 10 Planning and Preparation for Discovery
C. Preparing for Formal Discovery

2-10 Federal Litigation Guide § 10.45

§ 10.45 Evaluating the Conventional Discovery Approach

[1] Serving Interrogatories and Requesting Documents Before Conducting Depositions

The three most commonly used methods of discovery provided for in the Federal Rules of Civil Procedure are often employed in the following sequence:

- Written interrogatories under Rule 33;
- Requests for documents under Rule 34; and
- Depositions on oral examination under Rule 30.

In this approach, the lawyer, whether representing the plaintiff or defendant, first uses interrogatories to identify individuals with knowledge and the location and description of potentially relevant documents. Although the importance of interrogatories has arguably diminished in light of the initial mandatory disclosure requirements under Rule 26(a), interrogatories may also be used to begin exploring the contentions of the opposing party. Having used Rule 33 interrogatories to supplement the allegations of the pleadings and to lay the groundwork for further discovery, documents may then be requested from the opposing party under Rule 34.

While interrogatories may precede document requests, a better practice may be to initiate both these methods of discovery at the same time. The strongest reason for doing so is to compress what might be termed the pre-deposition phase of the action. Although interrogatory answers may prompt the filing of a second set of document requests, at least in the meantime the process of document production and review has been set in motion.

In addition, counsel should consider requesting admissions under Rule 36. The too-often-ignored use of requests for admission of facts and genuineness of documents can reduce discovery costs by eliminating issues from dispute, thereby eliminating the need to conduct discovery on those admitted facts.

Once the basic facts in the case are established through these initial forms of discovery, depositions may be planned accordingly.

[2] Evaluating the Advantages of Taking Depositions After Reviewing Documents

There are real advantages in taking depositions only after having had access to the pertinent files of the adverse party and of the deponent in particular:

- Documents prepared by the opposing party and its agents and employees serve as an invaluable check on the deposition testimony of those individuals.

- The files also provide a framework from which you can understand the involvement of a particular individual, and from which you can outline your questioning of that person.

- To the extent that documents are of independent evidentiary importance, you may need to use the deposition to authenticate them, and to learn whether the author can explain away the apparent effect of what he or she has written.

It follows that in determining the sequence in which to conduct discovery, counsel should review all available documents before taking depositions. It is worth pursuing even in a situation in which review of documents will precede depositions by a matter of hours only, as where a distant business has been sued in its local court for a limited sum, and you will make a single trip to the defendant's offices, reviewing and selecting documents one day, preparing your questioning overnight, and beginning depositions on the following morning.

[3] Considering Exceptions to the Conventional Discovery Approach

To the extent that it appears that an early settlement of the litigation may hinge on making the process unpleasant or expensive for the other side, the use of the "conventional" approach may be less suitable. In the typical lawsuit, the process becomes unpleasant for the adverse parties when depositions begin. To the extent that settlement will be helped by coming to close quarters with the opposition early in its preparation (or to the extent that the client believes that the opposition will collapse under pressure), counsel may wish to avoid the delays involved in the more systematic approach.

Another reason for varying the sequence of discovery is the conviction that an early deposition of a critical witness may so tilt the balance between the parties as to promote early and favorablesettlement without the expense of substantial additional discovery. Such a deposition will most typically be one of a nonparty witness; if the opponent is being well served by his or her own lawyer, he or she should already be aware of anything his or her own people can say that is so devastating as to radically change his or her perception of the case. Early depositions of nonparty witnesses who may be related to or friendly to the opposing party also may affect the opposing party who is seeking to protect them from the rigors of discovery or curry favor with them.

Another exception may be made for an early deposition of a nonparty witness whose knowledge of the facts bearing on some important issue will be pivotal in its outcome. In addition, some issues in the case may call for a deposition for which documents are not important, even though significant in the litigation as a whole. Typically this too will be a deposition of a nonparty witness that is expected to provide testimony that will be helpful to the case.

Finally, if you have access to a nonparty witness who is disposed to cooperate, but who may not be available to appear at trial, you may choose to take that person's deposition at once because the testimony is favorable and may be delivered without dependence on documents. Opposing counsel's opportunity to cross-examine will be less useful than it would be after further discovery by both sides. Such a deposition will preserve the testimony of the witness for trial should the witness become unavailable. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureRemediesCosts & Attorney FeesCostsDepositions & Transcripts

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 32(a)(3).*

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CHAPTER 10 Planning and Preparation for Discovery
C. Preparing for Formal Discovery

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§ 10.46 Determining The Sequence of Depositions

Because depositions are often the most useful discovery method, special consideration should be given to when depositions are conducted. The following general factors may affect the sequence of depositions in any given case:

- **Considering the Opponent's Perception.** You may decide that the early deposition of a key witness (before interrogatories have been answered and documents have been produced) is desirable because the testimony may affect your opponent's perception of the case, and you may decide to schedule that deposition to take place as soon as the preliminary stages of discovery are completed.

- **Preserving Testimony.** The possible future unavailability of a witness whose testimony you want will prompt you to take that witness' depositions as soon as you can.

- **Deposing Key Witnesses First.** In a case in which the issues are relatively uncomplicated and the witnesses are few, logic dictates that the most important witness for the opposing party be deposed first. Because of the cost of depositions, and the fact that most lawsuits are settled, you should normally learn as much as you can as quickly as you can about the basic issues in the case.

- **Deferring Depositions Until After Key Facts Are Understood.** In a complex case, where you are concerned that opposing counsel is more familiar with the underlying facts than you are, it may be advisable to defer the depositions of key actors for the adverse party until you have educated yourself to the point of being able to do an exhaustive job.

- **Deposing Experts** Typically, the depositions of the opposing party's expert witnesses will not be taken until late in the sequence. Since such experts will usually testify about opinions which they have developed based on the underlying facts of the case, you should thoroughly understand those facts before attempting to examine the witness.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil

ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureDiscoveryMethodsWritten Depositions

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CHAPTER 11 Discovery and Interim Injunctive Relief

2-11 Federal Litigation Guide 11.syn

§ 11.syn Synopsis to Chapter 11: Discovery and Interim Injunctive Relief

§ 11.01 Evaluating the Use of Expedited Discovery When Seeking Interim Injunctive Relief

§ 11.02 Considering the Types of Interim Injunctive Relief Available

§ 11.03 Seeking a Temporary Restraining Order Under Rule 65(b)
[1] Evaluating the TRO Standard
[2] Timing Generally Precludes Discovery

§ 11.04 Seeking a Preliminary Injunction Under Rule 65(a)
[1] Noticing the Opposition of Request for Relief
[2] Evaluating the Standard for Preliminary Injunctions
[3] Preparing for the Preliminary Injunction Hearing

§ 11.05 Evaluating Discovery Timing as it Relates to Injunctive Relief
[1] Using Information Obtained Through Mandatory Initial Disclosure in Preparation of Interim Relief Motion
[2] Making Initial Disclosures and Attending Discovery Conference Before Conducting Formal Discovery

§ 11.06 Stipulating to an Expedited Discovery Schedule
[1] Agreeing to Early Discovery In Advance of Preliminary Injunction Hearing
[2] Stipulating to Expedited Discovery Under Rule 29
[3] Considering the Requirement for a Discovery Conference and Discovery Schedule

§ 11.07 Evaluating the Court's Discretion to Order Expedited Discovery
[1] Seeking a Court Order When the Parties Cannot Reach Agreement to Expedite Discovery
[2] Comparing Expedited Discovery for Purposes of Interim Relief With Depositions Taken Under Rule 27 in Preparation of an Action
[3] Seeking Expedited Discovery on the Basis of Necessity or Prejudice
[4] Offering Evidence in Support of Expedited Discovery

§ 11.08 Deciding Whether to Pursue Expedited Discovery
[1] Evaluating Whether Expedited Discovery is Necessary
[2] Seeking Expedited Discovery on Behalf of Plaintiff
[3] Seeking Expedited Discovery on Behalf of Defendant

§ 11.09 Moving for Expedited Discovery
[1] Filing Motion for Expedited Discovery With Motion for Preliminary Injunction
[2] Providing the Opposing Party With Notice of Motion
[3] Specifying the Scope and Nature of Expedited Discovery Sought
[4] Anticipating Objections to the Motion for Expedited Discovery

§ 11.10 Considering the Use of Expedited Depositions
[1] Evaluating When Court Order is Required to Take Depositions
[2] Noticing the Deposition
[3] Noticing the Deposition of Corporate Party or Other Organization

§ 11.11 Determining the Scope of the Expedited Deposition
[1] Considering the Overall Claim and the Interim Relief Sought
[2] Seeking Information Regarding Irreparable Harm
[3] Seeking Information Regarding Alleged Hardship
[4] Organizing Depositions for the Preliminary Injunction Hearing

§ 11.12 Using Expedited Document Requests in Preparation of Preliminary Injunction Hearing
[1] Considering the General Time Constraints of Document Requests
[2] Considering Possible Objections to Court Order
[3] Managing Documents During Expedited Discovery

§ 11.13 Propounding Interrogatories In Preparation of Preliminary Injunction Hearing

§ 11.14 Preparing for the Preliminary Injunction Hearing
[1] Offering Evidence Obtained Through Expedited Discovery
[2] Submitting a Brief in Support of the Preliminary Injunction

§ 11.15 Emergency Motion for an Order Expediting Discovery
[1] FORM
Emergency Motion for an Order Expediting Discovery
[2] Use of Form
[3] Filing of Affidavits
[4] Critical Considerations

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CHAPTER 11 Discovery and Interim Injunctive Relief

2-11 Federal Litigation Guide Scope

Scope

SCOPE

This chapter explores discovery incident to a request for injunctive relief. A party may decide to seek interim injunctive relief if it will likely suffer irreparable harm before full resolution of the action. Expedited discovery is often a necessary and valuable aid in preliminary injunction proceedings.

The decision to engage in expedited discovery and the methods by which the process can be accelerated are examined. The chapter discusses each of the following:

- Stipulations between the parties concerning expedited discovery
- Moving for an order to expedite discovery
- Judicial standards for granting motions for expedited discovery
- Methods and scope of expedited discovery

Suggestions for handling expedited depositions and document requests in the limited time available are also offered. The chapter provides a discussion of how the information obtained through expedited discovery may be used as evidence at the preliminary injunction hearing.

The chapter concludes with a sample form of a motion seeking expedited discovery and includes comments on use of the form.

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CHAPTER 11 Discovery and Interim Injunctive Relief

2-11 Federal Litigation Guide § 11.01

§ 11.01 Evaluating the Use of Expedited Discovery When Seeking Interim Injunctive Relief

Cases in which interim injunctive relief is sought may be among the most challenging and demanding. The underlying litigation is likely to be complex in its own right, and proceedings for interim relief are usually fast-breaking and there is generally little time to prepare or oppose an application for interim relief.

Cases involving a request for interim injunctive relief often require expedited discovery. If properly used, expedited discovery may be used to obtain extremely valuable information. Because of the accelerated pace of injunction proceedings, however, discovery may not be necessary or appropriate in every instance. Therefore, it must be decided at the outset whether to seek expedited discovery and, if so, how to pursue that discovery most effectively.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

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CHAPTER 11 Discovery and Interim Injunctive Relief

2-11 Federal Litigation Guide § 11.02

§ 11.02 Considering the Types of Interim Injunctive Relief Available

Interim injunctive relief in federal court is governed by *Rule 65 of the Federal Rules of Civil Procedure*. On proper showing, interim relief may be sought in the following forms:

- Temporary restraining order (TRO) n1
- Preliminary injunction n2

This chapter focuses on the use of early discovery for the purpose of preparing for preliminary injunction hearings. For further discussion of injunctive relief, see Ch. 7, *Injunctions*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 65(b).*

(n2)Footnote 2. *Fed. R. Civ. P. 65(a).*

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CHAPTER 11 Discovery and Interim Injunctive Relief

2-11 Federal Litigation Guide § 11.03

§ 11.03 Seeking a Temporary Restraining Order Under Rule 65(b)

[1] Evaluating the TRO Standard

Under *Rule 65(b) of the Federal Rules of Civil Procedure*, a temporary restraining order (TRO) may be granted on an ex parte basis only where the applicant can show, by specific facts set forth in an affidavit or verified complaint, each of the following:

- Immediate and irreparable harm n1 will result before the adverse party may be heard in opposition n2

- Likelihood of success on the merits n3

The applicant's attorney must also certify to the court in writing the efforts, if any, made to give notice to the opponent and the reasons supporting the claim that notice should not be required. n4

[2] Timing Generally Precludes Discovery

Temporary restraining orders are generally sought at the immediate onset of litigation or in an emergency. The duration of a TRO is expressly limited and may not exceed 14 days. n5 By their very nature, the circumstances warranting the grant of a TRO generally do not afford time for discovery.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

FOOTNOTES:
(n1)Footnote 1. *See, e.g., Clemente v. Pearle Vision, Inc., 762 F. Supp. 1518 (D. Me. 1991)* .

(n2)Footnote 2. *See FDIC v. Cafritz, 762 F. Supp. 1503 (D.D.C. 1991)* (factors considered by the court); *Doe by Doe v. Shenandoah County School Bd., 737 F. Supp. 913 (W.D. Va. 1990)* .

(n3)Footnote 3. *Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 434 U.S. 1345, 98 S. Ct. 359, 54 L. Ed. 2d 439 (1977) . See also Rita, Inc. v. Flandreau Santee Sioux Tribe, 798 F. Supp. 586 (D.S.D. 1992)* ; *Trailer Marine Transport Corp. v. Ortiz, 733 F. Supp. 490 (D.P.R. 1990)* .

(n4)Footnote 4. *Fed. R. Civ. P. 65(b).*

(n5)Footnote 5. *Fed. R. Civ. P. 65(b).*

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CHAPTER 11 Discovery and Interim Injunctive Relief

2-11 Federal Litigation Guide § 11.04

§ 11.04 Seeking a Preliminary Injunction Under Rule 65(a)

[1] Noticing the Opposition of Request for Relief

Preliminary injunctions are typically sought when the threatened harm is less immediate than in the case necessitating a TRO, or after expiration of a TRO. Under *Rule 65(a) of the Federal Rules of Civil Procedure*, a preliminary injunction may be entered only after the defendant is given notice and an opportunity to oppose the application for injunctive relief. In most situations, then, preliminary injunctions involve an evidentiary hearing with respect to the request for interim relief. n1

Unlike a TRO, a preliminary injunction remains in effect until the matter is disposed of by final trial on the merits or until further order of court. n2 Accordingly, an injunction entered following a hearing and for an indefinite duration is properly classified as a preliminary injunction rather than as a TRO. n3

[2] Evaluating the Standard for Preliminary Injunctions

To obtain a preliminary injunction, in most federal courts the moving party must demonstrate each of the following:

- A likelihood of success on the merits n4
- A substantial threat of irreparable injury pending the litigation n5
- That the injury to the moving party outweighs any hardship or harm the proposed injunction may cause the opposing party or other interested parties n6 and
- That the public interest will not be disserved n7

Although the precise formulation of the standard, or balancing, conducted by the court may vary from circuit to circuit, the analytical elements considered by the courts are essentially the same. n8

While these factors structure the court's inquiry, no single factor will necessarily determine the outcome. Rather, the evaluation of a request for a preliminary injunction entails a "delicate balancing" of all these elements. n9 Where, for example, factors of irreparable harm and consideration of the public interest strongly favor the moving party, the court may issue an injunction without as strong a likelihood of ultimate success as would otherwise be required. n10 On the

other hand, where the threatened injury to the movant is limited or balanced to a substantial degree by countervailing hardship to the defendant, or by detriment to third parties or to the public interest, the court may place greater significance on the requirement that the moving party demonstrate a substantial likelihood of success on the merits. n11

[3] Preparing for the Preliminary Injunction Hearing

The importance of the preliminary injunction hearing should not be underestimated. Success or failure at the hearing often has a profound impact on a party's ability and desire to continue the litigation. Where, for example, a preliminary injunction restrains a defendant from exploiting an opportunity that might diminish or even disappear by the time of trial, that interim relief resolves the litigation for all practical purposes. Moreover, the preliminary injunction hearing will affect the final disposition even where substantial issues remain to be resolved at trial. In some cases, trial on the merits will be advanced and consolidated with the preliminary injunction hearing. n12

In all cases, evidence received at the preliminary injunction hearing will become part of the record for purposes of trial on the merits. n13 It is imperative to treat the preliminary injunction hearing as a trial. Accordingly, pre-hearing discovery on an expedited basis is a critical consideration when seeking a preliminary injunction.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsElementsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

FOOTNOTES:
(n1)Footnote 1. *Forts v. Ward, 566 F.2d 849, 851-854 (2d Cir. 1977)* ; *SEC v. Frank, 388 F.2d 486, 490-491 (2d Cir. 1968)* ; *Sims v. Greene, 161 F.2d 87 (3d Cir. 1947)* .
An evidentiary hearing is not required, however, in every case. Drywall Tapers and Painters of Greater N.Y., *Local 1974 v. Local 530 of Operative Plasterers & Cement Masons Int'l Ass'n, 954 F.2d 69 (2d Cir. 1992)* (hearing unnecessary where prior hearings, affidavits, and court's findings supporting an earlier injunction "provided an adequate basis for the court's decision."); *Jackson v. Fair, 846 F.2d 811, 819 (1st Cir. 1988)* ; *International Paper Co. v. Inhabitants of the Town of Jay, 672 F. Supp. 29, 33 (D. Me. 1987)* ; *Sugarhill Records, Ltd. v. Motown Record Corp., 570 F. Supp. 1217, 1221-1222 (S.D.N.Y. 1983)* .
The findings of fact made at the hearing on the preliminary injunction are not binding on the court at the trial on the merits. *Technical Publishing Co. v. Lebhar-Friedman, Inc., 729 F.2d 1136 (7th Cir. 1984)* .

(n2)Footnote 2. An application for a TRO is not a prerequisite for an application for a preliminary injunction. Nevertheless, where a TRO is issued, Rule 65(b) provides that "the motion for a preliminary injunction shall be set down for hearing at the earliest possible time ... ." If the party who obtained the TRO does not proceed with the application for a preliminary injunction, the TRO will be dissolved.

(n3)Footnote 3. *In re Steakhouse, Inc., 46 B.R. 227 (S.D.N.Y. 1985)* .

(n4)Footnote 4. *See, e.g., Senate of State of Cal. v. Mosbacher, 968 F.2d 974 (9th Cir. 1992)* ; *Abbott Labs. v. Mead Johnson & Co., 971 F.2d 6 (7th Cir. 1992)* (noting that the greater the likelihood of success on the merits, the lower the required showing of irreparable harm).

(n5)Footnote 5. *Kelbe Corp. v. Hall, 789 F. Supp. 241 (S.D. Ohio 1992)* (irreparable harm a "critical issue"); *Transamerica Rental Fin. Corp. v. Rental Experts, 790 F. Supp. 378 (D. Conn. 1992)* (monetary loss does not satisfy irreparable harm requirement).

(n6)Footnote 6. *See Wroncy v. Bureau of Land Management, 777 F. Supp. 1546 (D. Or. 1991)* ; *Gilleo v. City of Ladue, 774 F. Supp. 1559 (E.D. Mo.)* , *summary judgment granted, 774 F. Supp. 1564 (E.D. Mo. 1991)* , *aff'd on other grounds, 986 F.2d 1180 (8th Cir. 1993)* .

(n7)Footnote 7. *See, e.g., Abbott Laboratories v. Mead Johnson & Co., 971 F.2d 6 (7th Cir. 1992)* (public interest may be outweighed by other factors); *Tally-Ho, Inc. v. Coast Community College Dist., 889 F.2d 1018, 1022 (11th Cir. 1989)* ; *All Care Nursing Serv., Inc. v. Bethesda Memorial Hosp., Inc., 887 F.2d 1535, 1537 (11th Cir. 1989)* ; *DeBaca v. County of San Diego, 794 F. Supp. 990 (S.D. Cal. 1992)* (public interest should be taken into account when balancing the hardships).

(n8)Footnote 8. *Cabot Corp. v. King, 790 F. Supp. 153 (N.D. Ohio 1992)* ; *Cardona v. Oakland Unified School Dist., 785 F. Supp. 837 (N.D. Cal. 1992) . See, e.g., Tucker Anthony Realty Corp. v. Schlesinger, 888 F.2d 969, 972 (2d Cir. 1989)* ; *Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 800 (3d Cir. 1989)* ; *Ping v. National Educ. Ass'n, 870 F.2d 1369, 1371-1372 (7th Cir. 1989)* ; *Vision Sports, Inc. v. Melville Corp., 888 F.2d 609, 612 (9th Cir. 1989)* ; *Sea Containers Ltd. v. Stena AB, 890 F.2d 1205, 1208 (D.C. Cir. 1989)* ; *Jackson v. Fair, 846 F.2d 811, 814-815 (1st Cir. 1988)* .

(n9)Footnote 9. *Little Ceasar Enters., Inc. v. R-J-L Foods, Inc., 796 F. Supp. 1026 (E.D. Mich. 1992)* (stating that the four elements are "factors to be balanced, not prerequisites to be met").

(n10)Footnote 10. *Budish v. Gordon, 784 F. Supp. 1320 (N.D. Ohio 1992)* (noting that the strength of one or more of the other factors may overcome weakness of substantial likelihood of success factor); *Diginet, Inc. v. Western Union ATS, Inc., 958 F.2d 1388 (7th Cir. 1992)* ("The greater the harm to the plaintiff if the injunction is denied, the less of a showing that his case has merit need he make").

(n11)Footnote 11. *Direx Israel, Ltd. v. Breakthrough Medical Corp., 952 F.2d 802 (4th Cir. 1991)* ; *Fashion Victim, Ltd. v. Sunrise Turquoise, Inc., 785 F. Supp. 1302 (N.D. Ill. 1992)* (there is a sliding scale relationship between the likelihood of success on the merits and the degree to which a plaintiff must demonstrate that it is favored by a balancing of the relative harms). *See also American Hosp. Ass'n v. Harris, 625 F.2d 1328, 1331 (7th Cir. 1980)* ("the required showing of probability of success on the merits 'varies with the quality and quantum of harm that [the moving party] will suffer from the denial of an injunction' "); *Roth v. Bank of the Commonwealth, 583 F.2d 527, 537-538 (6th Cir. 1978)* ("the likelihood of success that need be shown will vary inversely with the degree of injury the plaintiff will suffer absent an injunction"); *Constructors Ass'n of W. Pa. v. Kreps, 573 F.2d 811, 815 (3d Cir. 1978)* .

(n12)Footnote 12. *See Burlington N. Ry. Co. v. Sheet Metal Workers' Int'l Ass'n, 636 F. Supp. 809 (N.D. Ill. 1986)* .

(n13)Footnote 13. *Fed. R. Civ. P. 65(a)(2)* provides in pertinent part:

> Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received on an application for a preliminary injunction which would be admissible on the trial of the merits becomes part of the record on the trial and need not be repeated on the trial.

However, a factual finding made pursuant to a preliminary injunction hearing may be rejected by the court at trial on the merits. *University of Texas v. Camenisch, 451 U.S. 390, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981)* ; *Technical Pub. Co. v. Lebhar-Friedman, Inc., 729 F.2d 1136 (7th Cir. 1984)* .

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CHAPTER 11 Discovery and Interim Injunctive Relief

2-11 Federal Litigation Guide § 11.05

§ 11.05 Evaluating Discovery Timing as it Relates to Injunctive Relief

[1] Using Information Obtained Through Mandatory Initial Disclosure in Preparation of Interim Relief Motion

Initial mandatory disclosures made under Rule 26(a)(1) will often precede the filing of a preliminary injunction motion and the information exchanged pursuant to the rule may help in the preparation of the motion.

Except in categories of cases specifically exempt, Rule 26(a) now provides for mandatory disclosure of certain core information at the onset of litigation. Under Rule 26(a), parties are required to exchange information regarding the following, before conducting formal discovery: n1

- Individuals likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment
- Documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment
- Claims and calculations of damages
- Insurance coverage

For complete discussion of initial mandatory disclosure requirements under Rule 26(a), see Ch. 9, *The Purposes of Discovery*.

[2] Making Initial Disclosures and Attending Discovery Conference Before Conducting Formal Discovery

Unless otherwise stipulated or directed by the court, initial mandatory disclosures must be made at or within 14 days after the initial discovery conference between the parties, as required under Rule 26(f). With respect to discovery in general, Rule 26(d) provides that a party may *not* seek discovery from any source until the parties have conferred as required by Rule 26(f), "except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E), or when authorized under these rules or by order or agreement of the parties." n2

Under Rule 26(f), unless otherwise ordered or exempted, the parties are to hold a discovery conference at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), 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 the circumstances of the action and states the objection in the Rule 26(f) discovery plan. n3 For additional discussion regarding the initial discovery conference, see Ch. 10, *Planning and Preparation for Discovery*.

The discovery provisions specifically relating to depositions, n4 interrogatories, n5 and document requests n6 echo this restriction.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(a)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(d).*

(n3)Footnote 3. *Fed. R. Civ. P. 26(f).*

(n4)Footnote 4. *Fed. R. Civ. P. 30(a)(2)(A)(iii)* states that leave of court is required if "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."

(n5)Footnote 5. *Fed. R. Civ. P. 33(a)* ("Without leave of court or written stipulation, interrogatories may not be served before the time specified in Rule 26(d)").

(n6)Footnote 6. *Fed. R. Civ. P. 34(b)* ("Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d)").

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CHAPTER 11 Discovery and Interim Injunctive Relief

2-11 Federal Litigation Guide § 11.06

§ 11.06 Stipulating to an Expedited Discovery Schedule

[1] Agreeing to Early Discovery In Advance of Preliminary Injunction Hearing

The Federal Rules of Civil Procedure provide time periods prescribing when discovery may be initiated and when responses must be made. n1 The rules provide, however, that the parties may enter into stipulations regarding the scheduling of discovery. Accordingly, when the parties each have an interest in expediting the discovery process, the simplest approach is to stipulate to an expedited discovery schedule.

The timing of discovery necessarily is dictated by the urgency of a particular case. Optimally, discovery should be concluded a few days before the scheduled hearing to allow adequate time to prepare for the hearing.

[2] Stipulating to Expedited Discovery Under Rule 29

Where parties are mutually interested in expedited discovery, agreement should be reached regarding the scope, method, and timing of discovery. Rule 29 permits the parties to agree to expedited discovery. Both parties can benefit from expeditious discovery regarding the matters that will be raised in the hearing for interim relief. *Fed. R. Civ. P. 29* states:

Unless otherwise directed by the court, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, on any notice, and in any manner and when so taken may be used like other depositions, and (2) modify other procedures governing or limitations placed on discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may, if they would interfere with any time set for completion of discovery, for hearing of a motion, or for trial, be made only with the approval of the court.

The purpose of this rule is to provide greater opportunity for parties themselves to agree on discovery modifications. According to the 1993 Advisory Committee Note, counsel "are encouraged to agree on less expensive and time-consuming methods to obtain information, as through voluntary exchange of documents, use of interviews in lieu of depositions, etc." n2 Note that under Rule 29, the court's approval is generally not required. However, court approval must be obtained if the court's discovery deadline would be affected by the parties' extension of the 30-day period for responding to interrogatories, document requests, or requests for admissions.

[3] Considering the Requirement for a Discovery Conference and Discovery Schedule

Regardless of whether the parties can reach an agreement on expedited discovery, parties must agree to a discovery schedule in conjunction with the Rule 26(f) conference. This conference must be held "as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)." n3 At this conference the parties must discuss the nature and basis of their claims and defenses and the possibilities of a settlement; they must also develop a proposed discovery plan, n4 which must be submitted to the court in written form within 14 days after the meeting. n5 The court's subsequent scheduling order, among other things, shall limit the time to complete discovery, n6 and it may also include modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted. n7 When the parties have agreed to expedited discovery, that agreement should be reflected in the written report required by Rule 26(f). This report will likely be incorporated into the court's scheduling order, thus minimizing the risk of non-compliance and providing a basis for prompt relief in the event of a breach.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 30(a)*, *33(a)*, *34(b)*.

(n2)Footnote 2. *Fed. R. Civ. P. 29* Advisory Committee's Note (1993).

(n3)Footnote 3. *Fed. R. Civ. P. 26(f)*.

(n4)Footnote 4. Under *Fed. R. Civ. P. 26(f)(3)*, 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).

The plan should also provide for the exchange of exhibits, witness lists, and briefs prior to the scheduled date of the hearing. Note that it is a good idea to have the names of deponents listed in a discovery order. If additional depositions become necessary, they may be arranged by agreement with counsel. If counsel refuses to produce the additional deponents, the court may order the additional depositions, if they are necessary.

(n5)Footnote 5. *Fed. R. Civ. P. 26(f)(2).*

(n6)Footnote 6. *Fed. R. Civ. P. 16(b)(3)(A).*

(n7)Footnote 7. *Fed. R. Civ. P. 16(b)(3)(B).*

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CHAPTER 11 Discovery and Interim Injunctive Relief

2-11 Federal Litigation Guide § 11.07

§ 11.07 Evaluating the Court's Discretion to Order Expedited Discovery

[1] Seeking a Court Order When the Parties Cannot Reach Agreement to Expedite Discovery

Absent a stipulation to expedite discovery, formal discovery generally may not commence until the parties have conferred and have developed a proposed discovery plan. Accordingly, it may be necessary for a party seeking interim relief to seek a court order expediting the discovery process. The 1993 Advisory Committee Note to Rule 26 states that expedited discovery will be appropriate in some cases, such as those "involving requests for a preliminary injunction or motions challenging personal jurisdiction." n1

[2] Comparing Expedited Discovery for Purposes of Interim Relief With Depositions Taken Under Rule 27 in Preparation of an Action

Although the federal rules provide for leave of court to allow expedited discovery, the rules set forth no firm standards for determining whether leave should be granted. The determination is left entirely to the court's discretion. However, *Fed. R. Civ. P. 27*, which governs the use of depositions in preparation of an action, provides some guidance for the related issue of expedited discovery. Rule 27 is normally used when testimony of a witness would be lost if not recorded immediately, such as when the witness is quite old or infirm or in danger of dying due to a serious illness or injury. n2

Under Rule 27, the applicant need not show an independent ground for federal jurisdiction to conduct a deposition before an action is filed, although the applicant is required to demonstrate that federal jurisdiction will exist for the action for which the testimony is sought. n3 Similarly, expedited discovery in the context of seeking immediate injunctive relief may precede a detailed examination of the basis for subject matter jurisdiction. A district court will order pre-filing discovery if satisfied that the perpetuation of testimony may prevent a failure or delay of justice. n4 Likewise, a similar standard may be applicable in expedited discovery for the purpose of seeking interim relief.

[3] Seeking Expedited Discovery on the Basis of Necessity or Prejudice

There are few reported opinions dealing with expedited discovery. Those courts that have written on the subject have uniformly required some showing of necessity or prejudice that would occur if the requested discovery were not allowed. The degree of necessity or prejudice that will be required depends, of course, on the facts and circumstances of each case.

Courts have suggested that leave of court for expedited discovery may be appropriate in the following circumstances:

- Where a party seeks testimony from an aged or infirm witness who might not be available otherwise n5
- Where there is a significant risk of loss of evidence n6 (such as where the witness is about to leave the country), n7
- Where the party seeking a preliminary injunction lacks the information necessary to succeed on the motion n8
- Where the moving party suffers or is in danger of suffering irreparable harm and needs to discover information to avoid further injury n9
- Where discovery is necessary to locate a missing defendant n10

In seeking expedited discovery in support of a motion for a preliminary injunction,counsel must do more than assert that discovery will allow for better preparation for the injunction hearing. n11

[4] Offering Evidence in Support of Expedited Discovery

One court has held that a plaintiff's request to expedite taking a deposition of the defendant must be supported by each of the following: n12

- A showing of irreparable injury
- Some probability of success on the merits
- Some connection between the expedited discovery and the avoidance of the irreparable injury
- Some evidence that the injury that will result without expedited discovery looms greater than the injury that the defendant will suffer if the expedited relief is granted

Although not every court will require such a stringent showing for expedited discovery, these factors provide a useful guide to follow in preparing a motion for expedited discovery.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26* Advisory Committe's Note (1993).

(n2)Footnote 2. *See, e.g., Petition of Rosario, 109 F.R.D. 368 (D. Mass. 1986)* ; *In re Sims, 389 F.2d 148 (5th Cir. 1967)* .

(n3)Footnote 3. *General Motors Corp. v. Gunn, 752 F. Supp. 729 (N.D. Miss. 1990)* ; *Dressler Indus., Inc. v. United States, 596 F.2d 1231 (5th Cir. 1979)* .

(n4)Footnote 4. *Fed. R. Civ. P. 27(a)(3).*

(n5)Footnote 5. *Babolia v. Local 456, Teamsters & Chauffeurs Union, 11 F.R.D. 423, 424 (S.D.N.Y. 1951) . Cf. In re Agent Orange Product Liability Litigation, 96 F.R.D. 587 (E.D.N.Y. 1983) .*

(n6)Footnote 6. *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference, 14 F.R.D. 189, 190 (E.D. Pa. 1953) . Cf. K.J. Schwartzbaum, Inc. v. Evans, Inc., 279 F. Supp. 422, 424 (S.D.N.Y. 1968) .*

(n7)Footnote 7. *Fed. R. Civ. P. 30(a)(2)(A)(iii).*

(n8)Footnote 8. *Notaro V. Koch, 95 F.R.D. 403, 405 n.3 (S.D.N.Y. 1982) .*

(n9)Footnote 9. *Fimab-Finanziaria Maglifico v. Helio Import/Export, Inc., 601 F. Supp. 1, 3 (S.D. Fla. 1983)* ; *Fimab-Finanziaria Maglifico v. Kitchen, 548 F. Supp. 248, 250 (S.D. Fla. 1982) .*

(n10)Footnote 10. *Allendale Mut. Ins., Co. v. Bull Data Systems, 32 F.3d 1175 (7th Cir. 1994)* (discovery order not appealable as an interlocutory injunction, as there was no showing of irreparable harm or infringement of any substantive right); *United States v. Agnew, 80 F.R.D. 506 (S.D. Fla. 1978) .*

(n11)Footnote 11. *See Pearce v. Southeast Banking Corp., 97 F.R.D 536-537 (S.D. Fla. 1983)* ; *Gibson v. Bagas Restaurants, Inc., 87 F.R.D. 60, 61 (W.D. Mo. 1980) .*

(n12)Footnote 12. *Notaro v. Koch, 95 F.R.D. 403, 405 (S.D.N.Y. 1982) .*

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CHAPTER 11 Discovery and Interim Injunctive Relief

2-11 Federal Litigation Guide § 11.08

§ 11.08 Deciding Whether to Pursue Expedited Discovery

[1] Evaluating Whether Expedited Discovery is Necessary

The liberal purposes of discovery under the Federal Rules of Civil Procedure are widely recognized. Therefore, when time permits, it is not surprising that most trial lawyers are inclined to ask for discovery before appearing at a preliminary injunction hearing.

Even if the requirements for obtaining expedited discovery can be met, however, consideration should be given to whether expedited discovery is necessary or desirable. If the party seeking interim relief has the evidence necessary to satisfy the standards for issuance of a preliminary injunction or if the issues in dispute are essentially legal rather than factual, expedited discovery may not be advantageous. In fact, early discovery may only delay the proceedings or suggest to the court that there are substantial factual issues in dispute, thus diminishing the strength of the request for injunctive relief.

In most cases, however, some discovery is advisable. In cases where issues of intent and credibility are involved or where the underlying facts are subject to sudden change, expedited discovery can be particularly helpful.

[2] Seeking Expedited Discovery on Behalf of Plaintiff

Plaintiff's counsel may seek an order for expedited discovery to provide early momentum in the case and to establish admissions and other evidence necessary to sustain the burden of proof at the preliminary injunction hearing. Expedited discovery may also make it possible to flush out the defenses on which the defendant will rely to oppose the request for injunctive relief.

By facilitating and perhaps simplifying preparation for a motion seeking interim relief, expedited discovery can enhance the likelihood of success at the preliminary injunction hearing. In addition, effective discovery at the outset of the case may establish a stronger posture for potential settlement negotiations.

[3] Seeking Expedited Discovery on Behalf of Defendant

Defense counsel may seek early discovery for similar reasons as plaintiff's counsel. Obviously, to oppose a motion for preliminary injunction it will help to learn as much as possible about the facts and theory of the moving party's case before the evidentiary hearing.

By effectively using discovery, the defendant may also slow down a plaintiff's momentum and obtain valuable evidence, including admissions favorable to the defense. Discovery may also be used to identify areas of common interest and other information that may advance settlement negotiations.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

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CHAPTER 11 Discovery and Interim Injunctive Relief

2-11 Federal Litigation Guide § 11.09

§ 11.09 Moving for Expedited Discovery

[1] Filing Motion for Expedited Discovery With Motion for Preliminary Injunction

As a general rule, depositions and document requests are the most useful methods of expedited discovery. Interrogatories are not often practical, but, in rare cases, may be helpful to elicit basic facts.

The memorandum of law in support of an expedited discovery motion should state as clearly and forcefully as possible both the basis on which discovery is appropriate and the facts that support the motion. With few exceptions, the motion for expedited discovery should be filed with the proposed motion for preliminary injunction and the request for a hearing date.

[2] Providing the Opposing Party With Notice of Motion

Courts are reluctant to grant a motion for expedited discovery without notice to the opposing party except in the most compelling circumstances. One source suggests that a party who seeks expedited discovery on an ex parte basis, such as in a case involving a threat of alteration or destruction of evidence, should treat the matter as a request for a temporary restraining order and should simultaneously present affidavits or other evidence in support of the motion for expedited discovery and an application for a temporary restraining order prohibiting alteration or destruction of specific documents. n1

[3] Specifying the Scope and Nature of Expedited Discovery Sought

The motion for expedited discovery should identify as precisely as possible the scope and nature of the discovery sought. If the moving party seeks leave to take depositions, the motion should identify the witnesses to be deposed and should include a proposed deposition schedule. If seeking an order to expedite requests for production of documents, the actual requests should be attached to the motion as an exhibit.

Overall, expedited discovery requests should be precise, well focused, and drawn as narrowly as possible.

[4] Anticipating Objections to the Motion for Expedited Discovery

Anticipate the opponent's objections and persuade the court that the request for expedited discovery is reasonable under the circumstances. For example, if it is likely that the opponent will claim that the information sought is highly

confidential, is a trade secret, or is otherwise commercially sensitive, propose to submit a confidentiality order that may be quickly approved and implemented. Similarly, if it is anticipated that the opposition may raise a claim of privilege, prepare a motion to compel on the basis of the information already known, so that the matter may be resolved promptly.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

FOOTNOTES:
(n1)Footnote 1. *See* DeAnda, Hogan & Healey, *Injunctive Relief and Expedited Discovery in Federal Court (Part II), 1987 Tex. B.J. 1250, 1251.*

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CHAPTER 11 Discovery and Interim Injunctive Relief

2-11 Federal Litigation Guide § 11.10

§ 11.10 Considering the Use of Expedited Depositions

[1] Evaluating When Court Order is Required to Take Depositions

Absent an agreement between the parties, in all circumstances other than where the witness is expected to leave the country, expedited depositions require leave of court. Rule 30(a) states that without a written stipulation, a court order is required to depose a prisoner or to take a deposition in the following circumstances: n1

- The deposition would result in more than ten depositions under Rule 30 or 31 by the plaintiffs, or by the defendants, or by third-party defendants
- The proposed deponent has already been deposed
- A party seeks to take a deposition before the time specified in Rule 26(d), *i.e.,* before the parties haveconferred regarding discovery as required by Rule 26(f). An exception exists if the notice of deposition "contains a certification, with supporting facts, that the person to be examined is expected to leave the United States and be unavailable for examination in this country unless deposed before that time."

Under Rule 30(a)(2), leave of court is to be granted for the purpose of allowing depositions to the extent consistent with the principles enunciated in Rule 26(b)(2). n2

[2] Noticing the Deposition

Under Rule 30(b)(1), parties are required to give reasonable notice in writing of any deposition to be taken to all parties in the action. The notice must include the following: n3

- The time and place of the deposition
- The name and address of the person to be examined

Prior agreement between counsel on the time and place of the deposition is extremely important in expedited discovery because the delay caused by objections to time and place impair the immediate objectives in the litigation. Only if agreement on those details is not possible should counsel send a peremptory notice of deposition.

If the deponent is to bring any documents or other tangible items to the deposition, specify with particularity in the notice of deposition the items the deponent must produce. The request must be made in compliance with Rule 34. n4 Any ambiguity will result in delay if the witness does not bring the desired documents to the deposition.

[3] Noticing the Deposition of Corporate Party or Other Organization

When seeking a preliminary injunction in an action involving a corporate party or a partnership, association, or governmental agency, consider the provisions of *Fed. R. Civ. P. 30(b)(6)*. Under that rule, the party taking discovery must describe "with reasonable particularity the matters on which examination is requested." The organization named as the deponent must then designate one or more officers, directors, or other persons to testify on its behalf.

Where more than one individual is necessary to comply with the deposition request, the organization is required to designate individuals who will testify on each of the matters listed. Use of Rule 30(b)(6) in this setting is advantageous. Time is not wasted deposing people who lack sufficient knowledge of the pertinent subject matter. More importantly, because the organization is bound by the testimony of the person it designates, this procedure can yield valuable admissions that may be introduced against the organization at the injunction hearing.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 30(a).*

(n2)Footnote 2. That rule states:
The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act on its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).

(n3)Footnote 3. *Fed. R. Civ. P. 26(e)(1).*

(n4)Footnote 4. *Fed. R. Civ. P. 30(b)(5).*

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CHAPTER 11 Discovery and Interim Injunctive Relief

2-11 Federal Litigation Guide § 11.11

§ 11.11 Determining the Scope of the Expedited Deposition

[1] Considering the Overall Claim and the Interim Relief Sought

The basic outline for deposition inquiries depends on the elements of the cause of action and the attendant defenses. With discovery incident to obtaining a preliminary injunction, it is critical to elicit evidence of irreparable harm and the balance of hardships.

[2] Seeking Information Regarding Irreparable Harm

Irreparable harm is harm that cannot be redressed by a legal or equitable remedy following a trial. n1 In most cases the issue is whether monetary damages will adequately compensate the plaintiff for the defendant's alleged wrongdoing. Factors relevant to that issue include the following: n2

- The nature of the plaintiff's losses and the difficulty of quantifying those losses with reasonable certainty
- Whether an award of damages will be too late to save the interests plaintiff is trying to protect
- The likelihood of collecting an award of damages

Loss of profits or income that ultimately can be recouped at trial usually does not constitute irreparable harm. n3

Accordingly, the deposition should be used to develop evidence supporting the adequacy or inadequacy of money damages. Testimony obtained at deposition may be critical to show whether or not money damages will be sufficient to compensate the plaintiff and whether the defendant's conduct should be enjoined.

[3] Seeking Information Regarding Alleged Hardship

Just as the defendant should probe plaintiff's claim of irreparable harm, so the plaintiff should inquire as to any alleged hardship that the defendant would suffer because of the injunction.

If any potential hardship to the defendant from an erroneously issued injunction can be cured by a favorable final judgment or can be fully compensated by the bond required under Rule 65(c), then there is no real harm to the

defendant, nor is there any reason to deny interim relief that is otherwise warranted. n4

[4] Organizing Depositions for the Preliminary Injunction Hearing

In conducting expedited discovery, and particularly during depositions before the preliminary injunction hearing, counsel should create a discovery record that may be used easily at the evidentiary hearing. For example, when multiple depositions are taken in preparation of the hearing, it may help to identify and number exhibits sequentially continuing from one deposition to the next, instead of initiating a new numbering system for each deposition. It will save time and avoid confusion if the parties can use the exhibit numbers from the depositions for the preliminary injunction hearing. Similarly, when referring to the discovery record at the hearing on the preliminary injunction, there will be less likelihood of confusion from the use of differing sets of exhibit numbers.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

FOOTNOTES:
(n1)Footnote 1. *Campbell Soup Co. v. ConAgra, Inc., 977 F.2d 86 (3d Cir. 1992)* ; *Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 801 (3d Cir. 1989)* ; *Puerto Rico Conserv. Found. v. Larson, 797 F. Supp. 1066 (D.P.R. 1992) . See generally* Laycock, *The Death Of The Irreparable Injury Rule, 103 Harv. L. Rev. 688 (1990).*

(n2)Footnote 2. *Nnadi v. Richter, 976 F.2d 682 (11th Cir. 1992)* ; *Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 801 (3d Cir. 1989)* ; *Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 386 (7th Cir. 1984)* ; *Little Caesar Enters., Inc. v. R-J-L Foods, Inc., 796 F. Supp. 1026 (E.D. Mich. 1992) .*

(n3)Footnote 3. *Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 801-803 (3d Cir. 1989)* ; *Franks GMC Truck Center, Inc. v. GMC, 847 F.2d 100 (3d Cir. 1988)* ; *Owens-Illinois, Inc. v. Levin, 792 F. Supp. 429 (D. Md. 1992)* (litigation costs insufficient to show irreparable harm); *Transamerica Rental Fin. Corp. v. Rental Experts, 790 F. Supp. 378 (D. Conn. 1992)* (monetary losses not irreparable harm).

(n4)Footnote 4. *National Kidney Patients Assoc. v. Sullivan, 958 F.2d 1127 (D.C. Cir. 1992) , cert. denied, 113 S. Ct. 966, 122 L. Ed. 2d 122 (1993)* ; *Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 387 (7th Cir. 1984)* ; *qad., Inc. v. ALN Assoc., Inc., 781 F. Supp. 561 (N.D. Ill. 1992) .*

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CHAPTER 11 Discovery and Interim Injunctive Relief

2-11 Federal Litigation Guide § 11.12

§ 11.12 Using Expedited Document Requests in Preparation of Preliminary Injunction Hearing

[1] Considering the General Time Constraints of Document Requests

Rule 34(b) provides that "[w]ithout leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d)." The rule also provides that all parties must respond to a request to produce documents or things within 30 days of service of the request; a shorter or longer time may be ordered by the court or agreed to by the parties. n1 Accordingly, if the opponent does not agree to expedite the schedule to request and produce documents, counsel may petition the court to shorten the time period set by the rule.

[2] Considering Possible Objections to Court Order

Counsel should anticipate objections that might delay production of essential documents. For example, if it likely that the other party will claim that many of the sought-after documents are highly confidential and sensitive, draft a form of agreed protective order. If the opposing party is likely to raise a claim of privilege regarding certain essential documents, submit a memorandum of law on the anticipated objection in support of the motion for expedited discovery. In the alternative, propose placing the documents under seal or requiring their production *in camera*.

[3] Managing Documents During Expedited Discovery

The obvious goal of expedited document discovery is to have the documents available for examination as soon as possible. Nevertheless, the need for careful document control procedures is even more acute here than in routine document discovery. The heightened time pressure of expedited production and inspection increases the risk of error for all parties. In the typically frenetic rush to complete discovery in time for the injunction hearing, privileged documents may be producedinadvertently, critical documents may be overlooked and not marked for copying, and any number of other errors may occur.

In screening the client's documents, and in requesting and inspecting production by the opponent, counsel must strike a balance between selectivity and thoroughness. Make special efforts to identify key documents for purposes of the preliminary injunction hearing. All documents potentially useful in the case, however, should be copied even though their significance might relate to issues that will only arise later in the litigation.

Obviously, as with all document production, no document should be produced until it is first reviewed by counsel for privilege and substance. An agreement between the parties providing that inadvertent disclosure of privileged material

will not constitute a waiver of the privilege may be helpful in moving discovery along.

For additional discussion regarding document management, see Ch. 15, *Document Management*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 34(b).*

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CHAPTER 11 Discovery and Interim Injunctive Relief

2-11 Federal Litigation Guide § 11.13

§ 11.13 Propounding Interrogatories In Preparation of Preliminary Injunction Hearing

A court order is required to propound interrogatories at any time before the parties have conferred regarding discovery as required under Rule 26(d). n1 Usually, it is not practical to use interrogatories in preliminary injunction discovery. Generally, the information desired may be obtained more quickly through document requests and depositions.

In certain cases, however, a few, narrowly drawn interrogatories designed to identify key witnesses may be useful and generally will not impose substantial burdens. Those questions must be extremely narrow so as to permit opposing counsel to respond in a few days. It is likely, however, that the trial judge will not grant an order allowing for the early use of interrogatories (including a response on shortened time) unless he or she first reviews the proposed interrogatories and finds that they are not burdensome and that the information cannot be obtained more easily by another type of discovery. In most situations, counsel should limit preliminary injunction discovery to document requests, depositions, and perhaps a request to inspect the premises in appropriate cases.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 33(a).*

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CHAPTER 11 Discovery and Interim Injunctive Relief

2-11 Federal Litigation Guide § 11.14

§ 11.14 Preparing for the Preliminary Injunction Hearing

[1] Offering Evidence Obtained Through Expedited Discovery

It is critical to make effective use of evidence obtained through expedited discovery at the preliminary injunction hearing. Evidence received at the hearing becomes part of the record and the results of the hearing can determine the course of the litigation.

While the most salient and dramatic points of a case are probably best presented through live testimony, the presentation of the case should be streamlined at the preliminary injunction hearing. Testimony and documents obtained through expedited discovery may be effectively offered for the following purposes:

- To establish a foundation and background evidence
- To corroborate and underscore evidence presented through the key witnesses
- To help establish factors in support of, or in opposition to, the preliminary injunction, such as the degree of harm at issue

[2] Submitting a Brief in Support of the Preliminary Injunction

It is absolutely necessary to submit a supporting brief in advance of the preliminary injunction hearing. The brief should set forth the relevant law and analogous cases supporting the elements of the requested injunctive relief and the relevant factors to be balanced under the circumstances. In addition, the brief should address anticipated objections of privilege or work-product.

The brief should contain references to the testimony and documents obtained through expedited discovery, which will be offered as evidence of record. Such a brief will provide the court with a roadmap of arguments to be made at the hearing, which includes reference to supporting evidence that will be offered. For additional discussion regarding preliminary injunction hearings, see Ch. 7, *Injunctions*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

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CHAPTER 11 Discovery and Interim Injunctive Relief

2-11 Federal Litigation Guide § 11.15

§ 11.15 Emergency Motion for an Order Expediting Discovery

[1] FORM

Emergency Motion for an Order Expediting Discovery

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

NOTICE IS HEREBY GIVEN that on [*date*] at [*time of day (specify a.m. or p.m.)*], or as soon thereafter as counsel may be heard, [*party designation and name of moving party*] will move this Court, at the United States Courthouse, located at [*address of court*], Courtroom [*courtroom number*], for an order pursuant to *Federal Rules of Civil Procedure, Rule 26(d)*; [*Federal Rules of Civil Procedure, Rule 30(a)(2)* (depositions); and *Federal Rules of Civil Procedure 34(b)* (document requests]:

> (a) granting that discovery may be expedited in this action in preparation of a preliminary injunction hearing, pursuant to the following discovery schedule: [*set forth proposed schedule of expedited discovery including individuals to be deposed and time and place of depositions (making reference to attached deposition notices); as well as all proposed document requests (making reference to attached requests)*]; and
>
> (b) granting [*moving party*] such other relief as may be appropriate.

This motion is based on this Notice of Motion, the accompanying Declaration (*or affidavit or other affidavit substitute (substantiating the need for the early discovery under the circumstances)*) of [*name of signatory*] dated (*or sworn to*) [*date*], the accompanying Memorandum of Law dated [*date*], and on all of the pleadings and papers on file in this action.

[*Date*]

[*Signature of attorney*

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for [*name and designation of party*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules; see § 2.03*]

TO: [*Name of opposing counsel*], Attorney for [*name of party*]

[2] Use of Form

This is a form of notice of motion pursuant to *Fed. R. Civ. P. 26(d)* seeking an order to expedite discovery for the purpose of preparing for a preliminary injunction hearing. The party seeking relief should provide the court with a proposed discovery schedule to aid in the preparation of the preliminary injunction hearing and attach proposed deposition notices and document requests.

[3] Filing of Affidavits

Parties seeking and opposing orders for expedited discovery should submit affidavits or appropriate affidavit substitutes supporting their position for the necessity or lack of necessity of expedited discovery.

[4] Critical Considerations

Parties must consult the federal rules, local rules, and individual judge's rules regarding the following issues:

- Formatting requirements
- Bluebacks and other covers
- Page limits
- Caption
- Signature block
- Specifying the rule or statute on which motion is based
- Date and time of hearing
- Oral argument on the motion
- Expedited hearing
- Supporting papers
- Serving motion papers
- Filing motion papers
- Courtesy copies
- Opposing papers

- Reply papers

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedureCounselGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

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CHAPTER 12 Interrogatories

2-12 Federal Litigation Guide 12.syn

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§ 12.02 Persons Subject to Interrogatories
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[3] Interrogatories Must Be Directed to Named Party
[4] Party Challenging Jurisdiction Is Subject to Interrogatories Until Case Dismissed
[5] Next Friend Not Personally Subject to Interrogatories, But May Answer Interrogatories on Behalf of Infant or Incompetent Party
[6] Interrogatories to Named or Unnamed Class Members in Class Actions
[6.--1] Named Class Members Are Parties Subject to Interrogatories
[6.--2] Court Has Discretion to Permit Service of Interrogatories on Unnamed Class Members
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§ 12.20 Interrogatories Must Adequately Inform Responding Party of Information Requested

§ 12.21 Using Instructions and Definitions

§ 12.22 Interrogatories May Cross-Reference Other Discovery Demands

§ 12.23 Using Form and Pattern Interrogatories

§ 12.24 Number of Interrogatories That May Be Propounded Is Limited
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[3.--2] Courts Evaluate Requests for Additional Interrogatories on Case-by-Case Basis
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[4] Parties May Stipulate to Additional Interrogatories
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§ 12.25 Local Rules May Require Numbering Sets in Sequence

§ 12.26 Signature Required

§ 12.27 Timing and Service of Interrogatories
[1] Restrictions on Timing of Discovery
[2] Effect of Discovery Cutoff Dates or Trial Setting
[3] Serving All Parties

§ 12.28 CHECKLIST: Drafting Interrogatories

§§ 12.29 through 12.39 [Reserved]

§ 12.40 Deadline for Responding
[1] 30-Day Deadline Generally Applies
[2] Agreement or Order May Alter Deadline for Responding
[3] Timing of Response for Removed Actions
[4] Failure to Make Timely Response Sanctionable

§ 12.41 Duty to Respond, and Form of Answer
[1] Responding Party Must Answer or Object
[2] Interrogatories Must Be Answered Separately, Fully, and in Writing
[3] Responding Party Has Duty to Furnish All Information Available to It
[3.--1] Duty Encompasses Information Controlled by Party, But Does Not Include Duty to Search Out New Information
[3.--2] For Organizational Entity, Duty Encompasses Information Possessed by Officers, Employees, and Subsidiaries
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§ 12.42 Incorporation By Reference of Other Discovery Disfavored

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[7] Providing Supplemental Answers

§§ 12.47 through 12.59 [Reserved]

§ 12.60 Objections Must Be Served With Answers

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§ 12.63 Untimely Objections Are Waived Unless "Good Cause" is Shown

§ 12.64 Replacing Insufficient, But Timely Objection

§ 12.65 Serving Appropriate Parties

§ 12.66 Claiming Privilege

§ 12.67 Protecting Trade Secrets

§ 12.68 Signing Objections

§ 12.69 CHECKLISTS: Preparing Objections to Interrogatories
[1] CHECKLIST: Grounds for Objection
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§§ 12.70 through 12.99 [Reserved]

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CHAPTER 12 Interrogatories

2-12 Federal Litigation Guide Scope

Scope

SCOPE

This chapter covers procedures for propounding and responding to interrogatories, and includes coverage of the following topics:

- **Types of inquiries that may be made through interrogatories**
- **Advantages and disadvantages of using interrogatories as opposed to other discovery devices**
- **Drafting and timing considerations**
- **Distinctions between identification and contention interrogatories**
- **Service requirements**
- **Requirements for answering interrogatories on behalf of a business entity**
- **The use and effect of interrogatory answers**
- **Objecting to interrogatories**
- **Consequences of a party's failure to respond to interrogatories**

The chapter contains sample interrogatories, as well as sample answers to interrogatories. A checklist of possible objections is also included.

For expanded coverage of interrogatories, ***see*** MOORE'S Federal Practice, Ch. 33, ***Interrogatories to Parties*** (Matthew Bender 3d ed.).

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CHAPTER 12 Interrogatories
A. Understanding Use of Interrogatories

2-12 Federal Litigation Guide § 12.01

§ 12.01 Interrogatories May Inquire Into Claims or Defenses

Interrogatories are written questions served by one party on any other party that may relate to any matter, not privileged, that is relevant to the claim or defense of any party. n1

Interrogatories are typically used to determine the basis for a claim or defense, and to delineate the facts and issues in dispute. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryMethodsInterrogatoriesUseCivil ProcedureDiscoveryPrivileged MattersGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(b)(1), 33.*

(n2)Footnote 2. *See Fonseca v. Regan, 734 F.2d 944, 948 (2d Cir. 1984) , cert. denied, 469 U.S. 882 (1984) .*

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CHAPTER 12 Interrogatories
A. Understanding Use of Interrogatories

2-12 Federal Litigation Guide § 12.02

§ 12.02 Persons Subject to Interrogatories

[1] Parties Only

A party may serve interrogatories on any other party to the action. n1 Parties subject to interrogatories include any person or entity named in the summons and complaint, including public and private corporations, partnerships, associations, or governmental agencies. n2

Interrogatories may *not* be served on a nonparty, although an exception is occasionally carved out for absent class members. n3 The closest alternative discovery device, the deposition upon written questions, may be used to inquire of nonparties. n4

[2] Non-Adverse Parties

A party may serve any other party with interrogatories, even if their interests are not adverse. n5 Accordingly, a plaintiff may require that a third-party defendant respond to the plaintiff's interrogatories, even though the plaintiff is not suing the third-party defendant. n6

[3] Interrogatories Must Be Directed to Named Party

Interrogatories may not be directed to a particular person within a corporation or business entity if that person is not a party. Rather, the interrogatories must be directed to the named corporation or business entity itself. n7

If the propounding party seeks to learn the names of individuals with personal knowledge of each response, it can ask for them as part of the interrogatories directed to the corporation or business entity. n8

[4] Party Challenging Jurisdiction Is Subject to Interrogatories Until Case Dismissed

A party challenging the jurisdiction of the court is still a party for purposes of answering interrogatories, until the jurisdictional issues are determined. n9 The party's failure to respond to interrogatories pertaining to jurisdiction may even result in sanctions, including a determination that personal jurisdiction exists. n10

[5] Next Friend Not Personally Subject to Interrogatories, But May Answer Interrogatories on Behalf of

Infant or Incompetent Party

The next friend of an infant or incompetent party is not a party. n11 Consequently, a next friend cannot be compelled to answer interrogatories in his or her personal capacity. n12 However, a next friend may answer interrogatories on behalf of an infant or incompetent party when the party is incapable of answering. n13

[6] Interrogatories to Named or Unnamed Class Members in Class Actions

[6.--1] Named Class Members Are Parties Subject to Interrogatories

In a class action, named members of the class are parties, and are thus subject to interrogatories. Plaintiffs whose actions are consolidated as a class action are all properly subject to discovery as parties without any showing of special circumstances. n14 For discussion of class actions, see Ch. 42, *Class Actions*.

[6.--2] Court Has Discretion to Permit Service of Interrogatories on Unnamed Class Members

Unnamed class members are not technically parties within the meaning of the rules governing class action suits. n15 However, unnamed class members may not be immune from discovery. The court has discretion to permit submission of interrogatories to unnamed but identifiable members of a class, pursuant to its authority to manage class action suits. n16 Reasonable discovery by means of interrogatories should be permitted from unnamed class members when the special circumstances of the case justify it. n17

The propounding party has the burden of demonstrating the merits of the requested discovery. n18

If the court allows discovery from unnamed class members, they must receive adequate notice so that they are fully informed of the discovery order and the potential consequences of noncompliance with the order. n19

[6.--3] Several Factors Determine if Unnamed Class Members Should Be Subject to Interrogatories

In determining whether unnamed class members should be subject to interrogatories, courts generally consider the following factors: n20

- The relevance of the discovery to issues which are common to the class
- Whether the interrogatories are tendered in good faith and not be unduly burdensome
- Whether the information sought is unavailable from the *named* class representatives

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedureClass ActionsClass MembersNamed MembersCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesUse

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 33(a).*

(n2)Footnote 2. *See Fed. R. Civ. P. 33(a)*; *Chilcutt v. United States, 4 F.3d 1313, 1320-1324 (5th Cir. 1993) .*

(n3)Footnote 3. *See Transamerican Ref. Corp. v. Dravo Corp., 139 F.R.D. 619, 621 (S.D. Tex. 1991)* (citing

Moore's Federal Practice).

(n4)Footnote 4. *See Fed. R. Civ. P. 31.*

(n5)Footnote 5. *Fed. R. Civ. P. 33(a)* advisory committee's note (1970).

(n6)Footnote 6. *Andrulonis v. United States, 96 F.R.D. 43, 45 (N.D.N.Y. 1982)* (citing Moore's).

(n7)Footnote 7. *Holland v. Minneapolis-Honeywell Regulator Co., 28 F.R.D. 595, 595 (D.D.C. 1961)* .

(n8)Footnote 8. *Shepherd v. American Broad. Cos., Inc., 62 F.3d 1469, 1482 (D.C. Cir. 1995)* .

(n9)Footnote 9. *See, e.g., Provident Nat'l Bank v. California Fed. Sav. & Loan Ass'n, 819 F.2d 434, 438 (3d Cir. 1987)* .

(n10)Footnote 10. *See Insurance Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 706, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982)* .

(n11)Footnote 11. A "next friend" is defined as "[o]ne acting for benefit of infant, or other person unable to look after his or her own interests or manage his or her own lawsuit." BLACK'S LAW DICTIONARY 1043 (6th ed. 1990).

(n12)Footnote 12. *See Ju Shu Cheung v. Dulles, 16 F.R.D. 550, 552 (D. Mass. 1954)* .

(n13)Footnote 13. *Hall v. Hague, 34 F.R.D. 449, 450 (D. Md. 1964)* .

(n14)Footnote 14. *In re Folding Carton Antitrust Litig., 83 F.R.D. 260, 264 (N.D. Ill. 1979)* .

(n15)Footnote 15. *See Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 333-336, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980)* (citing **Moore's Federal Practice**); *see also Fed. R. Civ. P. 23* (class actions).

(n16)Footnote 16. *Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1004 (7th Cir. 1971)* , *cert. denied, 405 U.S. 921 (1972)* ; *see Fed. R. Civ. P. 23(d)* (court may make appropriate procedural orders in conducting class action suits).

(n17)Footnote 17. *Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1004 (7th Cir. 1971)* , *cert. denied, 405 U.S. 921 (1972)* ; *but see Cox v. American Cast Iron Pipe Co., 784 F.2d 1546, 1556 (11th Cir. 1986)* (individual discovery from unnamed class members may be available only in rare situations at later stage of sex discrimination proceeding).

(n18)Footnote 18. *Clark v. Universal Builders, Inc., 501 F.2d 324, 340 (7th Cir. 1974)* , *cert. denied, 419 U.S. 1070 (1974)* .

(n19)Footnote 19. *Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1006 (7th Cir. 1971)* , *cert. denied, 405 U.S. 921 (1972)* .

(n20)Footnote 20. *Dellums v. Powell, 566 F.2d 167, 187 (D.C. Cir. 1977)* , *cert. denied, 438 U.S. 916 (1978)* ; *Transamerican Ref. Corp. v. Dravo Corp, 139 F.R.D. 619, 621 (S.D. Tex. 1991)* .

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CHAPTER 12 Interrogatories
A. Understanding Use of Interrogatories

2-12 Federal Litigation Guide § 12.03

§ 12.03 Effect of Interrogatory Responses

Responses to interrogatories may be used as evidence to the extent permitted by the Federal Rules of Evidence, including:

- As admissions of a party opponent n1
- For impeachment purposes n2
- In support of motions, such as motions for summary judgment, or motions to dismiss for lack of jurisdiction n3

If an interrogatory seeks the factual basis of a party's allegations, the response does not usually limit the responding party's proof at trial, except in unusual circumstances where reliance on the response has caused serious prejudice. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesUseEvidenceHearsayExemptionsGeneral OverviewEvidenceTestimonyCredibilityImpeachmentGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Evid. 801(d)(2)*; *Bell v. A-Leet Leasing Corp., 863 F.2d 257, 259 (2d Cir. 1988)* .

(n2)Footnote 2. *See Fed. R. Evid. 613(a)*; *see also Meadows v. Palmer, 33 F.R.D. 136, 137 (D. Md. 1963)* .

(n3)Footnote 3. *See, e.g., King v. E.F. Hutton & Co., 117 F.R.D. 2, 6 (D.D.C. 1987)* ; *see also Duff v. Lobdell-Emery Mfg. Co., 926 F. Supp. 799, 804 (N.D. Ind. 1996)* .

(n4)Footnote 4. *See Fed. R. Civ. P. 33(b)* advisory committee's note (1970); *see also Ruiz v. Hamburg-American Line, 478 F.2d 29, 33 (9th Cir. 1973)* ; *Zielinski v. Philadelphia Piers, Inc., 139 F. Supp. 408, 413-414 (E.D. Pa. 1956)* .

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CHAPTER 12 Interrogatories
A. Understanding Use of Interrogatories

2-12 Federal Litigation Guide § 12.04

§ 12.04 Understanding Permissible Scope of Interrogatories

[1] Interrogatories Must Seek Information Relevant to Claims or Defenses

Interrogatories may inquire about matters relating to any claim or defense including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of any discoverable matter. n1

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 trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. n2

[2] Seeking Facts Within Knowledge of Interrogating Party Permissible

Interrogatories may inquire into information within the knowledge of the interrogating party. n3 This type of inquiry narrows and defines the issues and gives the propounding party insight into how the responding party views the facts. n4

[3] Seeking Legal Conclusions Impermissible

Interrogatories may not pose questions when the answers would involve a statement of pure law. n5 Interrogatories involving pure law are those that call for "legal issues unrelated to the facts of the case." n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesUseCivil ProcedureDiscoveryRelevance

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(b)(1)*; *see Tri-Star Pictures, Inc. v. Unger, 171 F.R.D. 94, 101 (S.D.N.Y. 1997)* .

(n2)Footnote 2. *Fed. R. Civ. P. 26(b)(1)*.

(n3)Footnote 3. *See SEC v. Cymaticolor Corp., 106 F.R.D. 545, 549 (S.D.N.Y. 1985)* .

(n4)Footnote 4. *Weiner v. Bache Halsey Stuart, Inc. 76 F.R.D. 624, 625 (S.D. Fla. 1977)* .

(n5)Footnote 5. *Fed. R. Civ. P. 33(c)* advisory committee's note (1970).

(n6)Footnote 6. *Fed. R. Civ. P. 33(b)* advisory committee's note (1970); *see also Everett v. USAir Group, Inc., 165 F.R.D. 1, 3 (D.D.C. 1995)* .

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CHAPTER 12 Interrogatories
A. Understanding Use of Interrogatories

2-12 Federal Litigation Guide § 12.05

§ 12.05 Two Types of Interrogatories

There are two general types of interrogatories: n1

- Identification interrogatories seeking factual information n2
- Contention interrogatories inquiring into an opinion or contention that relates to fact or the application of law to fact and helps a party determine the other party's theory of the case n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryMethodsInterrogatoriesUse

FOOTNOTES:
(n1)Footnote 1. *See generally, Johnston & Johnston, Contention Interrogatories in Federal Court, 148 F.R.D. 441 (1993)* .

(n2)Footnote 2. *See § 12.06*.

(n3)Footnote 3. *See § 12.07*.

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CHAPTER 12 Interrogatories
A. Understanding Use of Interrogatories

2-12 Federal Litigation Guide § 12.06

§ 12.06 Using Identification Interrogatories

Identification interrogatories are used principally at the beginning of a case to: n1

- Identify and locate witnesses for deposition, and to develop deposition questions
- Obtain factual detail pertaining to an opposing party's allegations and defenses
- Identify the opponent's expert witnesses
- Identify relevant documents
- Identify conversations or other communications concerning specified subjects
- Understand the opposing party's computation of damages
- Request information about the opposing party's corporate or business structure, and the nature of its business

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesUse

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(b)(1).*

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CHAPTER 12 Interrogatories
A. Understanding Use of Interrogatories

2-12 Federal Litigation Guide § 12.07

§ 12.07 Using Contention Interrogatories

Contention interrogatories, as distinguished from identification interrogatories, n1 are generally used later in the case to inquire into an opinion or contention that relates to fact or the application of law to fact, including asking a party to: n2

- State what it contends, or whether it is making a certain contention
- Explain the facts underlying its contention
- Assert a position or explain that position with regard to how the law applies to the facts
- Articulate the legal or theoretical basis for a particular contention

While a contention interrogatory is not objectionable merely because its answer involves the responding party's opinion or contention, the court may order that answers to contention interrogatories be deferred until after other designated discovery has been completed, or until a pretrial conference or other later time. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesUse

FOOTNOTES:
(n1)Footnote 1. Discussed in *§ 12.06*.

(n2)Footnote 2. *Fed. R. Civ. P. 33(c)*; *McCarthy v. Paine Webber Group, Inc., 168 F.R.D. 448, 450 (D. Conn. 1996)* ; *Everett v. USAir Group, Inc., 165 F.R.D. 1, 3 (D.D.C. 1995)* ; *Diversified Prods. Corp. v. Sports Ctr. Co., 42 F.R.D. 3, 4 (D. Md. 1967)* .

(n3)Footnote 3. *Fed. R. Civ. P. 33(a)(2)*; *United States ex rel. Tyson v. Amerigroup Ill., Inc., 230 F.R.D. 538, 541 n.5 (N.D. Ill. 2005)* (citing **Moore's**).

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CHAPTER 12 Interrogatories
A. Understanding Use of Interrogatories

2-12 Federal Litigation Guide § 12.08

§ 12.08 Advantages of Interrogatories

Advantages of interrogatories compared to other discovery devices include the following: n1

- Interrogatories are more convenient and less expensive than depositions
- Interrogatories may help the propounding party prepare for trial by informing that party of the opponent's evidence
- Interrogatories require a party to provide all information available to that party, compared to deposition questions which only require the deponent to provide information as to which he or she has knowledge

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesUse

FOOTNOTES:
(n1)Footnote 1. *See Compagnie Francaise d'Assurance v. Phillips Petroleum Co., 105 F.R.D. 16, 43 (S.D.N.Y. 1984)* .

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CHAPTER 12 Interrogatories
A. Understanding Use of Interrogatories

2-12 Federal Litigation Guide § 12.09

§ 12.09 Disadvantages of Interrogatories

Disadvantages of interrogatories include the following:

- Interrogatories are limited to parties; depositions may be used to obtain discovery from nonparties n1

- Interrogatory responses typically are prepared by the opposing attorney (after consulting with the client); deposition questions, on the other hand, must be responded to personally by the deponent

- Interrogatories do not allow for follow up questions; depositions permit the attorney to ask follow-up questions based on the answers to previous questions, or to repeat questions if the party being deposed attempts to evade answering or gives incomplete answers n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesUseCivil ProcedureDiscoveryMethodsOral Depositions

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 30(a)(1), 31(a)(1), 33(a).*

(n2)Footnote 2. *See Fed. R. Civ. P. 30.*

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CHAPTER 12 Interrogatories
A. Understanding Use of Interrogatories

2-12 Federal Litigation Guide § 12.10

§ 12.10 Impact of Rule 26 Mandatory Disclosure

[1] Nature of Rule 26 Requirements

Except in certain categories of cases, parties must voluntarily sharecertain specified types of information at specific pretrial stages *without* a discovery request: n1

- **Preliminary disclosures:** During the early pretrial period, parties are required to exchange information regarding (1) individuals likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment; (2) documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses,unless solely for impeachment; (3) claims and calculations of damages; and (4) insurance coverage

- **Expert witness disclosures:** Information about and from retained expert witnesses is to be shared later into the pretrial period

- **Pretrial disclosures:** Information about evidence that the parties contemplate using at trial is to be shared near the end of the pretrial period

Many of the types of information subject to mandatory disclosure, such as names of witnesses, had often been obtained through interrogatories prior to enactment of the mandatory disclosure rules. Now, use of interrogatories must be modified in accordance with the disclosure rules. Interrogatories concerning a matter subject to mandatory disclosure should not be promulgated prematurely, before the mandatory disclosure is due.

For complete discussion regarding initial mandatory disclosure under Rule 26, see Ch. 9, *The Purposes of Discovery*.

[2] Use of Interrogatories to Discover Further Information

Parties may use traditional discovery methods, including interrogatories, to obtain further information regarding any matters subject to mandatory disclosure. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesUse

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 26(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(a)* advisory committee's note (1993).

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CHAPTER 12 Interrogatories
A. Understanding Use of Interrogatories

2-12 Federal Litigation Guide §§ 12.11 through 12.19

[Reserved]

§§ 12.11[Reserved]

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CHAPTER 12 Interrogatories
B. Preparing Interrogatories

2-12 Federal Litigation Guide § 12.20

§ 12.20 Interrogatories Must Adequately Inform Responding Party of Information Requested

The Federal Rules of Civil Procedure do not prescribe any specific form for interrogatories. n1 However, as one district court has pointed out, properly drafted interrogatories must be definite, clear, concise, and adequately advise the interrogated party what information is being sought. n2 To further this goal, the court may suggest the manner in which questions may be asked, although it may not substitute its own questions. n3

Before drafting interrogatories, the attorney should consult local rules. Most federal jurisdictions have rules that govern the format of interrogatories. For example, some federal district courts require that interrogatories be numbered consecutively and provide space for the responding party's answer immediately following each interrogatory.

Apart from requirements imposed by local rule, the propounding party has considerable leeway in drafting its questions. However, it is to the propounding party's advantage to craft its interrogatories as precisely as possible, because an artlessly drafted question is unlikely to produce any useful information, and may be subject to objection on the grounds that it is overly broad and ambiguous.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryMethodsInterrogatoriesUse

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 33.*

(n2)Footnote 2. *Babcock Swine, Inc. v. Shelbco, Inc., 126 F.R.D. 43, 45 (S.D. Ohio 1989) .*

(n3)Footnote 3. *Sempier v. Johnson & Higgins, 45 F.3d 724, 736 (3d Cir. 1995) .*

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CHAPTER 12 Interrogatories
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2-12 Federal Litigation Guide § 12.21

§ 12.21 Using Instructions and Definitions

Interrogatories may include standard instructions for answering questions or raising objections. n1

Interrogatories may also include definitions of certain terms, especially when the dictionary definition may be insufficient. For example, a definition of "corporation" that includes parents, subsidiaries, affiliates, officers, employees, and agents is probably justified. Definitions should be kept as simple as possible. n2

Lengthy definitions should be avoided because they may increase the likelihood of objection based on undue burden.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryMethodsInterrogatoriesUse

FOOTNOTES:
(n1)Footnote 1. *See, e.g., Harlem River Consumers Coop., Inc. v. Associated Grocers, 64 F.R.D. 459, 465 (S.D.N.Y. 1974)* .

(n2)Footnote 2. *See Diversified Prods. Corp. v. Sports Ctr. Co., 42 F.R.D. 3, 4 (D. Md. 1967)* .

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CHAPTER 12 Interrogatories
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2-12 Federal Litigation Guide § 12.22

§ 12.22 Interrogatories May Cross-Reference Other Discovery Demands

Interrogatories may refer to other discovery requests served with the interrogatories.For example, requests for admission may be served at the same time as interrogatories, and an interrogatory may ask the responding party, if it denies a particular admission, to explain the reason for the denial. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryMethodsInterrogatoriesUse

FOOTNOTES:
(n1)Footnote 1. *See, e.g., United States v. National Steel Corp., 26 F.R.D. 603, 606 (S.D. Tex. 1960)* .

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CHAPTER 12 Interrogatories
B. Preparing Interrogatories

2-12 Federal Litigation Guide § 12.23

§ 12.23 Using Form and Pattern Interrogatories

Although form or pattern interrogatories are often derided, n1 they are not prohibited. They may provide an inexpensive and efficient means of covering all aspects of a case. One district court held that when pattern interrogatories are used, they must be used selectively as appropriate to the case, prepared by a lawyer or under a lawyer's direction, and numbered consecutively. n2

The district courts have disparate attitudes towards pattern or "canned" interrogatories. Some criticize them harshly, while some merely attempt to discourage their use by means of local rules mandating that they be geared to the particular case, or by forbidding service of photocopied interrogatories or those that are not numbered consecutively. By contrast, some federal districts have developed court-approved uniform interrogatories for use in special circumstances.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryMethodsInterrogatoriesUse

FOOTNOTES:
(n1)Footnote 1. *See, e.g., Robbins v. Camden City Bd. of Educ., 105 F.R.D. 49, 57 (D.N.J. 1985)* .

(n2)Footnote 2. *SCM Societa Commerciale S.P.A. v. Industrial & Commercial Research Corp., 72 F.R.D. 110, 113 n.5 (N.D. Tex. 1976)* .

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CHAPTER 12 Interrogatories
B. Preparing Interrogatories

2-12 Federal Litigation Guide § 12.24

§ 12.24 Number of Interrogatories That May Be Propounded Is Limited

[1] Original Actions: 25 Interrogatories on Each Party, Absent Court Order, Stipulation, or Local Rule

Absent court order or written stipulation of the parties, a party may serve on each other party up to 25 written interrogatories, including discrete subparts. n1 A court may alter the 25-interrogatory limit by local rule, and many district courts have done so. n2

In multi-party cases, a party may serve 25 interrogatories on each party involved. For example, if parties A and B are suing parties X, Y, and Z, then A can serve 25 interrogatories on X, 25 on Y, and 25 on Z, and B can do the same. n2.1 The interrogatories are subject, however, to objections based on duplication. n3

[2] Numerical Limits Include Discrete Subparts

The limit on the number of interrogatories a party may serve includes "all discrete subparts." n4 In other words, a party cannot avoid the numerical limits by asking questions about distinct subjects, but numbering the questions as subparts. A party is permitted, however, to ask a general question about a particular kind of communication and then request the time, place, persons present, and contents of each communication without violating the subparts rule. n5

Once a subpart of an interrogatory introduces a line of inquiry that is separate and distinct from the inquiry made by the portion of the interrogatory that precedes it, the subpart must be considered a separate interrogatory, no matter how it is designated. n5.1 If the first question can be answered fully and completely without answering the second question, then the second question is totally independent of the first and not "factually subsumed within and necessarily related to the primary question." n5.2

[3] Exceeding Numerical Limits

[3.--1] Courts Permit Additional Interrogatories if Benefits Outweigh Burden

To serve more than 25 interrogatories, a party must secure a court order or a written stipulation from the responding party. n6 The court's permission may be granted at a scheduling conference or other pretrial conference, n7 but otherwise, the propounding party may need to file a formal motion.

A court may permit a party to serve additional interrogatories to the extent such additional discovery is consistent with Rule 26(b)(2). n8 The point of requiring leave of court to serve additional interrogatories is not to curtail necessary discovery, but to permit the court to examine the situation before the parties propound excessive interrogatories. n9

[3.--2] Courts Evaluate Requests for Additional Interrogatories on Case-by-Case Basis

In evaluating requests to serve additional interrogatories, the courts do not apply any specific criteria, other than balancing the benefits of more discovery against the burden on the responding party. n10 Rather than applying a rote test, the courts examine each request in the context of the case. The propounding party bears the burden ofpersuading the court that the additional interrogatories are necessary under the circumstances of the case. Some jurisdictions have local rules requiring an express showing of "good cause" before they will grant a request to serve more interrogatories.

The court may find numerous interrogatories appropriate in a case involving complex, technical litigation or significant amounts of money. n11

[3.--3] Court May Grant Leave to Serve Additional Interrogatories in Scheduling Order or at Pretrial Conference

The court may grant leave to serve additional interrogatories when it issues a scheduling order before trial, n12 and courts often address discovery matters at that time. The court may also grant permission to pose additional interrogatories at a pretrial conference. n13

[4] Parties May Stipulate to Additional Interrogatories

Rather than seeking permission from the court to serve more than 25 interrogatories, the parties may stipulate to a greater number. n14 The Federal Rules of Civil Procedure require that stipulations be written. n15 Some local rules provide that a stipulation may be informal, but must be confirmed in writing. Obtaining a stipulation in writing is always the safer practice.

Some jurisdictions do not permit the parties to stipulate to more than 25 interrogatories, and require the parties always to obtain leave of court.

[5] Removed Actions: Propounding Party Must Specify Interrogatories to Be Answered, Seek Additional Interrogatories, or Resubmit

When a case with more than 25 outstanding interrogatories is removed from state court to federal court, the propounding party has three choices. n16 It may: n17

- Move the court to permit the additional interrogatories
- Specify which 25 of the interrogatories are to be answered
- Resubmit 25 interrogatories

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryMethodsInterrogatoriesUseCivil ProcedureDiscoveryMethodsStipulations

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 33(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(b)(2).*

(n3)Footnote 2.1. *See St. Paul Fire & Marine Ins. Co. v. Birch, Stewart, Kolasch & Birch, LLP, 217 F.R.D. 288, 289 (D. Mass. 2003)* (local rule, which limited interrogatories to 25 per side, was superseded by Rule 33, which permits each party to serve 25 interrogatories on any other party).

(n4)Footnote 3. *See Fed. R. Civ. P. 26(b)(2).*

(n5)Footnote 4. *Fed. R. Civ. P. 33(a)*; *see also Nyfield v. Virgin Islands Tel. Corp., 200 F.R.D. 246, 247-248 (D.V.I. 2001)* .

(n6)Footnote 5. *Fed. R. Civ. P. 33(a)* advisory committee's note (1993).

(n7)Footnote 5.1. *See Willingham v. Ashcroft, 226 F.R.D. 57, 59 (D.D.C. 2005)* .

(n8)Footnote 5.2. *See Estate of Manship v. United States, 232 F.R.D. 552, 555 (M.D. La. 2005)* .

(n9)Footnote 6. *Fed. R. Civ. P. 33(a).*

(n10)Footnote 7. *See* [3.--3], *below.*

(n11)Footnote 8. *Fed. R. Civ. P. 33(a)*; *see Fed. R. Civ. P. 26(b)(2).*

(n12)Footnote 9. *Fed. R. Civ. P. 33(a)* advisory committee's note (1993).

(n13)Footnote 10. *See* [3.--2], *above.*

(n14)Footnote 11. *See, e.g., Roesberg v. Johns-Manville Corp., 85 F.R.D. 292, 297 (E.D. Pa. 1980)* (defendant asbestos manufacturer required to answer numerous, detailed interrogatories listing products it had manufactured since 1925 and nature of advertising, education efforts, and government findings).

(n15)Footnote 12. *Fed. R. Civ. P. 33(a)* advisory committee's note (1993); *see Fed. R. Civ. P. 16(b).*

(n16)Footnote 13. *See Fed. R. Civ. P. 26(a)* advisory committee's note (1983).

(n17)Footnote 14. *Fed. R. Civ. P. 33(a).*

(n18)Footnote 15. *Fed. R. Civ. P. 29*, *33(a).*

(n19)Footnote 16. *See Fed. R. Civ. P. 81(c)* (federal civil procedure rules govern removed cases).

(n20)Footnote 17. *Fed. R. Civ. P. 33(a)* advisory committee's note (1993).

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CHAPTER 12 Interrogatories
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2-12 Federal Litigation Guide § 12.25

§ 12.25 Local Rules May Require Numbering Sets in Sequence

When more than one set of interrogatories is served, local rules may require that the questions in each set be numbered sequentially. That is, if the last question in the first set is number 15, the first question in the second set should be numbered 16.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryMethodsInterrogatoriesUse

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2-12 Federal Litigation Guide § 12.26

§ 12.26 Signature Required

Interrogatories must be signed by the propounding party's attorney and include the attorney;s address, e-mail address, and telephone number. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryMethodsInterrogatoriesUse

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(g)(1).*

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CHAPTER 12 Interrogatories
B. Preparing Interrogatories

2-12 Federal Litigation Guide § 12.27

§ 12.27 Timing and Service of Interrogatories

[1] Restrictions on Timing of Discovery

Interrogatories may be served as determined by:

- Time limits prescribed by federal statutes and local district court rules n1
- Agreement of the parties n2
- Order of the court n3

In most districts, the parties' Rule 26(f) preliminary discovery conference is the event triggering the opening of formal discovery, including service of interrogatories. Rule 26(d) disallows parties from seeking discovery before the conference, absent a court order or stipulation between the parties. n4 n5

The various discovery devices may be used in any sequence, so that interrogatories may be served before or after other discovery devices have been used, unless the court orders otherwise for the convenience of the parties and witnesses and in the interests of justice. n6

The fact that a party is conducting a deposition or is in the midst of any other type of discovery does not operate to delay any other party's discovery. n7

[2] Effect of Discovery Cutoff Dates or Trial Setting

When the court has established a discovery deadline, a party must serve interrogatories in sufficient time to permit the responding party the 30-day response time allowed under Rule 33. n8

Accordingly, a party must serve its interrogatories at least 30 days before the discovery deadline. n9

[3] Serving All Parties

When interrogatories are served on one party, copies must be served on all other parties, even though responses are only

sought from one party. n10

Parties to an action include any person or entity named in the summons and complaint, including public and private corporations, partnerships, associations, or governmental agencies. n11

Interrogatories may not be directed to a particular person within a corporation or business entity if that person is not a party. They must be directed to the corporation or business itself. n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesUse

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 26, 33.*

(n2)Footnote 2. *Fed. R. Civ. P. 26(f), 33(a).*

(n3)Footnote 3. *Fed. R. Civ. P. 33(a).*

(n4)Footnote 4. *See Fed. R. Civ. P. 26(d)(1), (f).*

(n5)Footnote 5. [Reserved]

(n6)Footnote 6. *Fed. R. Civ. P. 26(d)(2)(A).*

(n7)Footnote 7. *Fed. R. Civ. P. 26(d)(2)(B).*

(n8)Footnote 8. *Northern Ind. Pub. Serv. Co. v. Colorado Westmoreland, Inc., 112 F.R.D. 423, 424 (N.D. Ind. 1986) , aff'd mem., 845 F.2d 1024 (7th Cir. 1988) .*

(n9)Footnote 9. *See, e.g., Thomas v. Pacificorp, 324 F.3d 1176, 1179 (10th Cir. 2003) .*

(n10)Footnote 10. *Fed. R. Civ. P. 5(a); Diversified Prods. Corp. v. Sports Ctr. Co., 42 F.R.D. 3, 4 (D. Md. 1967) .*

(n11)Footnote 11. *See Fed. R. Civ. P. 33(a); see also United States v. Kordel, 397 U.S. 1, 8, 90 S. Ct. 763, 25 L. Ed. 2d 1 (1970) .*

(n12)Footnote 12. *Holland v. Minneapolis-Honeywell Regulator Co., 28 F.R.D. 595, 595 (D.D.C. 1961) .*

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2-12 Federal Litigation Guide § 12.28

§ 12.28 CHECKLIST: Drafting Interrogatories

The following checklist may be used as a general guideline for drafting interrogatories. Each interrogatory should be drafted with the following issues in mind:

☐ **Useful information.** Is interrogatory precisely calculated to elicit information useful to proponent?

☐ **Clarity.** Is language of each interrogatory unambiguous? If not:

- ☐ **Subparts.** Consider dividing the ambiguous inquiry into various subparts.
- ☐ **Definitions.** Consider including separate list of definitions at beginning of set of interrogatories.
- ☐ **Instructions.** Consider including separate instructions at beginning of set of interrogatories.

☐ **Breadth.** Is the interrogatory appropriate in its scope?

☐ **Burden on responding party.** Is the interrogatory defensible as to its scope and degree of burden in the context of a motion to compel under Rule 37?

☐ **Determining permissible number of interrogatories.**

☐ **Limitations.** Note any limitations on number of interrogatories that may be served under local rules.

☐ **Expanding number.** If necessary, consider expanding permissible number of interrogatories by stipulation or motion.

☐ **Review possible grounds for objection.** Review list of possible grounds for objection and frame interrogatories, as appropriate, to minimize potential for objection.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryMethodsInterrogatoriesUseCivil ProcedureDiscoveryMethodsStipulations

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2-12 Federal Litigation Guide §§ 12.29 through 12.39

[Reserved]

§§ 12.29[Reserved]

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CHAPTER 12 Interrogatories
C. Responding to Interrogatories

2-12 Federal Litigation Guide § 12.40

§ 12.40 Deadline for Responding

[1] 30-Day Deadline Generally Applies

A party on whom interrogatories have been served must serve the answers and objections, if any, on the propounding party within 30 days after service of the interrogatories. n1 An additional three days are allowed if interrogatories are served by any of the following methods: n2

- Service by mail
- Service to the clerk of the court based on no known address
- Electronic or other means of delivery consented to in writing

Service of interrogatory responses ordinarily is complete when the responses are hand-delivered to the party or the attorney for the represented party, or when they are placed in the mail. n3

Service by electronic means is complete on transmission, and service by other consented means under Rule 5(b)(2)(D) is complete when the person making service delivers the copy to the agency designated to make delivery. n3.1 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. n3.2

[2] Agreement or Order May Alter Deadline for Responding

The deadline for responding to interrogatories may be shortened or lengthened by: n4

- Written agreement of the parties n5
- Court order

An agreement extending the time for responses requires court approval if it would interfere with any dates set by the court for completion of discovery, for the hearing of a motion, or for trial. n6

A motion for an order extending the time for responses should show good cause for the extension. n7 Parties frequently move the court to delay answers to contention interrogatories, and the court has the discretion to order that such interrogatories need not be answered until other, designated discovery has been completed. n8

[3] Timing of Response for Removed Actions

In cases removed to federal court that have outstanding interrogatories at the time of removal, the time limit for responses to interrogatories is measured from the date of the parties' meeting under the federal meet and confer requirements. n9 Those requirements provide that the parties must meet as soon as practical, or at least 14 days before the scheduling conference, to attempt to settle the case and to resolve discovery issues. n10 Response time is measured from this meeting in removed cases because, under the federal rules, a party may not seek discovery from any source until the parties have met and conferred. n11

[4] Failure to Make Timely Response Sanctionable

Sanctions may be levied against a party who fails to comply with discovery deadlines. n12

For complete discussion of sanctions, see Ch. 8A, *Sanctions*, and Ch. 22, *Enforcement of Discovery*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryMethodsInterrogatoriesUseCivil ProcedureDiscoveryMethodsStipulations

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 33(b)(2)*; *see Turick v. Yamaha Motor Corp., 121 F.R.D. 32, 36 (S.D.N.Y. 1988)* .

(n2)Footnote 2. *Fed. R. Civ. P. 6(d)*.

(n3)Footnote 3. *Fed. R. Civ. P. 5(b)*.

(n4)Footnote 3.1. *Fed. R. Civ. P. 5(b)(2)(D)*.

(n5)Footnote 3.2. *Fed. R. Civ. P. 5(b)(3)*.

(n6)Footnote 4. *Fed. R. Civ. P. 33(b)(2)*.

(n7)Footnote 5. *See also Tropix, Inc. v. Lyon & Lyon, 169 F.R.D. 3, 3-4 (D. Mass. 1996)* .

(n8)Footnote 6. *Fed. R. Civ. P. 29*.

(n9)Footnote 7. *Fed. R. Civ. P. 33(b)(3)*.

(n10)Footnote 8. *Fed. R. Civ. P. 33(a)(2)*; *see also § 22.07* (using contention interrogatories).

(n11)Footnote 9. *Fed. R. Civ. P. 33(a)* advisory committee's note (1993); *see Fed. R. Civ. P. 26(d)*.

(n12)Footnote 10. *Fed. R. Civ. P. 26(f)*.

(n13)Footnote 11. *Fed. R. Civ. P. 26(d)(1)*.

(n14)Footnote 12. *Fed. R. Civ. P. 16(f), 37(d)*; *Geiserman v. MacDonald, 893 F.2d 787, 791-792 (5th Cir. 1990)* .

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CHAPTER 12 Interrogatories
C. Responding to Interrogatories

2-12 Federal Litigation Guide § 12.41

§ 12.41 Duty to Respond, and Form of Answer

[1] Responding Party Must Answer or Object

A party on whom interrogatories have been served has the following options: n1

- Answer the interrogatories in writing and under oath
- Object to some or all of the interrogatories
- Move for a protective order

Under certain specified conditions, an answer may take the form of production of business records. n2

A party does not have the option of simply ignoring one or more interrogatories. n3 Indeed, the court may impose sanctions for failing to answer or object to an interrogatory. n4

A party answering interrogatories generally must provide all responsive information that is available to that party. n5 Any part of a multi-part interrogatory that is not objectionable must be answered. n6

If the responding party is unable to give a complete answer by the time responses are due, but has access to the information, it is proper for the party to give whatever incomplete information it can, and move to extend the time for serving a complete answer, with an estimate of how much time will be needed. n7

To the extent that a party is unable to respond because it lacks knowledge, it may admit this circumstance in response to an interrogatory and should set forth and explain efforts made to obtain the information. n8

[2] Interrogatories Must Be Answered Separately, Fully, and in Writing

The responding party must answer each interrogatory separately, fully, and in writing. n9 Local rules often require that in the document containing the responses, the responding party first set forth each question before answering or objecting to it.

Answers to interrogatories must be responsive, complete, and not evasive. n10

Answers to interrogatories must include sufficient detail to respond fully to the question. n11 A sufficient answer generally entails a conscientious and good faith effort to comprehend the question and to answer it explicitly.

One district court has held that if the responding party is unable to give a complete answer by the time responses are due, but has access to the information, the proper course of action is for the party to give whatever incomplete information it can, and move to extend the time for serving a complete answer, with an estimate of how much time will be needed. n12 This should be distinguished from the situation in which a party is unable to respond because it lacks the information and cannot obtain it.

[3] Responding Party Has Duty to Furnish All Information Available to It

[3.--1] Duty Encompasses Information Controlled by Party, But Does Not Include Duty to Search Out New Information

A party answering interrogatories has an affirmative duty to furnish any and all information available to the party. This duty to provide all information available encompasses the responsibility to provide information controlled by a party. n13

[3.--2] For Organizational Entity, Duty Encompasses Information Possessed by Officers, Employees, and Subsidiaries

In the case of a organizational party to an action, the duty to provide all information available refers to any information imputed to the organizational party itself, including information possessed by officers, employees, and former employees of the party, as well as the party's counsel. For example, an officer or agent answering interrogatories for a corporation must secure all information within the personal knowledge of anyone in the corporation. n14 Also, a corporate officer or agent must furnish, in response to interrogatories, whatever information is available to the corporation through reasonable efforts. n15

This rule has been found subject to an exception for personal information acquired by a corporate officer outside the scope of official duties. A corporate party has no duty to ferret out such information in response to interrogatories. n16

When a subsidiary is under the control of its parent corporation, one district court has held that the answers to interrogatories directed to the parent corporation normally must include information in the possession of the subsidiary. In that case, the party must either obtain the information from its subsidiary or state specifically why it is unable to do so. n17

In the case of an unincorporated association, which has no identity separate from that of its members, interrogatories may seek information unknown to the answering agent individually, but presumptively known to the organization's members. In such acase, courts have required the answering agent to solicit the information from its members or other sources under its control. n18

[3.--3] Lack of Knowledge May Excuse Answering Interrogatory

If a party is unable to reply because it lacks knowledge or information, the party may not simply refuse to answer. Rather, the party must respond in a way that lets the requesting party know the information is unavailable. n19 At least one court has ruled that the response to the interrogatory must state under oath the party's inability to provide the information sought, disclose any information the party does have, and set forth specific efforts made to obtain the rest of the information. n20

If the party acquires more information later, it has a duty to supplement its responses. n21

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryMethodsInterrogatoriesUse

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 33(b)(3).*

(n2)Footnote 2. *See § 12.44.*

(n3)Footnote 3. *See, e.g., Hansel v. Shell Oil Corp., 169 F.R.D. 303, 305 (E.D. Pa. 1996)* ; *Gray v. Faulkner, 148 F.R.D. 220, 224 (N.D. Ind. 1992)* .

(n4)Footnote 4. *Harlem River Consumers Coop., Inc. v. Associated Grocers, 64 F.R.D. 459, 465 (S.D.N.Y. 1974)* ; *see Fed. R. Civ. P. 37.*

(n5)Footnote 5. *Fed. R. Civ. P. 26(b), 33(b)(3)*; *see, e.g., Trane Co. v. Klutznick, 87 F.R.D. 473, 476 (W.D. Wis. 1980)* .

(n6)Footnote 6. *See Fed. R. Civ. P. 33(b)* advisory committee's note (1993).

(n7)Footnote 7. *See, e.g., Harlem River Consumers Coop., Inc. v. Associated Grocers, 64 F.R.D. 459, 463 (S.D.N.Y. 1974)* ; *see also Fed. R. Civ. P. 33(b)* advisory committee's note (1993).

(n8)Footnote 8. *Hansel v. Shell Oil Corp., 169 F.R.D. 303, 305 (E.D. Pa. 1996)* .

(n9)Footnote 9. *Fed. R. Civ. P. 33(b)(1)*; *see Sempier v. Johnson & Higgins, 45 F.3d 724, 734 (3d Cir. 1995)* .

(n10)Footnote 10. *See Profile Gear Corp. v. Foundry Allied Indus., 937 F.2d 351, 353-354 (7th Cir. 1991)* ; *Truck Treads, Inc. v. Armstrong Rubber Co., 818 F.2d 427, 429 (5th Cir. 1987)* ; *Ruiz v. Hamburg-American Line, 478 F.2d 29, 33 (9th Cir. 1973)* .

(n11)Footnote 11. *Chubb Integrated Sys., Ltd. v. Nat'l Bank of Wash., 103 F.R.D. 52, 60-61 (D.D.C. 1984)* .

(n12)Footnote 12. *Association of Am. Physicians & Surgeons, Inc. v. Clinton, 837 F. Supp. 454, 457 (D.D.C. 1993)* ; *see Fed. R. Civ. P. 33(b)* advisory committee's note (1993) (need for additional time to answer some questions or some aspects of questions does not justify delay in responding to questions that can be answered within prescribed time.

(n13)Footnote 13. *Trane Co. v. Klutznick, 87 F.R.D. 473, 476 (W.D. Wis. 1980)* (citing **Moore's Federal Practice**).

(n14)Footnote 14. *General Dynamics Corp. v. Selb Mfg., 481 F.2d 1204, 1210 (8th Cir. 1973)* .

(n15)Footnote 15. *Martin v. Brown, 151 F.R.D. 580, 593-594 (W.D. Pa. 1993)* .

(n16)Footnote 16. *Gerling Int'l Ins. Co. v. Commissioner of Internal Revenue, 839 F.2d 131, 137-139 (3d Cir. 1988)* .

(n17)Footnote 17. *Transcontinental Fertilizer Co. v. Samsung Co., 108 F.R.D. 650, 652-653 (E.D. Pa. 1985)* .

(n18)Footnote 18. *International Ass'n of Machinists, Dist. 169 v. Amana Refrigeration Inc., 90 F.R.D. 1, 2 (E.D. Tenn. 1978)* .

(n19)Footnote 19. *Cullins v. Heckler, 108 F.R.D. 172, 177 (S.D.N.Y. 1985)* .

(n20)Footnote 20. *Hansel v. Shell Oil Corp., 169 F.R.D. 303, 305-306 (E.D. Pa. 1996)* (citing **Moore's Federal Practice**).

(n21)Footnote 21. *See § 12.45*.

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CHAPTER 12 Interrogatories
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2-12 Federal Litigation Guide § 12.42

§ 12.42 Incorporation By Reference of Other Discovery Disfavored

Responses to interrogatories should not rely upon a mere reference to pleadings, depositions, other documents, or other interrogatories, at least when a reference to another interrogatory makes it difficult to ascertain if the original interrogatory has been answered completely without a detailed comparison of answers. n1

However, the incorporation of outside material by reference in responses to interrogatories is evaluated on a case-by-case basis, and the judge has discretion to find such a response acceptable. n2 Thus, it may be acceptable for a response to an interrogatory to refer to answers of other interrogatories or other discovery in order to avoid unnecessary repetition, but the referral must be clear and precise. n3

However, referring to allegations of the complaint in answers to interrogatories is improper because the answers must be in a form acceptable for use at trial. n3.1 Answers to interrogatories are admissible in support of a motion for summary judgment, as affirmative evidence at trial, for cross-examination, and for impeachment, while assertions in a complaint are not admissible because they are merely the statements of the drafting attorney. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryMethodsInterrogatoriesUseCivil ProcedureDiscoveryUndue Burdens

FOOTNOTES:
(n1)Footnote 1. *Atlanta Shipping Corp., Inc. v. Cross & Brown Co., 113 F.R.D. 108, 111 (S.D.N.Y. 1986)* .

(n2)Footnote 2. *Guruwaya v. Montgomery Ward, Inc., 119 F.R.D. 36, 40 (N.D. Cal. 1988)* .

(n3)Footnote 3. *See, e.g., Kenney v. Shaw Indus. Inc., 764 F. Supp. 1501, 1503 (N.D. Ga. 1991)* .

(n4)Footnote 3.1. *See Davidson v. Goord, 215 F.R.D. 73, 77 (W.D.N.Y. 2003)* .

(n5)Footnote 4. *King v. E.F. Hutton & Co., 117 F.R.D. 2, 6 (D.D.C. 1987)* .

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CHAPTER 12 Interrogatories
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2-12 Federal Litigation Guide § 12.43

§ 12.43 Persons Who May Respond; Duty to Sign, Verify, and Certify Responses

[1] Interrogatories Directed to Individual Must Be Answered, Signed, and Verified by That Person

Interrogatories directed to an individual party must be answered in writing under oath and signed by that party. n1

Courts are aware that a party often will require and receive assistance from counsel in the preparation of responses to interrogatories, particularly complex interrogatories or those requesting opinions or contentions. But despite counsel's substantial assistance, it is not proper or acceptable for the attorney alone to sign or verify responses. n2 However, the attorney must certify the responses by signing them along with the client. n3 In addition, objections to interrogatories must be signed by the attorney making them. n4

[2] Interrogatories Directed to Organization Must Be Answered, Signed, and Verified by Officer or Agent

When the party to whom interrogatories are directed is a corporation, partnership, or association, the interrogatories must be signed by an officer or agent of the business. n5 The officer or agent has a duty to provide all information available to the corporation, n6 but may sign and verify the interrogatories on the basis of knowledge, information, and belief, without firsthand knowledge of the information in the responses. n7 On the other hand, the signing agent must be able to warrant the veracity of the answers. Thus, when a corporate defendant's agent signed interrogatories by disclaiming personal knowledge of the facts stated in the answers, but acknowledging that the persons who provided the facts had stated them to be true, the court found the verification adequate, stating that "the law requires no more." n8

[3] Organization Entitled to Designate Agent; Attorney May Be Agent

When interrogatories are addressed to a corporation, partnership, or association, the business is entitled, and indeed is required, to designate its own officer or agent toanswer the interrogatories. n9 The officer or agent designated to answer interrogatories may be an attorney for the business. n10

The propounding party is not entitled to select the person who will answer for the company by directing the interrogatories to a particular officer or agent; rather, the interrogatories must be directed to the company as a whole. n11 In selecting its agent to answer interrogatories, a corporation or business has a obligation to appoint someone who can furnish the requested information. n12 In all other respects, the responding party has a fair amount of discretion in its selection of agents, on the rationale that the corporation is generally in the best position to know who can provide the

requested information most effectively. Moreover, as one district court has pointed out, it is not the agent's personal knowledge that is called upon to respond to the interrogatories, but the collected knowledge of theorganization. n13

A corporation that abuses its powers of designation by selecting an agent who does not provide responsive answers is subject to sanctions. n14

[4] Interrogatories Directed to Government Agency Must Be Answered, Signed, and Verified by Officer or Agent

Interrogatories addressed to governmental agencies may be answered by an officer or agent of the government. Governments and governmental agencies generally are subject to the same rules as corporate entities in designating agents to answer interrogatories. n15

[5] Attorney for Party Must Certify Responses

In addition to being signed and verified by the party making them, responses to interrogatories must be signed by at least one attorney of record. The attorney must include his or her address, e-mail address, and telephone number. An unrepresented party must certify the responses personally and state his or her address. n16

Any objections to the interrogatories must likewise be signed by the attorney making them. n17

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryMethodsInterrogatoriesUse

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 33(b)(2).*

(n2)Footnote 2. *McDougall v. Dunn, 468 F.2d 468, 472 (4th Cir. 1972)* ; *Saria v. Massachusetts Mut. Life Ins. Co., 228 F.R.D. 536, 538-539 (S.D. W. Va. 2005)* .

(n3)Footnote 3. *Fed. R. Civ. P. 26(g)(1).*

(n4)Footnote 4. *Fed. R. Civ. P. 33(b)(5).*

(n5)Footnote 5. *Fed. R. Civ. P. 33(a).*

(n6)Footnote 6. *Fed. R. Civ. P. 33(a).*

(n7)Footnote 7. *United States v. 42 Jars, 264 F.2d 666, 670 (3d Cir. 1959)* (citing **Moore's Federal Practice**); *see also Shepherd v. American Broad. Cos., 62 F.3d 1469, 1482-1483 (D.C. Cir. 1995)* .

(n8)Footnote 8. *Dial v. Travelers Indem. Co., 780 F.2d 520, 525 (5th Cir. 1986)* .

(n9)Footnote 9. *United States v. Kordel, 397 U.S. 1, 8, 90 S. Ct. 763, 25 L. Ed. 2d 1 (1969)* .

(n10)Footnote 10. *Rea v. Wichita Mortgage Corp., 747 F.2d 567, 574 n.6 (10th Cir. 1984)* .

(n11)Footnote 11. *Law v. NCAA, 167 F.R.D. 464, 476 (D. Kan 1996)* (citing **Moore's Federal Practice**).

(n12)Footnote 12. *United States v. Kordel, 397 U.S. 1, 8, 90 S. Ct. 763, 25 L. Ed. 2d 1 (1969)* .

(n13)Footnote 13. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1257 n.82 (E.D. Pa. 1980)* (citing **Moore's Federal Practice**).

(n14)Footnote 14. *Black Panther Party v. Smith, 661 F.2d 1243, 1257 (D.C. Cir. 1981)* , *vacated on other grounds, 458 U.S. 1118 (1982)* .

(n15)Footnote 15. *Trane Co. v. Klutznick, 87 F.R.D. 473, 476-477 (W.D. Wis. 1980)* .

(n16)Footnote 16. *Fed. R. Civ. P. 26(g)(1).*

(n17)Footnote 17. *Fed. R. Civ. P. 33(b)*; *see also Fed. R. Civ. P. 26(g)(1).*

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CHAPTER 12 Interrogatories
C. Responding to Interrogatories

2-12 Federal Litigation Guide § 12.44

§ 12.44 Providing Business Records in Lieu of Response

Rule 33(d) allows a responding party to substitute access to business records, including electronically stored information, for an interrogatory answer in situations where the burden of deriving the answer will be substantially the same for either party. n1 To substitute documents or electronically stored information for an interrogatory answer, the responding party should:

- Specify the records from which the answer may be derived or ascertained
- Afford the propounding party a reasonable opportunity to inspect the records

The option is limited to situations in which the burden of deriving the answer from the records is substantially the same for the propounding party as the responding party. n2

Directing the propounding party to an undifferentiated mass of business records that may or may not answer the interrogatory is not permitted. n3

The application of the option to produce records is limited to business records, including electronically stored information. Before a court will consider the appropriateness of allowing the responding party to use the option, the court must determine whether the offered documents or electronically stored information constitute business records.

A party that opts to produce business records in lieu of answering an interrogatory must specify the records in sufficient detail for the propounding party to locate and identify, as readily as can the responding party, the records from which the answer may be ascertained. n4 The specificity requirement is intended to guard against misuse of the option to produce business records. A responding party cannot abuse the option by making vague references to "company files" or by directing the propounding party to a mass of undifferentiated records. n5

A party is not entitled to avail itself of the option to produce business records in answer to interrogatories and then claim that some or all of the records are privileged. When a party invokes the option, the party must be prepared to permit inspection of the records. n6 In addition, a responding party cannot use the option to produce business records to avoid answering an interrogatory if the answer cannot be ascertained from the records. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryMethodsInterrogatoriesUse

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 33(d).*

(n2)Footnote 2. *Fed. R. Civ. P. 33(d).*

(n3)Footnote 3. *See, e.g.*, Rainbow Pioneer No. 44-18-04A v. *Hawaii-Nevada Inv. Corp., 711 F.2d 902, 906 (9th Cir. 1983)* ; *In re Heritage Bond Litig., 220 F.R.D. 624, 626 (C.D. Cal. 2004)* .

(n4)Footnote 4. *Fed. R. Civ. P. 33(d)*; *United States v. Rachel, 289 F. Supp. 2d 688, 693 (D. Md. 2003)*

(n5)Footnote 5. *See, e.g., Rainbow Pioneer No. 44-18-04A v. Hawaii-Nevada Inv. Corp., 711 F.2d 902, 906 (9th Cir. 1983)* .

(n6)Footnote 6. *Blake Assocs., Inc. v. Omni Spectra, Inc., 118 F.R.D. 283, 288-290 (D. Mass. 1988)* .

(n7)Footnote 7. *See, e.g., Govas v. Chalmers, 965 F.2d 298, 302 (7th Cir. 1992)* .

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CHAPTER 12 Interrogatories
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2-12 Federal Litigation Guide § 12.45

§ 12.45 Responding Party Has Continuing Duty to Supplement Answers

If a responding party acquires material additional information or learns that information submitted was materially incorrect after submitting answers, and that additional information is not otherwise known to the propounding party, the responding party has a duty to supplement or amend its responses. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsSupplemental PleadingsCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryMethodsInterrogatoriesUse

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(e)(1)*; *see, e.g., Alldread v. City of Grenada, 988 F.2d 1425, 1436 (5th Cir. 1993)* .

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CHAPTER 12 Interrogatories
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2-12 Federal Litigation Guide § 12.46

§ 12.46 Strategic Approach to Responding to Interrogatories

[1] Identifying Persons With Knowledge of Specific Event

If an interrogatory seeks identification of persons with knowledge of a specific event, and if many individuals have knowledge of the particular event, counsel should consider drafting a narrow response combining an objection (based on the ground that interrogatory is unduly burdensome and not calculated to lead to discovery of admissible evidence) with a reasonable amount of information (*e.g.*, the approximate number of individuals with knowledge, and the names of specific individuals who were most closely involved in the event).

[2] Identifying Documents

Interrogatories seeking identification of documents will sometimes call for the responding party to attach some significance to the documents. In identifying documents in an interrogatory response, counsel should not inadvertently apply or accept characterizations of the legal significance of those documents. Counsel should consider objecting to the contention aspect of the interrogatory, or give a carefully qualified response.

[3] Evaluating Damage Claims

The response to an interrogatory directed to a party's claimed damages will vary according to the simplicity or complexity of the type of damages claimed. The response will require adequate detail so that the propounding party can conduct further discovery regarding the claimed damages. Claims for lost profits, goodwill, or claimed future losses often are denied as imprecise or speculative, so sufficient information should be provided to guard against pretrial motions for summary dismissal or limitation of damages claims, and to permit intelligent probing of these claims.

[4] Dealing With Contention Interrogatories

When confronted with contention interrogatories, counsel should ensure, so far as possible, that the client's answers do not incorporate inadvertent admissions that will assist the opposing party.

It may be desirable to seek to delay the response to contention interrogatories until after designated discovery has been completed, or until a pretrial conference or other later time as permitted by Rule 33(a)(2). n1

A decision to delay answering will depend on assessment of the likelihood that the contention will change over time and how plausibly counsel can justify (to the opponent and the court) a present inability to respond. If counsel represents a plaintiff, and the defendant's interrogatory is directed to a contention central to the plaintiff's case, it may be difficult to rationalize a need for more time. On the other hand, a defendant who has asserted a defense or a waiver may legitimately claim a need to develop that position through discovery.

In phrasing the interrogatory response, counsel should keep in mind that under appropriate circumstances, opposing counsel might attempt to bring the response to the attention of the jury or the court for impeachment purposes, or as an admission. Care should be taken to avoid any invitation for such use.

[5] Identifying Persons Involved in Preparing Responses

When representing a large organization, counsel must decide who will verify the responses to interrogatories. The person providing the information is a clear target for further discovery. If the client has in-house counsel, and if information must be gathered from a number of sources, it is helpful to have the in-house counsel gather the information and provide the verification. Generally, an in-house lawyer will be an unrewarding deponent for the opposing party.

[6] Providing Factual Narratives

Interrogatories calling for factual narratives are disfavored, and frequently the responding party can resist answering such interrogatories altogether, arguing that the facts are better developed using some other method of discovery. If a party is directed to provide a factual narrative, or if counsel chooses to have the client answer for tactical reasons, counsel should be alert to the same risks as when responding to a contention interrogatory [*see* [4], *above*].

[7] Providing Supplemental Answers

Whenever counsel discovers new information that helps the client's case, counsel should review prior interrogatory responses to determine whether a supplemental response is necessary to ensure that the newly discovered evidence may be used at trial. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesUse

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 33(a)(2).*

(n2)Footnote 2. *See Fed. R. Civ. P. 26(e)(1).*

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CHAPTER 12 Interrogatories
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2-12 Federal Litigation Guide §§ 12.47 through 12.59

[Reserved]

§§ 12.47[Reserved]

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CHAPTER 12 Interrogatories
D. Objecting to Interrogatories

2-12 Federal Litigation Guide § 12.60

§ 12.60 Objections Must Be Served With Answers

Objections and separate answers to each interrogatory not objected to must be served together, within 30 days of service of the interrogatories, or as otherwise ordered by the court or agreed to by the parties. n1 An objection to a specific interrogatory will only postpone the time to answer, unless the objection is sustained or a protective order issued, if the party seeking discovery is not content to acquiesce in the objection.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesUse

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 33(b)(2)*; *see also § 12.40* (deadline for responding to interrogatories).

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CHAPTER 12 Interrogatories
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2-12 Federal Litigation Guide § 12.61

§ 12.61 Stating Precise Grounds for Objection

Objections to interrogatories must: n1

- State which interrogatory is being challenged
- Include the precise reason for the objection

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesUse

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 33(b)(4)*; *Burns v. Imagine Films Entertainment, Inc., 164 F.R.D. 589, 593 (W.D.N.Y. 1996)* .

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CHAPTER 12 Interrogatories
D. Objecting to Interrogatories

2-12 Federal Litigation Guide § 12.62

§ 12.62 Avoiding Blanket Objections

Generally, blanket objections are unacceptable. For example, it is insufficient merely to assert that the party objects, or that the interrogatories are burdensome, oppressive, duplicative, irrelevant, or that they require research. n1 Rather, the objecting party must explain why an interrogatory has any of these undesirable characteristics. n2

Although Rule 33 requires a specific statement of objection, general objections stated at the beginning of the response may sometimes be appropriate. For example, a general objection may be made with respect to improper definitions and with respect to defects that permeate the entire set of interrogatories.

General objections to all interrogatories should conclude with a statement that incorporates the general objection into each response. Moreover, if counselprovides answers over objections, counsel's answer to each such interrogatory should include the statement "subject to and without waiving the objection to_____ (*e.g.*, overbreadth) stated above, the_____ (plaintiff *or* defendant) responds as follows. ..."

Objections to interrogatories asserting a general objection "to the extent" it may apply to a particular interrogatory are "meritless" and are considered "mere hypothetical or contingent possibilities, where the objecting party makes no meaningful effort to show the application of any such theoretical objection to any request for discovery." n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesUse

FOOTNOTES:
(n1)Footnote 1. *McLeod, Alexander, Powel & Apffel, P.C. v. Quarles, 894 F.2d 1482, 1485 (5th Cir. 1990)* ; *see also Cliffstar Corp. v. Sunsweet Growers, Inc., 218 F.R.D. 65, 69 (W.D.N.Y. 2003)* .

(n2)Footnote 2. *Chubb Integrated Sys. v. National Bank of Washington, 103 F.R.D. 52, 59-60 (D.D.C. 1984)* ; *see Swackhammer v. Sprint Corp. PCS, 225 F.R.D. 658, 660-661 (D. Kan. 2004)* (objections to interrogatories asserting a general objection "to the extent" it may apply to a particular interrogatory are "meritless" and are considered "mere hypothetical or contingent possibilities, where the objecting party makes no meaningful effort to show the application of

any such theoretical objection to any request for discovery").

(n3)Footnote 3. *See Swackhammer v. Sprint Corp. PCS, 225 F.R.D. 658, 660-661 (D. Kan. 2004)* .

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CHAPTER 12 Interrogatories
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2-12 Federal Litigation Guide § 12.63

§ 12.63 Untimely Objections Are Waived Unless "Good Cause" is Shown

Any ground for objection to an interrogatory that is not raised in a timely manner is waived. Strict attention must be paid to the 30 day period (or any different stipulated or ordered time period) to avoid waiver of valid objections. n1

The court may excuse a failure to object timely for "good cause". n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesUse

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 33(b)(4)*; *see, e.g., Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1473-1477 (9th Cir. 1992) , cert. dismissed sub nom,. China Everbright Trading Co. v. Timber Falling Consultants, Inc., 506 U.S. 948 (1992) .*

(n2)Footnote 2. *Fed. R. Civ. P. 33(b)(4).*

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CHAPTER 12 Interrogatories
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2-12 Federal Litigation Guide § 12.64

§ 12.64 Replacing Insufficient, But Timely Objection

If a party in good faith makes an initial timely objection, it will not waive another, more valid objection if it promptly puts forward the more valid objection on realizing the insufficiency of the first objection. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesUse

FOOTNOTES:
(n1)Footnote 1. *See Cahela v. Bernard, 155 F.R.D. 221, 226-227 (N.D. Ga. 1994)* .

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CHAPTER 12 Interrogatories
D. Objecting to Interrogatories

2-12 Federal Litigation Guide § 12.65

§ 12.65 Serving Appropriate Parties

Objections must be served on the following: n1

- Counsel for the propounding party or, if the propounding party is unrepresented, directly on the party
- Counsel for all other parties to the action, or directly to parties unrepresented by counsel

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesUse

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 5(a), (b), 33(b)(2).*

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CHAPTER 12 Interrogatories
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2-12 Federal Litigation Guide § 12.66

§ 12.66 Claiming Privilege

The assertion of privilege must be specific. A naked, nonspecific assertion of privilege may be insufficient. n1 A party claiming privilege must provide sufficient information regarding the nature of the material not disclosed to enable the opposing party to evaluate the applicability of the claimed privilege. n2

A party who wishes to assert privilege in objection to an interrogatory should providea responsive answer except for the specific items claimed to be privileged, and should include a statement of the basis for the privilege. The party must describe the allegedly privileged material in a manner that, without revealing information itself privileged, will enable other parties to assess the applicability of the privilege. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesUseCivil ProcedureDiscoveryPrivileged MattersGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See In re Shopping Carts Antitrust Litig., 95 F.R.D. 299, 305 (S.D.N.Y. 1982)* (citing **Moore's Federal Practice**).

(n2)Footnote 2. *Fed. R. Civ. P. 26(b)(5)*; see e.g., *Stabilus v. Haynsworth, Baldwin, Johnson & Greaves, 144 F.R.D. 258, 268 (E.D. Pa. 1992)* .

(n3)Footnote 3. *Fed. R. Civ. P. 26(b)(5)*; *see McLeod, Alexander, Powel & Apffel, P.C. v. Quarles, 894 F.2d 1482, 1485 (5th Cir. 1990)* .

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§ 12.67 Protecting Trade Secrets

A party may protect trade secrets or confidential business information from disclosure through interrogatories by seeking an order limiting discovery or a protective order preventing the discovery. n1

Courts may be reluctant to strike completely interrogatories requesting confidential information because these kinds of interrogatories normally request information that is quite relevant to the issues. By granting a limiting or protective order, the court can provide the propounding party with the information it needs, while still shielding the information from public disclosure. n2

The responding party usually may not assert the rights of third parties to protect the third parties' proprietary or confidential business information. n3 Rather, the affected third parties must intervene directly to protect this information. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesUseCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryProtective OrdersTrade Secrets LawCivil ActionsDiscoveryTrade Secrets LawCivil ActionsProtection Orders

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 26(c)(1)(G)*; *see, e.g., Gelb v. AT&T, 813 F. Supp. 1022, 1035 (S.D.N.Y. 1993)* .

(n2)Footnote 2. *Stillman v. Vassileff, 100 F.R.D. 467, 468 (S.D.N.Y. 1984)* (order limiting discovery).

(n3)Footnote 3. *See Burton Mechanical Contractors, Inc. v. Foreman, 148 F.R.D. 230, 234 (N.D. Ind. 1992)* .

(n4)Footnote 4. *See Blum v. Schlegel, 150 F.R.D. 38, 38-39 (W.D.N.Y. 1993)* .

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CHAPTER 12 Interrogatories
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§ 12.68 Signing Objections

Responses to interrogatories must be signed by the person making the responses, n1 as well as by the attorney. n2 Any objections to the interrogatories must be signed by the attorney making them. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesUse

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 33(b)(5).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(g)(1).*

(n3)Footnote 3. *Fed. R. Civ. P. 33(b)*; *see also Fed. R. Civ. P. 26(g)(1).*

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2-12 Federal Litigation Guide § 12.69

§ 12.69 CHECKLISTS: Preparing Objections to Interrogatories

[1] CHECKLIST: Grounds for Objection

On receiving interrogatories, counsel for the responding party should consider the possible grounds for objection. The following checklist may be used as a guide to the most frequent grounds for objection to interrogatories.

☐ **Argumentative or speculative.** Interrogatories are subject to objection if they call for argumentative or speculative answers. n1

☐ **Available from another source.** Interrogatories may not seek information that is obtainable from some other source that is more convenient, less burdensome, or less expensive. n2

☐ **Burden outweighs benefit.** The burden or expense of the interrogatories must not outweigh their likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake, and the importance of the interrogatories in resolving the issues. n3

☐ **Cumulative or duplicative.** Interrogatories may not seek information that is unreasonably cumulative or duplicative. n4

☐ **Not Related to Claim or Defense.** Absent a court order, parties may only seek information relevant to claims or defenses. n5

☐ **Legal conclusions.** Interrogatories may not seek legal conclusions on questions of pure law. n6

☐ **Nonwitness experts.** Facts known and opinions held by nonwitness experts are beyond the scope of discovery. n7

☐ **Number exceeded.** Interrogatories served on a specific party must not exceed the number permitted under local rules. n8

☐ **Other opportunities to obtain same information.** Interrogatories may not seek information that the propounding party has had ample other opportunities to obtain. n9

☐ **Overbreadth.** Overbroad interrogatories are subject to objection. n10

☐ **Premature contention interrogatories.** Prematurely served contention interrogatories may be subject to objection.

☐ **Privilege.** Privileged information is beyond the scope of discovery. n11

☐ **Trade secrets.** Trade secrets and confidential business information aregenerally subject to restrictions on discovery. n12

☐ **Vagueness.** Interrogatories are subject to objection if they are so vague or ambiguous as to be burdensome or oppressive. n13

☐ **Work product protection.** Protected work product is beyond the scope of discovery. n14

[2] CHECKLIST: Considering Strategic Avoidance of Objection

If one or more of the objections stated in [1], *above*, clearly applies, counsel should make the following determinations:

☐ **Evaluate scope of objection.** If the interrogatory is subject to objection on vagueness grounds, determine whether it can be responded to broadly or narrowly, as best serves the client's interests.

☐ **Ascertain reciprocity.** If counsel intends to serve a similarly objectionable interrogatory on behalf of his or her client, determine whether the court adheres to a rule of reciprocity based on the substance of discovery requests.

☐ **Balance utility and risk.** If considered objection is of marginal validity and utility, consider whether the benefit of an objection would be outweighed by the cost, risk of failure, or possible loss of credibility with the court.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryMethodsInterrogatoriesUseCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryUndue Burdens

FOOTNOTES:

(n1)Footnote 1. *See In re Erie Lackawanna Ry. Co., 496 F.2d 1189, 1190 (6th Cir. 1974)* .

(n2)Footnote 2. *Fed. R. Civ. P. 26(b)(2)(C)(i).*

(n3)Footnote 3. *Fed. R. Civ. P. 26(b)(2)(C)(iii)*; *see Macmillan, Inc. v. Federal Ins. Corp., 141 F.R.D. 241, 243 (S.D.N.Y. 1992)* .

(n4)Footnote 4. *Fed. R. Civ. P. 26(b)(2)(C)(i).*

(n5)Footnote 5. *Fed. R. Civ. P. 26(b)(1).*

(n6)Footnote 6. *See § 12.04[3].*

(n7)Footnote 7. *See Fed. R. Civ. P. 26(b)(4).*

(n8)Footnote 8. *See Fed. R. Civ. P. 33(a)* (25-interrogatory limit, from which many district courts have opted out by local rule or policy); *see § 12.24[1].*

(n9)Footnote 9. *Fed. R. Civ. P. 26(b)(2)(C)(ii).*

(n10)Footnote 10. *Cahela v. Bernard, 155 F.R.D. 221, 227-228 (N.D. Ga. 1994)* .

(n11)Footnote 11. *See Fed. R. Civ. P. 26(b)(1).*

(n12)Footnote 12. *See § 12.67.*

(n13)Footnote 13. *See, e.g., Frost v. Perry, 161 F.R.D. 434, 435-436 (D. Nev. 1995)* .

(n14)Footnote 14. *Fed. R. Civ. P. 26(b)(3).*

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CHAPTER 12 Interrogatories
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[Reserved]

§§ 12.70[Reserved]

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CHAPTER 12 Interrogatories
E. Forms

2-12 Federal Litigation Guide § 12.100

§ 12.100 Interrogatories

[1] FORM

Interrogatories

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

TO: [*Party designation and name of responding party*]

FROM: [*Party designation and name of propounding party*]

SET NO. [*number*]

[*Name of propounding party*] requests that you, [*name of responding party*], answer all of the following interrogatories, in writing and under oath, as required by the *Federal Rules of Civil Procedure, Rule 33*. Under Rule 33, a copy of your written response to these interrogatories must be served on [*name of attorney for propounding party*], the attorney for [*name of propounding party*] within 30 days after service, at the address listed in this document.

In answering each interrogatory:

(a) Identify by date, sender, recipient, location, and custodian each document relied on or that forms a basis for the answer given or that corroborates the answer given or the substance of what is given in answer to these interrogatories;

(b) State whether the information furnished is within the personal knowledge of the person answering, and if not, the name, if known, of each person to whom the information is a matter of personal knowledge;

(c) Identify each person who assisted or participated in preparing or supplying any of the information given in answer to or relied on in preparing answers to these interrogatories; and

(d) If you maintain that any document or record that refers to or relates to anything about which these

interrogatories ask has been destroyed, set forth the content of that document, the location of any copies of the document, the date of destruction and the name of the person who ordered or authorized the destruction.

The following definitions apply:

(a) "Communication" means the transmittal of information (in the form of facts, ideas, inquiries, or otherwise).

(b) "Document" is defined according to *Federal Rules of Civil Procedure, Rule 34(a)*, including, without limitation, electronic or computerized data compilations. A draft or nonidentical copy is a separate document within the meaning of this term.

(c) "To identify a person" means to give, to the extent known, the person's full name, present or last known address, and when referring to a natural person, additionally, the present or last known place of employment. Once a person has been so identified, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

(d) "To identify documents" means to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s) and recipient(s).

(e) The designation of "Plaintiff," "Defendant," a party's full or abbreviated name, or a pronoun referring to a party, means the party and, where applicable, its officers, directors, employees, partners, corporate parent, subsidiaries or affiliates. This definition is not intended to impose a discovery obligation on any person who is not a party to the litigation.

(f) "Person" means any natural person or any business, legal, or governmental entity or association.

(g) "Concerning" means relating to, referring to, describing, evidencing, or constituting.

[*Insert numbered interrogatories, taking into account format and numerical limitations imposed by Rule 33 or local court rules. For example*:]

1. Identify each person who saw [*describe occurrence*].

2. State which of the persons in the answer to Interrogatory 1 made written statements concerning [*describe subject matter*], and further state in whose custody each written statement reposes.

3. Identify each person who was present during [*describe occurrence*].

4. State which of the persons in the answer to Interrogatory 3 made written statements concerning [*describe subject matter*], and further state in whose custody each written statement reposes.

[*Date*]

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for [*name and designation of party*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

[2] Definitions

The definitions in the form may be omitted or modified as needed. n1

Consult local district court rules regarding use of definitions in discovery demands.

[3] Precise Interrogatories Required

Interrogatories must be definite, clear, and narrowly tailored for the case, and must adequately advise the responding party of the information sought. n2

[4] Content of Interrogatories

Interrogatories may include the following:

- Standard instructions for answering questions or raising objections n3
- Definitions of certain terms, especially when the dictionary definition is insufficient n4
- Subparts, if necessary to avoid ambiguity or confusion; note, however, that subparts may count toward a limited number of interrogatories permitted
- Cross-references to other discovery requests

[5] Limits on Number of Interrogatories

Rule 33 limits the number of interrogatories that may be served by one party on another party to 25. However, some district courts have opted out from this limit. n5

In districts that limit the number of interrogatories that may be served, in order to exceed the limit, a party must secure a court order or, if local rules permit, a written stipulation from the responding party. n6 Additionally, the court may grant leave to serve additional interrogatories. n7

[6] Signature Required

Interrogatories must be signed by the propounding party's attorney, and must state the signer's address, e-mail address, and telephone number. n8

[7] Rule 26(f) Meeting May Be Required Prior to Commencement of Discovery

Under the Federal Rules, interrogatories generally may not be served before the parties have had their initial discovery planning meeting, as required by Rule 26(d) and (f). n9

[8] Timing of Service of Interrogatories

The timing of service of interrogatories may comply with any of the following: n10

- Time limits prescribed by federal statutes and local rules n11
- Agreement of the parties n12
- Order of the court n13

Discovery methods may be used in any sequence. Interrogatories therefore may be served before or after other discovery, unless the court orders otherwise for the convenience of the parties and witnesses and in the interests of justice. n14

When the court has established a discovery deadline, a party must serve interrogatories in sufficient time to permit the responding party the 30-day response time allowed under *Fed. R. Civ. P. 33*. n15 A party therefore must serve interrogatories at least 30 days before the discovery deadline. n16

[9] Service on Parties

Interrogatories must be served on the attorney of the responding party, or if the party does not have an attorney, on the party. n17

When one party is served with interrogatories, copies of the interrogatories also must be served on all other parties, even though responses are only sought from one party. Therefore, copies must be served on the attorneys of all other parties, or on the parties themselves if unrepresented. n18

If a party is a corporation or other business entity, interrogatories may not be directed to a particular person within a corporation or business entity if that person is not also a party. They must be directed to the corporation or business itself. n19

[10] Filing of Interrogatories Generally Not Permitted

Discovery requests and responses shall not be filed unless they are used in the proceedings or the court orders filing. n20

FOOTNOTES:
(n1)Footnote 1. *See § 12.21.*

(n2)Footnote 2. *Roberts v. Heim, 130 F.R.D. 424, 427 (N.D. Cal. 1989)* ; *see § 12.20.*

(n3)Footnote 3. *See, e.g., Harlem River Consumers Coop., Inc. v. Associated Grocers, 64 F.R.D. 459, 465 (S.D.N.Y. 1974)* .

(n4)Footnote 4. *See, e.g.,* S.D.N.Y. & E.D.N.Y., L.R. 26.3(a), (b) (setting forth uniform definitions and construction rules deemed incorporated in all discovery requests).

(n5)Footnote 5. *See Fed. R. Civ. P. 26(b)(2), 33(a)*; *see also § 12.24.*

(n6)Footnote 6. *Fed. R. Civ. P. 29, 33(a).*

(n7)Footnote 7. *See § 12.24[1].*

(n8)Footnote 8. *Fed. R. Civ. P. 26(g)(1)*; *see § 12.26.*

(n9)Footnote 9. *Fed. R. Civ. P. 26(d), 33(a).*

(n10)Footnote 10. *See § 12.27.*

(n11)Footnote 11. *See Fed. R. Civ. P. 26, 33.*

(n12)Footnote 12. *Fed. R. Civ. P. 26(f), 33(a).*

(n13)Footnote 13. *Fed. R. Civ. P. 33(a).*

(n14)Footnote 14. *Fed. R. Civ. P. 26(d)(2).*

(n15)Footnote 15. *Northern Ind. Pub. Serv. Co. v. Colorado Westmoreland, Inc., 112 F.R.D. 423, 424 (N.D. Ind. 1986) , aff'd mem., 845 F.2d 1024 (7th Cir. 1988) .*

(n16)Footnote 16. *See, e.g., Smith v. Principal Cas. Ins. Co., 131 F.R.D. 104, 105 (S.D. Miss. 1990)* ; *see § 12.27[2].*

(n17)Footnote 17. *See Fed. R. Civ. P. 5(b).*

(n18)Footnote 18. *See Fed. R. Civ. P. 5(a),(b)*; *see § 12.27[3].*

(n19)Footnote 19. *Holland v. Minneapolis-Honeywell Regulator Co., 28 F.R.D. 595, 595 (D.D.C. 1961) .*

(n20)Footnote 20. *Fed. R. Civ. P. 5(d).*

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CHAPTER 12 Interrogatories
E. Forms

2-12 Federal Litigation Guide § 12.101

§ 12.101 Answers to Interrogatories

[1] FORM

Answers to Interrogatories

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

Answer of [*responding party, e.g., defendant, or responding entity, e.g., name of corporation by designated agent*] to interrogatories served on [him/her/it] by [*party designation and name of propounding party*] on [*date*].

Interrogatory No. 1: [*Repeat interrogatory verbatim*] [*give answer or objection, as appropriate*].

Interrogatory No. 2: [*Repeat interrogatory verbatim*] [*give answer or objection, as appropriate*].

[*Date*]

[*Signature of responding party*]

[*Party designation and name of responding party*]

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for [*name and designation of party*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

[2] Response to Each Interrogatory Required

A party must respond to each interrogatory by any of the following: n1

- An answer
- An objection
- A motion for protective order

The court may impose sanctions for failure to respond to an interrogatory. n2

[3] All Available Information Must Be Provided

A party answering interrogatories generally must provide all responsive information available. n3 Any part of a multi-part interrogatory that is not objectionable must be answered. n4

A responding party who is unable to give a complete answer in a timely manner, but has access to the information, may provide whatever information it can and move to extend time for serving a complete answer within an estimated time. n5

To the extent that a party is unable to respond because it lacks knowledge, it may admit ignorance in response to an interrogatory and describe efforts made to obtain the information. n6

[4] Answer of Corporation or Other Entity

When interrogatories are served on a corporation, partnership, association, or government agency, the entity must: n7

- Furnish all responsive, nonprivileged information that is available to the entity
- Designate one of its officers or agents to verify the answers

The officer or agent must provide all information available to the entity, but may sign and verify the interrogatories on the basis of knowledge, information, and belief, without firsthand knowledge of the information in the responses. n8

[5] Signing Answers

Rule 33 requires that answers be signed under oath by the person making them. n9

In addition, Rule 26(g) requires any answer made by a represented party to be signed by at least one attorney of record in the attorney's individual name, with the attorney's address, e-mail address, and telephone number included. An unrepresented party is required to sign the answers personally and state his or her address, e-mail address, and telephone number. n10

[6] Methods of Service

Service of interrogatory responses ordinarily is complete when the responses are hand-delivered to the party or the attorney for the represented party or when they are placed in the mail. n11

Service by electronic means is complete on transmission, and service by other consented means under Rule 5(b)(2)(D) is complete when the person making service delivers the copy to the agency designated to make delivery. n12 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. n13

FOOTNOTES:

(n1)Footnote 1. *See § 12.41[1].*

(n2)Footnote 2. *Harlem River Consumers Coop., Inc. v. Associated Grocers, 64 F.R.D. 459, 465 (S.D.N.Y. 1974)* ; *see Fed. R. Civ. P. 37.*

(n3)Footnote 3. *Fed. R. Civ. P. 26(b), 33(b)(3).*

(n4)Footnote 4. *see Fed. R. Civ. P. 33(b)* advisory committee's note (1993).

(n5)Footnote 5. *See, e.g., Harlem River Consumers Coop., Inc. v. Associated Grocers, 64 F.R.D. 459, 463 (S.D.N.Y. 1974)* ; *see also Fed. R. Civ. P. 33(b)*, advisory committee's note (1993).

(n6)Footnote 6. *Cullins v. Heckler, 108 F.R.D. 172, 177 (S.D.N.Y. 1985)* .

(n7)Footnote 7. *Fed. R. Civ. P. 33(a),(b).*

(n8)Footnote 8. *See Skelton & Co. v. Goldsmith, 49 F.R.D. 128, 130-131 (S.D.N.Y. 1969)* .

(n9)Footnote 9. *Fed. R. Civ. P. 33(b)(5).*

(n10)Footnote 10. *Fed. R. Civ. P. 26(g)(1).*

(n11)Footnote 11. *Fed. R. Civ. P. 5(b)(2).*

(n12)Footnote 12. *Fed. R. Civ. P. 5(b)(2)(E), (F).*

(n13)Footnote 13. *Fed. R. Civ. P. 5(b)(2)(E).*

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CHAPTER 13 Production of Documents

2-13 Federal Litigation Guide 13.syn

§ 13.syn Synopsis to Chapter 13: Production of Documents

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[2] Use Limited to Pending Action
[3] Use Generally Limited to Pretrial Discovery
[4] Use Limited to Parties
[4.--1] General Rule: Any Party May Serve Rule 34 Request on Any Other Party
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[4.--3] Limitation: Absent Class Members Are Not "Parties" for Purposes of Rule 34
[5] Advantages of Rule 34 Requests
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[2] Mandatory Disclosure Provisions May Affect Timing
[2.--1] Nature of Mandatory Disclosure Requirements
[2.--2] Requests for Items Subject to Later Disclosure May Be Untimely
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[2] Limitations to General Rule
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§ 13.04 Making Requests Specific
[1] Making Requests in Writing
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[2.--1] Identifying Requested Items Individually or by Category

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§ 13.05 Certifying Requests

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[6] Notifying Party of Inadvertent Disclosure of Privileged Materials

§ 13.08 CHECKLIST: Drafting Rule 34 Document Request

§§ 13.09 through 13.99 [Reserved]

§ 13.100 Request for Production of Documents or Electronically Stored Information
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[3] Contents of Request
[4] Signature Required
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[8] Service
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CHAPTER 13 Production of Documents

2-13 Federal Litigation Guide Scope

Scope

SCOPE

The right of a party to obtain disclosure of documents pursuant to Rule 34 is a valuable discovery tool. Rule 34 requests may be used to request not only the inspection and copying of documents and/or electronically stored information, but the Rule also allows for the testing and sampling of documents and/or electronically stored information. Because there are no specified limitations on the number of demands for production that can be made, the procedure provides an important means of obtaining or electronically stored information insight into the issues and available proof. Document requests serve the offensive purpose of obtaining favorable evidence with the help of the other party, as well as the defensive object of establishing before trial the affirmative points the other party's evidence will make. Documents and electronically stored information obtained in discovery are critical for deposing both parties and nonparty witnesses. Rule 34 also recognizes that similar discovery may be obtained from nonparties pursuant to Rule 45.

This chapter focuses on requests for production of documents and electronically stored information pursuant to Rule 34. The chapter outlines the key legal, strategic, and tactical issues concerning production requests, including the procedural and substantive requirements for requests. The use of a subpoena to obtain documents from nonparties pursuant to Rule 45 is also considered. Local rules must be consulted before proceeding under Rule 34, as district courts may impose procedural requirements and limitations in addition to those found in the Federal Rules of Civil Procedure.

The chapter includes a sample request for documents and electronically stored information, and discusses procedural requirements and use of the form.

For related coverage, *see* Ch. 14, ***Document Responses***, Ch. 15, ***Management of Documents***, and Ch. 20, ***Inspection of Land and Other Tangibles***.

For expanded coverage of production of documents, ***see*** Moore's Federal Practice, Ch. 34, ***Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes*** (Matthew Bender 3d ed.).

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CHAPTER 13 Production of Documents

2-13 Federal Litigation Guide § 13.01

§ 13.01 Using Requests for Production of Documents or Production of Electronically Stored Information

[1] Types of Discovery Available Under Rule 34

Rule 34 allows for two basic types of discovery: n1

- Requests to a party for production of documents or production of electronically stored information
- Requests for inspection of land and other tangibles

This chapter focuses on requests for production of documents and electronically stored information. For coverage of requests for inspection of land and other tangibles, *see* Chapter 20, *Inspection of Land and Other Tangibles*.

[2] Use Limited to Pending Action

Rule 34 discovery is only available *after* an action is commenced. n2

Perpetuation proceedings pursuant to Rule 27 may be used to obtain production or inspection *before* the initiation of a formal action. n3

[3] Use Generally Limited to Pretrial Discovery

Rule 34 is intended to be used principally as a pretrial discovery device. n4

Whether Rule 34 may be used at trial is generally made moot by the Rule's 30-day response time, the easy availability of a Rule 45 subpoena, and the existence of court-ordered discovery deadlines. n5

[4] Use Limited to Parties

[4.--1] General Rule: Any Party May Serve Rule 34 Request on Any Other Party

A Rule 34 discovery demand may be served by any party on any other party. n6

A plaintiff or defendant may serve a request on a third-party defendant, and vice versa. Co-plaintiffs and co-defendants

may serve Rule 34 requests on each other. n7

Document requests against nonparties are governed by Rule 45. n8

[4.--2] Dispute May Arise as to Who Is Party

Although it is usually clear who is and is not a party to a lawsuit for purposes of Rule 34, occasionally a dispute may arise on this point. n9 Most commonly, the issue involves whether documents are in the "custody" or "control" of an entity standing in a legal relationship to a party. n10

[4.--3] Limitation: Absent Class Members Are Not "Parties" for Purposes of Rule 34

In class action litigation, absent class members are not "parties" within the meaning of Rule 34; therefore, requests for production may not be served on them under the Rule. Instead, production of documents may be ordered pursuant Rule 23(d) on a proper showing. n11

[5] Advantages of Rule 34 Requests

Advantages of using Rule 34 compared to other discovery devices may include the following:

- Rule 34 requests may be used to obtain documents from nonresident alien parties at locations where a subpoena duces tecum cannot be served
- Rule 34 requests may be used to obtain documents prior to taking a deposition, to be reviewed at counsel's convenience
- Rule 34 requests generally may be unlimited in number and length, in contrast to limitations on the number and length of oral depositions, and the number of interrogatories and requests for admission
- Rule 34 requests may specify the form or forms in which electronically stored information should be produced
- Rule 34 requests may be used to request not only the inspection and copying of documents and/or electronically stored information, but the Rule also allows for the testing and/or sampling of documents and/or electronically stored information

[6] Disadvantages of Rule 34 Requests

Disadvantages of using Rule 34 compared to other discovery devices may include the following:

- Rule 34 requests cannot be used to obtain production of documents from nonparties (although Rule 45 may permit documents to be obtained from a nonparty)
- Rule 34 requests generally require a minimum 30-day response time, while the response time for subpoenas may be shorter

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedurePretrial MattersSubpoenas

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 34(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(b)(1).*

(n3)Footnote 3. *See Fed. R. Civ. P. 27(a).*

(n4)Footnote 4. *See Goldy v. Beal, 91 F.R.D. 451, 456 (M.D. Pa. 1981)* .

(n5)Footnote 5. *See Fed. R. Civ. P. 16(b), (c).*

(n6)Footnote 6. *See Fed. R. Civ. P. 34(a).*

(n7)Footnote 7. *See Biben v. Card, 119 F.R.D. 421, 424-425 (W.D. Mo. 1987)* .

(n8)Footnote 8. *See Fed. R. Civ. P. 34(c), 45(d).*

(n9)Footnote 9. *See, e.g., In re Penn Cent. Sec. Litig., 560 F.2d 1138, 1145 (3d Cir. 1977)* (Rule 34 inapplicable because street name record owners of stock were not "parties" in class action by beneficial owners); *In re Greenwood Air Crash, 161 F.R.D. 387, 394-398 (S.D. Ind. 1995)* (tax returns of decedent's minor children who were arguably his statutory wrongful death beneficiaries must be produced pursuant to document request served upon plaintiff who brought action as personal representative of decedent's estate, because children were "parties" within meaning of Rule 34).

(n10)Footnote 10. *See, e.g., Japan Halon Co. v. Great Lakes Chem. Corp., 155 F.R.D. 626, 627-629 (N.D. Ind. 1993)* .

(n11)Footnote 11. *Fed. R. Civ. P. 23(d)*; *see In re Agent Orange Prod. Liab. Litig., 104 F.R.D. 559, 562 n.1 (E.D.N.Y. 1985)* , *aff'd, 821 F.2d 139 (2d Cir. 1987)* ; *see also Dellums v. Powell, 566 F.2d 167, 187 (D.C. Cir. 1977)* , *cert. denied, 438 U.S. 916 (1978)* ; *Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1004-1005 (7th Cir. 1971)* , *cert. denied sub nom., Herriman v. Midwestern United Life Ins. Co., 405 U.S. 921 (1972)* .

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CHAPTER 13 Production of Documents

2-13 Federal Litigation Guide § 13.02

§ 13.02 Ensuring Timely Request

[1] Restrictions on Timing of Discovery

Rule 34 requests may be served as determined by:

- Time limits prescribed by federal statutes and local rules n1
- Agreement of the parties n2
- Order of the court n3

In most districts, the parties' Rule 26(f) preliminary discovery conference is the event triggering the opening of formal discovery, including Rule 34 requests for production. Rule 26(d) disallows parties from seeking discovery before the conference, absent a court order or stipulation between the parties. n4

[2] Mandatory Disclosure Provisions May Affect Timing

[2.--1] Nature of Mandatory Disclosure Requirements

Except in certain categories of cases, Rule 26(a) requires parties to exchange specified types of information, unless a court order or stipulation allows otherwise. n5

Rule 26(a) requires the following voluntary disclosures:

- **Preliminary disclosures:** During the early pretrial period, parties are required to exchange information regarding (1) individuals likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment; (2) documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment; (3) claims and calculations of damages; and (4) insurance coverage n6
- **Expert witness disclosures:** Information about and from retained experts must be shared later in the pretrial period n7

- **Pretrial disclosures:** Information about evidence the parties contemplate using at trial must be shared near the end of the pretrial period n8

For complete discussion regarding initial mandatory disclosure under Rule 26, *see* Ch. 9, *The Purposes of Discovery*.

[2.--2] Requests for Items Subject to Later Disclosure May Be Untimely

A court may strike as untimely a Rule 34 request that seeks the same information required by the mandatory disclosure requirements of Rule 26(a) if the Rule 34 request is served before the Rule 26(a) disclosures are due. n9

This general prohibition does not prevent otherwise timely discovery under Rule 34 of independently discoverable documents or things not generated for purposes of mandatory disclosure. n10 For example, a party may serve a document request, perhaps coupled with a Rule 45 subpoena, to obtain material evidence provided by an expert for review, testing, or experimentation. n11 However, a party may not request the test results or drafts of the expert's report before that disclosure is due under Rule 26(a)(2), as modified by court order or stipulation of the parties. n12

[3] Request May Be Untimely If Served After Discovery Cutoff Date

Because the Federal Rules of Civil Procedure allow parties 30 days to respond to requests for production, requests must be served at least 30 days prior to the deadline for completion of fact discovery. n13 When the court enters a Rule 16(b) scheduling order setting the time for completion of discovery, a party must seek permission from the court to serve Rule 34 requests that seek production after the cutoff date. This rule applies whether service of the request is accomplished before or after the cutoff date. n14

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryRelevance

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 26*, *34*.

(n2)Footnote 2. *Fed. R. Civ. P. 26(f)*, 34(b)(2)(A).

(n3)Footnote 3. *Fed. R. Civ. P. 34(b)(2)(A)*.

(n4)Footnote 4. *See Fed. R. Civ. P. 26(d)(1)*, *(f)*.

(n5)Footnote 5. *See Fed. R. Civ. P. 26(a)*.

(n6)Footnote 6. *Fed. R. Civ. P. 26(a)(1)*.

(n7)Footnote 7. *Fed. R. Civ. P. 26(a)(2)*.

(n8)Footnote 8. *Fed. R. Civ. P. 26(a)(3)*.

(n9)Footnote 9. *See B.C.F. Oil Ref., Inc. v. Consolidated Edison Co., 168 F.R.D. 161, 166 (S.D.N.Y. 1996)* (expert interrogatories seeking opinions in advance of date set by court stricken); *see also Thompson v. Glenmede Trust Co., 1996 U.S. Dist. LEXIS 13083 (E.D. Pa. Aug. 26, 1996)* ("once mandatory discovery is complete, a party, pursuant to

Rule 26(b), may 'obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action' " under *Fed. R. Civ. P. 26(b)(1)*).

(n10)Footnote 10. *See Fed. R. Civ. P. 26(a)(1)-(3).*

(n11)Footnote 11. *See Furniture World, Inc. v. D.A.V. Thrift Stores, 168 F.R.D. 61, 62 (D.N.M. 1996)* "[w]hen Rule 34(c) is read with Rule 26(a)(2), it is clear that all documents provided to a party's expert witness must be produced on request"); *see also Corrigan v. Methodist Hosp., 158 F.R.D. 54, 58 (E.D. Pa. 1994)* (documents provided by counsel to expert and which expert considered in coming to his opinions discoverable pursuant to Rule 34 or 45).

(n12)Footnote 12. *See Fed. R. Civ. P. 26(a)(2).*

(n13)Footnote 13. *Thomas v. Pacificorp, 324 F.3d 1176, 1179 (10th Cir. 2003)* .

(n14)Footnote 14. *See Fed. R. Civ. P. 16(b) see also Contardo v. Merrill Lynch, Pierce, Fenner & Smith, 119 F.R.D. 622, 625 (D. Mass. 1988)* .

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CHAPTER 13 Production of Documents

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§ 13.03 Ensuring Request Seeks Discoverable Matter

[1] General Rule: Rule 34 May Be Used to Request Documents in Possession, Custody, or Control of Another Party

Rule 34 may be used to request production of documents or electronically stored information in the possession, custody, or control of another party. n1

The production of documents is not limited by:

- The admissibility of the evidence at trial n2
- The requesting party's prior knowledge of or access to the matters sought n3

Note,
however, that Rule 34 discovery is subject to Rule 26(b), which allows a court to limit discovery that it finds cumulative or duplicative, burdensome or expensive, or directed at information that the discovering party already has within its control. n4

[2] Limitations to General Rule

[2.--1] Discoverable Matter Must Be Relevant to Claims or Defenses

Discovery under Rule 34 is limited to information that is relevant to the claim or defense of any party. n5

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 trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. n6

[2.--2] Unnecessary or Burdensome Requests May Be Barred

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. n7

The frequency or extent of use of the discovery methods otherwise permitted under the Federal Rules of Civil Procedure and by any local rule shall be limited by the court if it determines that: n8

- The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive, or
- The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought, or
- The burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues

[2.--3] Ready Availability of Matter From Another Source May Bar Discovery

A court may refuse to order production of documents, such as public records, that are equally accessible to all parties. n9

However, the court may order production from the adverse party when it would be excessively burdensome (for financial or other reasons) for the requesting party to obtain the documents from the public source rather than from the opposing party. n10

[2.--4] Discoverable Matter May Be Protected by Work-Product Doctrine

The work product doctrine protects documents and tangible things used in preparation for trial that reveal an attorney's legal theories, strategy, evaluation of strengths and weaknesses, and mental impressions. n11

[2.--5] Discoverable Matter May Be Protected by Privilege

Discovery under Rule 34 is limited to information that is not privileged. Discovery of privileged information is not permitted even if the information is relevant to the claims or defenses of any party. n12

[3] Requesting Electronically Stored Information

Rule 34(a)(1) governs requests for electronically stored information. The Rule is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments. n13

Rule 34(b) allows the requesting party to designate the form or forms in which it wants electronically stored information produced. However, the rule does not require that the requesting party choose a form or forms of production. n14

The responding party also is involved in determining the form of production. In the written response to the production request that Rule 34 requires, the responding party must state the form it intends to use for producing electronically stored information if the requesting party does not specify a form or if the responding party objects to a form that the requesting party specifies. The Advisory Committee Notes encourage parties to communicate concerning the forms in which production is to be produced before the production occurs. This may permit the parties to identify and seek to resolve disputes before the expense and work of the production occurs. n15

If the requesting party is not satisfied with the form stated by the responding party, or if the responding party has objected to the form specified by the requesting party, the parties must meet and confer under Rule 37(a)(1) in an effort to resolve the matter before the requesting party can file a motion to compel. If they cannot agree and the court resolves the dispute, the court is not limited to the forms initially chosen by the requesting party, stated by the responding party, or specified in this rule for situations in which there is no court order or party agreement. n16

If the form of production is not specified by party agreement or court order, the responding party must produce electronically stored information either in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable. n17

Whether or not the requesting party specified the form of production, Rule 34(b) provides that the same electronically stored information ordinarily need be produced in only one form.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryRelevanceCivil ProcedureDiscoveryUndue Burdens

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 34(a).*

(n2)Footnote 2. *See Seattle Times Co. v. Rhinehart, 467 U.S. 20, 29-30, 104 S. Ct. 2199, 81 L. Ed. 2d. 17 (1984) .*

(n3)Footnote 3. *See* Italia di *Navigazione, S.p.A. v. M.V. Hermes I, 564 F. Supp. 492, 495 (S.D.N.Y.) , aff'd on other grounds, 724 F.2d 21 (2d Cir. 1983)* (citing **Moore's**); *see also See Burton Mechanical Contractors, Inc. v. Foreman, 148 F.R.D. 230, 236 (N.D. Ind. 1992)* (citing **Moore's**); *Weiner v. Bach Halsey Stuart, Inc., 76 F.R.D. 624, 625 (S.D. Fla. 1977) .*

(n4)Footnote 4. *See Fed. R. Civ. P. 26(b)(2); see also Bartley v. Isuzu Motors, Ltd., 158 F.R.D. 165, 167 (D. Colo. 1994) .*

(n5)Footnote 5. *See Fed. R. Civ. P. 26(b)(1).*

(n6)Footnote 6. *Fed. R. Civ. P. 26(b)(1).*

(n7)Footnote 7. *Fed. R. Civ. P. 26(b)(2)(B).*

(n8)Footnote 8. *Fed. R. Civ. P. 26(b)(2)(C).*

(n9)Footnote 9. *See Bleecker v. Standard Fire Ins. Co., 130 F. Supp. 2d 726, 739 (E.D.N.C. 2000) .*

(n10)Footnote 10. *See Snowden v. Connaught Lab., Inc. 137 F.R.D. 325, 333 (D. Kan. 1991) ; see also Dushkin Publ'g Group, Inc. v. Kinko's Serv. Corp., 136 F.R.D. 334, 335 (D.D.C. 1991) .*

(n11)Footnote 11. *Fed. R. Civ. P. 26(b)(3), (4); Fed. R. Evid. 502(g); Hickman v. Taylor, 329 U.S. 495, 511-512, 67 S. Ct. 385, 91 L. Ed. 451 (1947) .*

(n12)Footnote 12. *See Fed. R. Civ. P. 26(b)(1).*

(n13)Footnote 13. *Fed. R. Civ. P. 34(a)* Committee Note (2006).

(n14)Footnote 14. *Fed. R. Civ. P. 34(b)* Committee Note (2006).

(n15)Footnote 15. *Fed. R. Civ. P. 34(b)* Committee Note (2006).

(n16)Footnote 16. *Fed. R. Civ. P. 34(b)* Committee Note (2006).

(n17)Footnote 17. *Fed. R. Civ. P. 34(b)(2)(E)(ii).*

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CHAPTER 13 Production of Documents

2-13 Federal Litigation Guide § 13.04

§ 13.04 Making Requests Specific

[1] Making Requests in Writing

Rule 34 requests must be in writing. n1 A court may refuse to compel production if it finds the formalities of Rule 34 are not satisfied. n2

[2] Complying With Required Formalities

[2.--1] Identifying Requested Items Individually or by Category

The request must contain the items to be inspected or produced, identified either by individual item or by category. n3

It is good practice to number sequentially each particular request.

[2.--2] Describing Requested Items With Reasonable Particularity

Each item in the request must be described with reasonable particularity. The test is whether a reasonable person would know what documents are called for in the request. n4

The specificity required may depend on the extent of the requesting party's knowledge with regard to the documents requested, n5 as well as how far the proceedings have progressed at the time the request is made. n6

[2.--3] Description Satisfying Rule 26(a)(1)(A)(ii) Also Should Satisfy Rule 34 Requirements

A "description by category and location" satisfying a party's obligations under Rule 26(a)(1)(A)(ii) (mandatory disclosures regarding documents and things relevant to disputed facts) should also satisfy the Rule 34(b) requirement to set forth by category the documents to be inspected with reasonable particularity. n7

Consequently, if a party has furnished a description of documents and things pursuant to Rule 26(a)(1)(A)(ii), the opposing party should be able to use that description in a Rule 34(b) document request.

[2.--4] Specifying Time for Inspection at Least 30 Days After Service of Request

The requesting party chooses the time for inspection. The time chosen must be reasonable, and should be at least 30 days after service of the request, extended by three days for service by any of the following methods: n8

- Service by mail
- Service to the clerk of the court based on no known address
- Electronic or other means of delivery consented to in writing

The date chosen for production of the documents should be after the date the response is due, so that the requesting party will know whether the responding party plans to produce the items.

[2.--5] Party May Seek Change in Requested Time

If a party wants more or less time to make a request or to produce the requested documents, the party must do one of the following:

- Obtain an agreement in writing from the opposing party, except that stipulations extending the time for responses may be made only with approval of the court if they would interfere with any time set for completion of discovery, hearing a motion, or for trial n9
- Obtain a court order n10

[2.--6] Specifying Reasonable Place and Manner for Inspection

The place and manner of inspection must be reasonable. n11 The place of inspection also is subject to control by the court. n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryRelevance

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 34(a)* (requiring service of process).

(n2)Footnote 2. *See Roberts v. Americable Int'l, Inc., 883 F. Supp. 499, 501 n.2 (E.D. Cal. 1995)* ; *see also Schwartz v. Marketing Publishing Co., 153 F.R.D. 16, 20-21 (D. Conn. 1994)* (motion to compel denied as to documents requested in letter).

(n3)Footnote 3. *Fed. R. Civ. P. 34(b)(1)(A).*

(n4)Footnote 4. *Fed. R. Civ. P. 34(b)(1)(A)*; *Bruggeman ex rel. Bruggeman v. Blagojevich, 219 F.R.D. 430, 436 (N.D. Ill. 2004)* .

(n5)Footnote 5. *Westhemeco Ltd. v. New Hampshire Ins. Co., 82 F.R.D. 702, 709 (S.D.N.Y. 1979)* .

(n6)Footnote 6. *See Taylor v. Florida Atl. Univ., 132 F.R.D. 304, 305 (S.D. Fla. 1990)* , *aff'd*, *976 F.2d 743 (11th Cir. 1992)* , *cert. denied*, *507 U.S. 1051 (1993)* (plaintiff set forth categories of documents "with as much reasonable particularity as can be expected at this stage of discovery").

(n7)Footnote 7. *See Brook Groupe Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 230, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)* ; *see also Fed. R. Civ. P. 26(a)(1)* advisory committee's note (1993).

(n8)Footnote 8. *Fed. R. Civ. P. 6(d).*

(n9)Footnote 9. *Fed. R. Civ. P. 34(b)(2)(A)*; *see Fed. R. Civ. P. 29(b).*

(n10)Footnote 10. *Fed. R. Civ. P. 34(b)(2)(A)*; *Fed. R. Civ. P. 26(c)(1)(B).*

(n11)Footnote 11. *Fed. R. Civ. P. 34(b)(1)(B).*

(n12)Footnote 12. *See Fed. R. Civ. P. 26(c)(1)(B), 34(b).*

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2-13 Federal Litigation Guide § 13.05

§ 13.05 Certifying Requests

If the requesting party is represented by counsel, the requests must be signed by at least one attorney of record. The attorney must include his or her address, e-mail address, and telephone number. n1

An unrepresented party must certify the requests personally and state his or her address, e-mail address, and telephone number. n2

If the request lacks proper certification, no action need be taken with respect to it by the other parties, and the court will strike the request, unless it is promptly signed after the omission is called to the requestor's attention. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(g)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(g)(1).*

(n3)Footnote 3. *Fed. R. Civ. P. 26(g)(2).*

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CHAPTER 13 Production of Documents

2-13 Federal Litigation Guide § 13.06

§ 13.06 Serving Appropriate Parties

A Rule 34 request must be served on the party to whom it is directed and on all other parties in the action, unless the court directs otherwise. Service usually is made by mail to each party's attorney of record. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 5(a), (b), 34(a).*

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CHAPTER 13 Production of Documents

2-13 Federal Litigation Guide § 13.07

§ 13.07 Requesting Documents from Nonparties by Subpoena

[1] Using Rule 45 Subpoena to Obtain Documents or Electronically Stored Information

The procedure for obtaining documents or electronically stored information from nonparties requires use of a subpoena pursuant to Rule 45. An attorney, as an officer of the court, may issue a subpoena on behalf of the court in which the attorney is authorized to practice, or for a court in a district in which production is compelled by subpoena, and valid attorney-issued subpoenas operate as enforceable mandates of the court on whose behalf they are served. n1 A Rule 45 subpoena compels a nonparty to attend and give testimony or to produce and permit inspection, copying, testing, or sampling of designated books, documents, electronically stored information, or tangible things in the possession, custody or control of that person. n2

A command to produce evidence or to permit inspection, copying, testing, or sampling may be joined with a command to appear at trial or hearing or at a deposition, or may be issued separately. n3

The requesting party may designate a form or forms for production of electronically stored information. n4 Rule 45(c)(2) authorizes the person served with a subpoena to object to the requested form or forms. n5 Pursuant to Rule 45(d)(1)(B), 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. n6 Rule 45(d)(1)(C) provides that the person producing electronically stored information need not produce the same information in more than one form unless so ordered by the court for good cause. n7

Rule 45(c) provides protection against undue impositions on nonparties. Rule 45(c)(1) directs that a party serving a subpoena "must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." n8 Rule 45(d)(1)(D) provides that the responding person need not provide discovery of electronically stored information from sources the party identifies as not reasonably accessible, unless the court orders such discovery for good cause, considering the limitations of Rule 26(b)(2)(C), on terms that protect a nonparty against significant expense. n9

[2] Serving the Subpoena

A subpoena may be served by any person who is not a party and is at least 18 years old. If the subpoena compels attendance, fees for attendance and mileage must be tendered when the subpoena is delivered. n10 Prior notice of any commanded production of documents and things or inspection of premises before trial must be served on each party in

the manner prescribed by Rule 5(b), which allows for service by personal delivery, by mail, or by electronic or other means consented to in writing under Rule 5(b)(2)(D). n11

[3] Obtaining Documents at Trial

Rule 45 explicitly applies to trials and hearings, and thus may be used to subpoena any person--party or nonparty--to produce documents, electronically stored information, or tangible things at the trial. n12

While Rule 34 is silent as to whether its procedures may be resorted to once trial has commenced, it is clearly intended to be used principally as a pretrial discovery device. n13

[4] Protection of Persons Subject to Subpoenas

Rule 45 explicitly provides protection to nonparties who are subpoenaed to produce documents, including placing an enforceable duty on the party seeking a subpoena to "take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." n14

The court on behalf of which the subpoena was issued will enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorneys' fee. n15

Rule 45(c)(3) provides for the quashing of a subpoena as a means of protecting a witness from the oppressive or unreasonable use of the subpoena power. n16

To determine whether a subpoena presents an undue burden, the court considers the following factors: n17

- Relevance of the information requested
- The need of the party for the documents
- The breadth of the document request
- The time period covered by the request
- The particularity with which the subpoena describes the requested documents
- The burden imposed

The court may also consider the expense and inconvenience to a nonparty in responding to a subpoena.

[5] Use of Rule 45 to Circumvent Discovery Rules or Orders Improper

Although Rule 45 is not limited by its terms to nonparties, it should not be used to obtain pretrial production of documents or things, or inspection of premises, from a party in circumvention of discovery rules or orders. Discovery from a party, as distinct from a nonparty, is governed by Rule 34, not Rule 45. n18 If a Rule 45 subpoena is used to obtain documents from a party as a discovery device, the subpoena must be filed and served prior to the close of the discovery period. n19

[6] Notifying Party of Inadvertent Disclosure of Privileged Materials

If information is produced in response to a subpoena that 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. n20

After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. n21

A receiving party may promptly present the information to the court under seal for a determination of the claim. n22 If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved. n23

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedurePretrial MattersSubpoenas

FOOTNOTES:
(n1)Footnote 1. *Calabro v. Stone, 224 F.R.D. 532, 533 (E.D.N.Y. 2004)* .

(n2)Footnote 2. *See Fed. R. Civ. P. 45*; *see also Fed. R. Civ. P. 34(c)* (a person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 45).

(n3)Footnote 3. *Fed. R. Civ. P. 45(a)(1)(C)*.

(n4)Footnote 4. *Fed. R. Civ. P. 45(a)(1)(C)*.

(n5)Footnote 5. *Fed. R. Civ. P. 45(c)(2)*.

(n6)Footnote 6. *Fed. R. Civ. P. 45(d)(1)(B)*.

(n7)Footnote 7. *Fed. R. Civ. P. 45(d)(1)(C)*.

(n8)Footnote 8. *Fed. R. Civ. P. 45(c)(1)*.

(n9)Footnote 9. *Fed. R. Civ. P. 45(d)(1)(D)*.

(n10)Footnote 10. *See Klockner Namasco Holdings Corp. v. Daily Access.Com, Inc., 211 F.R.D. 685, 687 (N.D. Ga. 2002)* .

(n11)Footnote 11. *Fed. R. Civ. P. 5(b)(2)*.

(n12)Footnote 12. *See Fed. R. Civ. P. 45(a)(1), (c)(2)(A)*.

(n13)Footnote 13. *See Goldy v. Beal, 91 F.R.D. 451, 456 (M.D. Pa. 1981)* .

(n14)Footnote 14. *Fed. R. Civ. P. 45(c)(1)*.

(n15)Footnote 15. *Fed. R. Civ. P. 45(c)(1)*.

(n16)Footnote 16. *See Fed. R. Civ. P. 45(c)(3)*; *see also Wiwa v. Royal Dutch Petroleum Co., 392 F.3d 812, 818 (5th Cir. 2004)* .

(n17)Footnote 17. *See Wiwa v. Royal Dutch Petroleum Co., 392 F.3d 812, 818 (5th Cir. 2004)* .

(n18)Footnote 18. *Hasbro, Inc. v. Serafino, 168 F.R.D. 99, 100 (D. Mass. 1996)* (denying defendant's motion to compel production of documents from plaintiff under Rule 45).

(n19)Footnote 19. *See Mortgage Info. Servs. v. Kitchens, 210 F.R.D. 562, 566-567 (W.D.N.C. 2002)* .

(n20)Footnote 20. *Fed. R. Civ. P. 45(d)(2)(B)*.

(n21)Footnote 21. *Fed. R. Civ. P. 45(d)(2)(B)*.

(n22)Footnote 22. *Fed. R. Civ. P. 45(d)(2)(B)*.

(n23)Footnote 23. *Fed. R. Civ. P. 45(d)(2)(B)*.

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§ 13.08 CHECKLIST: Drafting Rule 34 Document Request

The following checklist may be used as a general guideline for drafting Rule 34 document requests:

☐ **Determine party status.** Determine whether the person or entity to whom the request is to be directed is a party to the action. n1

☐ **Determine when requests will be served.** Determine when requests will be served, considering:

- ☐ **Conference requirement.** Ascertain that parties have conferred as required by Rule 26(d), unless stipulation or court order provides otherwise. n2
- ☐ **Local rules.** Review local rules for any exceptions to general rule for service of papers.
- ☐ **Shortening time.** Consider whether a motion for shortening time for service of responses and objections is appropriate. n3

☐ **Draft requests.** Draft each request keeping in mind the following issues:

- ☐ **Useful information.** Is the request precisely calculated to elicit information useful to the proponent?
- ☐ **Mandatory disclosures requirement.** Ensure that request does not seek the same information required by Rule 26 before the time those disclosures are due. n4

☐ **Organization by individual item or by category.** Is the request organized either by individual item or by category? n5

☐ **Description with reasonable particularity.** Are the requested documents described with reasonable particularity? n6

☐ Does the request designate the form or forms for electronically stored information? n7

☐ **Designation of time for inspection or production.** Does the request designate a reasonable time for inspection for inspection, copying, testing, or sampling? n8

☐ **Date of inspection compared to date of response.** Is the date of inspection set at least 30 days after the request is served? n9

☐ **Date of inspection compared to date for completion of discovery.** Ensure that the request does not seek production or inspection after the discovery cutoff date. n10

☐ **Designation of reasonable place, and manner for inspection.** Does the request designate a reasonable place and manner for inspection, copying, testing, or sampling? n11

☐ **Number requests sequentially.** Number each request sequentially, as required by applicable local rules.

☐ **Review possible grounds for objections.** Review list of possible grounds for objections, and frame requests, as appropriate, to minimize potential objections.

☐ **Certifying request.** If requesting party is represented by counsel, counsel must sign the request and include an address, e-mail address, and telephone number. An unrepresented party must certify requests personally and provide the same information. n12

☐ **Service of requests.** Serve requests within appropriate time frame. n13

☐ **Certificate of service.** Attach certificate of service, if required by local rules.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

FOOTNOTES:
(n1)Footnote 1. *See § 13.01[4].*

(n2)Footnote 2. *Fed. R. Civ. P. 26(d)*; *see § 13.02[1].*

(n3)Footnote 3. *See Fed. R. Civ. P. 34(b)* (30-day basic time frame for response).

(n4)Footnote 4. *See § 13.02[2].*

(n5)Footnote 5. *See § 13.04[2.--1].*

(n6)Footnote 6. *See § 13.04[2.--2].*

(n7)Footnote 7. *See § 13.03[3].*

(n8)Footnote 8. *See § 13.04[2.--4].*

(n9)Footnote 9. *See § 13.04[2.--4].*

(n10)Footnote 10. *See § 13.02[3].*

(n11)Footnote 11. *See § 13.04[2.--6].*

(n12)Footnote 12. *See § 13.05.*

(n13)Footnote 13. *See § 13.06.*

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CHAPTER 13 Production of Documents

2-13 Federal Litigation Guide §§ 13.09 through 13.99

[Reserved]

§§ 13.09[Reserved]

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CHAPTER 13 Production of Documents

2-13 Federal Litigation Guide § 13.100

§ 13.100 Request for Production of Documents or Electronically Stored Information

[1] Form

Request for Production of Documents or Electronically Stored Information

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

Request for Production

[*Party designation and name of requesting party*] requests, pursuant to *Federal Rule of Civil Procedure, Rule 34*, that [*party designation and name of responding party*]:

1. Produce and permit [*party designation and name of requesting party*] to inspect and copy each of the following documents: [*list documents*].

2. Produce and permit [*party designation and name of requesting party*] to inspect, copy, test, and/or sample the following electronically stored information in the designated forms [*list the information requested and designate form of production*].

3. Produce and permit [*party designation and name of requesting party*] to inspect and [*specify, e.g., photograph*] each of the following objects: [*list objects*].

[*Party designation and name of requesting party*] requests that the production described above be made on _____[*date*] at [*time of day (specify a.m. or p.m.)*]. Inspection will be made by [*specify manner of inspection*].

_____ [*Date*]

_____ [*Signature of attorney*]

_____ [*Typed or printed name of attorney*]

_____ [*Firm name, if applicable*]

_____ Attorney for [*name and designation of party*]

_____ [*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

[2] Use of Form

This is a form of request for production of documents or electronically stored information for use by a requesting party.

[3] Contents of Request

A request for production must contain the following:

- A description of the documents or electronically stored information to be produced, identified either by individual item or by category, and described with particularity n1

- The time for production which must be reasonable and should be at least 30 days after service of the request, extended by three days for service by mail, service to the court clerk, or service by electronic or other agreed-upon means of delivery n2

- The place and manner of inspection, which must be reasonable, and is subject to control by the court n3

[4] Signature Required

Rule 34 requests must be signed by the requesting party's attorney, and must state the signer's address, e-mail address, and telephone number. n4

[5] Rule 26(f) Meeting May Be Required Prior to Commencement of Discovery

Under the Federal Rules, Rule 34 requests generally may not be served before the parties have had their initial discovery planning meeting, as required by Rule 26(d) and (f). n5

[6] Request Must Not Conflict With Mandatory Disclosure Obligations

A court may strike as untimely a Rule 34 request that seeks the same information required by Rule 26 before the time those disclosures are due. This general prohibition does not prevent otherwise timely discovery under Rule 34 of independently discoverable documents or things not generated for purposes of mandatory disclosure. n6

[7] Effect of Discovery Cutoff Date

When the court enters a scheduling order under Rule 16(b) setting the time for completion of discovery, a party must seek permission from the court to serve Rule 34 requests that seek production or inspection after the cutoff date. This rule applies whether service is accomplished before or after the cutoff date. n7

[8] Service

A Rule 34 request must be served on the party to whom it is directed and on all other parties in the action, unless the court directs otherwise. Service usually is made by mail to each party's attorney of record. n8

[9] Filing Generally Not Permitted

Discovery requests and responses shall not be filed unless they are used in the proceedings or the court orders filing. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 34(b)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 6(d), 34(b)(1).*

(n3)Footnote 3. *Fed. R. Civ. P. 34(b)(1).*

(n4)Footnote 4. *Fed. R. Civ. P. 26(g)(1).*

(n5)Footnote 5. *Fed. R. Civ. P. 26(d)(1).*

(n6)Footnote 6. *See Fed. R. Civ. P. 26(a)(1)-(3).*

(n7)Footnote 7. *See Fed. R. Civ. P. 16(b).*

(n8)Footnote 8. *Fed. R. Civ. P. 5(a), (b), 34(a).*

(n9)Footnote 9. *Fed. R. Civ. P. 5(d).*

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CHAPTER 14 Responding to Document Requests

2-14 Federal Litigation Guide 14.syn

§ 14.syn Synopsis to Chapter 14: Responding to Document Requests

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§ 14.02 Ensuring Timely Response
[1] Basic Deadline: 30 Days After Service of Request
[2] Modifying Deadline by Court Order or Stipulation
[3] Avoiding Waiver of Objections

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[1] Using Protective Order
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§ 14.08 Serving Appropriate Parties

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§ 14.20 Making Timely Objection to Request

§ 14.21 Making Objections Specific

§ 14.22 Considering Grounds for Objections

§ 14.23 Avoiding Blanket Objections

§ 14.24 Claiming Privilege
[1] Providing Opposing Party Sufficient Information to Analyze Privilege Claim
[2] Considering Effect of Unintentional Disclosure of Privileged Material

§ 14.25 Protecting Privacy and Trade Secrets

§ 14.26 Complying With Unobjectionable Portions of Request

§ 14.27 Serving Objections on Appropriate Parties

§ 14.28 Certifying Objections

§ 14.29 CHECKLISTS: Preparing Objections to Rule 34 Production Request
[1] CHECKLIST: Considering Grounds for Objection
[2] CHECKLIST: Considering Protective Order
[3] CHECKLIST: Drafting Objections to Rule 34 Production Request

§§ 14.30 through 14.39 [Reserved]

§ 14.40 Discovery Encompasses Material in Party's Possession, Custody, or Control

§ 14.41 Determining Generally What Constitutes Possession, Custody, or Control
[1] Court's Territorial Jurisdiction Over Requested Materials Is Not Required
[2] Materials Located Outside United States May Be Discoverable
[3] Party's Mere Assertion Regarding Possession, Custody or Control May Be Insufficient
[4] Possession, Not Legal Ownership, Is Determinative
[5] Control and Custody Are Broader Than Possession
[5.--1] Establishing Control
[5.--2] Party Seeking Production Generally Has Burden of Establishing Control
[5.--3] Seeking Possession of Documents Held by Related Corporations
[5.--4] Seeking Possession of Documents Held by Affiliated Entities
[5.--5] Seeking Possession of Documents Held by Corporate Officers or Directors
[5.--6] Seeking Possession of Documents Held by Party's Attorneys or Insurers
[5.--7] Seeking Possession of Documents Held by Assignor

§§ 14.42 through 14.49 [Reserved]

§ 14.50 Requesting Party Sets Date for Inspection

§ 14.51 Determining Place of Production

§ 14.52 Determining Manner of Production

§ 14.53 Paying Costs of Compliance
[1] General Rule: Responding Party Pays Cost of Production; Requesting Party Pays Copying Costs
[2] Limitation: Responding Party's Undue Burden or Expense
[3] Requesting Party Generally Bears Any Translation Costs
[4] Responding Party May Bear Additional Expense If Special Procedures Are Required to Read Document

§ 14.54 CHECKLISTS: Evaluating Rule 34 Requests
[1] CHECKLIST: Determining Whether Responding Party Has Possession, Custody, or Control

[2] CHECKLIST: Determining Whether Time, Place, and Manner of Inspection Is Reasonable
[3] CHECKLIST: Determining Whether to Allow Destructive Testing

§§ 14.55 through 14.99 [Reserved]

§ 14.100 Response and Objections to Request for Production and Inspection
[1] FORM
Response and Objections to Request for Production and Inspection
[2] Use of Form
[3] Sequential Numbering
[4] Specific Responses Required
[5] Signing Responses
[6] Service of Response
[7] Filing Generally Not Permitted

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CHAPTER 14 Responding to Document Requests

2-14 Federal Litigation Guide Scope

Scope

SCOPE

Rule 34 controls the right of a party to request the production of documents and electronically stored information from another party, as well as the obligation to respond to that request.

Care should be taken in preparing the written response to each production demand to insure that the response is complete, accurate, and specific. If there is an objection to a particular demand, the objection must be explicitly stated, and not merely couched in generalized, conclusory language. When a privilege is claimed, there must be a specific and adequate description of the withheld item. Adequate procedures should be established to govern the pre-production review by qualified personnel to insure that privileged materials are not inadvertently disclosed. Otherwise, inadvertent disclosure might be held to constitute a waiver of the privilege.

While the responding party may bring a motion for protective order against a demand for production, generally speaking it is better practice to respond to the demand, stating specific reasons for inability or refusal to produce. A proper response will have the effect of placing the burden on the demanding party to move to compel responses, and can often lead to an accommodation between the parties as to production without court intervention.

This chapter discusses the various issues involved in responding to a Rule 34 production request. The chapter examines requirements under the Rule, and describes the timing and content of the response. Tactical considerations regarding potential objections are explored. The attorney-client and attorney work product privileges, as they apply to a document production, are evaluated.

The chapter includes a form of response to a production request, and discusses procedural requirements and use of the form.

For related coverage, see Ch. 13, ***Production of Documents***, Ch. 15, ***Document Management***, and Ch. 20, ***Inspection of Land and Other Tangibles***.

For expanded coverage of responding to document requests, ***see*** Moore's Federal Practice, Ch. 34, ***Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes*** (Matthew Bender 3d ed.).

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CHAPTER 14 Responding to Document Requests
A. General Rules Governing Responses to Rule 34 Production Demands

2-14 Federal Litigation Guide § 14.01

§ 14.01 Options Regarding Rule 34 Requests

A party upon whom a Rule 34 document request has been served may respond by doing any of the following: n1

- Agreeing to produce documents as requested
- Objecting to the request
- Moving for a protective order

Unless a protective order has been obtained, the party to whom a Rule 34 request is directed must respond in writing. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryProtective Orders

FOOTNOTES:
(n1)Footnote 1. *Badalamenti v. Dunham's, Inc., 896 F.2d 1359, 1362 (6th Cir. 1990)* .

(n2)Footnote 2. *See Fed. R. Civ. P. 34(b)*; *see also Fed. R. Civ. P. 26(c)* (protective orders).

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CHAPTER 14 Responding to Document Requests
A. General Rules Governing Responses to Rule 34 Production Demands

2-14 Federal Litigation Guide § 14.02

§ 14.02 Ensuring Timely Response

[1] Basic Deadline: 30 Days After Service of Request

The party responding to a Rule 34 document request has 30 days, extended three days if service is to the court clerk, electronic, by mail, or by other agreed-upon means, in which to serve a response. n1

[2] Modifying Deadline by Court Order or Stipulation

On motion of the responding party, the court may shorten or lengthen the 30-day time period to respond to a Rule 34 document request. n2

The parties also may agree in writing to shorten or lengthen the 30-day time period to respond to a Rule 34 request. n3 However, court approval of any stipulation extending the time to respond is required if the extension would interfere with a discovery cutoff date, a motion hearing, or trial. n4

[3] Avoiding Waiver of Objections

The court may hold that the responding party has waived its objections to the request if the party: n5

- Fails to respond to the Rule 34 request
- Fails to make a timely objection
- Fails to follow the requirements of Rule 34 for objecting

However, the court may grant relief from waiver on a showing of good cause. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for

Production & InspectionCivil ProcedureDiscoveryMethodsStipulations

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 34(b)*; *see Fed. R. Civ. P. 6(d)* (three additional days if served to the court clerk, electronic, or by mail).

(n2)Footnote 2. *Fed. R. Civ. P. 34(b)(2)(A). see also Hall v. Sullivan, 231 F.R.D. 468, 474 (D. Md. 2005)* .

(n3)Footnote 3. *Fed. R. Civ. P. 34(b)(2)(A).*

(n4)Footnote 4. *Fed. R. Civ. P. 29.*

(n5)Footnote 5. *Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1473 (9th Cir.)* , *cert. dismissed sub nom., China Everbright Trading Co. v. Timber Falling Consultants, Inc., 506 U.S. 948 (1992)* ; *Marx v. Kelly, Hart & Hallman, 929 F.2d 8, 12 (1st Cir. 1991)* ; *Peat, Marwick, Mitchell & Co. v. West, 748 F.2d 540, 541-542 (10th Cir. 1984)* , *cert. dismissed, 469 U.S. 1199 (1985)* .

(n6)Footnote 6. *Scaturro v. Warren & Sweat Mfg. Co., 160 F.R.D. 44, 46 (M.D. Pa. 1995)* (citing **Moore's**); *In re Uranium Antitrust Litig., 480 F. Supp. 1138, 1149 (N.D. Ill 1979)* .

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CHAPTER 14 Responding to Document Requests
A. General Rules Governing Responses to Rule 34 Production Demands

2-14 Federal Litigation Guide § 14.03

§ 14.03 Formatting Response to Rule 34 Requests

[1] Numbering Items in Response

Each item in the response to the Rule 34 document request should have the same number or letter and be in the same order as the item or category of the request to which it relates. n1

[2] Complying With Local Rules Governing Format

Local district court rules often provide that in answering or objecting to Rule 34 requests, the responding party must first state verbatim the propounded request, and immediately after the quoted request, must state the answer or objection. Local rules should be consulted for any such requirements.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 34(b).*

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CHAPTER 14 Responding to Document Requests
A. General Rules Governing Responses to Rule 34 Production Demands

2-14 Federal Litigation Guide § 14.04

§ 14.04 Making Response Specific

The party responding to a Rule 34 request must address individually each item or category of the request. n1

The response specifically must state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the responding party objects to the item or category requested, in which event the reasons for the objection must be stated. n2

The responding party may state that it is unable to comply with the Rule 34 request. This type of response should state that a diligent and good faith inquiry has been made, as well as the reason the party cannot comply (*e.g.*, the document never existed, has been lost or stolen, was inadvertently destroyed, etc.). n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 34(b)(2)(B).*

(n2)Footnote 2. *Fed. R. Civ. P. 34(b)(2)(C).*

(n3)Footnote 3. *See Searock v. Stripling, 736 F.2d 650, 654 (11th Cir. 1984) .*

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CHAPTER 14 Responding to Document Requests
A. General Rules Governing Responses to Rule 34 Production Demands

2-14 Federal Litigation Guide § 14.05

§ 14.05 Objecting to Request

The responding party may object to a particular item or category of the request, in whole or in part. The objection must: n1

- Identify the specific item or category to which objection is made
- Specify the reason for the objection

When the party objects to the production of an item or category in part, rather than in its entirety, the objection must specify the part to which the objection pertains. n2

If a responding party objects to the requested form or forms for producing electronically stored information - or if no form was specified in the request - the responding party must state the form or forms it intends to use. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryUndue Burdens

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 34(b)(2)(C).*

(n2)Footnote 2. *Fed. R. Civ. P. 34(b)(2)(C).*

(n3)Footnote 3. *Fed. R. Civ. P. 34(b)(2)(D).*

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CHAPTER 14 Responding to Document Requests
A. General Rules Governing Responses to Rule 34 Production Demands

2-14 Federal Litigation Guide § 14.06

§ 14.06 Seeking Protective Orders

[1] Using Protective Order

As an alternative to responding to a Rule 34 request, a party may seek a protective order. n1

Instead of filing a motion for a protective order, a responding party more typically will elect to interpose an objection, which will place the burden on the requesting party to make a motion to compel production or inspection pursuant to Rule 37(a). n2

[2] Asserting Rights of Third Parties in Proprietary Information

The party responding to a Rule 34 document request generally may not assert the rights of a third party to protect the third party's privacy or proprietary or confidential business information. Rather, the affected parties must intervene directly to protect such information. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryProtective Orders

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 26(c).*

(n2)Footnote 2. *See Fed. R. Civ. P. 37(a).*

(n3)Footnote 3. *See Burton Mechanical Contractors, Inc. v. Foreman, 148 F.R.D. 230, 234 (N.D. Ind. 1992)* ; *see also Bush Devel. Corp. v. Harbour Place Assocs., 632 F. Supp. 1359, 1364 (E.D. Va. 1986)* .

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CHAPTER 14 Responding to Document Requests
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2-14 Federal Litigation Guide § 14.07

§ 14.07 Certifying Responses

If the responding party is represented by counsel, the responses must be signed by at least one attorney of record. The attorney must include his or her address, e-mail address, and telephone number. An unrepresented party must certify the responses personally, and state his or her address, e-mail address, and telephone number. n1

If a response lacks proper certification, no action need to be taken with respect to it by the other parties, and the court will strike the response, unless it is signed promptly after the omission is called to the responding party's attention. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(g)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(g)(1).*

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CHAPTER 14 Responding to Document Requests
A. General Rules Governing Responses to Rule 34 Production Demands

2-14 Federal Litigation Guide § 14.08

§ 14.08 Serving Appropriate Parties

The response to a Rule 34 document request must be served on the requesting party's counsel, or on the requesting party itself if that party is without counsel. Copies must also be served on all other parties in the action. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 5(a).*

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CHAPTER 14 Responding to Document Requests
A. General Rules Governing Responses to Rule 34 Production Demands

2-14 Federal Litigation Guide § 14.09

§ 14.09 Failure to Respond Is Sanctionable

The failure to respond to a Rule 34 document request is sanctionable pursuant to Rule 37(d), regardless of whether a prior motion to compel has been made or granted. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 37(d).*

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2-14 Federal Litigation Guide § 14.10

§ 14.10 CHECKLIST: Drafting and Serving Responses to Rule 34 Production Requests

☐ **Review requests for required form and content.** Determine whether requests adhere to the form and content requirements of Rule 34 and any applicable local rules

☐ **Objectionable requests.** Consider which requests, if any, are objectionable; consider seeking protective order. n1

☐ **Information and materials to be gathered.** Consider documents which must be gathered to respond to requests.

☐ **Consider motion for enlargement of time.** Determine whether motion for order enlarging 30-day period for responding to requests is appropriate. n2

☐ **Format of response.** Depending on applicable local rules, precede each item in the response with the same number or letter, and in the same sequence, as the item or category of the request to which it pertains. n3

☐ **Content of response.** Respond separately to each item or category in the request by either:

- ☐ **Agreeing to comply.** State specifically with respect to each item or category that inspection or related activities will be permitted as requested.
- ☐ **Stating inability to comply.** State client's inability to comply, including reason.

☐ **Note objections.** For responses objected to, state that no answer is required because objection is raised. Note that if a party objects to only a *part* of the information requested, the responding party must

permit inspection of the unobjectionable parts. n4

☐ **Certifying response.** If responding party is represented by counsel, have at least one attorney of record sign response. An unrepresented party must certify responses personally.

☐ **Service of response.** Within 30 days after service of the request (extended three days for service by mail), serve response on requesting party; serve copies on all other parties in the action. n5

☐ **Certificate of service.** Attach certificate of service if required by local rules.

☐ **Responses generally not filed.** District courts generally do no require filing of responses to Rule 34 requests.

■ **FORM:** For a sample form of response to a Rule 34 document request, see *§ 14.100*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryProtective Orders

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 26(c).*

(n2)Footnote 2. *See Fed. R. Civ. P. 34(b)(2)(A).*

(n3)Footnote 3. *See Fed. R. Civ. P. 34(b).*

(n4)Footnote 4. *Fed. R. Civ. P. 34(b)(2)(C).*

(n5)Footnote 5. *Fed. R. Civ. P. 34(b)(2)(A)*; *see Fed. R. Civ. P. 6(d)* (service by mail).

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CHAPTER 14 Responding to Document Requests
A. General Rules Governing Responses to Rule 34 Production Demands

2-14 Federal Litigation Guide §§ 14.11 through 14.19

[Reserved]

§§ 14.11[Reserved]

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CHAPTER 14 Responding to Document Requests
B. Objecting to Rule 34 Requests

2-14 Federal Litigation Guide § 14.20

§ 14.20 Making Timely Objection to Request

Absent court order or written stipulation between the parties, the responding party has 30 days (extended three days for service by mail) after service of a Rule 34 request to serve a response, stating any objections. n1

If the responding party fails to make a timely objection, the party may be held to have waived its objections. n2 Even claims of attorney-client privilege and work product immunity are waived unless the party's failure to object is excused by the court for good cause shown. n2.1

However, a finding of waiver is not mandatory. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewCivil ProcedureDiscoveryRelevanceCivil ProcedureDiscoveryUndue Burdens

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 6(d), 34(b)(2)(A).*

(n2)Footnote 2. *Marx v. Kelly, Hart & Hallman, 929 F.2d 8, 12 (1st Cir. 1991) .*

(n3)Footnote 2.1. *See Cardenas v. Dorel Juvenile Group, Inc., 231 F.R.D. 616, 618 (D. Kan. 2005) .*

(n4)Footnote 3. *See Young v. United States, 149 F.R.D. 199, 206 (S.D. Cal. 1993)* (dictum that waiver of privilege might not be found because response was only three days late (citing **Moore's**)).

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CHAPTER 14 Responding to Document Requests
B. Objecting to Rule 34 Requests

2-14 Federal Litigation Guide § 14.21

§ 14.21 Making Objections Specific

Objections to Rule 34 requests must: n1

- Specifically state which document or thing is being challenged
- State the reason for the objection

If the party objects to the production of an item or category in part, the objection must identify specifically the part to which the objection pertains. n2

If objection is made to the requested form or forms for producing electronically stored information - or if no form was specified in the request--the responding party must state the form or forms it intends to use. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewCivil ProcedureDiscoveryRelevanceCivil ProcedureDiscoveryUndue Burdens

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 34(b)(2)(B).*

(n2)Footnote 2. *Fed. R. Civ. P. 34(b)*; *see also Hall v. Sullivan, 231 F.R.D. 468, 474 (D. Md. 2005)* .

(n3)Footnote 3. *Fed. R. Civ. P. 34(b)(2)(C).*

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CHAPTER 14 Responding to Document Requests
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2-14 Federal Litigation Guide § 14.22

§ 14.22 Considering Grounds for Objections

The most frequently asserted objections to Rule 34 document requests are:

- Lack of relevance to claims or defenses of any of the parties n1
- Requested material is privileged or proprietary information, or attorney work product
- Request is unnecessary or unduly burdensome, and compliance would beunreasonably difficult and expensive n2

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. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryRelevanceCivil ProcedureDiscoveryUndue Burdens

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(b)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(b).*

(n3)Footnote 3. *Fed. R. Civ. P. 26(b)(2)(B).*

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CHAPTER 14 Responding to Document Requests
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2-14 Federal Litigation Guide § 14.23

§ 14.23 Avoiding Blanket Objections

The party objecting to a Rule 34 document request must clearly set forth the specifics of the objection and how the objection relates to the documents being demanded. n1

Generally, blanket objections are unacceptable. For example, an objection stating that each request "seeks information and material protected by the attorney-client, work-product doctrine or other privilege" is insufficient, and may be held to be a waiver of any objections not adequately stated. n2

However, when objections are stated but they do not fully comply with Rule 34, the court may allow the responding party to make a more complete response. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionEvidencePrivilegesAttorney-Client PrivilegeWaiver

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 34(b)(2)(B).*

(n2)Footnote 2. *See Obiajulu v. City of Rochester, 166 F.R.D. 293, 295 (W.D.N.Y. 1996) .*

(n3)Footnote 3. *See Harris v. United States, 121 F.R.D. 652, 655 (W.D.N.C. 1988)* (defendant produced some documents and objected to production of others on six separate grounds but failed to specify which parts of the requests the objections applied to, and court granted leave to make more complete response).

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CHAPTER 14 Responding to Document Requests
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2-14 Federal Litigation Guide § 14.24

§ 14.24 Claiming Privilege

[1] Providing Opposing Party Sufficient Information to Analyze Privilege Claim

A party claiming privilege in response to a Rule 34 document request must provide sufficient information regarding the nature of the material not produced or disclosed to enable the requesting party to evaluate the applicability of the privilege. n1

A responding party who wishes to assert a privilege in response to a Rule 34 request should provide a responsive answer except for the specific items claimed to be privileged, and should include a statement of the basis for the privilege. The party must describe the allegedly privileged material in a manner that, without revealing information itself privileged, will enable other parties to assess the applicability of the privilege. n2

Rule 26 does not detail how much information must be furnished when withholding documents under claim of privilege; it merely requires sufficient information to enable other parties to evaluate the applicability of the privilege or protection. n3

An accepted method of asserting a privilege with respect to documents withheld from production is to furnish a privilege log identifying each document by author, date, recipient, description of its nature and general content, and the basis for withholding it. n4

[2] Considering Effect of Unintentional Disclosure of Privileged Material

When made in a federal proceeding, a disclosure does not operate as a waiver if: n5

- The disclosure is inadvertent
- The holder of the privilege or protection took reasonable steps to prevent disclosure; and
- The holder promptly took reasonable steps to rectify the error, including (if applicable) following *Fed. R. Civ. P. 26(b)(5)(B)*

If information is produced in discovery that 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 and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved. n6

A party asserting a claim of privilege or protection after production must give notice to the receiving party. n7 That notice should be in writing unless the circumstances preclude it. Such circumstances could include the assertion of the claim during a deposition. The notice should be as specific as possible in identifying the information and stating the basis for the claim. n8

Because the receiving party must decide whether to challenge the claim and may sequester the information and submit it to the court for a ruling on whether the claimed privilege or protection applies and whether it has been waived, the notice should be sufficiently detailed so as to enable the receiving party and the court to understand the basis for the claim and to determine whether waiver has occurred. n9

After receiving notice, each party that received the information must promptly return, sequester, or destroy the information and any copies it has. No receiving party may use or disclose the information pending resolution of the privilege claim. The receiving party may present to the court the questions whether the information is privileged or protected as trial-preparation material, and whether the privilege or protection has been waived. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryProtective Orders

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(b)(5)(A).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(b)(5)(A).*

(n3)Footnote 3. *Fed. R. Civ. P. 26(b)(5)(A).*

(n4)Footnote 4. *See Taylor v. Florida Atlantic Univ., 132 F.R.D. 304, 306 (S.D. Fla. 1990)* , *aff'd sub nom.*, *Taylor v. Popovich, 976 F.2d 743 (11th Cir. 1992)* , *cert. denied*, *507 U.S. 1051 (1993)* (requiring defendant to supply privilege list identifying documents objected to in response to request for production).

(n5)Footnote 5. *Fed. R. Evid. 502(b).*

(n6)Footnote 6. *Fed. R. Civ. P. 26(b)(5)(B).*

(n7)Footnote 7. *Fed. R. Civ. P. 26(b)(5)(B).*

(n8)Footnote 8. *Fed. R. Civ. P. 26(b)(5)* Committee Note (2006).

(n9)Footnote 9. *Fed. R. Civ. P. 26(b)(5)* Committee Note (2006).

(n10)Footnote 10. *Fed. R. Civ. P. 26(b)(5)* Committee Note (2006).

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CHAPTER 14 Responding to Document Requests
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2-14 Federal Litigation Guide § 14.25

§ 14.25 Protecting Privacy and Trade Secrets

A party may protect privacy, or trade secrets, or confidential business information from disclosure through a Rule 34 request by seeking an order limiting discovery, n1 or a protective order. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryProtective OrdersTrade Secrets LawCivil ActionsDiscovery

FOOTNOTES:
(n1)Footnote 1. *See Petz v. Ethan Allen, Inc., 113 F.R.D. 494, 497 (D. Conn. 1985)* (limiting inspection to plaintiff's counsel).

(n2)Footnote 2. *See Fed. R. Civ. P. 26(c)(1)(G).*

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CHAPTER 14 Responding to Document Requests
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2-14 Federal Litigation Guide § 14.26

§ 14.26 Complying With Unobjectionable Portions of Request

The party responding to a Rule 34 document request must specify the item or category to which the objection pertains. If an item or category is objectionable only in part, the responding party must comply with the unobjectionable portions of the request. n1

A party who fails to specify the parts of the request to which the objections apply may be held to have waived any objections not adequately stated. However, when a responding party makes noncomplying objections, the court may allow the party to make a more complete request. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 34(b)(2)(C).*

(n2)Footnote 2. *Harris v. United States, 121 F.R.D. 652, 655 (W.D.N.C. 1988) .*

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CHAPTER 14 Responding to Document Requests
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2-14 Federal Litigation Guide § 14.27

§ 14.27 Serving Objections on Appropriate Parties

Objections to a Rule 34 document request must be served on the requesting party, or if the requesting party is represented, on the party's attorney. n1

Copies of objections must also be served on all unrepresented parties, as well as on attorneys of all represented parties. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 5, 34(b)(2)(A).*

(n2)Footnote 2. *Fed. R. Civ. P. 5(a), (b).*

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2-14 Federal Litigation Guide § 14.28

§ 14.28 Certifying Objections

If the objecting party is represented by counsel, the objections must be signed by at least one attorney of record. The attorney must include his or her address, e-mail address, and telephone number. An unrepresented party must certify the responses personally, and state his or heraddress, e-mail address, and telephone number. n1

If an objection lacks proper certification, no action need to be taken with respect to it by the other parties, and the court will strike the objection, unless it is signed promptly after the omission is called to the objector's attention. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(g)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(g)(2).*

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2-14 Federal Litigation Guide § 14.29

§ 14.29 CHECKLISTS: Preparing Objections to Rule 34 Production Request

[1] CHECKLIST: Considering Grounds for Objection

The following checklist may be used as a guide to preparing objections to a Rule 34 document request:

☐ **Available from another source.** Requests may not seek information that is obtainable from some other source that is more convenient, less burdensome, or less expensive. n1

☐ **Inaccessible Source.** Determine whether requested electronically stored information is not reasonably accessible because of undue burden or cost. n1.1

☐ **Burden outweighs benefit.** The burden or expense of the requests must not outweigh their likely benefit, considering the needs of the case, the amount in controversy, the parties'resources, the importance of the issues at stake, and the importance of the responses in resolving the issues. n2

☐ **Cumulative or duplicative.** Requests may not seek information that is unreasonably cumulative or duplicative. n3

☐ **Inadequate description.** Requests may be objectionable for inadequate description if they describe a category that encompasses too many subcategories to have any real meaning. n4

☐ **Not in possession, custody, or control.** Documents are not in the responding party's possession, custody, or control. n5

☐ **Not relevant to claims or defenses.** Rule 34 requests are subject to objection if they are not relevant to the claims or defenses of any of the parties. n6

☐ **Privileged information.** Privileged information is beyond the scope of discovery, even if the information is relevant to the subject matter of the action. n7

☐ **Trade secrets.** Trade secrets and confidential business information are generally subject to restrictions on discovery.

☐ **Unrelated to discovery of admissible evidence.** Information that is not reasonably calculated to lead to discovery of admissible evidence is beyond the scope of discovery. n8

☐ **Work product protection.** Protected work product is beyond the scope of discovery. n9

[2] CHECKLIST: Considering Protective Order

A protective order may be used instead of an objection:

☐ **Evaluate use of protective order.** Determine whether motion for protective order is appropriate, and what type of relief would be desired. n10

☐ **Confer with other affected parties.** Party seeking protective order must confer or attempt to confer with other affected parties before filing the motion. n11

[3] CHECKLIST: Drafting Objections to Rule 34 Production Request

Counsel should take the steps outlined below when drafting objections:

☐ **Comply with local rules.** Local district court rules frequently contain provisions governing the format of a response to a Rule 34 document request. In the absence of any such requirements, precede each item in the response with the same number or letter, and in the same sequence, as the item or category of the request to which it pertains. n12

☐ **State objection grounds.** Set forth grounds for objections.

☐ **Comply with unobjectionable requests.** Comply with any requests not objected to.

☐ **Service of written objections.** Absent court order or written stipulation, within 30 days after service of request (extended three days if served by mail), serve objections to requests on either requesting party or requesting party's attorney, and on all other parties to the action. When a party is represented by an attorney, objections to requests must be served on the party's attorney, unless the court orders service on the party. n13

☐ **Certificate of service.** Attach certificate of service, if required by local rules.

☐ **Objections generally not filed.** District courts generally restrict filing of objections.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryRelevanceCivil ProcedureDiscoveryUndue Burdens

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(b)(2)(C)(i).*

(n2)Footnote 1.1. *Fed. R. Civ. P. 26(b)(2)(B)* Committee Note (2006).

(n3)Footnote 2. *Fed. R. Civ. P. 26(b)(2)(C)(iii).*

(n4)Footnote 3. *Fed. R. Civ. P. 26(b)(2)(C)(i).*

(n5)Footnote 4. *Fed. R. Civ. P. 34(b).*

(n6)Footnote 5. *Fed. R. Civ. P. 34(b).*

(n7)Footnote 6. *Fed. R. Civ. P. 26(b)(1).*

(n8)Footnote 7. *Fed. R. Civ. P. 26(b)(1).*

(n9)Footnote 8. *Fed. R. Civ. P. 26(b)(1).*

(n10)Footnote 9. *Fed. R. Civ. P. 26(b)(3).*

(n11)Footnote 10. *See Fed. R. Civ. P. 26(c).*

(n12)Footnote 11. *See Fed. R. Civ. P. 26(c).*

(n13)Footnote 12. *See Fed. R. Civ. P. 34(b)(2)(B).*

(n14)Footnote 13. *Fed. R. Civ. P. 5(b).*

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CHAPTER 14 Responding to Document Requests
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2-14 Federal Litigation Guide §§ 14.30 through 14.39

[Reserved]

§§ 14.30[Reserved]

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CHAPTER 14 Responding to Document Requests
C. Determining Whether Requested Material is in Party's Possession, Custody, or Control

2-14 Federal Litigation Guide § 14.40

§ 14.40 Discovery Encompasses Material in Party's Possession, Custody, or Control

To be subject to discovery under Rule 34, the documents, electronically stored information or things requested must be within the possession, custody, or control of a party. n1

The terms *possession*, *custody*, or *control* are listed in the disjunctive, and thus, only one of these requirements must be met. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryUndue Burdens

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 34(a)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 34(a)(1)*; *see Cumis Ins. Soc'y, Inc. v. South-Coast Bank, 610 F. Supp. 193, 196 (N.D. Ind. 1985)* (argument on "control" without merit when possession undisputed).

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CHAPTER 14 Responding to Document Requests
C. Determining Whether Requested Material is in Party's Possession, Custody, or Control

2-14 Federal Litigation Guide § 14.41

§ 14.41 Determining Generally What Constitutes Possession, Custody, or Control

[1] Court's Territorial Jurisdiction Over Requested Materials Is Not Required

To be within a party's possession, custody, or control, the requested materials need not be within the territorial jurisdiction of the court, because a court having jurisdiction over the parties can enforce an order for production regardless of the location of the documents or things. n1

[2] Materials Located Outside United States May Be Discoverable

A party seeking to discover documents or things located outside the United States from a party over whom the court has personal jurisdiction may use Rule 34 without first resorting to the Hague Convention on Taking Evidence Abroad, although the Hague Convention procedures are also available to facilitate the gathering of evidence. n2 However, federal courts often exercise "special vigilance" in this situation to protect foreign litigants from unnecessary or unduly burdensome discovery. n3

[3] Party's Mere Assertion Regarding Possession, Custody or Control May Be Insufficient

When it appears that the documents may exist or are within in the possession, custody, or control of the responding party, that party's mere assertion to the contrary may be insufficient. n4

[4] Possession, Not Legal Ownership, Is Determinative

Legal ownership is not required for "possession"; a party having actual possession of materials must permit discovery even if the documents belong to someone else. n5

[5] *Control* and *Custody* Are Broader Than *Possession*

[5.--1] Establishing *Control*

The term *control* is broadly construed. Control includes the legal right to obtain the documents on demand. Neither legal ownership nor actual possession is necessary if the party has the right, authority, or ability to obtain the items. n6

The concept of control also extends to situations in which the party has the practical ability to obtain materials in another'spossession, even if the responding party cannot compel the other person or entity to produce the requested materials. n7

[5.--2] Party Seeking Production Generally Has Burden of Establishing Control

The party seeking production has the burden of establishing control overthe requested documents by the responding party. n8

However, if the requesting party demonstrates that its adversary has a legal right to obtain the requested documents, the burden shifts to the adversary to show why it lacks control. n9

[5.--3] Seeking Possession of Documents Held by Related Corporations

Although cases involving related corporations are often highly fact specific, courts generally look at the following factors to determine whether the party from whom documents are sought has sufficient control for purposes of Rule 34: n10

- Corporate structures, including one company's share ownership in the other companies, and any overlap of directors, officers, and employees
- Financial relationship between the corporations
- Nonparty's connection to the transaction at issue
- Whether and to what degree the nonparty will receive the benefit of any award in the case
- Ability of the party to action to obtain the documents when it wants them

Courts generally consider whether there is, on balance, a sufficiently close connection between the entities to justify a finding of control, rather than assigning any particular weight to any one factor. n11

[5.--4] Seeking Possession of Documents Held by Affiliated Entities

A nonparty company that is affiliated in some way with a business entity party may be ordered to produce documents in its possession when those documents are requested under Rule 34. n12

However, production will be denied if the showing of a connection between the companies is insufficient. n13

[5.--5] Seeking Possession of Documents Held by Corporate Officers or Directors

A corporation may be required to produce documents in the possession or control of one of its officers. n14

Conversely, a party to an action who is an officer, director, or majority shareholder of a corporation may be required to produce documents in the corporation's possession. n15

[5.--6] Seeking Possession of Documents Held by Party's Attorneys or Insurers

Documents may be considered to be within the party's control within the meaning of Rule 34 when the documents are in the possession of the party's attorneys n16 or insurers. n17

[5.--7] Seeking Possession of Documents Held by Assignor

A party may seek possession of documents pursuant to Rule 34 held by an assignor when to do otherwise would frustrate discovery. n18

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsForeign DiscoveryCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryUndue Burdens

FOOTNOTES:
(n1)Footnote 1. *See Societe Nationale Industrielle Aerospatiale v. United States Dist. Court, 482 U.S. 522, 539-540, 107 S. Ct. 2542, 96 L. Ed. 2d 461 (1987)* ; *see also In re Uranium Antitrust Litig., 480 F. Supp. 1138, 1145 (N.D. Ill. 1979)* ; *Laker Airways Ltd. v. Pan Am. World Airways, 103 F.R.D. 42, 46-47 (D.D.C. 1984)* .

(n2)Footnote 2. *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court, 482 U.S. 522, 539-541, 107 S. Ct. 2542, 96 L. Ed. 2d 461 (1987)* ; *see* Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. No. 7444, *28 U.S.C. § 1781*.

(n3)Footnote 3. *See Societe Nationale Industrielle Aerospatiale v. United States Dist. Court, 482 U.S. 522, 539-541, 107 S. Ct. 2542, 96 L. Ed. 2d 461 (1987)* .

(n4)Footnote 4. *See Norman v. Young, 422 F.2d 470, 472-473 & n.4 (10th Cir. 1970)* (citing **Moore's**).

(n5)Footnote 5. *See In re Bankers Trust Co., 61 F.3d 465, 470 (6th Cir. 1995)* , *cert. denied sub nom., Bankers Trust Co. v. Proctor & Gamble Co., 517 U.S. 1205 (1996)* .

(n6)Footnote 6. *Japan Halon Co. v. Great Lakes Chem. Corp., 155 F.R.D. 626, 627 (N.D. Ind. 1993)* ; *Camden Iron & Metal Inc. v. Marubeni Am. Corp., 138 F.R.D. 438, 441 (D.N.J. 1991)* .

(n7)Footnote 7. *See In re Woolworth Corp. Secs. Class Action Litig., 166 F.R.D. 311, 313 (S.D.N.Y. 1996)* ; *see also Soto v. City of Concord, 162 F.R.D. 603, 620 (N.D. Cal. 1995)* ; *Comeau v. Rupp, 810 F. Supp. 1127, 1166 (D. Kan. 1992)* ; *In re Domestic Air Transp. Antitrust Litig., 142 F.R.D. 354, 356-357 (D. Ga. 1992)* .

(n8)Footnote 8. *See United States v. International Union of Petroleum & Indus. Workers, 870 F.2d 1450, 1452 (9th Cir. 1989)* ; *see also Norman v. Young, 422 F.2d 470, 472-473 (10th Cir. 1970)* ; *McBryar v. International U.A.W., 160 F.R.D. 691, 695 (S.D. Ind. 1993)* ; *Camden Iron & Metal Inc.v. Marubeni Am. Corp., 138 F.R.D. 438, 441 (D.N.J. 1991)* .

(n9)Footnote 9. *Scott v. Arex, Inc. 124 F.R.D. 39, 42 (D. Conn. 1989)* (resisting party must show substantial justification).

(n10)Footnote 10. *See McBryar v. U.A.W., 160 F.R.D. 691, 697 (S.D. Ind. 1993)* .

(n11)Footnote 11. *See Japan Halon Co. v. Great Lakes Chem. Corp., 155 F.R.D. 626, 627-629 (N.D. Ind. 1993)* .

(n12)Footnote 12. *See Cooper Indus., Inc. v. British Aerospace, Inc., 102 F.R.D. 918, 919-920 (S.D.N.Y. 1984)* ; *see also Alimenta (U.S.A.), Inc. v. Anheuser-Busch Corp., 99 F.R.D. 309, 313 (N.D. Ga. 1983)* ; *In re Uranium Antitrust Litig., 480 F. Supp. 1138, 1152-1153 (N.D. Ill. 1979)* .

(n13)Footnote 13. *See e.g., Pennwalt Corp. v. Plough, Inc., 85 F.R.D. 257, 263 (D. Del. 1979)* (production denied

in case in which it was not shown that corporations had identical Board of Directors nor that their respective business operations were sufficiently intertwined).

(n14)Footnote 14. *Riddell Sports, Inc. v. Brooks, 158 F.R.D. 555, 558-559 (S.D.N.Y. 1994)* .

(n15)Footnote 15. *General Env't Science Corp. v. Horsfall, 136 F.R.D. 130, 134 (N.D. Ohio 1991)* .

(n16)Footnote 16. *See Gray v. Faulkner, 148 F.R.D. 220, 223 (N.D. Ind. 1992)* .

(n17)Footnote 17. *See Henderson v. Zurn Indus., Inc., 131 F.R.D. 560, 565-568 (S.D. Ind. 1990)* .

(n18)Footnote 18. *See Bank of New York v. Meridien Biao Bank Tanz., 171 F.R.D. 135, 148-149 (S.D.N.Y. 1997)* .

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CHAPTER 14 Responding to Document Requests
C. Determining Whether Requested Material is in Party's Possession, Custody, or Control

2-14 Federal Litigation Guide §§ 14.42 through 14.49

[Reserved]

§§ 14.42[Reserved]

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CHAPTER 14 Responding to Document Requests
D. Producing Material for Inspection Pursuant to Rule 34 Request

2-14 Federal Litigation Guide § 14.50

§ 14.50 Requesting Party Sets Date for Inspection

The requesting party must specify a reasonable time for inspection. The time specified in the request should be at least 30 days after service of the request. n1 The court may, on motion of the affected party, permit a longer or shorter time to produce the requested documents. n2

Any questions or disputes regarding the timing of production normally are resolved without the necessity of filing a motion. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 34(b)(1)(B), (2)(A).*

(n2)Footnote 2. *Fed. R. Civ. P. 34(b)(2)(A).*

(n3)Footnote 3. *See Federal Sav. & Loan Ins. Corp. v. Village Creek Joint Venture, 130 F.R.D. 357, 360 (N.D. Tex. 1989) .*

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CHAPTER 14 Responding to Document Requests
D. Producing Material for Inspection Pursuant to Rule 34 Request

2-14 Federal Litigation Guide § 14.51

§ 14.51 Determining Place of Production

The requesting party must specify a reasonable place for inspection. n1

When the volume of material sought would make copying and transporting burdensome and oppressive to the party from whom discovery is requested, or when the distance between the parties is great, the court may require that the requesting party conduct the inspection at the convenience of the party in possession of the documents. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryUndue Burdens

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 34(b)(2)(A).*

(n2)Footnote 2. *See Caruso v. Coleman Co., 157 F.R.D. 344, 349-350 (E.D. Pa. 1994)* ; *Baine v. General Motors Corp., 141 F.R.D. 328, 331-332 (M.D. Ala. 1991)* .

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CHAPTER 14 Responding to Document Requests
D. Producing Material for Inspection Pursuant to Rule 34 Request

2-14 Federal Litigation Guide § 14.52

§ 14.52 Determining Manner of Production

Unless the parties otherwise agree, or the court otherwise orders: n1

- A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request

- If a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable

- A party need not produce the same electronically stored information in more than one form

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 34(b)(2).*

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CHAPTER 14 Responding to Document Requests
D. Producing Material for Inspection Pursuant to Rule 34 Request

2-14 Federal Litigation Guide § 14.53

§ 14.53 Paying Costs of Compliance

[1] General Rule: Responding Party Pays Cost of Production; Requesting Party Pays Copying Costs

Ordinarily, the responding party pays the cost associated with document production, while the requesting party pays for the cost of making copies. n1

[2] Limitation: Responding Party's Undue Burden or Expense

The court has authority to condition production of documents on the requesting party's paying the costs of production. n2

The court will shift costs if the responding party can show that production involves undue burden or expense. n3 However, the court generally will issue a protective order for cost-shifting or sharing only when the burden is extreme. n4

[3] Requesting Party Generally Bears Any Translation Costs

The requesting party generally bears the cost of translating a document into English. A production request requiring translation would be unduly burdensome, especially if it comes when the significance of the documents requested is not yet known. n5

However, if the requesting party translates a document for its own use, it may seek to recover its translation expenses as cost of suit if it prevails in the litigation. n6

[4] Responding Party May Bear Additional Expense If Special Procedures Are Required to Read Document

If requested documents can only be read or comprehended by the use of special procedures, the responding party may be required to pay theadditional expense associated with producing the documents for inspection. n7

In cases involving computer data, Rule 34(b) specifically provides for translation of data compilations into "reasonably usable form." n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

FOOTNOTES:
(n1)Footnote 1. *See Riddell Sports, Inc. v. Brooks, 158 F.R.D. 555, 559 (S.D.N.Y. 1994)* ; *see also Caruso v. Coleman Co., 157 F.R.D. 344, 349-350 (E.D. Pa. 1994)* .

(n2)Footnote 2. *Fed. R. Civ. P. 34(a)* advisory committee's note (1970); *see In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 669 F.2d 620, 623 (10th Cir. 1982)* .

(n3)Footnote 3. *See Bills v. Kennecott Corp., 108 F.R.D. 459, 464 (D. Ut. 1985)* (computer stored data).

(n4)Footnote 4. *See Bills v. Kennecott Corp., 108 F.R.D. 459, 464 (D. Ut. 1985)* (computer stored data).

(n5)Footnote 5. *See In re Puerto Rico Elec. Power Auth., 687 F.2d 501, 505-509 (1st Cir. 1982)* .

(n6)Footnote 6. *See In re Puerto Rico Elec. Power Auth., 687 F.2d 501, 506 (1st Cir. 1982)* .

(n7)Footnote 7. *Delozier v. First Nat'l Bank of Gatlinburg, 109 F.R.D. 161, 164 (E.D. Tenn. 1986)* (bank must bear costs of producing microfilmed documents if they are not readable unless photocopied by special equipment).

(n8)Footnote 8. *Fed. R. Civ. P. 34(b)(2)(E)*; *see In re Puerto Rico Elec. Power Auth., 687 F.2d 501, 508 (1st Cir. 1982)* .

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2-14 Federal Litigation Guide § 14.54

§ 14.54 CHECKLISTS: Evaluating Rule 34 Requests

[1] CHECKLIST: Determining Whether Responding Party Has Possession, Custody, or Control

Both requesting and responding parties must determine whether the respondent has possession, custody, or control of the documents or things requested, considering: n1

☐ **Possession.** Does responding party have actual possession, even without legal ownership?

☐ **Control or custody.** Does responding party have:

☐ The right or authority to obtain the requested items on demand, even without legal ownership or possession?

☐ The practical ability to obtain materials in another's possession, even if the responding party cannot compel the other party to produce the requested materials?

☐ **Related entities.** Is there a sufficiently close connection between related corporations or entities to justify finding control if requested materials are in the possession of the related entity, considering:

☐ Corporate structures, including one company's share ownership in the other companies and any overlap of directors, officers, and employees.

☐ Financial relationship between the entities.

☐ Nonparty's connection to the transaction at issue.

☐ Whether and to what degree the nonparty will receive the benefit of any award in

the case.

☐ Ability of the party to action to obtain the documents when it wants them.

☐ **Affiliated entities of individuals.** Are the documents in the possession of the party's:

☐ Attorneys.

☐ Insurers.

☐ Corporate officers, or directors.

☐ Assignor.

[2] CHECKLIST: Determining Whether Time, Place, and Manner of Inspection Is Reasonable

Both requesting and responding parties must consider whether the time, place, and manner of inspection is reasonable, including:

☐ **Timing.** Date specified for the request must be at least 30 days after service of the request. n2

☐ **Place.** Place specified for inspection must be reasonable. n3

☐ **Manner.** Manner of document production must be reasonable and may be either: n4

☐ **Usual course of business.** As the documents are kept in the normal course of business.

☐ **Requestor's categories.** Labeled to correspond to the categories in the request.

[3] CHECKLIST: Determining Whether to Allow Destructive Testing

Both requesting and responding parties must determine whether destructive testing is necessary and whether it can be justified, considering:

☐ **Interests served compared to value of preserving evidence.** Are the interests served by testing greater or less than the value of preserving the evidence? n5

☐ **Previous testing.** Has the party in possession of the items already tested them? n6

☐ **Destruction of entire item.** Will the entire item of evidence be destroyed. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryUndue Burdens

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 34(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 34(b)(2)(A).*

(n3)Footnote 3. *Fed. R. Civ. P. 34(b)(1)(B).*

(n4)Footnote 4. *Fed. R. Civ. P. 34(b)(2)(E).*

(n5)Footnote 5. *See, e.g., Ostrander v. Cone Mills, Inc., 119 F.R.D. 417, 419 (D. Minn. 1988)* (granting motion to compel production of fabric swatches for destructive testing in action alleging injury from flammable nightwear).

(n6)Footnote 6. *See Ostrander v. Cone Mills, Inc., 119 F.R.D. 417, 419 (D. Minn. 1988)* .

(n7)Footnote 7. *See Ostrander v. Cone Mills, Inc., 119 F.R.D. 417, 419 (D. Minn. 1988)* .

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CHAPTER 14 Responding to Document Requests
D. Producing Material for Inspection Pursuant to Rule 34 Request

2-14 Federal Litigation Guide §§ 14.55 through 14.99

[Reserved]

§§ 14.55[Reserved]

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CHAPTER 14 Responding to Document Requests
E. Forms

2-14 Federal Litigation Guide § 14.100

§ 14.100 Response and Objections to Request for Production and Inspection

[1] FORM

Response and Objections to Request for Production and Inspection

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

Response to Request for Production and Inspection

[*Party designation and name of responding party*] by [his/her] attorney(s), makes the following response to the request of [*party designation and name of requesting party*] for [*production of documents/production of electronically stored information*] dated [*insert date*]:

INTRODUCTION AND RESERVATION OF OBJECTIONS

[*Party designation and name of responding party*] has attempted to determine what [*documents/electronically stored information*] it has in response to the request, but this attempt will by necessity be ongoing. This response reflects [*party designation and name of responding party*]'s present state of knowledge [*documents/electronically stored information*] requested. By making this response, [*party designation and name of responding party*] does not waive, and expressly reserves, all privileges, including the attorney-client privilege and the work-product rule.

In addition, [*party designation and name of responding party*] does not waive, but on the contrary reserves, (a) the right to object on the grounds of competency, relevancy, and materiality, or any other proper ground, to the use of any document or electronically stored information for any purpose, in whole or in part, in any subsequent step or proceeding in this action or in any other action; (b) the right to object on any and all grounds at any time to interrogatories, requests for inspection, or other discovery procedures involving or relating to the subject matter of the Requests herein answered; and (c) the right at any time to revise, correct, add to, or clarify any of the responses propounded herein.

GENERAL OBJECTIONS

1. [*Party designation and name of responding party*] objects to the requests and each of them, to the extent they seek [*documents/electronically stored information*] thatare privileged from disclosure pursuant to the attorney-client

privilege, the attorney work product doctrine, and any other legal privilege or immunity.

2. [*Party designation and name of responding party*] objects to the requests and each of them, to the extent that they are overly broad, unduly burdensome, excessive, unreasonable, oppressive, and/or seek documents that are irrelevant, immaterial, or not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST NO. 1 [*Reproduce request*]

[*EITHER*]

1. [*Party designation and name of responding party*] will permit production as requested.

[*OR*]

1. [*Party designation and name of responding party*] is unable to comply with the request for production as requested because [*specify reasons, e.g., nonpossession of documents*]. [*Party designation and name of responding party*] has made a diligent and good faith inquiry to comply with this request in that [*describe efforts to comply with request*].

[*OR*]

1. [*Party designation and name of responding party*] objects to the request for production on the ground that [*specify objection*].

[*Repeat for each Request*]

[*Date*]

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*] Attorney for [*name and designation of party*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

[2] Use of Form

This is a form of response to a Rule 34 request for production.

[3] Sequential Numbering

Each item in the response should have the same number (or letter) and be in the same order as the item or category of the request to which it relates. n1

Many local rules require a party answering or objecting to Rule 34 requests to first state verbatim the propounded request and, immediatelyafter the quoted request, must state the answer or objection. n2

[4] Specific Responses Required

The response must state, with respect to each item or category, that inspection and related activities will be permitted as

requested, unless the request is objected to, in which case the reasons for the objection must be stated. If objection is made to part of an item or category, the part must be specified and inspection permitted of the remaining parts. n3

[5] Signing Responses

If the objecting party is represented by counsel, the objections must be signed by at least one attorney of record. The attorney must include his or her address, e-mail address, and telephone number. An unrepresented party must sign the responses personally and state his or her address, e-mail address, and telephone number. n4

[6] Service of Response

The party on whom the request is served must serve a written response within 30 days after the service of the request, extended three days if service is to the court clerk if there is no known address by mail, by electronic means, or after agreed-upon means. n5

A shorter or longer time may be directed by the court or, in the absence of a court order, agreed to in writing by the parties, subject to Rule 29. n6

[7] Filing Generally Not Permitted

Discovery requests and responses shall not be filed unless they are used in the proceedings or the court orders filing. n7

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 34(b)(2)(B).*

(n2)Footnote 2. *See* N.D.N.Y., L.R. 26.1; W.D.N.Y., L.R. 5.2(c).

(n3)Footnote 3. *Fed. R. Civ. P. 34(b)(2)(C).*

(n4)Footnote 4. *Fed. R. Civ. P. 26(g)(1).*

(n5)Footnote 5. *Fed. R. Civ. P. 6(d), 34(b)(2)(A).*

(n6)Footnote 6. *Fed. R. Civ. P. 34(b)(2)(A).*

(n7)Footnote 7. *Fed. R. Civ. P. 5(d).*

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CHAPTER 15 Management of Documents *

2-15 Federal Litigation Guide 15.syn

§ 15.syn Synopsis to Chapter 15: Management of Documents *

§ 15.01 Organizing Documents for Accessibility

§ 15.02 Considering Methods of Document Management

§ 15.03 Managing Documents Manually
[1] Examining and Evaluating Documents
[2] Filing Documents
[3] Creating a Master Document List

§ 15.04 Managing Documents Manually and Electronically

§ 15.05 Managing Documents Electronically
[1] Imaging Documents on CD-ROM
[2] Indexing Words Within the Document or Coding the Document
[3] Storing Electronic Documents in Folders

§ 15.06 Combining Imaging Systems with Network- and Web-Based Access

§ 15.07 Reviewing and Organizing Key Documents
[1] Reviewing Key Documents
[2] Organizing Key Documents

§ 15.08 Using Paralegals for Initial Document Review

§ 15.09 [Reserved]

§ 15.10 Reviewing Documents for Initial Mandatory Disclosure Under Rule 26(a)

§ 15.11 Preparing for Document Production Under Rule 34
[1] Anticipating Production Requests
[2] Obtaining Documents from the Client's Employees and Agents
[3] Considering Whether Documents Are Protected From Production
[4] Redacting Documents Prior to Production

[5] Numbering Documents for Production

§ 15.12 Producing Client E-Mails

§ 15.13 Reviewing Documents Produced Under Rule 34
[1] Determining Time and Place of Production
[2] Reviewing Documents On-Site

§ 15.14 Maintaining Electronically Stored Information in Reasonably Usable Form

§§ 15.15 through 15.19 [Reserved]

§ 15.20 Keeping a Control Set of Documents

§ 15.21 Organizing Documents Chronologically

§ 15.22 Indexing Significant Documents
[1] Creating a Computer-Based Index System
[2] Coding Electronic Documents

§ 15.23 Maintaining a "Hot Document" File

§ 15.24 Recording Document Use

§ 15.25 Creating Witness Files

§ 15.26 Creating Subject Matter Files

§ 15.27 Maintaining Files for Potential Exhibits

§ 15.28 CHECKLISTS: Managing Litigation Documents
[1] CHECKLIST: Choosing a Method of Organization
[2] CHECKLIST: Maintaining Control of Documents Throughout Litigation

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CHAPTER 15 Management of Documents *

2-15 Federal Litigation Guide Scope

Scope

SCOPE

In document-intensive litigation, the most important concern is to be able to locate all documents and be certain of their origin. A system of control and indexing that makes documents readily accessible is critical. Typical document management involves sorting, labeling, filing, and indexing documents in a manner that allows for easy retrieval. Document management typically involves some level of automation. Even for a small case, it is useful to maintain a computer-based index of pertinent documents.

The use of electronic documents has revolutionized document management, especially in large cases. Document imaging services that scan paper documents into digital images on CD-ROM are commonly used for the purpose of automating and indexing documents in complex cases. At some firms, document imaging and management systems with comprehensive indexing and retrieval features are used in all cases. A growing number of firms use Web-based sites with document management systems that make it possible for multiple users to store, index, retrieve, and electronically distribute all types of case documents with accuracy and ease.

This chapter discusses effective management of pertinent litigation documents. The chapter covers the following topics:

- Methods of document management
- Objectives of document management
- Organizing discovery documents
- Keeping a control set of documents
- Indexing documents for retrieval and annotation
- Keeping "hot document" files, witness files, subject matter files, and exhibit files

The chapter concludes with two checklists. The first checklist reviews the methods of document management and highlights the benefits of digital imaging and electronic coding. The second checklist covers techniques for keeping

track of documents throughout the course of litigation.

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CHAPTER 15 Management of Documents *
A. Evaluating Objectives and Methods of Document Management

2-15 Federal Litigation Guide § 15.01

§ 15.01 Organizing Documents for Accessibility

Proper document management allows counsel to keep track of and retrieve pertinent documents throughout the course of litigation. The key to document management lies in planned organization. Regardless of the number of documents, standardized methods of organization require:

- Indexing and/or coding of documents
- Secure storage of documents
- Accessibility to documents on an as-needed basis

Management efforts do not need to be complex in every case. In many cases, document management will involve nothing more than labeling a few tabs on file folders, putting the documents in the appropriate folders, and maintaining a master list or index of the documents.

The large number of documents involved in some cases requires management with some additional foresight, and will typically involve some level of computerized automation. In cases involving large amounts of documents, CD-imaging is often the most practical means of coding and storing documents for future use and accessibility. When paper documents are received in an office, they must be organized to be useful. Documents are labeled, sorted, filed, and indexed. Electronic documents are no different. A document imaging software system must have a comprehensive indexing system that organizes documents in a manner that makes them available on an as-needed basis.

Regardless of the method of organization, the objectives will be the same whatever the actual number of documents involved. What will vary is the complexity of the organization or the expense of technology that must be put in place to accomplish the task. Although the sole practitioner or small firm with a limited number of large cases may be unable to justify buying imaging systems, litigation support services may be retained for imaging needs on a case-by-case basis.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedurePretrial MattersConferencesCase

ManagementEvidenceDocumentary EvidenceWritingsGeneral OverviewEvidenceDocumentary EvidenceWritingsSummaries

* Chapter 15 was rewritten in 2003 by Andrew E. Westley, Esq., of San Francisco, California.

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CHAPTER 15 Management of Documents *
A. Evaluating Objectives and Methods of Document Management

2-15 Federal Litigation Guide § 15.02

§ 15.02 Considering Methods of Document Management

Methods of document management may include:

- Manual organization and filing of paper documents for manual retrieval
- Manual organization combined with automated indexing to retrieve paper documents
- Electronic CD imaging, coding, indexing, and retrieval of electronicdocuments on CD-ROM
- Electronic imaging combined with network-based or web-based access to documents for multiple users

The decision to use a manual system or a high-tech approach will probably be determined by one or more of the following variables:

- The information technology resources available
- The case budget
- The specific litigation
- The number of individuals in need of document access

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedurePretrial MattersGeneral Overview

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CHAPTER 15 Management of Documents *
A. Evaluating Objectives and Methods of Document Management

2-15 Federal Litigation Guide § 15.03

§ 15.03 Managing Documents Manually

[1] Examining and Evaluating Documents

The first step in the management of documents is reviewing relevant documents on receipt. The initial review requires counsel to consider whether the document has relevance in the litigation, and to also consider whether the document is protected as privileged or confidential material, or whether it is subject to discovery.

[2] Filing Documents

As documents are received, counsel should establish a system of organization for filing. Documents may be subdivided based on the type of document, such as: party correspondence, investigation documents, transaction documents, documents that tend to prove the client's position, discovery-related documents, and privileged documents. Separate files may then be organized in a standardized manner, such as chronologically based on the date the document was generated or received.

[3] Creating a Master Document List

Maintenance of a master document list is essential in all cases, and in its simplest form the list may be generated in table format with basic word processing software. The master document list should include basic information about each document, such as:

- Document title or type of document
- Date of document
- Author or source of document
- Short description or significance of document
- Potential uses for the document (discovery, trial exhibit, etc.)
- Document location (file name)

The master list provides an inventory of relevant litigation documents, as well as a means to quickly review and access key documents.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesCase Management

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CHAPTER 15 Management of Documents *
A. Evaluating Objectives and Methods of Document Management

2-15 Federal Litigation Guide § 15.04

§ 15.04 Managing Documents Manually and Electronically

The combined approach to document management typically involves:

- Organizing documents as they are received,
- Classifying documents for index purposes, and
- Developing a computerized database for indexing

The documents are then manually filed and may be retrieved using the electronic database. Once located, documents may be pulled and copied as needed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedurePretrial MattersGeneral Overview

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CHAPTER 15 Management of Documents *
A. Evaluating Objectives and Methods of Document Management

2-15 Federal Litigation Guide § 15.05

§ 15.05 Managing Documents Electronically

[1] Imaging Documents on CD-ROM

Imaging is the creation of an electronic copy of a document. Each person on the case may then display the document on a computer screen. Paper copies of the documents may still be retained as a backup, but are rarely touched. Electronic documents may be organized and manipulated quickly and efficiently.

With electronic imaging, each page is electronically scanned and saved on a CD-ROM disk. Electronic image software is then used to electronically access documents based on coded information. The software may be modified to suit the needs of a particular case. Most software systems for organizing electronic documents will also store deposition transcripts and other full-text files in fully searchable form. Legal support services that specialize in imaging technology offer various services relating to the creation and management of electronic documents.

Electronic documents in an imaging system may be stored and accessed based on various forms of organization, including:

- Full-text indexing
- Indexing of coded information
- Storing documents in electronic folders and sub-folders

[2] Indexing Words Within the Document or Coding the Document

Document imaging systems with Optical Character Recognition (OCR) provideautomatic full-text indexing of all documents. Once scanned, the imaging software can automatically index every word to track the location of each word and phrase within every document, dramatically reducing indexing costs while providing extensive searching capabilities.

Documents may also be organized by index codes that are specifically assigned to documents. The most basic coding systems and services provide bibliographic information for coded documents,such as: document page numbers, packet/attachment ranges, authors, recipients, copies, date, and document type.

A more comprehensive database may include bibliographic information, as well as relevant data extrapolated from the document body, such as: names and organizations in-text, key words, and issue-specific codes.

Whatever combination of indexing methodologies are employed, it is important to remember that they be easily used and understood by the people who need access to the documents.

[3] Storing Electronic Documents in Folders

Along with full-text and code-based indexing, some imaging software systems have a visual method of filing documents. In any office, files are normally found by looking in a particular folder in a particular drawer in a particular file cabinet. There is a variety of document management software that has the ability to duplicate this filing system. A flexible folder structure eases the transition from paper filing to electronic filing and may make the use of electronic documents more successful at the onset.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedurePretrial MattersGeneral Overview

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CHAPTER 15 Management of Documents *
A. Evaluating Objectives and Methods of Document Management

2-15 Federal Litigation Guide § 15.06

§ 15.06 Combining Imaging Systems with Network- and Web-Based Access

As the number of documents increases in a given case, the opportunity for a single lawyer to review each document diminishes. Hands-on work with key documents often plays a crucial role throughout the course of litigation, and the number of individuals with the need for access to key documents may be substantial depending on the size of the case.

A document imaging and retrieval system, combined with a network- or Web-based database, enables multiple users to search for a document, retrieve the document to a computer screen, view the document, make notations to the related searchable database about the document, and print the document if needed. Secure sites allow firms to post documents and other data online and selectively share the information with clients, co-counsel, or other individuals. A wide variety of litigation support businesses specialize in providing services to organize and access electronic documents.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesCase Management

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CHAPTER 15 Management of Documents *
A. Evaluating Objectives and Methods of Document Management

2-15 Federal Litigation Guide § 15.07

§ 15.07 Reviewing and Organizing Key Documents

[1] Reviewing Key Documents

An important goal of document review is to progress towards an *ever-decreasing* body of important documents. Whatever methods are employed to review and organize documents, the documents should be culled throughout the course of litigation to eliminate those that have little or no bearing on the action's key issues.

Key documents need to be gathered and made accessible at the onset of litigation in order to begin with substantive case preparation. The object must be to initially identify potentially significant documents, in such a way as to minimize the work required in a second, more thorough review. Prompt culling of a large body of documents minimizes the time and expense of a subsequent handling. However, it generally is better to reduce the universe of documents in later stages than to overlook totally important documents in the first step.

[2] Organizing Key Documents

Relevant documents should be organized in the manner (*e.g.*, chronologically, by subject matter, by witness, etc.) best calculated to facilitate their overall review. It is always necessary to maintain some system of control over the entire body of documents.

At the same time, counsel may want the ability to "parse" the documents in ways different from their fundamental, or source-related, arrangements. For instance, it is possible to assemble all significant documents seen by a particular witness or party, or all documents, from whatever source, dealing with a given subject. Under some circumstances, it might be necessary to simultaneously sort the universe of relevant documents according to several distinct criteria-- *e.g.*, all documents seen or authored by a particular witness within a given period of time.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedurePretrial MattersGeneral Overview

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CHAPTER 15 Management of Documents *
A. Evaluating Objectives and Methods of Document Management

2-15 Federal Litigation Guide § 15.08

§ 15.08 Using Paralegals for Initial Document Review

An important question to consider in apportioning document review assignments to paralegals is whether each paralegal will be responsible for a particular fact area or segment of the case, or whether each paralegal should be available for whatever most needs to be done. Specialization has the obvious advantage of promoting detailed understanding. Also, clearly defined roles and responsibilities foster independent thought, initiative, and a sense of equality among team members. A disadvantage of specialization, on the other hand, is that if a specialist leaves the job, a potentially serious gap may be left. In a particularly complex case, specialization may result even if not initially intended, just because it is not possible for each person to understand equally all aspects of the case as itdevelops; different issues frequently require analysis of very different types of documents.

One way to avoid the shortcomings of specialization is to have a central place where all attorney and paralegal work product is kept available for use by all team members. Both paralegals and attorneys should be required to generate memoranda when they learn significant new information about pertinent documents. Electronic imaging and file share software provides centralized access for multiple users, and it also allows users to annotate document files. Other mechanisms for sharing and documenting information can alleviate the dangers inherent in specialization. The pace and complexity of the case, however, are the chief factors in determining whether to have individuals specialize or not. A particularly fast- moving case may require that the paralegals handle one rush assignment after another, while a complex but slower-paced case may require that detailed long-term research be conducted on several fronts simultaneously.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesCase Management

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CHAPTER 15 Management of Documents *
A. Evaluating Objectives and Methods of Document Management

2-15 Federal Litigation Guide § 15.09

[Reserved]

§ 15.09[Reserved]

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CHAPTER 15 Management of Documents *
B. Managing Discovery Documents

2-15 Federal Litigation Guide § 15.10

§ 15.10 Reviewing Documents for Initial Mandatory Disclosure Under Rule 26(a)

An early evaluation of the client's documents is an essential component of planning for initial disclosure requirements under Rule 26(a). In applicable cases, even before any formal discovery demands are made, the parties are required to exchange documents, electronically stored information, and other tangible things that: n1

- Are in the possession, custody, or control of the party, and that
- The disclosing party may use to support its claims or defenses, unless solely for impeachment

For complete discussion of mandatory disclosure under Rule 26(a), see Ch. 10, *Purposes of Discovery*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesCase Management

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(a)(1).*

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CHAPTER 15 Management of Documents *
B. Managing Discovery Documents

2-15 Federal Litigation Guide § 15.11

§ 15.11 Preparing for Document Production Under Rule 34

[1] Anticipating Production Requests

While reviewing the client's files in preparation of mandatory disclosure requirements under Rule 26(a), it is important to start anticipating the opponent's production requests under Rule 34. At this stage of the process, it is generally sensible to be over-inclusive and to gather all documents and electronically stored information that may be needed throughout the discovery process, as well as throughout the course of litigation.

Rule 34 may be used to request production of documents or electronically stored information that are relevant to claims or defenses and that are in the possession, custody, or control of any party. n1

Unless the parties otherwise agree, or the court otherwise orders: n2

- A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request

- If a request does not specify the form or forms for producing electronically stored information, a responding party must produce the informationin a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable

- A party need not produce the same electronically stored information in more than one form

Based on the facts in the case, counsel should consider what types of documents may be subject to discovery, and then inquire of the client whether such documents exist, in what form (*e.g.,* hard copy, electronic file, e-mail, etc.) they exist, and what their production would entail.

It is critical to maintain careful records of the documents that have been or will be subject to production. In addition, it is always important to identify, segregate, and record identifying data on documents that are *not* subject to production on privilege or other grounds.

[2] Obtaining Documents from the Client's Employees and Agents

If the client's employees or agents are in possession of documents needed for discovery, explore whether you will encounter resistance obtaining the documents. If resistance is likely, it may be useful to consult the client on how best to overcome it. Resistance is common when the needed documents are considered "personal" in nature, such as desk calendars, note files, or e-mail messages. Be prepared to explain the need for the intrusion. To the extent possible, counsel should work with the client to minimize disruption, and to promote the good will of people who are mostly unfamiliar with litigation and its demands.

Once all of the individuals in a client corporation or organization who may have relevant documents are identified, develop amemorandum that will be sent to each of them by a senior person within the client, such as its general counsel. An important part of this memorandum should be a request for a response even if the particular individual has *no* documents that fit the description given. Thus, if at some future point an individual's name arises as a potential source, your records will contain a sign-off indicating that, as of the date of the original request, that person had no documents meeting the description of the request.

[3] Considering Whether Documents Are Protected From Production

When inquiring about and accumulating discovery documents, keep in mind that some documents may be excepted from production based on "undue burden," confidentiality, or privilege. As with all steps in the litigation process, the client needs to know about the risk and reward of taking certain positions in discovery, including the expense of defending that position and the possibility of sanctions. The inadvertent disclosure of protected communications or information does not result in privilege waiver if the disclosing party took reasonable steps to prevent the disclosure and to correct the error after it occurred. n1

[4] Redacting Documents Prior to Production

Since documents in the client's possession, custody, or control may cover a number of topics or contain confidential or privileged material, it may be necessary to produce them in part, by masking or otherwise concealing irrelevant or privileged materials. This procedure is sometimes time-consuming, difficult to implement, and subject to criticism by opposing counsel. However, if there is no alternative, redactions should be performed carefully.

[5] Numbering Documents for Production

Numbering of documents is often the simplest way to identify and organize documents for production. The numbering system serves as a means to keep inventory of produced documents, and the production numbers can be used for purposes of indexing discovery documents. If documents are organized by request, the response to the request can make reference to document numbers, and the documents can be easily referenced and retrieved.

For complete discussion concerning responses to document requests, see Ch. 14, *Responding to Document Requests*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryUndue BurdensCivil ProcedurePretrial MattersGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 34(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 34(b).*

(n3)Footnote 1. *Fed. R. Evid. 502(b).*

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CHAPTER 15 Management of Documents *
B. Managing Discovery Documents

2-15 Federal Litigation Guide § 15.12

§ 15.12 Producing Client E-Mails

Individuals often use e-mail as a quick and convenient way to engage in a wide variety of business activities, including discussion and revision of policies and procedures, circulation of draft documents and meeting minutes, distribution of work assignments and schedules, and actual business transaction. While many organizations have enthusiastically embraced the opportunities provided by e-mail, the vast majority overlook the fact that when e-mail messages contain evidence of business decisions, actions, and transactions, they become documents which are subject to the same legal requirements, restrictions, and standards as any record produced in any form or media.

If there are e-mail documents that a party may use to support its claims or defenses, those documents are subject to mandatory disclosure under Rule 26(a). n1 Likewise, if e-mail documents concerning a subject of litigation exist, whether in print, on someone's hard drive or network system, or on backup tapes after the messages have supposedly been deleted, they are subject to discovery and must be produced upon request. n2

Failure to produce documentation in a timely manner can result in severe sanctions. If e-mail documents are not properly organized as business documents, the client may have to face the possibility of financing a search of unmanaged andunclassified electronic data for the purpose of production. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedurePretrial MattersGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(a)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 34(a).*

(n3)Footnote 3. *See* In re Brand Name Prescription Drugs Anti-Trust Legislation, 1995 U.S. Dist, LEXIS 8218, *1-2 (N.D. Ill. June 13, 1995).

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CHAPTER 15 Management of Documents *
B. Managing Discovery Documents

2-15 Federal Litigation Guide § 15.13

§ 15.13 Reviewing Documents Produced Under Rule 34

[1] Determining Time and Place of Production

The requesting party must specify a reasonable time and place for production of requested documents. n1 Typically, the parties will agree to a means of production that involves either the delivery of copies to the requesting party or reviewing the documents in the office of the opposing party or opposing counsel. As a practical matter, the possibility of review at the document site arises most often where those records have been produced as maintained in the ordinary course of business.

[2] Reviewing Documents On-Site

In the case involving an extensive body of documents that are being produced as maintained in the ordinary course of business, the document review will almost invariably take place in the offices of the opposing party or opposing counsel. Hence, the reviewers may be operating under time constraints and without complete support facilities.

Each of these factors militates against a carefully selective review at this production stage. The risk of error is too great, and the time normally is not available. The appropriate course is to sweep very broadly, saving fine distinctions for a more detailed review in your own offices after selected documents are copied.

In cases involving the exchange of large numbers of documents, the parties may reach an agreement to share the cost of electronically imaging documents selected from production. Additional copies of the CDs may then be made for nominal cost.

For complete discussion concerning document production, see Ch. 13, *Production of Documents*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedurePretrial MattersGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 34(b).*

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CHAPTER 15 Management of Documents *
B. Managing Discovery Documents

2-15 Federal Litigation Guide § 15.14

§ 15.14 Maintaining Electronically Stored Information in Reasonably Usable Form

Rule 34(b) allows the requesting party to designate the form or forms in which it wants electronically stored information produced. However, the rule does not require that the requesting party choose a form or forms of production. n1

The responding party also is involved in determining the form of production. In the written response to the production request that Rule 34 requires, the responding party must state the form it intends to use for producing electronically stored information if the requesting party does not specify a form or if the responding party objects to a form that the requesting party specifies. Stating the intended form before the production occurs may permit the parties to identify and seek to resolve disputes before the expense and work of the production occurs. n2

If the requesting party is not satisfied with the form stated by the responding party, or if the responding party has objected to the form specified by the requesting party, the parties must meet and confer under Rule 37(a)(2)(B) in an effort to resolve the matter before the requesting party may file a motion to compel. If they cannot agree and the court resolves the dispute, the court is not limited to the forms initially chosen by the requesting party, stated by the responding party, or specified in Rule 34 for situations in which there is no court order or party agreement. n3

If the form of production is not specified by party agreement or court order, the responding party must produce electronically stored information either in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedurePretrial MattersGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 34(b)* Committee Note (2006).

(n2)Footnote 2. *Fed. R. Civ. P. 34(b)* Committee Note (2006).

(n3)Footnote 3. *Fed. R. Civ. P. 34(b)* Committee Note (2006).

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CHAPTER 15 Management of Documents *
B. Managing Discovery Documents

2-15 Federal Litigation Guide §§ 15.15 through 15.19

[Reserved]

§§ 15.15 [Reserved]

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CHAPTER 15 Management of Documents *
C. Maintaining Control of Documents Throughout Litigation

2-15 Federal Litigation Guide § 15.20

§ 15.20 Keeping a Control Set of Documents

Regardless of the method of document management, it is critical to maintain a master set of documents. This serves as a control when any document-related problems, questions, or issues subsequently arise. In the early stages of a case, the importance of such a control set may not be readily apparent. However, as documents are handled, redacted, copied, analyzed, used as deposition exhibits, given to experts for analysis, used in witness preparation, or used as attachments to pleadings, the importance of the control set grows.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedurePretrial MattersGeneral Overview

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CHAPTER 15 Management of Documents *
C. Maintaining Control of Documents Throughout Litigation

2-15 Federal Litigation Guide § 15.21

§ 15.21 Organizing Documents Chronologically

In many cases, it is valuable to establish a chronological set of all documents. Alternatively, a chronological *index* of documents may be assembled to concisely present the flow of events and of the documents surrounding those events.

Once this is done, your staff can simply review that index rather than spend hours grappling with great volumes of documents. There should be sufficient information in the index to permit selective document requests when needed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedurePretrial MattersGeneral Overview

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CHAPTER 15 Management of Documents *
C. Maintaining Control of Documents Throughout Litigation

2-15 Federal Litigation Guide § 15.22

§ 15.22 Indexing Significant Documents

[1] Creating a Computer-Based Index System

Once document review is completed, pertinent documents have to be organized in a meaningful yet flexible manner. The use of computer-based indexing systems in which abstracts of documents can be searched by key word methods, as well as date and author, is a vital tool in controlling documents in a large case. The ability to make multiple indexes for different purposes aids the ability to prepare for each deposition, as well as trial.

The most useful indexing includes:

- The document number (where applicable)
- The date of the document
- The author
- The people to whom it was addressed either directly or by copy
- A brief description of the contents

The indexing process provides subdivisions for the entire body of documents and begins to focus attention on the most important documents. Large document cases often yield remarkable quantities of transactional documentation such as sales receipts and invoices. Unless the case revolves around issues directly linked to these transactions, once the documents are indexed, they may never have to be handled again.

[2] Coding Electronic Documents

When CD imaging of key documents is employed each electronic document may be coded in a variety of ways for indexing. Documents can then be accessed using:

- Full-text searching

- Objective codes (date, author, title or number of document, etc.)
- Subjective codes (issues discussed, good and bad language, etc.)

Documents can then be retrieved in electronic form, according to any coded characteristic or combination of characteristics. If the document has been scanned with a document imaging system with Optical Character Recognition (OCR), a search can be conducted based on key words or phrases. This type of search is likely to resultin the retrieval of many more documents than the coded systems, but full-text searching is critical in large cases where familiarity with large numbers of documents and codes may be impractical.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedurePretrial MattersGeneral Overview

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CHAPTER 15 Management of Documents *
C. Maintaining Control of Documents Throughout Litigation

2-15 Federal Litigation Guide § 15.23

§ 15.23 Maintaining a "Hot Document" File

It is extremely unlikely that there will be any one document that will be dispositive of a complex case. Rather, there will be a sequence of documents which establish a course of events that is either very helpful or very harmful. These are the types of documents to include in the "hot document" file. Here too, however, the variations in individual perceptions within your staff, and caution on the part of the reviewers, may lead to over-inclusion. Therefore, the contents of this file should be reviewed periodically to eliminate documents whose importance has been supplanted by subsequent discoveries. An "issues memorandum" based on the hot document file can help determine whether the possible proof afforded by the documents is consistent with the evidence discovered from other sources.

The hot document file is also a convenient place for preliminary research and notes about the admissibility and evidentiary issues with regard to the most important documents in the case. That research may then be a basis for motions in limine or the trial notebook. Each time the documents are handled during the discovery process, lawyers and paralegals can insert thoughts about the evidentiary issues, which may continue to change as the case proceeds.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedurePretrial MattersGeneral Overview

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CHAPTER 15 Management of Documents *
C. Maintaining Control of Documents Throughout Litigation

2-15 Federal Litigation Guide § 15.24

§ 15.24 Recording Document Use

A complete document index should identify documents produced to different parties, withheld on grounds of irrelevance and/or privilege, partially withheld by redaction, considered extremely sensitive, or covered by protective orders. The index should also identify the various ways in which each document was used, such as deposition exhibits, attachments to pleadings, and attachments to affidavits.

Furthermore, an index that tracks the uses to which opposing counsel puts various documents may provide insight into the opponent's strategy well in advance of the trial. Large document cases tend to boil down to limited document use by the time of trial. Therefore, it may be very important to anticipate your opponent's case by having an adequate document-use inventory.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedurePretrial MattersGeneral Overview

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CHAPTER 15 Management of Documents *
C. Maintaining Control of Documents Throughout Litigation

2-15 Federal Litigation Guide § 15.25

§ 15.25 Creating Witness Files

The purpose of a witness file is the collection in one place of all of the documents:

- Authored by a particular witness
- Received by a particular witness
- Mentioning a particular witness

The witness file should be a manageable instrument which can be used to prepare witnesses for deposition or trial or to prepare for cross-examination. Therefore, it may be necessary to consider subdividing a large witness file into subject categories, chronological periods, or other meaningful segments. Whatever choices are made for a particular witness file, the best means of organization is to put each segment in chronological order so that the witness may work through the documents in an orderly manner.

A properly prepared document index containing all of the names mentioned in any document can be a useful tool in the assembly of witness files. It may be helpful to prepare a "witness book" by placing the document copies pertaining to a particular witness in a binder. The goal of any indexing system, whether manual or computerized, should be to permit this kind of flexibility.

Obviously, the greatest advantage of the witness files is their use in dealing with witnesses whom you consider bringing to court or to a deposition.

Witness files and preparation for depositions are discussed in Ch. 16, *Preparation for Depositions*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedurePretrial MattersGeneral OverviewCivil ProcedureTrialsDepositions

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CHAPTER 15 Management of Documents *
C. Maintaining Control of Documents Throughout Litigation

2-15 Federal Litigation Guide § 15.26

§ 15.26 Creating Subject Matter Files

The use of subject or issue files serves functions quite similar to those of the witness files. Depending on the volume of subject files, it may be desirable to use abstracts or summaries of their contents in lieu of the files. As long as these abstracts or summaries contain adequate reference to the documents, there is no reason not to place full reliance on them. As with witness files, subject files may become too cumbersome to use effectively, if they are not constantly divided and subdivided to outline the issues and sub-issues as they develop during discovery. In most cases, those issues will continue to evolve right up to the eve of trial, long after discovery is complete. The subject files should continue to evolve along with the issues.

Subject files may be extremely valuable in preparing to address issues of proof, educating new members of the trial team, or simply as a refresher. The periodic re-evaluation of those files refines the case and understanding of all its details in a way nothing else can.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedurePretrial MattersGeneral Overview

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CHAPTER 15 Management of Documents *
C. Maintaining Control of Documents Throughout Litigation

2-15 Federal Litigation Guide § 15.27

§ 15.27 Maintaining Files for Potential Exhibits

If the organizational process has worked according to plan, the documents with the greatest potential as trial or deposition exhibits will become increasingly apparent. Typically, the most important documents for use as exhibits are located in the "hot document" file.

An important consideration in the selection of exhibits is whether they are easily understood or presented. Exhibit files provide an opportunity to evaluate the strength of potential exhibits before they are used for evidentiary purposes.

For a complete discussion on exhibits, see Ch. 34, *Exhibits*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedurePretrial MattersGeneral Overview

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CHAPTER 15 Management of Documents *
C. Maintaining Control of Documents Throughout Litigation

2-15 Federal Litigation Guide § 15.28

§ 15.28 CHECKLISTS: Managing Litigation Documents

[1] CHECKLIST: Choosing a Method of Organization

The following checklist highlights some document management considerations:

☐ **Consider basic method of organization.** The method of organization may include one of the following:

☐ **Manual organization.** Manual organization and hand-filing of paper documents for manual retrieval.

☐ **Automated indexing.** Manual organization combined with automated indexing to retrieve paper documents.

☐ **CD-ROM imaging.** Electronic CD imaging, coding, indexing, and retrieval of electronic documents on CD-ROM.

☐ **CD-ROM imaging combined with electronic file sharing.** Electronic imaging combined with network-based or web-based access to documents for multiple users or locations.

☐ **Factors lending to method of organization.** The decision to use a manual system or a high-tech approach will probably be determined by one or more of the following variables:

☐ **Technological resources.** The information technology resources available.

☐ **Budget.** The case budget may or may not warrant the use of automated organization.

☐ **The specific litigation.** Document intensive cases often necessitate some level of automation.

☐ **Access needs.** The number of individuals in need of document access may require network- or Web-based access for multiple users.

☐ **In document-intensive cases, consider using CD imaged documents.** The benefits of imaged documents include the following:

☐ **Capacity for multiple users.** Images can be accessed simultaneously by multiple parties to a lawsuit or by multiple offices.

☐ **Time savings.** There will be a significant time savings with regard to document handling, searching, retrieving, and distribution of litigation documents.

☐ **Protection of original documents.** Images cannot be damaged, regardless of how often they are used.

☐ **Portability.** Images are more portable and easier to access during trial than hard copy documents.

☐ **Copy quality.** Copies printed from an image will be of original quality.

☐ **Copy ease.** There is no waiting for documents to be copied or electronically faxed.

☐ **Loss reduction.** No need to deal with lost or misfiled documents.

☐ **Document annotation.** Documents can be annotated as needed and even annotations can be electronically searched.

☐ **Quick retrieval of documents.** When imaged documents are linked to a database or coupled with indexing information, search and retrieval is virtually instantaneous.

[2] CHECKLIST: Maintaining Control of Documents Throughout Litigation

☐ **Gathering documents from client.** Early in the litigation, discuss with the client the documents that need to be gathered for the case.

☐ **Consider whether the client's agents or employees have pertinent documents.**

☐ **Consider whether electronic documents, such as e-mails, will be subject to disclosure and/or discovery.**

☐ **Organize documents for discovery.** Early in the case, it is critical to begin organizing documents that may be subject to:

☐ **Mandatory initial disclosure under Rule 26(a).**

☐ **Production requests under Rule 34(a).**

☐ **Keeping a control set of documents.** A control set of documents will:

☐ **Limit damage to documents.**

☐ **Reduce the possibility of losing documents.**

☐ **Maintaining a hot document file.** A hot document file should include:

☐ **Documents that are helpful to prove the client's position.**

☐ **Documents that may be damaging to the client's case.**

☐ **Recording document use.** Throughout the course of litigation, it is critical to annotate the document index for each document. Annotations might include:

☐ **The significance of the document and how it has been used (investigation, deposition preparation, response to document request, etc.).**

☐ **Whether the document is helpful to the client's case or harmful to the case.**

☐ **Whether the document is privileged.**

☐ **Whether the document is a potential exhibit.**

☐ **Creating witness files.** Witness files for the separate witnesses may include the following documents, amongst others:

☐ **Documents authored by the witness.**

☐ **Documents received by the witness.**

☐ **Documents that mention the witness.**

☐ **Creating subject matter files.** Subject matter files may be useful in large cases for the following purposes:

☐ **To group documents based on discrete issues that need to be proved.**

☐ **To review the case based on the subject matter of the pertinent issues.**

☐ **Creating exhibit files.** Throughout the litigation, specific key documents can be segregated and filed as potential exhibits:

☐ **Exhibit files may include many of the same documents as the hot document file.**

☐ **Exhibit files provide an opportunity to continually weigh the strength of potential evidence.**

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedurePretrial MattersGeneral Overview

* Chapter 15 was rewritten in 2003 by Andrew E. Westley, Esq., of San Francisco, California.

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CHAPTER 16 Preparation for Depositions *

2-16 Federal Litigation Guide 16.syn

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[2] Using Depositions to Evaluate Adversary's Case
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CHAPTER 16 Preparation for Depositions *

2-16 Federal Litigation Guide Scope

Scope

SCOPE

As the first of three chapters on the subject of depositions, this chapter discusses various techniques for planning an effective deposition strategy and considers some of the issues that arise when preparing to take a deposition. While Chapter 17 focuses on the taking of a deposition and Chapter 18 on the defense of a deposition, this chapter examines more generally the strategy that underlies an effective deposition program and some of the issues that may be confronted when preparing for depositions of various kinds of witnesses.

The chapter addresses the role depositions play in the discovery process. It discusses several tools that can be used to organize depositions to discover information that will maximize the chances for success at trial. By developing and pursuing a deposition strategy that explicitly probes for information supporting the theory of the case, counsel can make depositions a vital component of the discovery program.

The chapter then turns to a discussion of how to most effectively select the deponents to examine and how to anticipate the witnesses an adverse party will depose. By carefully selecting the most appropriate deponents, counsel can obtain deposition testimony on important issues in a cost-effective manner. Then, anticipating the depositions that an adversary will take, counsel can frequently obtain valuable additional time to prepare friendly witnesses for their depositions, communicate with "neutral" non-party witnesses before their views have been prejudiced by biased information learned from adverse counsel, and designate the most effective corporate deponents under Rule 30(b)(6).

The chapter also covers preparation of an adverse party's deposition. The chapter considers the scope of the questions and the role of documents. It also explores how to develop effective lines of questioning to elicit testimony supporting the theory of the case.

Next, the chapter discusses preparing for the deposition of a non-party witness, including how to identify likely non-party deponents and best approach them to secure their cooperation. This chapter offers advice on conducting successful interviews with non-party deponents, paying particular attention to former employees of the parties. In addition, the chapter considers factors to evaluate when determining whether a written statement from the witness may be useful as an alternative to a deposition.

Finally, the chapter explores some of the issues that can arise when taking and defending depositions of current and former employees of a client. It examines the status of the attorney-client privilege between counsel for a corporation and the corporation's employees, and it reviews some of the legal and ethical considerations that may lead to the

conclusion that an employee should be represented by separate counsel.

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CHAPTER 16 Preparation for Depositions *

2-16 Federal Litigation Guide § 16.01

§ 16.01 Purpose of Depositions

[1] Law Authorizing Depositions

Rule 30(a)(1) states that, "A party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by subpoena as provided in Rule 45."

Deposition practice is the linchpin of litigation. At depositions, facts are learned, theories tested, and witnesses evaluated. In short, the deposition has become a major battlefield where cases can be effectively won or lost. n1

[2] Using Depositions to Evaluate Adversary's Case

The significance of depositions has made them one of litigation's most valuable discovery devices. They provide a meaningful mechanism for discovering what potential witnesses know and what they may say at trial. Depositions also allow attorneys to gauge how well witnesses will perform at trial. Unlike other forms of discovery, the deposition is a dialogue. It is the only discovery method that enables counsel to receive an answer and then frame a new question based on that answer or to inquire into subtleties and nuances; to change the subject and later return to it from a different perspective; and to explore areas that could be damaging if explored at trial.

In addition, depositions give an opportunity to probe the factual allegations in pleadings and the content of documents that have been produced. A deposition commits a deponent to a definite version of the facts, reducing the risk of *ad hoc* or creative stories by the witness. It preserves testimony and helps prevent faulty memory, changes of heart, or influence of the adversary. It may even lead to early admissions. Vital information for impeachment purposes can be obtained. In view of the important advantages that depositions offer, they should be used to probe all relevant facts, both favorable and unfavorable. n2

[3] Benefits of Taking Depositions

Depositions provide an opportunity for a party to test its theory of the case by asking some of the "tough" questions. This allows counsel the opportunity to alter or adapt the theory after hearing key witnesses' deposition testimony. Deposition testimony also may provide an adequate basis for adding claims or counterclaims. Likewise, a deposition may bring to light weaknesses in a case, which may prompt settlement or withdrawal of a claim. At the very least, it will demonstrate the rigors, inconveniences, and unpleasantries of having unfavorable evidence brought to light. A

deposition also provides a good opportunity to show the other side your confidence, diligence, and thoroughness. This also may help prompt settlement. Finally, deposition testimony may provide the evidence necessary to secure a summary judgment.

Clearly, then, the value of depositions as a discovery tool cannot be underestimated, and most lawyers are keenly aware of this value. Yet while pretrial depositions are a dominant feature of modern federal civil litigation, not all counsel engage in the preparation and planning required to obtain the most from depositions. Now more than ever, strategic thinking must form a part of the deposition-planning process. With the presumptive limits on depositions set out in Rule 30, it is no longer safe to assume that the key information will eventually come out in discovery. Counsel must plan not only each deposition, but the entire discovery process.

[4] Establishing Strategic and Tactical Goals of Deposition

Before beginning a deposition, counsel should begin thinking about how the case will be presented at trial. By thinking about trial presentation from the start, the attorney can frame deposition strategy and even the actual question to yield evidence strengthening the case. Certain deposition questions should be asked *exactly* as they will be asked at trial to ensure that necessary answers are obtained. Others should be asked merely to find out what the witness will say, and deposition questions for witnesses who will be at trial can be phrased in a variety of ways to test the witnesses' veracity and minimize the possibility of changed testimony.

Focusing on trial-presentation issues before depositions begin reduces the risk that deposition testimony favoring the client's case will be overlooked. Unlike pleadings and discovery requests, which can usually be amended and supplemented, depositions yield immediate and finite results. Once closed, a deposition cannot be resumed merely because counsel neglected to develop a line of questioning or failed to question the witness about a document now considered critical.

[5] Establishing Deposition Plan

A useful starting point when planning depositions is the development of various conceptual and organizational tools. Four tools in particular can greatly assist with planning for successful depositions: n3

- The theory of the case.
- The issues and witness lists.
- The case chronology.
- The witness file.

While the use of these tools may seem cumbersome in smaller cases, and unnecessary when merely discovering facts and not presenting them, they help ensure that the trial presentation will be enhanced as much as possible. In addition, as discovery progresses and the quantity of information on each potential trial witness becomes larger, these tools provide an accessible and flexible way of organizing information learned from and about each witness. Whether these or other organizational tools are used, the most important aspect of deposition planning and preparation is the recognition that tools are necessary.

Many courts have established presumptive limits on not only the number of depositions but their duration as well. Similarly, some courts now require estimates of the total number of deposition *hours* a party will need. n4 These types of limitations make efficient use of deposition time essential.

[6] Evaluating Deposition Objective

To make the most of a deposition's advantages, counsel, as part of the planning process, should carefully define the purpose and objectives of each deposition. Examples of purposes and objectives include:

- To learn or prove essential facts.
- To establish background facts, relationships, and unique perspectives of parties and witnesses.
- To re-create reality through the witness's recollection.
- To block a defense or neutralize an opponent's theory.
- To secure documents and explanations about them.
- To establish damages for settlement purposes.
- To develop a *prima facie* case.
- To perpetuate testimony of important witnesses who may not be available for trial.

Each is a legitimate goal, and more than one may be pursued in a given deposition. There is no single correct way either to prepare an effective deposition strategy or to take, or defend, a deposition. Indeed, deposition preparation varies a great deal depending upon counsel's style, the personality of the witness, the size and complexity of the case, and cost constraints. Although these factors may result in many different approaches to preparing for depositions, some degree of systematic preparation is warranted in every case.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureSummary JudgmentEvidenceEvidenceTestimonyExaminationCross-ExaminationGeneral Overview

FOOTNOTES:
(n1)Footnote 1. To the extent that the preparation for the defense of a deposition is discussed in this chapter, it is primarily to show how certain organizational tools can help counsel prepare for the deposition of a witness. The preparation of the witness to be deposed and the actual defense of the deposition are discussed in Ch. 18, *Defense of Depositions*.

(n2)Footnote 2. In a limited number of circumstances unfavorable responses should be avoided. For example, when deposing a witness who will not testify at trial, limiting the deposition to the development of favorable facts prevents negative testimony in a transcript from being used at trial, absent examination by opposing counsel. Similarly, where the witness is a non-party witness, avoiding unfavorable testimony may be beneficial if opposing counsel fails to cross-examine, or cross-examine effectively.

(n3)Footnote 3. See *§ 6.02* for a complete discussion of these tools.

(n4)Footnote 4. *See, e.g.*, Guzman v. El Paso Natural Gas Co., 51 Fair Empl. Prac. Cas. (BNA) 1767 (W.D. Tex. 1990) .

* Chapter 16 revised in 1999 by Peter Kearns, Esq., San Francisco, California.

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CHAPTER 16 Preparation for Depositions *

2-16 Federal Litigation Guide § 16.02

§ 16.02 Developing a Successful Deposition

[1] Understanding Theory of the Case

[1.--1] Establishing Underlying Theory

Ultimately, a theory of the case will be used to persuade the trier of fact that your client's version of the facts is more accurate or believable than the adverse party's; each side will attempt to persuade the trier of fact that the evidence supports its theory of the contested events. Thus, deposition planning generally should begin with an effort to develop a theory of the case to explain the events in the lawsuit. Although the theory often changes and develops as discovery proceeds, its formulation helps ensure that discovery covers all necessary areas and assists in designing a discovery plan that will yield the factual support to make the theory, as adapted, as persuasive as possible.

A theory of the case ideally should be conceived as early as possible in litigation, or even before litigation begins. Unfortunately, the liberal pleading rules allow pleadings to contain minimal detail and conflicting, alternative causes of action. As a result, some lawyers delay thinking about a case theory until the later stages of discovery. Delaying consideration of the theory of the case until after depositions, however, can result in the loss of valuable opportunities to further develop evidence that supports your theory of the case. A better approach is to formulate a theory at the outset of the case and to refine it as the litigation progresses.

[1.--2] Using Deposition Planning to Develop Theory

When taking depositions of both adverse parties and non-parties, counsel should systematically ask questions of all key witnesses to elicit testimony that supports the theory. At the same time, carefully framed questions may yield answers that reveal facts *undermining* that theory. By learning about potentially negative facts early in the litigation, counsel can refine the theory of the case to reduce the possibility of surprise at trial. It is, of course, entirely possible that the deposition process will reveal that the initial theory of the case is simply untenable. Under such circumstances, it may be necessary either to refine the initial theory or to reject it and formulate a new one.

Deposition planning thus helps the trial attorney develop a theory of the case in several ways:

- It forces counsel to think about and develop the theory at an early stage.
- It requires counsel to consider what proof will be required to put forth that theory.

- It forces counsel to develop a list of deponents and the preferred order for taking their depositions.

In addition to helping counsel develop facts bearing on the theory of the case, depositions allow counsel to learn about and undermine the adverse party's theory of the case. By anticipating an adverse party's theory of the case, counsel can probe for facts that may undermine it and better prepare witnesses for their own depositions. In short, development of a theory of the case requires thinking about the big picture early in the litigation and mapping out how to get where you need to go to win at trial.

[1.--3] Considering Various Sources of Information to Develop Theory

To develop a theory of the case, counsel should consider a number of sources.

First, conduct a careful review of the pleadings, interrogatory responses, and documents served or produced by the parties in the action. Although there is seldom a single allegation or document that leads to one indisputable theory of the case, these sources are the bedrock that support the possible theories that explain the factual issues in the case.

Second, in the early stages of litigation, the client may be a source for possible theories of the case. Even though clients may not always appreciate the issues that are *legally* relevant in a lawsuit, they often develop a theory that explains the basis of the dispute.

Third, it also is essential to hear each known witness's version of the facts, compare that version with other witnesses' recollections and the written records, and determine whether possible theories are plausible in light of this information.

Either before or after an initial theory of the case is developed, themes can be created for presenting that theory. Basic trial advocacy requires development of a theme that sets forth a basic moral foundation of persuasion as to why one side should win.

[2] Developing Lists of Issues and Witnesses

Once initial themes and theories of the case are developed, it is useful to develop a list of issues raised by these tools. The issues list addresses what legal and factual proofs and support will be necessary to prove the theory of the case. Along with the issues list, the witness list should be put together early. Together, these lists allow serious discovery planning to go forward.

The issues and witness lists consist of the relevant legal and factual issues in the litigation and the people who may testify concerning each issue. The issues list develops in tandem with the effort to develop a theory of the case and assists in the organization of the deposition process. The issues list helps with development of the theory of the case by identifying the legal and factual requirements the theory of the case must meet. Creation of an issues list aids the deposition process by identifying testimony necessary to prove these issues at trial. Once the relevant issues have been identified and paired with the witnesses who can provide testimony on them, planning for the actual depositions can begin.

There are numerous ways to identify issues that are likely to arise and that must be proven at trial. For example, drafting a proposed set of jury instructions can provide counsel with a detailed road map of the elements of the claims that will be asserted at trial. Similarly, if the case is to be tried to a judge, drafting a set of conclusions of law and even a set of proposed findings of fact will lay out the elements of the causes of action asserted and the facts that may support them.

When preparing an issues list, counsel need not know the names of potential witnesses. Generally, it is important only to determine at the early stage the role a person played. For instance, in a case where it is relevant to learn the events at

a factory at a particular time, the names of the employees are not necessary to appreciate that they may know what happened. Simply knowing the actual or likely job title is enough. Similarly, where it is relevant to know how a document was prepared, the document custodian or secretary probably can provide such information, even though that person's name is unknown.

With presumptive limits on the number and length of depositions becoming commonplace, the issues list allows for a more strategic approach. It allows the witness list to be prioritized and forces attorneys to think through exactly what they hope to learn from each witness.

[3] Developing Case Chronology

One of the simplest and most useful ways to organize the facts in a case is by the creation of a chronology. Organizing the key events in a case in chronological order helps to develop a better sense of how those events took place and perhaps even *why* they took place. Sometimes, the relationship among the events in a case takes on a greater clarity when organized chronologically.

A case chronology is an especially useful tool for preparing depositions. Because witnesses frequently recall events without reference to the order in which they occurred, a detailed chronology can clarify what might otherwise be disjointed testimony. Once key facts have been elicited from a witness, the deposing attorney can then use the chronology to reorganize that testimony in a series of clear, concise questions.

A case chronology should not be limited to a diagram. In addition to developing a written chronology, all of the documents should be put in chronological order, if time and expense allow. In fact, creating a chronological document set should precede the creation of a case chronology, to ensure that all important events are accounted for. Once this chronological set has been reviewed, an overall chronology can be drafted, with supporting documents identified. The client or its employees can then be interviewed for additional details. As new facts come to light, the chronology can be updated.

[4] Developing Witness Files

Witness files are usually thought of as accompanying trial preparation. Individual witness files for trial generally include all of the relevant material on each witness, including background information about the witness, the documents about which the witness may testify or from which the witness may be impeached, and testimony of other witnesses about him.

But a witness file need not await pretrial. In many cases, witness files can aid greatly in deposition preparation. Thus, witness files for probable deponents should be created as early as possible in the litigation so that all relevant materials for the witness can be gathered in one place for easy retrieval. Of course, cost is a factor in deciding whether to create witness files early on. If a case has several hundred thousand production documents, creating witness files for all potential witnesses is inefficient.

The contents of a witness file are often incorrectly limited to a collection of those documents authored or received by the witness. Original documents should be supplemented with documents that concern the subject matter about which the witness will be questioned. Once the probable subject matter of a witness's testimony is identified, witness files can be updated to include these documents.

Although witness file creation and maintenance can be labor intensive and expensive, new technologies have helped to reduce both the time and cost of this important effort. Some of the new software products designed to assist with litigation can significantly reduce the costs of maintaining witness files. For example, documents can now be copied onto computers using imaging software. These documents can then be searched by field or word and then reviewed or

printed as necessary. Rather than spending enormous paralegal effort pulling documents and putting them in chronological order, this software allows the user to conduct a search and then either read or print the documents in whatever order desired.

[5] Deciding When To Begin Deposition Preparation

Deposition planning should not be restricted to a specific period of time during a lawsuit. In fact, effective deposition planning continues from the beginning of a case until discovery ends. Thus, planning for the prosecution or defense of depositions should begin with the first meeting with potential witnesses.

Similarly, notes from pre-litigation meetings with an adverse party should be preserved for possible use during depositions. When planning or preparing for depositions, trial counsel often find key information in earlier depositions in the same case. Counsel should always be alert for information that can be used in a deposition.

[6] Timing of Depositions

Generally, a deposition should be taken only after sufficient written and document discovery to make the deposition as useful as possible. Under the Federal Rules of Civil Procedure, no deposition can occur until after the Rule 26(f) conference has been held, absent court order or the parties' consent. As a practical matter, this puts depositions off until after initial mandatory disclosure is provided, and in complex cases, probably until after at least one round of discovery requests has been served and answered.

Except where counsel believes one or two early depositions could lead to early settlement, the wisest course of action is to wait before taking depositions. Generally, depositions should not be taken until after documents have been produced and individuals with relevant information identified. Unless circumstances require otherwise, *i.e.*, because the parties dispute a need to produce documents, depositions should always await a review of documents produced. Knowledge of the relevant documents is essential for framing probing questions. Further, documents can be used to refresh a witness's recollection or to keep a witness from straying too far from the written record. A deposition is the ideal place to establish the admissibility of documents. By using documents with deposition witnesses, counsel can dispense with pretrial objections and ensure that the documents can be used at trial.

Exceptions to this general flow of events occur when, for example, a party seeks a preliminary injunction. Similarly, early depositions may occur where necessary to develop facts to support a Rule 12 motion to dismiss.

In addition, other strategic circumstances might prompt counsel to take depositions before other discovery. For example, taking a deposition before the witness's counsel has developed a more sophisticated knowledge of the case may help ensure that the witness's testimony is as uncoached as possible. Also, if important non-party witnesses are about to leave the court's jurisdiction or otherwise become unavailable, their deposition should be taken without the benefit of other discovery rather than risk losing the opportunity to depose them.

A further exception to the rule of waiting to take depositions may arise where the adverse party's case depends to a large extent on the testimony of a particular witness. Deposing that witness shortly after the lawsuit commences could enable better, early evaluation of the case. Lastly, it may be appropriate to take limited deposition testimony before other discovery if the parties agree that the depositions will help in evaluating settlement possibilities. In such circumstances, the scope of these depositions can be curtailed by agreement to those issues that will promote settlement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil

ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureRemediesCosts & Attorney FeesCostsDepositions & TranscriptsEvidenceTestimonyRefreshing RecollectionGeneral Overview

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CHAPTER 16 Preparation for Depositions *

2-16 Federal Litigation Guide § 16.03

§ 16.03 Identifying Witnesses To Be Deposed

[1] Understanding Basic Guidelines

Under the Federal Rules, counsel may depose "any person" without leave of court, subject to certain limitations. n1 The Federal Rules require careful selection of deponents to avoid wasting time and money on useless depositions. n2 Rule 30 provides that a party must obtain leave of court if, without the written stipulation of the parties, a proposed deposition would result in more than 10 deposition being taken under Rule 30 or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants. n3

In addition, the Federal Rules also presumptively limit each deponent to one deposition. n4 Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours. n4.1

Furthermore, Rule 26(b)(2) provides that:

[t]he frequency or extent of use of the discovery methods ... shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Thus, a party or witness may be entitled to an order preventing the other party from taking a person's deposition a second time. n5

Although the Federal Rules allow broad inquiry, local rules limiting the length of depositions may effectively curtail the breadth permitted by the Federal Rules. n6 Rule 30(a)(2) allows the presumptive limit on the number of depositions to be waived if the court finds in fairness that additional depositions are necessary for full discovery.

Under Rule 30(b)(6), included in the "any person" definition are depositions of corporations, partnerships, associations, government agencies, and other entities. Rule 30(b)(6) presents a very useful tool, especially in complex litigation, for obtaining relevant information with a minimum number of depositions. Because the presumptive limits are based on the number of *depositions*, not witnesses, Rule 30(b)(6) has taken on even greater significance.

After an attorney prepares the issues and witness lists and identifies the individuals who may be able to provide relevant information on the various issues in the case, it is relatively easy to identify the witnesses who should be deposed and those whom adverse parties will probably depose. Nonetheless, the selection of deponents should be made after careful consideration, because depositions are an expensive and time-consuming process. Moreover, the significant restrictions that now exist on the number and/or duration of depositions require that deposition discovery be targeted, planned, and focused.

[2] Using Pleadings to Identify Witnesses

The identification of potential deponents usually begins with a review of the pleadings, although their usefulness varies from case to case. In simple cases, many of the needed deponents may be identified in the pleadings. For instance, if the complaint in a slander case indicates who made and who heard the slanderous remarks, it may provide the identity of all of the necessary liability deponents.

In most cases, and especially in complex litigation, the pleadings probably are devoid of the type of factual detail necessary to compile deposition witness lists. With the advent of mandatory disclosure, however, the information provided under Rule 26(a) will identify most or all witnesses, with discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment. Further identification or refinement of the potential deposition witness list will then require a review of the documents ultimately produced and consideration of persons identified during other depositions.

[3] Using Documents to Identify Witnesses

Before the advent of mandatory disclosure, interrogatory answers and documents furnished by a client or produced by adverse parties were the principal sources of the identity of possible deposition witnesses. Now, the mandatory disclosure statement is likely to be that source. Nonetheless, in the course of reviewing documents, the identity and relationship of the critical participants in the disputed events may become clear. Thus, documents will provide a means for narrowing the list of potential deponents from that provided in the initial mandatory disclosure. Careful review of documents also will enable counsel to determine potential witnesses based upon subjects that must be probed. Additional facts about these subjects may be discovered either by identifying an individual or pursuant to Rule 30(b)(6).

In litigation involving corporate entities, corporate organization charts can provide a quick means for identifying persons by subject. These charts will allow refinement of the deposition list based on responsibilities that coincide with areas that require investigation. Wherever possible, then, organizational charts should be obtained early in discovery. Ideally, requests should be made for all corporate organizational charts covering the time period affecting the events raised in the suit. In this manner, counsel can identify relevant witnesses based on their corporate responsibilities at the appropriate time. Past corporate organization charts also will allow identification of witnesses no longer employed by the parties, but whose former jobs make their testimony relevant and desirable.

[4] Using Interrogatories to Identify Witnesses

The identification of witnesses has long been recognized as one of the primary types of information that can be obtained by the use of interrogatories. However, given mandatory disclosure, the usual interrogatories asking for the identity of persons most knowledgeable could become largely obsolete. Rule 26(a)(1)(A) requires the disclosure, without request, of the name and known addresses and telephone numbers of all individuals likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment. As a result, parties should not have to use their now-limited number of interrogatories to obtain this basic information. Moreover, since Rule 26(e) *requires* supplementation of the initial disclosure, a party need not use an interrogatory to obtain the names of later-discovered witnesses.

The use of interrogatories to identify witnesses should not be completely abandoned. A well-drafted interrogatory may serve to narrow or focus the list of names provided in mandatory disclosure. By asking an adverse party to identify witnesses concerning specific issues in the lawsuit, counsel can reduce the possibility that an important witness on a key issue will not be identified and deposed.

Typically, an adverse party is best able to identify its own employees or agents who may have played a role in the disputed events. Thus, an interrogatory seeking to identify witnesses "most knowledgeable" about an issue (as opposed to the requirement of Rule 26(a)(1)(A) requirement to identify persons "likely to have discoverable information") can still be quite useful.

Using an interrogatory also increases a party's options when forced to resort to court intervention. If an adverse party fails to identify an important witness in response to an appropriate interrogatory that seeks such information, the court will probably permit a deposition of the witness after he is identified, even though discovery is otherwise complete. Under Rule 37(a), the court can compel such a deposition upon motion by a party.

Amended Rule 37(c)(1) states that a party that "fails to disclose information required by Rule 26(a) or 26(e)(1) *shall not*, unless such failure is harmless, be permitted to use as evidence at trial, at a hearing, or on a motion *any witness or information* not so disclosed" (emphasis added). Thus, failure to disclose an important witness in a mandatory disclosure jurisdiction *requires* the exclusion of that witness's testimony.

[5] Using Client Interviews to Identify Witnesses

The client or client's employees may help identify people who can provide testimony on the disputed issues. Because clients are usually closer to the events in a lawsuit, they may know the identity of people who can give relevant testimony, but whose names do not appear on any of the relevant documents. For instance, a client may know that a secretary heard a discussion at a key meeting, even though the secretary is not identified in any of the documents describing the meeting.

Moreover, employees are likely to be aware of third-party contacts for which no documentation exists, or whose documents will have to be subpoenaed. In cases in which the client has had an ongoing relationship with the adverse party, the client can be an especially good source for the names of adverse witnesses. In addition to providing the names of relevant witnesses, the client may know much about each person's background and personality. Such background information may help with the preparation of deposition questions and anticipation of how the witness may react to questioning. In those situations where it appears that several potential witnesses may provide necessary but overlapping testimony, a knowledgeable client may provide information that will help in making the determination about which witness is likely to be the most useful or in what order the depositions should be taken.

The client or its employees are also often a great source for determining which of the party's own witnesses are best able to testify about certain matters. This information, if obtained early, allows counsel to meet with potential witnesses to decide who will be the best witness on a given topic.

[6] Using Deposition Testimony to Identify Witnesses

One of the best times to learn about witnesses with relevant information is during the depositions themselves. In responding to deposition questions, a witness frequently will reveal the name or identity of a person who may become an additional deponent. Whenever the witness discusses a meeting or telephone conversation, the witness should be asked to identify all the participants. Similarly, when the witness testifies about a document, he should be asked to identify the person who wrote or compiled it, with whom the witness discussed it, and to whom it was sent. Only by asking these questions can counsel be certain that relevant witnesses and related documents will be identified. n7

In addition, every deposition should routinely include questions asking who else might have knowledge of events in the case and whether there are any other documents relating to the issues. Such questions should always be asked as follow-up questions when a witness cannot fully answer because of lack of knowledge or memory. In this way, depositions help prevent surprise witnesses and documents from turning up at trial.

Even though witnesses are identified through mandatory disclosures, the identification of important witnesses should also be probed through deposition questions in case all relevant witnesses were not identified in the disclosures.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsPerpetuation of TestimonyEvidenceTestimonyCredibilityGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 30(a)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 16(a)(3).*

(n3)Footnote 3. *Fed. R. Civ. P. 30(a)(2)(A)(i).*

(n4)Footnote 4. *Fed. R. Civ. P. 30(a)(2)(A)(ii)* states, in part, that a party must obtain leave of court if, without written stipulation of the parties, "the deponent already has been deposed in the case."

(n5)Footnote 4.1. *Fed. R. Civ. P. 26(d)(1).*

(n6)Footnote 5. *See Graebner v. James River Corp., 127 F.R.D. 532 (N.D. Cal. 1989)* (deposing party did not raise any questions about completeness of first deposition).

(n7)Footnote 6. *See, e.g.*, N.D. Okla. Civ. R. 30.1(G) ("No deposition shall extend beyond six hours in length, beyond 5:00 p.m., or be taken on a weekend or holiday without [consent of the parties].")

(n8)Footnote 7. *See Marino v. Otis Eng'g Corp., 839 F.2d 1404, 1414 (10th Cir. 1988) . See Fed. R. Civ. P. 26(e)(2).*

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CHAPTER 16 Preparation for Depositions *

2-16 Federal Litigation Guide § 16.04

§ 16.04 Anticipating an Adverse Party's Deposition Requests

[1] Understanding Importance of Adversary's Deposition Plan

Discovery planning should include identification of witnesses that an adverse party may depose. There are significant benefits in successfully anticipating an adversary's deposition plans. Such benefits include:

- Early warnings to likely witnesses to avoid discussing the case except with counsel.
- An opportunity to select the best Rule 30(b)(6) witnesses.
- More complete preparation when the individuals are deposed.

Moreover, it allows trial preparation to begin at an earlier stage by focusing on defensive aspects of the case as well as the offensive ones.

[2] Considering What Depositions Will be Taken by Adversary

By anticipating a deposition long before the notice of examination arrives, counsel can ensure that there is adequate time to prepare the witness. In a highly technical case it may be necessary to begin a witness's preparation sessions substantially in advance of the deposition to ensure that there is ample time to understand the witness's testimony before the deposition. Similarly, if a witness's likely testimony will pose significant attorney-client privilege concerns, early preparation will leave sufficient time to file a motion for a protective order, if necessary, or to warn opposing counsel in advance. This can help avoid unnecessary cost and confrontation by allowing these issues to be debated and either settled or decided before the deposition begins.

Anticipating adverse depositions also helps when an important witness presents special problems. For example, an especially hostile or timid witness will probably require multiple meetings to prepare fully for the deposition. By preparing a difficult witness over the course of several sessions, the attorney may afford the witness the opportunity to practice and comprehend essential deposition skills. The witness will then be in a better position to offer clear, accurate testimony. Finally, becoming familiar with both the witness and the testimony allows counsel better control over the deposition once it begins.

[3] Influencing Opposing Counsel's Deposition Choices

Another potential advantage of anticipating depositions is the possibility of influencing adverse counsel's deposition choices. Although opportunities to influence an adverse party's choice of deposition witnesses are usually limited, they do exist. For example, it is not uncommon for adverse counsel to notice the depositions of the persons who verified the complaint (if the complaint was verified), assisted in thepreparation of answers to interrogatories, or are identified as persons most knowledgeable about a topic. Each instance presents an opportunity to steer the opposition toward preferred witnesses.

First, those who sign pleadings can be kept consistent. If pleadings are signed by persons other than counsel, there is little need to have different persons certifying the accuracy of alleged facts in a complaint or interrogatory answer, since the signatory need only attest that she has read the document and believes after reasonable inquiry it is accurate. n1

Similarly, careful selection of those listed in an interrogatory answer as most knowledgeable about a topic can minimize the number of persons exposed to depositions. n2 While it is poor practice to fail to name truly knowledgeable people (and presently a violation of Rule 26(a)(1), among others), it is often possible to designate or identify in an interrogatory response one person as knowledgeable on a variety of related issues. Careful selection of individuals in response to interrogatories or Rule 30(b)(6) motions can result in influencing opposing counsel's deponent selection.

If a proposed deponent's name appears on numerous relevant documents, only with mutual trust and respect among counsel is it still possible to influence the selection of deposition witnesses. If opposing counsel, for example, asks to depose a witness whose name appears as a "cc" on numerous documents, but the person has little or no information about the issues in the lawsuit, a wasteful deposition can be avoided by discussion among counsel, explaining the situation, and offering the names of more suitable witnesses. This approach should *not* be used to wrongly convince opposing counsel that a key witness has no information. Thus, if there is even a possibility that the person may be a witness at trial, this approach cannot apply. The purpose is to avoid unnecessary expense, not to mislead the opponent.

An opportunity for influencing the order of depositions can arise when an adverse party wants to depose numerous witnesses represented by the same counsel. Under these circumstances, that counsel may be given the opportunity to propose the order in which the depositions will be taken. For example, if counsel for a large corporate defendant agrees to bring witnesses from around the country to be deposed at the corporation's headquarters, adverse counsel may be willing to allow the corporation's counsel to determine the dates for each deposition or the sequence in which they will be taken. In short, influence by opposing counsel over such matters is the price a party may be willing to pay to ensure cooperation.

A number of courts have held that depositions of senior corporate managers and officers can justifiably be delayed until after lower level employees are deposed. The rule recognizes that senior management is rarely the *most* knowledgeable about the details of a case. Rather, their testimony can often be redundant. n3 Further, some courts hold that the busy schedules of senior personnel should be recognized. n4 These courts conclude that depositions of these busy people should occur only if the relevant facts cannot be obtained from lower level employees. n5

Scheduling favorable depositions, including those of key witnesses, earlier in a case may have advantages. For example, it may promote settlement prospects. On the other hand, if a key witness's testimony is potentially *damaging*, waiting until later in the discovery process could promote settlement as well.

[4] Designating a Rule 30(b)(6) Witness

[4.--1] Understanding Rule 30(b)(6)

Under Rule 30(b)(6), a party may notice the deposition of "a public or private corporation, partnership, an association or a governmental agency," rather than name a person as a deponent. When a Rule 30(b)(6) deposition notice is served, the

Rule states that the named organization "shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf." The Rule 30(b)(6) deposition notice must "describe with reasonable particularity the matters on which examination is requested." Thus, the focus of a Rule 30(b)(6) notice is not a particular person but the subjects identified in the notice.

In response to a Rule 30(b)(6) deposition notice, the deponent organization may choose someone from within the organization or even someone outside it to testify on its behalf. However, the designated Rule 30(b)(6) witness must be able to "testify as to matters known or reasonably available to the organization." n6

When a corporation produces an employee witness pursuant to a Rule 30(b)(6) deposition notice, the corporation represents that the employee has the authority to speak on behalf of the corporation with respect to those areas on which testimony was requested. n7 The witness's authority to speak on the corporation's behalf extends to matters of both fact and opinion. n8 Moreover, a witness designated to answer questions at a deposition under Rule 30(b)(6) must be prepared to testify for the entire organization, not merely for a certain unit or department. n9

[4.--2] Choosing Individual Best Suited for Rule 30(b)(6) Deposition

If no one person can testify as to all of the matters contained in the deposition notice, the party must provide more than one person or must educate one person about the organization's knowledge about the particular subject.

Thus, even if only one individual actually knows the facts relating to the identified subject, Rule 30(b)(6) does not command that this witness testify. Rather, the Rule permits a party to present the witness it chooses so long as the witness is fully educated about the factual information sought by the party issuing the notice. Moreover, Rule 30(b)(6) allows a party to select a different Rule 30(b)(6) witness for each topic on which Rule 30(b)(6) testimony is sought. And the witness need not be an employee. As a result, it is always possible for the noticed party to choose the Rule 30(b)(6) witness.

Before the designation is made, Rule 30(b)(6) witnesses should be interviewed and evaluated. When interviewing possible 30(b)(6) witnesses, counsel should discuss their roles in the events of the lawsuit, as well as relevant documents. For Rule 30(b)(6) witnesses in particular, it is essential to evaluate the witness's knowledge and credibility.

[4.--3] Deciding Whether to Designate Important Witness Under Rule 30(b)(6)

One issue that often arises when designating Rule 30(b)(6) witnesses concerns whether to designate "important" witnesses. Some lawyers prefer not to designate an important trial witness as a Rule 30(b)(6) witness because they do not want that witness to assume any additional obligations. By preventing an important witness from being designated as the organization's Rule 30(b)(6) witness, these lawyers apparently believe that the witness will be spared a more extensive cross-examination at trial. When the organization from which a Rule 30(b)(6) witness is sought is outside the court's subpoena power, some lawyers even try to select as a Rule 30(b)(6) witness someone who cannot be compelled to appear at trial. This gesture reflects a misunderstanding of the Federal Rules and of Rule 30(b)(6) testimony as well.

Under Rule 32(a)(3), testimony taken pursuant to Rule 30(b)(6) can be used by an adverse party at trial "for any purpose." Thus, using a Rule 30(b)(6) witness who will be beyond the court's subpoena power for trial merely limits the testimony to that obtained in the deposition. It does not avoid the introduction of that testimony at trial. On the other hand, selecting an important witness as a Rule 30(b)(6) witness can have the salutary effect of minimizing the number of witnesses that will be called for deposition. Further, it minimizes the probability of inconsistencies. Thus, there may be strong reasons for either decision.

[4.--4] Scope of Deposition Under Rule 30(b)(6)

Generally, a deposition under Rule 30(b)(6) must be confined to matters stated with "reasonable particularity" in the notice of deposition or subpoena. If the examiner goes beyond these matters, the deponent's attorney may be able to instruct the witness not to answer the questions. While the Rules generally permit broad inquiry, consistent questioning clearly beyond the scope of a Rule 30(b)(6) notice's categories is not generally tolerated. If this happens, courts will often sustain objections and will consider motions for sanctions or for terminating the deposition. n10

Often the genesis of confrontation in Rule 30(b)(6) depositions is the deposition notice. Far too often, Rule 30(b)(6) notices put forth broad categories that transcend corporate responsibilities. But confrontation can be avoided either by a subsequent definition or breakdown of the information sought, or by more narrowly drafting categories in the first instance. If neither of these actions is taken, the party preparing the Rule 30(b)(6) witness is left to flounder.

[5] Anticipating Adverse Counsel's Non-Party Deponents

Anticipating non-party witnesses that an adverse party may notice for deposition can be especially productive. Because non-party witnesses are often disinterested in the outcome of a litigation, they are sometimes surprisingly willing to meet with either side to discuss the case, even if they are not willing to testify for either side. Thus, it is often easier to anticipate and prepare for non-party testimony. Of course, this fact works against both sides equally. Moreover, the ethical constraints that prevent communication with an adverse party witness do not usually apply to non-parties. n11

In rare cases, early identification of a non-party witness that adverse counsel is likely to call may allow for earlier meetings during which a rapport can develop. If this happens before the witness is contacted by opposing counsel, the impact of the non-party witness's testimony might be significantly and legitimately blunted. Further, meeting with the non-party witness before he has met with the other side allows for a more candid conversation. The witness will not have been prejudiced by any information learned from adverse counsel. Even though meeting the witness first may not always result in a better interview or rapport, the possibility that it will is usually worth the effort.

Care must be exercised when meeting ex-employees of the opposing party. As discussed, *infra*, ethical rules in many states prohibit such meetings if the ex-employee has knowledge relevant to the case. Moreover, the ex-employee probably hasrestrictions on what can be disclosed based on continuing confidentiality agreements.

Assuming contact is permissible, however, by anticipating who these witnesses may be, and meeting with them, counsel can exert indirect influence over opposing counsel's deposition planning and scheduling. Moreover, it will demonstrate that you are one step ahead of the opponent.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsPerpetuation of TestimonyEvidenceTestimonyGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 11(b).*

(n2)Footnote 2. Generally, counsel can correctly object to use of the term "most knowledgeable," since the opposing party's identification of categories will rarely correspond to any one individual's corporate responsibilities. As a result, counsel can usually, in good faith, exercise some discretion in selecting knowledgeable individuals.

(n3)Footnote 3. *See, e.g., Wertheim Schroder & Co. v. Avon Prods., No. 91 Civ. 2287, 1995 U.S. Dist. LEXIS 79 (Jan. 9, 1995 S.D.N.Y. 1995) .*

(n4)Footnote 4. *See Armstrong Cork Co. v. Niagara Mohawk Power Corp., 16 F.R.D. 389 (S.D.N.Y. 1954)* .

(n5)Footnote 5. *See Salter v. Upjohn Co., 593 F.2d 649, 651 (5th Cir. 1979)* .

(n6)Footnote 6. *Fed. R. Civ. P. 30(b)(6).*

(n7)Footnote 7. *Cates v. LTV Aerospace Corp., 480 F.2d 620, 623 (5th Cir. 1973)* .

(n8)Footnote 8. *See Lapenna v. Upjohn Co., 110 F.R.D. 15 (E.D. Pa. 1986)* .

(n9)Footnote 9. In *FDIC v. Butcher, 116 F.R.D. 196 (E.D. Tenn. 1986)* , defendants' attorneys were advised during the initial depositions that the witnesses spoke only for the FDIC's investigative unit and that defendants would have to ask others if they wanted information known to FDIC employees outside the unit. The court granted defendants' motion to compel the FDIC to designate witnesses who would be fully knowledgeable about matters known or reasonably available to the FDIC in keeping with the very purpose of the rule.

(n10)Footnote 10. *See Paparelli v. Prudential Ins. Co., 108 F.R.D. 727 (D. Mass. 1985)* .

(n11)Footnote 11. *Compare* Model Rules of Professional Conduct Rule 4.3 (a lawyer is only restricted in dealing with an unrepresented person to the extent that he cannot represent that he is disinterested) *with* Rule 4.2 ("[A] lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so").

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CHAPTER 16 Preparation for Depositions *

2-16 Federal Litigation Guide § 16.05

§ 16.05 Planning To Take Depositions of Adverse Parties

[1] Reviewing Subjects to be Covered in Deposition of Adverse Party Witness

Preparation for the deposition of an adverse-party witness should begin with a review of the subjects that must be covered in the deposition. Much of this information will come from a careful review of the issues and witness lists and the witness files.

A witness should be interrogated about each item on counsel's issues and witness lists where her name appears. This will ensure she is questioned about her recollection on as many of the important issues about which she can testify. As discussed earlier, a deposition witness also should be questioned about the *relevant* documents in her witness file.

Since it is forbidden to communicate with an adverse party witness in advance, counsel must resort to other sources, such as client interviews and documents to learn about the anticipated subject matter of adverse witnesses' testimony.

[2] Using Documents to Prepare for Deposition of Adverse Party Witness

The documents in the witness file for an adverse witness often provide the best basis for planning and structuring the deposition. Even when the documentary record is not complete, it can be a reliable source for questions about the matters that are recorded; it will be, as well, a starting point for learning about undocumented events.

The complexity and bulk of the documents in the witness file may help determine whether the deposition questioning should proceed chronologically or by subject. If the documents are confined to a single issue, this may suggest that a simple chronological organization for the examination will be best. If the documents concern many issues over various time periods, it may be best to organize the questioning by subject matter. Even where this is done, however, consideration should be given to whether each subject matter should be approached chronologically or in some other fashion.

When documents are central to a case, which is the case in most commercial or complex litigation, systematically reviewing each important document with a knowledgeable witness can greatly improve the amount of discovery obtained and the usable evidence elicited. Documents can be used profitably in a deposition in a number of ways, including:

- Questioning a witness about the preparation and content of numerous documents to help prod the witness's memory

and improve the witness's overall recall.

- Using documents to keep in line witnesses who might be tempted to stray too far from the written record.

- Questioning a deposition witness about documents to discover what is behind that which appears on the face of the record.

Documents used at depositions should not be limited to those produced in response to discovery requests. Public sources of information about a deponent, such as newspapers, journals, public filings, databases, and previous legal actions (including depositions) all can contain useful information about either the deponent or the case. If the witness was quoted about the case or the issues in the case, a deposition may be the perfect venue for confronting him with his earlier statements.

While documents are clearly a means to obtain fruitful discovery during a deposition, overuse or over-reliance on documents can cause problems. First, deponents may be inclined to merely agree with what is said in the documents, and may be well-prepared by counsel for dealing with difficult documents. Further, many deponents will correctly refuse to look behind what is in a document. Thus, a deponent's recollection of important facts should first be probed without documents. A second problem with over-reliance on documents is time. Lawyers are under increasing pressure from clients and courts to be more efficient during depositions. There usually is not enough time to go over *every* relevant document with *every* witness. As a result, the development of good deposition taking skills has taken on greater importance than ever before. Lastly, over-reliance on documents makes the questioner lazy and can lead to significant gaps in the development of the factual record. Not everything is in the documents.

[3] Obtaining Admissions from Adverse Parties at Deposition

Another consideration in the planning process is whether to try to obtain admissions from an adverse witness that may support a theory of the case. Even if an adverse witness is not likely to give favorable testimony on the issues that are central to the theory of the case, the deponent's predictable testimony on some ancillary aspects of the theory may be useful.

For instance, in an employment discrimination suit, even though the documents may state that the plaintiff was terminated for insubordination to a supervisor, plaintiff's counsel may be able to elicit testimony that the supervisor was aware of senior management's desire to replace the plaintiff with a lower-grade employee at the time of the alleged insubordination. This type of admission can be quite useful. Although the fact may not even be in dispute, obtaining testimony on it will help minimize the likelihood that a change in testimony will occur later. Similarly, in a products liability case, a witness who testifies to the plaintiff's recklessness in using machines may also testify that the plaintiff appeared to be careful on the day she was injured. As these examples illustrate, some portions of an adverse witness's testimony may support a theory of the case even if the general thrust of the witness's testimony is adverse. Moreover, as with requests for admission, adverse witness testimony about essentialundisputed facts can be used to narrow the disputed issues at trial, thus saving costs and time.

[4] Preparing Questions for Adverse Party Deposition

Generally, it is best to choose a means of preparing deposition questions that allows for flexibility as well as thoroughness. In any deposition, the questioning technique must be flexible enough to permit the pursuit of unexpected topics that may emerge from the witness's testimony. It is extremely important to listen to the witness's complete answer before asking the next question. If a particular answer leads to a new and unexpected area, it should be pursued, regardless of any outlines or preset questions. After the tangent has been exhausted, the outline can be returned to, and the planned course resumed. Reference to an outline or list of subjects to be covered is important, however, to avoid omitting a line of questioning that may be interrupted.

Most experienced trial and deposition lawyers use few notes and rarely prepare specific questions. There is, however, at least one exception. If it is known in advance that deposition testimony will be used at trial, more careful planning of questions is necessary. In this instance, questions should be asked exactly as they would be at trial, to maximize their effect and ensure admissibility. Aside from this exception, experienced counsel prefer to prepare an outline of the topics they intend to cover at the deposition.

When preparing a deposition outline, the appropriate degree of detail may vary depending on the nature of the questions, the witness's role in the case, the purpose of the deposition (discovery versus use at trial), and the time and resources available to prepare.

The expected use of a deposition is an essential consideration in preparing for deposition questioning. While deposition questions that seek inadmissible responses still must be answered, if counsel intends to use the deposition testimony at trial, the information must be elicited in a manner that allows for admissibility under the Federal Rules of Evidence. When it is clear in advance that a deposition, rather than live testimony, will be used at trial, deposition questions must be choreographed, almost to the same extent as trial testimony. This may not be the case for a pure discovery deposition. Where a deposition is noticed solely to learn more about the witness, or to discover information that counsel hopes will lead to admissible evidence in later discovery, prepared questions can be cumbersome.

Despite the potential dangers of a verbatim script, some deposition examiners prepare verbatim questions as a *framework* for their questioning. These examiners use the prepared questions as a starting point, but allow themselves to detour into unexpected branches as they arise. Used in such a flexible manner, carefully prepared questions allow the examiner to draw out all of the *anticipated* testimony, but still have the freedom to explore unexpected opportunities for questioning the witness.

[5] Videotaping Adverse Party Depositions

Videotaping depositions has become much more commonplace. n1 Videotaping captures not only the witness's words, but demeanor as well. But videotaping also captures counsel's actions and demeanor. As a result, videotaped depositions require special consideration.

The degree of preparation necessary for taking videotaped depositions is similar to that for trial. Because the trier of fact will see the interrogation as it actually took place, counsel's performance must be more like trial than a typical deposition. Long pauses and verbal stumbling that mark some depositions must be avoided. For that reason, reliance on prepared questions is not unusual. Videotaped depositions, like trial, must be carefully planned while not appearing so to the trier of fact.

Generally, a videotaped deposition should be used as an evidentiary deposition, and not a discovery deposition. A discovery deposition, which by its nature focuses on learning *new* facts, can often yield unwanted testimony. The videotape can be used at trial, and the witness thus appears as if she were live. As a result, videotaped depositions should be reserved for situations where the witness's testimony will aid the taking party's cause. If there is any doubt whether the deposition will help your case, videotaping may be a risky proposition.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureTrialsDepositionsCivil ProcedureRemediesCosts & Attorney FeesCostsDepositions & Transcripts

FOOTNOTES:

(n1)Footnote 1. This is due largely to the fact that leave of court or stipulation of the parties is no longer a prerequisite to a videotaped deposition. Rule 30(b)(3)(A) provides that the party taking the deposition must state in the notice the method by which the testimony will be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition must bear the cost of the recording. Any party may arrange to transcribe a deposition recorded by any means.

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CHAPTER 16 Preparation for Depositions *

2-16 Federal Litigation Guide § 16.06

§ 16.06 Planning Depositions of Non-Party Witnesses.

[1] Understanding Importance of Non-Party Testimony

Non-party testimony may be critical to the outcome of a case. The trier of fact may weigh non-party testimony more heavily in the belief that, because the witness has no stake in the outcome of the litigation, his or her testimony is more reliable. By this reasoning, for example, a passerby who happens to witness a car accident will have no motive to give testimony that favors a particular party.

In some cases, non-parties may actually be better witnesses; a non-party is often not directly involved in the occurrence that gave rise to the litigation and, therefore, may have had a better opportunity to perceive the disputed events.

[2] Evaluating the Non-Party Witness

When confronted with the need for non-party testimony, the first task is to determine whether the potential non-party witness is adverse, neutral, or friendly. In some cases, the witness's attitudes may be known or may be easily discerned from available documents.

After a thorough review of the documentary record, consideration should be given to what information can be obtained from the third party. Once the situation has been evaluated, a meeting with the potential non-party witness should be arranged, if possible. Ethical rules do not prohibit contacting an unrepresented non-party witness, but may impose restrictions where the witness is a former employee of the adverse party.

The opportunity to speak directly to a non-party witness usually provides the best chance to determine how the witness will testify. In many cases, a non-party witness will provide information in an interview that is quite different from what was expected. A witness that the client believed was in the adverse camp can sometimes be favorable. Just as often, a non-party witness that the client considered friendly may actually be cooperating with an adverse party. In either event, interviewing the non-party witness before noticing a deposition allows for a reasoned assessment of the costs and benefits of the proposed deposition.

[3] Making Contact with Non-Party Witness

When contacting a non-party witness, it is best to be as clear as possible about your role as counsel in the litigation. Identify explicitly who the parties are. Explain that the witness may be able to provide information that is important to

the fair resolution of the dispute and express your appreciation for the witness's cooperation.

Although some lawyers prefer a letter, it is almost always better to make the first contact with the witness by telephone. A telephone call is more personable and usually more difficult for the witness to ignore. Even when the non-party refuses to meet, it reveals something. Therefore, making an approach to a third party is almost always useful. When a third party is uncooperative, the unwillingness to cooperate may reveal that the third party does not want to become involved in the dispute because it does business with both of the parties. The third party also may have already met with adverse counsel or been instructed not to cooperate by his current employer. Learning that opposing counsel already contacted this non-party witness may also yield insights into his theory of the case, or how he plans to pursue critical information. In short, something can always be learned by attempting to contact relevant third party witnesses.

Many third parties are willing to cooperate, but do not wish to be perceived as taking sides. As a result, it may be necessary to use a "friendly subpoena" so the third party can use the subpoena to indicate it had no choice in the matter.

[4] Interviewing Third Party Witnesses

Assuming that a non-party witness is willing to meet, several steps can be taken to ensure a successful interview. It is generally advisable to ask the potential witness whether he or she has a preference concerning the location of the meeting. The formality of an office setting may inhibit a relaxed conversation with the witness. Thus, interviewing the witness on neutral ground may be advantageous. Going outside the office also eliminates the possibility of interruptions and office distractions.

Although all of the elements of a witness's story--both favorable and unfavorable--must be learned in order to make an intelligent decision about whether to depose a third party, posing questions in a way that stresses a positive version of the events will protect against problematic later disclosures and may help any deposition testimony eventually given. In no event should the interviewer comment about litigation strategy, opposing counsel, the adverse party, or the court in a way that would be embarrassing if repeated by the witness. Since meetings with a non-party witness are subject to discovery, they can be extremely damaging if handled incorrectly.

Although it is wholly proper to remind a non-party witness of favorable facts during an interview, the witness should be encouraged to disclose all relevant facts. If the witness's recollection of unfavorable facts weakens your client's cause, learning them in an interview allows a considered judgment about whether to go forward with a deposition or to name the person as a trial witness.

In an interview with a non-party witness, all relevant areas of inquiry must be addressed. Use documents that refresh the witness's recollection, as well as documents to inform the witness of certain helpful facts. In addition, determine whether the witness has any documents that may bear on the issues that are being discussed. If the contents of any documents in the witness's possession are harmful, discuss them with the witness to determine if they can be explained in a favorable way.

At the conclusion of the interview, be sure to address several important points. Ask to be informed if the witness is approached by opposing counsel. Although some witnesses are so determined to remain neutral that they will decline to make such a commitment to either side, many potential witnesses will readily agree to this request. Also request that the witness follow up with additional information that subsequently comes to mind about the issues that were discussed.

If the witness is likely to be called at trial, she should be told to anticipate a deposition notice or other contact from opposing counsel before trial.When issuing a subpoena for a third party witness, be sure to include all necessary witness and travel fees. Without the accompanying fees, the subpoena is not effective. n1

Rule 26(e) requires supplementation of the information provided under Rule 26(a) *or* in response to a discovery request

if ordered by the court, "if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known ... during the discovery process." Thus, it appears that if a third party witness with material information relevant to a disputed fact alleged with particularity in the pleadings was not identified in the original mandatory disclosure statement, the witness's name must be disclosed after the interview reveals that they have knowledge of relevant facts.

No longer can counsel ignore relevant, damaging third party information in the hope opposing counsel will not find it, as some have in the past. As a result, analysis of the potential for uncovering harmful information from third parties must occur early, before the interview is scheduled.

[5] Planning for Depositions of Former Employees

Former employees, both friendly and adverse, deserve special attention. Because their employment experiences have likely triggered emotional responses, a special set of problems is posed by such witnesses. In addition, contacting former employees of adverse parties raises complex ethical questions.

The first thing to learn about a former employee is their attitude toward the former employer. If the witness is a former employee of your client, this should be relatively simple because your client should be able to provide information about the circumstances of the employee's departure. In some cases, current employees of the client may still be in contact with their former colleague. Learning the former employee's disposition probably will not affect the decision to contact them. It will, however, dictate how you approach the person. In all instances, it is generally advisable to approach former employees through people they knew while working for your client. This raises their comfort level *and* your success level.

Interviewing Former Employees of Adverse Party

If the witness is a former employee of an adverse party, sources of information are usually more limited, but the client may still be helpful. If the litigation arises from a continuing relationship between your client and the adverse party, the client's employees may know why the witness is no longer employed. It is imperative to try and obtain at least some information about why the person left. One efficient way of learning about departed adverse employees is through depositions of current adverse employees. In addition, by requesting the ex-employee's personnel file, the history of employment can be reviewed for clues about why the individual left.

While ethical restrictions surrounding the contact of former employees have been relaxed in several jurisdictions, n2 some states continue to impose constraints. n3 These states tend to express a continuing concern that former employees may possess privileged information, and a willingness to grant protective orders on their behalf. n4

A special opportunity may be presented when the potential witness is a *disgruntled* former employee of the adverse party. If the witness played a significant role in the events underlying the lawsuit, there is much to gain by attempting to obtain discovery. The witness may be able to testify credibly in a manner that contradicts the accounts given by those people still employed by the adverse party. While special effort should be made to interview such witnesses where it is permissible under local ethics rules, special care should be taken to avoid the ethical quagmire that this situation raises. If there is reason to believe that the former employee is disgruntled, the safest way to proceed is to notice a deposition.

Finally, if the former employee is truly hostile, even if she has relevant information, counsel must weigh the costs and benefits of trying to make contact. It may be best to do without the witness's testimony rather than lose control of the case or drive the witness into opposing counsel's open arms.

Interviewing Friendly Former Employees

Interviewing a former employee of your client who did not leave on good terms also requires special consideration. If the former employee is not predisposed to help his former employer, or has been approached by the adverse party, the interview can be described to the witness as a means of defending your client against its opponent. Often the lawyer must play the role of understanding intermediary, trying to get the witness to put aside personal issues for the benefit of the company as a whole.

If, on the other hand, the witness is disposed toward helping your client and thus can be expected to testify favorably, a different approach is required. Where the former employee has maintained ties with the client's organization, a current employee may be a useful intermediary. By injecting a known personality into the process, at least at the introductory stage, the former employee is more likely to trust counsel more and be more cooperative. The alternative, unilateral, unannounced contact by counsel runs a distant second to this practice.

Interviewing Former Employees of Adverse Party

Interviewing Friendly Former Employees

[6] Deciding To Depose Non-Party Witnesses

As a general rule, there is no need to take the deposition of a favorable non-party witness. Instead, present that witness at trial. If the witness refuses to appear at trial, however, and is not subject to a trial subpoena, a deposition may be the only available means for presenting the favorable evidence at trial. Under those circumstances, take the witness's deposition to preserve the testimony, and consider videotaping the deposition.

Even if the witness will appear or can be subpoenaed for trial, a favorable non-party witness probably will be deposed by opposing counsel shortly after he is identified in response to discovery supplementation or a request to identify trial witnesses. There are also occasions when a favorable witness's testimony should be preserved as a precautionary measure. For example, if the trial is scheduled some time in the future and the witness may not be available at that time, a deposition can ensure that the testimony will be available at trial even if the witness is not. Under these circumstances, if the witness is credible and presentable, the deposition should be videotaped for the judge and jury to watch as though it were live testimony. Once preserved, the testimony is readily subject to change. Although this will not compel the witness to give testimony at trial, it ensures that the testimony will be available for refreshing recollection should the need arise. In extreme situations where a favorable non-party witness changes his story, the preserved testimony can be used for impeachment. Finally, the testimony may be helpful in settlement discussions.

The decision to depose an unfavorable non-party witness will depend on several factors. First, if there will be no time to depose the witness after revelation of trial witnesses, there is significant risk in not taking the deposition. This risk can be avoided through early interrogatories asking for identification of all expected trial witnesses. Although this type of interrogatory meets objection early on, as the time nears for the close of discovery, its value increases significantly.

Where there is no opportunity to learn the identities of potential trial witnesses, however, there may be little choice but to take the deposition of an adverse non-party witness. By definition, the witness's testimony has the potential to do harm. Thus, understanding the witness's testimony is essential to the development of the theory of the case, and to presentation at trial. Not taking the adverse witness's deposition could result in surprise when the witness shows up as a witness for the other side at trial. Although noticing this deposition may disclose the identity of a harmful witness to an opponent, counsel must make a value judgment under these circumstances about whether opposing counsel is likely to know about this witness.

[7] Preparing the Friendly and Neutral Non-Party Witness for Deposition

Shortly before taking the deposition of a friendly non-party witness, if possible, review the witness's direct testimony

with him so that it will be presented clearly and concisely. A friendly non-party deposition is an opportunity to obtain "unbiased" direct testimony, and should therefore be treated similarly to direct trial testimony and prepared for in somewhat similar fashion. After going over the witness's direct testimony, the witness must be prepared for cross-examination. In the preparation session, remind the witness again that she should testify according to her truthful recollection. Review the general scope of the questions you will ask, together with all of the documents you will use as exhibits at the deposition, and caution the witness not to take notes of the preparation session and not to bring anything to the deposition.

Be particularly cautious in showing the witness memoranda, summaries, or other trial material prepared by or for counsel. These materials are not always protected from discovery if used in preparation for a deposition. Some protection is provided by Rule 26(b)(3), which provides that "a party may obtain discovery of documents and tangible things otherwise discoverable ... and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney) ... only upon a showing" of substantial need and undo hardship if discovery is denied. n5This is not an absolute rule, however.

Fed. R. Evid. 612 provides that if a witness uses a writing to refresh her memory, either while testifying or before testifying, the adverse party is entitled to have the writing produced for its inspection at the hearing if the court in its discretion determines it is necessary in the interest of justice. Some courts have held that showing attorney work product to a witness waives the conditional privilege for trial preparation materials and, where applicable, the attorney-client privilege. n6 Other cases have rejected the argument that all documents used in preparing a witness are discoverable under *Fed. R. Evid. 612*. n7 Some cases have employed a balancing test evaluating the totality of the circumstances. n8

While *Fed. R. Evid. 612* applies only to writings, not to oral preparation, statements made to non-party witnesses are difficult to cloak in attorney-client privilege. A court is not likely to sustain a claim of privilege for documents shown to a non-party witness. Nonetheless, a claim of work product might be sustainable for oral statements to non-party witnesses.

Generally excepted from these rules of forced disclosure of work product are the mental impressions, conclusions, opinions, and legal theories of an attorney or other representative of a party concerning the litigation ("opinion work product"). These materials and statements are subject to more stringent protection, if not outright immunity. n9 However, there is rarely, if ever, a need to convey such mental impressions to a third party, and there is generally even less need to make the disclosure in preparation for a deposition.

Preparation for a deposition is a proper subject of inquiry by adverse counsel. Thus, any witness, but especially non-party witnesses, should understand that meetings with counsel are completely proper and should be readily and truthfully acknowledged.

In some cases, the non-party witness will have his own lawyer present for the deposition preparation and during the deposition. The presence of the witness's lawyer has both pluses and minuses. One advantage is to cloak the preparation under the attorney-client privilege. For example, the friendly witness's lawyer can, under the right circumstances, protest privilege by discussing the areas for deposition questioning with you in advance and then reviewing them with the witness. In this manner, the adverse party's ability to determine what was said when the witness was prepared for the deposition probably will be limited by the attorney-client privilege.

Of course, the desirability of allowing another lawyer to prepare a witness for the deposition turns largely on the relationship between counsel. If the witness's lawyer is cooperative and competent, this method may work. However, if a friendly non-party witness does not intend to use another lawyer, pushing that approach can lead to unintended results in the witness's testimony.

[8] Evaluating the Friendly, but Unfavorable, Non-Party Witness

Sometimes a friendly non-party witness will only be able to give damaging testimony. Do not take this witness's deposition. However, counsel should learn about the potentially damaging testimony. When evaluating this unfavorable testimony, it is important to learn any facts that might make the witness's testimony less damaging. The development of such facts will provide a basis for cross-examination in the event an adverse party deposes the witness or calls the witness at trial. A complete understanding of the potentially harmful testimony improves the prospect of locating and developing testimony to limit the significance of this witness's negative testimony. The friendly nature of the witness allows delving into the details and nuances to locate inconsistencies or weak points. But counsel must exercise caution in learning this witness's probable testimony. If the witness concludes his testimony will be discredited, he may be less inclined to continue cooperating.

The adverse party's deposition plans will usually determine how important this type of witness's adverse testimony may become. It is thus especially important that the friendly non-party witness be asked to advise counsel of any contacts with the adverse party. In the event the adverse party chooses to take this witness's deposition and the witness will not be available at trial, cross-examination should be used to ask questions that will mitigate the effect of the negative testimony. Under these circumstances, the deposition transcript will probably be read at trial. Thus, the deposition will be the trial testimony.

[9] Using Non-Party Witness Statements

After meeting with a non-party witness, consider whether to prepare a witness statement. Witness statements are used more frequently in smaller, non-business disputes. In such cases, they are a convenient way to record events where a lawsuit is likely. Witness statements are rarely used in complex civil litigation. In a complex case, it is difficult to prepare a written summary that the witness will agree to sign because there may be too many facts to cover. Further, a sophisticated witness in a commercial case is likely to appreciate the perils involved in summarizing testimony in a formal written statement. Moreover, such witnesses are generally represented by counsel, who are likely to caution against providing a witness statement. Thus, in a complex case a witness statement loses much of its attraction as a relatively inexpensive discovery device.

Despite the difficulties inherent in the use of a witness statement, there are circumstances in which witness statements can be useful in preparing complex civil cases. n10 These include:

- If a non-party witness is especially weak and may be easily swayed, it may be useful to reduce the witness's favorable testimony to writing at a time when the witness will provide it.

- If a non-party witness has supplied facts that are contrary to the witness's own interests and will be less helpful if later coached by adverse counsel, the favorable version should be recorded in a signed statement.

- If a non-party's witness's story is adverse but is likely to get much worse under the guidance of adverse counsel, it may be useful to commit the story to writing.

The concern in each of these situations is the likelihood that the witness's story will change under pressure from adverse counsel or in recognition of the witness's self-interest or other partisan interests.

On the other hand, witness statements are counterproductive where the witness is friendly, where the witness has already testified under oath about the issues in dispute, or where there is little likelihood that opposing counsel will have access to or carry weight with the witness.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsPerpetuation of TestimonyEvidenceDocumentary EvidenceWritingsTranscripts & TranslationsDeposition TranscriptsEvidenceTestimonyRefreshing RecollectionGeneral OverviewEvidenceTestimonyRefreshing RecollectionRefreshing Before TestimonyEvidenceTestimonyRefreshing RecollectionRefreshing During Testimony

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 45(c)(3)(B)(iii).*

(n2)Footnote 2. In 1991, the American Bar Association issued Formal Opinion 91-359 which stated that Rule 4.2 of the Model Rules of Professional Conduct does not prohibit ex parte contact with former employees of an adverse corporate party. Several states have adopted this interpretation. *See Triple A Machine Shop, Inc. v. Nakano Warehouse & Transp. Corp., 6 Cal. App. 4th 1256 (1992)* ; *Neil S. Sullivan Assoc., Ltd. v. Medco Containment Services, Inc., 257 N.J. Super. 155, 607 A.2d 1386 (1992)* ; *Charleston Area Medical Center v. Herb, 190 W. Va 186, 437 S.E.2d 759 (1993)* .

(n3)Footnote 3. *See Monsanto Co. v. Aetna Cas. & Sur. Co., 593 A.2d 1013 (Del. 1990)* (court held that prior to interviewing former employees of a corporate-defendant, the interviewing attorney must 1) determine that the former employee is not represented by an attorney, 2) identify himself as an attorney for the adverse party in pending litigation involving the former employer, and 3) state the purpose of the communication).

(n4)Footnote 4. In *Bobele v. Superior Ct. of Los Angeles Cty., 199 Cal. App. 3d 708, 715 (1988)* , the court held that while an attorney can interview a former employee of a corporate defendant without the presence or consent of corporate counsel, he must nonetheless inform opposing counsel who may wish to seek a protective order on the former employee's behalf. The court indicated that such an order would be granted in a case where the former employee was privy to privileged information.

(n5)Footnote 5. This "work product" doctrine codifies the rule of *Hickman v. Taylor, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947)* . Since *Hickman*, the scope of the work product doctrine has been defined in numerous court decisions.

(n6)Footnote 6. *See Boring v. Keller, 97 F.R.D. 404 (D. Colo. 1983)* ; *James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138 (D. Del. 1982)* ; *Wheeling-Pittsburgh Steel Corp. v. Underwriters Laboratories, Inc., 81 F.R.D. 8 (N.D. Ill. 1978)* ; *Prucha v. M&N Modern Hydraulic Press Co., 76 F.R.D. 207 (W.D. Wis. 1977)* ; *Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (S.D.N.Y. 1977)* ; *Bailey v. Meister Brau, Inc., 57 F.R.D. 11 (N.D. Ill. 1972)* .

(n7)Footnote 7. *See Bogosian v. Gulf Oil Corp., 738 F.2d 587 (3d Cir. 1984)* ; *Sporck v. Peil, 759 F.2d 312 (3d Cir. 1985)* .

(n8)Footnote 8. *See, e.g., Barrer v. Women's Nat'l Bank, 96 F.R.D. 202 (D.D.C. 1982)* . A deponent had used his own handwritten memorandum to refresh his recollection. He had prepared the memorandum for his attorney, setting forth the events relevant to the litigation. Following the deposition, opposing counsel moved for production of the entire memorandum under *Fed. R. Evid. 612*. The court found the memorandum clearly fell within the attorney-client privilege and the work product doctrine, but that use of the memorandum to refresh the deponent's recollection constituted a waiver of those protections. However, the court balanced the competing interest by ordering an *in camera* comparison of the deposition transcript and the memorandum. If any discrepancies were found, disclosure would be ordered.

(n9)Footnote 9. *See Fed. R. Civ. P. 26(b)(3).*

(n10)Footnote 10. Witness statements prepared as part of your trial preparation are entitled to work product

protection. Thus, to obtain such a statement an adverse party will have to show that the qualified work product protection should yield to the practical difficulty of obtaining such information. Of course, if you expect to call a witness who gave such a statement at trial, the witness's statement will be discoverable for purposes of the adverse party's cross-examination. *See State of Colorado v. Schmidt-Tiago Constr. Co., 108 F.R.D. 731, 735 (D. Colo. 1985)* .

* Chapter 16 revised in 1999 by Peter Kearns, Esq., San Francisco, California.

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CHAPTER 16 Preparation for Depositions *

2-16 Federal Litigation Guide § 16.07

§ 16.07 Understanding Privilege and Issues Concerning Representation

[1] Considering Privilege in General

Deposition preparation requires counsel to be aware of issues relating to attorney-client privilege. This awareness should be heightened when preparing for the deposition of a corporate employee. n1

In addition to privilege issues, representation of a corporate employee can raise joint representation questions. In many instances, counsel must consider whether it is appropriate to represent both the corporation and the employee. Although a full discussion of these questions is beyond the scope of this chapter, these issues can influence deposition planning.

[2] Understanding Attorney-Client Privilege

The Supreme Court's decision in *Upjohn Co. v. United States* n2 left little question that corporations may assert an attorney-client privilege to protect communications made by corporate employees for the purpose of securing legal advice for the corporation. n3 Since *Upjohn*, it is generally recognized that the attorney-client privilege will protect communications between counsel for the corporation and most employees.

Upjohn has been applied to protect "orientation sessions" where counsel meets with current and former employees of a corporate client before their depositions. In *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, n4the court, relying on *Upjohn*, rejected plaintiffs' claims that they were prejudiced by defense counsel's representation of both the employees and the corporation. Although plaintiffs argued that the corporation's counsel's discussions with these employees would have been discoverable had the witnesses been separately represented, the court held that *Upjohn* protects the conversations between employees and corporate counsel. In concluding that "orientation sessions" between corporate counsel and the corporation's current and former employees are protected, the court agreed that the possibility that counsel may use information provided at these sessions when advising the corporation was a significant factor. Moreover, the court held that the protection applies to the discussion whether or not counsel actually represents the witnesses at the deposition. n5 Despite these cases, caution and jurisdiction-specific research should be undertaken to thwart an attempt by an adversary to discover conversations with a potential deponent who is an employee of the corporate client. Under the Federal Rules, attorney-client privilege is governed by state law in diversity cases and federal law in other matters. n6 Therefore, the likelihood of differences is great. It is imperative that counsel become familiar with the rules of the locality relating to privilege *before* beginning deposition preparation.

[3] Representing Current and Former Corporate Employees

In addition to privilege issues, corporate representation requires consideration of whether a current or former employee of the corporate client should be represented by different counsel. The Model Rules of Professional Conduct provide some guidance about when counsel representing a corporation may conclude that an employee witness requires separate counsel. Model Rule 1.13, entitled "Organization as Client," provides in pertinent part:

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents. ...

* * *

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

When a conflict develops between the interests of the corporation and any of its directors, officers, employees, or shareholders, both must be advised of the conflict. Further, it may be appropriate for the directors, officers, employees, or shareholders to retain independent representation. Most versions of this Rule place the burden on corporate counsel to advise officers, directors, and other employees of the potential for conflict and the need for independent counsel.

Further, Rule 1.13 is expressly made subject to Rule 1.7, which sets forth a general ethical rule on conflict of interest between clients. Under Rule 1.7, counsel may represent clients with adverse interests if counsel reasonably believes that the representation of one will not affect the relationship with the other and if both clients consent to counsel's continued representation of both. The thorniest issue here is whether the *individual* defendant is provided with sufficient information to allow for truly informed consent. This should include a discussion about where the parties' interests might diverge, the potential need for separate counsel if divergence occurs, and the possibility that claims or defenses may be waived if not pursued at that time.

Under the Model Rules, it is thus appropriate for counsel for a corporation to act also as counsel for an individual employee so long as the interests of the corporation and the employee are not adverse. Nonetheless, if there is a possibility that the corporate client and employee will develop adverse interests, counsel should promptly consider whether the employee should retain separate counsel.

Because it is possible that an employee deponent who is not a party may assume that counsel for the corporation is protecting the employee's independent legal interests, lawyers have a professional duty not to abuse the employee's confidence. If the employee thinks she is being represented, counsel must insure that the employee understands that only the corporation is represented and that she will need separate representation if she has individual interests to protect.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewEvidencePrivilegesAttorney-Client PrivilegeGeneral OverviewEvidencePrivilegesAttorney-Client PrivilegeScopeEvidencePrivilegesAttorney-Client PrivilegeWaiverLegal EthicsClient RelationsConfidentiality of InformationLegal EthicsClient RelationsConflicts of Interest

FOOTNOTES:
(n1)Footnote 1. In *Consolidated Litigation Concerning Int'l Harvester's Disposition of Wisconsin Steel, 666 F. Supp. 1148 (N.D. Ill. 1987)* , the court held that where International Harvester executives revealed confidential attorney-client

communications during depositions without objection from defense counsel, there was a waiver of the attorney-client privilege as to all such communications on the same subject.

(n2)Footnote 2. *Upjohn Co. v. United States, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)* .

(n3)Footnote 3. Prior to *Upjohn*, courts did not uniformly recognize a corporate attorney-client privilege. *See, e.g.*, *Radiant Burners, Inc. v. American Gas Ass'n, 207 F. Supp. 771, 773 (N.D. Ill. 1962)* (attorney-client privilege may be claimed only by a natural person), *rev'd*, *320 F.2d 314, 322 (7th Cir. 1963)* (the privilege may be claimed by any client without regard to its corporate or non-corporate character), *cert. denied*, *375 U.S. 929, 84 S. Ct. 330, 11 L. Ed. 2d 262 (1963)* .

(n4)Footnote 4. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 658 F.2d 1355 (9th Cir. 1981)* .

(n5)Footnote 5. After *Upjohn*, it is clear that a corporation's attorney-client privilege includes communications with even low and mid-level managerial employees, regardless of their power to "bind" the company. *Upjohn* thereby rejected the "control-group" test, which defined a "party" to include only the most senior management personnel exercising substantial control over the corporation.

(n6)Footnote 6. *See Quenneville v. Delmark Co., 708 F.2d 727 (6th Cir. 1982)* ; *Fed. R. Evid. 501* (providing that state law regarding privileges will apply in actions in which state law supplies the rule of decision of a claim or defense--namely, diversity cases).

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CHAPTER 17 Taking Depositions *

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[2] Importance of Depositions
[3] Procedural Requirements for Deposition Practice

§ 17.02 Permissible Scope of Deposition
[1] Seeking Information Relevant to Claims or Defenses
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CHAPTER 17 Taking Depositions *

2-17 Federal Litigation Guide Scope

Scope

SCOPE

This chapter concerns the taking of a deposition under the Federal Rules of Civil Procedure. The chapter first reviews the Rules that govern the scope of discovery at a deposition. It then discusses when a deposition should be scheduled during the discovery process to achieve optimal results and considers the Rules that govern where a deposition may be taken. Although the location of the deposition is a routine determination in many cases, if the parties or witnesses are not all in the same location, it can become a more complex decision.

Certain practical and procedural concerns that should be addressed prior to the start of a deposition are then discussed. Among these are issues concerning the deposition transcript and court reporter, preliminary statements and stipulations, protective orders, and videotape recording.

The chapter then focuses on the deposition of an adverse witness. It considers the purposes for the deposition of an adverse witness and discusses various questioning techniques that can help ensure that the examiner learns what the adverse witness knows, and does not know, about the factual issues in the lawsuit.

Following the discussion of depositions of adverse witnesses, the chapter reviews some of the common objections and the use of documentary exhibits.

The chapter then turns to non-party depositions and depositions of the examiner's own witness. Non-party depositions vary greatly depending upon both the extent of the witness's knowledge and the purpose of the deposition. Depositions of the examiner's own witness are relatively uncommon because lawyers try to save their own witnesses for trial. When such depositions are taken, it is often to preserve favorable testimony that may be unavailable at trial. For each of these types of deposition, the chapter highlights some of the examiner's more important concerns.

For expanded coverage of depositions, *see* Moore's Federal Practice, Ch. 30, *Depositions Upon Oral Examination* (Matthew Bender 3d ed.).

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CHAPTER 17 Taking Depositions *

2-17 Federal Litigation Guide § 17.01

§ 17.01 Understanding Use of Depositions

[1] General Purpose of Depositions

A deposition is a record of testimony taken outside the courtroom that has been certified in conformity with the Federal Rules of Civil Procedure so that a court may regard it as equivalent to testimony delivered inside the courtroom under oath. n1 The purpose of a deposition is to find out what the witness saw, heard, and knows, or what the witness thinks, through a question and answer conversation between the deposing lawyer and the witness. n2 Unlike interrogatories or requests for admission, which may not be addressed to nonparties, depositions of nonparties are permitted as of right. n3 Nonparties may also be required to produce documents through a deposition by service of a subpoena duces tecum pursuant to Rule 45.

Although the deposition is defined in terms of constituting sworn testimony equivalent to that given in open court, depositions are used most often for gathering information and supporting pretrial motion practice rather than for use at trial or as a substitute for testimony at trial, although these are also important functions of the deposition. The chief use of depositions at trial is for cross-examining witnesses and attempting to impeach their trial testimony to the extent it differs from testimony previously given at a deposition.

[2] Importance of Depositions

Depositions are used for a wide variety of litigation purposes including not only basic discovery but also preservation of information and establishment of facts crucial to settlement or rulings on pretrial motions. Even with the presumptive limit of 10 depositions per side, n4 depositions are a major pretrial litigation event and often comprise the most significant or costly pretrial segment of a case. The occasionally heated atmosphere surrounding depositions can also serve to make them a source of discovery motions, sanctions or other judicial intervention to assure that the deposition accomplishes valid purposes and no others.

Despite the importance of depositions, "there is not a lot of caselaw" regarding lawyer conduct and other aspects of the proceedings. n5 This relative lack of authoritative precedent stems from the normally nondispositive nature of depositions. Because deposition rulings seldom determine case outcome, district courts seldom write lengthy (or any) opinions for publication and appellate courts are even less inclined to write at length on deposition matters. In addition, trial courts supervising discovery are generally accorded broad discretion. As a result, good deposition practice is in many ways a matter of common sense and professionalism more than an exercise in legal doctrine or rule. Important rules and principles set the parameters for deposition practice but within those parameters the success or failure of

deposition endeavors often hinges on counsel's ability to adapt broad deposition principles to a particular situation and to convince the trial judge or magistrate judge of the reasonableness of the deposition behavior in question.

[3] Procedural Requirements for Deposition Practice

Depositions on oral examination are governed by Rule 30. n6 Depositions generally may be taken without leave of court, n7 but Rule 30 lists certain situations in which leave of court is required to take a deposition. n8 Rule 30 also contains specific procedures fornoticing depositions, n9 compelling the attendance of witnesses, n10 the production of documents at depositions, n11 and the recording of deposition testimony. n12

A deposition must be conducted before an officer. n13 This requirement simply means that the deposition must be taken before someone "authorized to administer oaths either by federal law or by the law in the place of the examination." n14 Either an official court reporter or a private court reporter who is a notary public normally qualifies as an officer for purposes of conducting a deposition as this person can administer an oath or affirmation, swear the witness, transcribe the proceedings, and attest to the deposition.

With certain exceptions, examination and cross-examination of the witness proceeds in the same manner as at trial. n15 However, if desired, a party may participate in the deposition by submitting written questions. n16 In addition, a deposition may be conducted by telephone or other electronic means. n17

Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours. The court must allow additional time if needed for a fair examination of the deponent if the deponent or another person, or other circumstance, impedes or delays the examination. n18 Sanctions may be imposed on those who frustrate the fair examination of the deponent. n19

A notice for a second deposition, issued without first seeking leave of court, is invalid, and a party may properly refuse to submit to such a deposition. n20

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsWritten DepositionsCivil ProcedureTrialsDepositions

FOOTNOTES:
(n1)Footnote 1. *Windsor Shirt Co. v. New Jersey Nat'l Bank, 793 F. Supp. 589, 606 (E.D. Pa. 1992) , aff'd, 989 F.2d 490 (3d Cir. 1993) .*

(n2)Footnote 2. *Hall v. Clifton Precision, 150 F.R.D. 525, 528 (E.D. Pa. 1993) .*

(n3)Footnote 3. *Fed. R. Civ. P. 30(a)(1).*

(n4)Footnote 4. *Fed. R. Civ. P. 30(a)(2)(A)(i).*

(n5)Footnote 5. *Hall v. Clifton Precision, 150 F.R.D. 525, 526 (E.D. Pa. 1993) .*

(n6)Footnote 6. *Fed. R. Civ. P. 30.*

(n7)Footnote 7. *Fed. R. Civ. P. 30(a)(1).*

(n8)Footnote 8. *Fed. R. Civ. P. 30(a)(2).*

(n9)Footnote 9. *Fed. R. Civ. P. 30(b)(1).*

(n10)Footnote 10. *Fed. R. Civ. P. 30(a)(1).*

(n11)Footnote 11. *Fed. R. Civ. P. 30(b)(2).*

(n12)Footnote 12. *Fed. R. Civ. P. 30(b)(3).*

(n13)Footnote 13. *Fed. R. Civ. P. 28(a), 30(b)(5).*

(n14)Footnote 14. *Fed. R. Civ. P. 28(a)(1)(A).*

(n15)Footnote 15. *Fed. R. Civ. P. 30(c)(1).*

(n16)Footnote 16. *Fed. R. Civ. P. 30(c)(3).*

(n17)Footnote 17. *Fed. R. Civ. P. 30(b)(4).*

(n18)Footnote 18. *Fed. R. Civ. P. 30(d)(1).*

(n19)Footnote 19. *Fed. R. Civ. P. 30(d)(1).*

(n20)Footnote 20. *See In re Sulfuric Acid Antitrust Litig., 230 F.R.D. 527, 531 (N.D. Ill. 2005).*

* Chapter 17 revised in 1999 by Peter Kearns, Esq., San Francisco, California.

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CHAPTER 17 Taking Depositions *

2-17 Federal Litigation Guide § 17.02

§ 17.02 Permissible Scope of Deposition

[1] Seeking Information Relevant to Claims or Defenses

The baseline for all discovery is Rule 26(b)(1), which provides that "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party." 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 trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. n1

Rule 30(c) states:

Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence except Rules 103 and 615. ... All objections made at the time of the examination ... shall be noted by the officer upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections.

Thus, the attorney conducting a deposition may ask questions about any relevant, non-privileged matters so long as the questioning is reasonably calculated to lead to the discovery of admissible evidence. Although questioning at trial will be limited to admissible matters, deposition questioning may extend to information that is not admissible so long as the information may lead to the discovery of admissible evidence. In practice, Rule 30 means that a witness at a deposition can be questioned without regard to many of the rules of evidence and without regard to the "personal knowledge" requirement of Rule 56(e). n1.1 Although it is wise to address some evidentiary concerns at the deposition, such as laying a proper foundation for testimony, the attorney taking a deposition need not always feel constrained by some of the more complex evidentiary rules, such as the hearsay and best evidence rules.

[2] Using Objections and Protective Orders to Limit Scope of Deposition

Rule 32(d) sets forth the basic rules concerning objections at depositions. It provides, in pertinent part:

(3) *As to Taking of Deposition.*

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

Even though the right to object to questioning and to instruct a witness not to answer is severely limited, the court has broad powers to protect a party or witness from abusive discovery tactics by ordering that a deposition not be taken, by limiting the time period for the deposition, or by terminating or otherwise limiting the subjectmatter of the deposition. n2 Finally, the court has the power to issue any order to protect a party or the deponent from annoyance, embarrassment, oppression, or undue burden or expense in connection with discovery requests. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryRelevanceCivil ProcedureTrialsDepositions

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(b)(1).*

(n2)Footnote 1.1. *See also Fed. R. Evid. 602.*

(n3)Footnote 2. *See Fed. R. Civ. P. 30(c)(3)(A),*,.

(n4)Footnote 3. *Fed. R. Civ. P. 26(c).*

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CHAPTER 17 Taking Depositions *

2-17 Federal Litigation Guide § 17.03

§ 17.03 Timing and Location of Depositions

[1] Considering General Importance of Time and Place of Deposition

Although the Federal Rules answer most of the technical questions of when and where a deposition may be taken, these matters should not be viewed merely as the mechanical application of rules. In fact, the timing of a deposition, and the selection of a location for it, can be an important part of planning the discovery program.

[2] Timing of Depositions Under Federal Rules

Under Rule 30(a)(2), without leave of court, a party cannot take a deposition until the parties have met and conferred as required by Rule 26(f). n1 That rule, in turn, mandates that unless exempt by court order, the parties are to meet "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)." The purpose of the meeting is to discuss:

- The nature and basis of the various claims and defenses and the possibilities for settlement.
- To make or arrange for the Rule 26(a)(1) disclosures.
- To develop a proposed discovery plan.

Depositions can be taken before the Rule 26(f) discovery conference, however, if the notice of deposition "contains a certification, with supporting facts, that the person to be examined is expected to leave the United States and be unavailable for examination in this country unless deposed before that time." In addition, Rule 27 permits depositions to be taken prior to the commencement of an action when it is necessary to perpetuate testimony. n2

[3] Taking Depositions After Written Requests for Discovery

Although depositions can be commenced in conjunction with other formal discovery, in many cases depositions should be taken only after documentary discovery has commenced. Although Rule 30(b)(2) *permits* a party to couple a notice of deposition with a Rule 34 document request, this should be avoided, absent compelling reasons to the contrary. Good practice dictates the Rule 34 document request be served sufficiently in advance of the deposition to allow documents to be analyzed and the results incorporated into the preparation and actual questioning of the deponent. By taking the deposition after the critical documents have been produced, the deposition can become a much more probing device.

In addition, a deposition frequently should follow some effort to obtain more information about the pleadings. Because notice pleading requires that a pleading give only minimal notice of a party's claims or defenses, you are often well advised to clarify the pleadings with interrogatories or requests for admissions prior to taking any deposition. After further details of the claims or defenses are obtained, you may be better able to determine what information should be sought at the deposition. For instance, answers to interrogatories can provide more factual details of the claim that can help you frame more effective questions and explore details not set forth in the pleadings. In addition, the party-deponent may then be asked to clarify both the pleadings and the interrogatory responses at the deposition. Not surprisingly, the interrogatory responses, which are drafted by counsel, will often provide information about the pleadings different from what the witness will provide.

Counsel sometimes worry about losing priority because of delays occasioned by the service of interrogatories or document requests. Under Rule 26(d), however, absent a court order to the contrary, no party enjoys any "priority" in the order of taking depositions so there need not be a race to notice the first deposition. In addition, as a matter of practice, you can still promptly serve a deposition notice and then agree to adjourn the deposition until after the documents and interrogatory responses are provided. From another perspective, in cases where depositions should be taken immediately, such as where injunctive relief is sought, the abolition of priority also means that no party's deposition discovery need be delayed on grounds that another party has priority. This means that counsel wishing to take a deposition need not wait until the adverse party concludes its deposition discovery. n3

[4] Considering Location of Deposition

[4.--1] Cooperating with Witnesses

Rather than engage in expensive and time-consuming motion practice to determinethe location for a party's deposition, it is generally advisable to agree on a suitable location for the deposition. Such cooperation makes sense because, while the location of a deposition can raise some tactical and financial concerns, these concerns are rarely important enough to justify the court's intervention. Moreover, specifying an inconvenient location of a deposition for the purpose of harassing another party is generally counterproductive. Although there may be a school of thought that believes that making life expensive and unpleasant for adverse parties is always the best course, such behavior often will only stiffen the determination of the adverse party and lead to a breakdown of cooperation among the parties.

Although there is a general presumption that a plaintiff who chooses a forum should be prepared to be deposed in that forum, a court may consider external restraints on the plaintiff's choice of forum, and permit nonresident plaintiffs to be deposed where they live when they have been able to show financial hardship. n4

When the plaintiff seeks to depose the defendant at a location distant from the defendant's principal place of business and the defendant objects, the plaintiff has the burden of affirmatively demonstrating "peculiar" circumstances that compel the court to order the deposition to be held in an alternative location. n4.1

[4.--2] Understanding Subpoena Power for Non-Parties

Under the Federal Rules, the deposition of a party to an action may be noticed for any location. n5 Rule 30(a)(1) states that "the deponent's attendance may be compelled by subpoena under Rule 45." Since a deposition subpoena is unnecessary for a party, Rule 45 does not apply to a party who is being deposed.

In addition to restrictions on service, n6 there are limits on the distance from which a witness must travel in order to attend the deposition. Rule 45(c)(3)(A) provides that on timely motion, the issuing court shall quash or modify a subpoena if it requires a non-party "to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person... ." n7 Note that Rule 45(c) also imposes a duty on the party or

attorney issuing the subpoena to take reasonable steps to avoid imposing undue burden or expense on the witness. If this duty is violated, the witness may on timely motion move to quash or modify the subpoena. n8

[4.--3] Considering Where to Depose Corporate Employees

Probably the most difficult questions concerning deposition location arise in the context of corporate employees. Rule 30(b)(6) states, in part, that if a corporation, partnership, or governmental entity is named as a deponent, it "shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf. ... A subpoena shall advise a non-party organization of its duty to make such a designation." Under the Federal Rules, a subpoena is not required to compel the attendance of an employee of a corporate party who is an officer, director, or managing agent of the corporation. n9 In addition, the attendance of an employee of a corporate party who is *not* an officer or director may sometimes be compelled upon notice if an argument can be made that the failure of the employee to cooperate in discovery can be treated under Rule 37 as the failure of the party itself. In practice, even though the Federal Rules may allow the corporate party to require a subpoena for employees who are not officers, directors, or managing agents, some corporations will agree to produce an employee-deponent on notice alone.

Examining counsel's apparently wide discretion when choosing the deposition location for a corporation's officers, directors, and managing agents is more constrained than the Rules might suggest. Exercising their discretion under Rule 26(c)(2)to control the place of discovery, n10 some courts have held that the depositions of executives and officers of corporate parties should generally be taken at the corporation's principal place of business. n11

Although the district court has the power to permit a Rule 30(b)(6) deposition to take place at a location other than a corporation's principal place of business, the party seeking the alternate location must overcome the presumption that the deposition should take place at corporate headquarters. n11.1 The proper procedure for objecting to a notice of deposition is to file a motion under Rule 26(c)(2) for a protective order designating a different location for the deposition. n12 This rule may be applied less stringently to the deposition of a plaintiff who chose the forum than to the defendant who had no such discretion. n13

Thus, where a corporation brings suit in a district far from where its representatives live and work, it may be called upon to respond to notices of deposition where it chose to sue. This rationale is weakened, of course, when problems of personal jurisdiction compelled the plaintiff to sue in a faraway district. n14 But where the corporate plaintiff is dilatory or fails to respond to court orders for discovery, the court may also choose to compel it to appear for depositions in the district in which the suit is pending. Thus, where corporate plaintiffs located in Hong Kong failed to respond to attempts to take depositions in Hong Kong, the court ordered the depositions take place in San Francisco in order that the court might oversee the proceedings. n15

The general proposition that the deposition of a corporation through its agents and officers should be taken at its offices applies especially where the corporation is the defendant. n16 Nevertheless, the proposition that a corporate defendant is entitled to have its spokesmen deposed at its principal offices is subject to the discretion of the court. Frequently, a trial court, in ruling upon the location of a deposition, will allocate the expenses of travel and accommodations in order to balance fairly the respective burdens upon the parties. n17

[4.--4] Strategizing Place of Deposition

As with the depositions of parties, the greatest flexibility may be realized when all counsel to an action can agree on where to take a non-party deposition. For instance, you may be able to work out mutually agreeable arrangements for the location of a deposition of a witness who under the Rules must be subpoenaed (*e.g.*, an employee who is not an officer, director, or managing agent; or a former employee) but who, as a practical matter, is within the parties' control. Frequently, defending counsel can persuade a retired former employee to be deposed at the former employer's place of business. Similarly, counsel may persuade a friendly non-party witness to be deposed at counsel's office in the city

where all of the parties and attorneys are located.

Some tactical considerations also can motivate lawyers to focus significant attention on the deposition location. Special local rules may exist in some jurisdictions which require that expenses be paid for the cost of attorneys who must travel significant distances for depositions. Because depositions are usually one of the most expensive discovery devices, some lawyers believe that scheduling expensive depositions can bea means of provoking settlement discussions in smaller cases. Obviously, the cost of any deposition will increase substantially if it is scheduled for a location that requires expensive travel and hotel accommodations. This tactic may provoke the court's displeasure and sanctions before it generates any settlement discussions. Many lawyers prefer to take depositions in their own offices where they have convenient access to the case files and support services, both of which are sometimes needed during the course of a deposition. In addition, some lawyers believe they are more able to control the deposition proceedings when they are conducted in counsel's own office. For instance, examining counsel may be better able to ensure that there are fewer interruptions, such as telephone calls, so that the witness feels compelled to answer the questions fully and promptly.

Even when examining a friendly witness, you should resist the witness's wish to stay near a telephone. Allowing the witness to be distracted by other concerns may be harmful to the quality of the testimony. You should simply explain that the deposition will be over sooner if the witness is not interrupted. For these reasons, whenever possible, many examiners schedule depositions for their own office.

Even when your office is a suitable location under the Rules, however, there are circumstances in which you may desire to schedule the deposition elsewhere. When taking the deposition of a witness with knowledge of many documents, you may consider whether the witness should be deposed close to the place where the documents are located. n18 When you are taking the depositions of a series of employees of an adverse corporation and cannot predict how long each deposition will last, you may find it more efficient to use a conference room at the corporation's office so that each deposition can begin promptly when the previous one is finished. If the depositions are held elsewhere, there may be substantial delays between depositions.

Do not overlook other advantages of deposing the witness at his office or place of business. It may be the only opportunity you will have to observe the layout of the work place and its personnel on the job. You may also be able to observe what treatises, journals, and other reading materials are kept on the tables or in the witness's bookshelves (this is particularly valuable in the case of an expert witness).

In cases where you believe that the lawyer representing the witness may invoke travel arrangements to limit the length of the deposition, you may prefer to travel to the witness in the hope that this will eliminate the excuse for limiting the deposition.

In some cases, with a potentially evasive witness, you may think that the courthouse, with its presumably easier access to the judge and air of formality, is the best place to depose that witness. n19

In some cases, practical considerations may dictate that a particular deposition be taken in an unusual setting. For instance, depositions are sometimes held in hospital rooms or private homes if the witness is too ill to attend elsewhere. n20 In the case of a senior executive of a large corporation, defending counsel may agree to the deposition more readily if it is scheduled for a location convenient for the witness. In such circumstances, by accepting the realities of the witness's schedule and status, you may avoid extensive motion practice and delay. n21

[4.--5] Considering Effect of Location on Witness.

Although the considerations for deposition location often involve matters of convenience, some lawyers believe that witness performance can be affected by the deposition location. Conventional wisdom suggests that a witness may be more comfortable when deposed in or near familiar surroundings. On a purely practical level, the witness may be better

rested having spent the night before the deposition at home. For this reason, some lawyers defending depositions believe a witness may not perform as well if the deposition is taken in an unfamiliar city.

In general, however, questions of whether the deposition location will affect a witness's testimony are difficult to answer and can be a distraction from the real purposes of discovery. Because such questions of psychological advantage frequently do not have a clear answer, they usually should not be among your primary concerns. Although both examining and defending counsel may properly give psychological factors more weight with certain witnesses, such as an extremely nervous or unsophisticated witness, counsel's preparation is usually more important to the successful deposition than any perceived psychological concerns.

To the extent that a witness may require reasonable accommodations at thedeposition location, n22 the examining lawyer should make such accommodations if they do not interfere with the questioning. For instance, a doctor or senior executive may claim a legitimate need to be accessible by telephone. While you should not permit the witness to abuse such an accommodation so as to disturb the questioning, it is usually sensible to allow the witness some flexibility. If abuse occurs, you should make a statement on the record and, if it continues, the court's assistance can be sought.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsStipulations

FOOTNOTES:
(n1)Footnote 1. Rule 30(a)(2)(A)(iii) refers to "the time specified in Rule 26(d)." That provision states that "a party may not seek discovery from any source before the parties have met and conferred as required by Rule 26(f)."

(n2)Footnote 2. Upon the petition of the party wishing to take the deposition, the court may order the deposition and may specify the subject matter of the deposition. Note, however, that Rule 27 requires 20 days' notice; one case has held that this notice may not be dispensed with even if the deponent is approaching death. *See In re Jacobs, 110 F.R.D. 422 (N.D. Ind. 1986)* . In addition, depositions are sometimes taken prior to service of the summons and complaint when the plaintiff is unable to locate the defendant. In *United States v. Agnew, 80 F.R.D. 506 (S.D. Fla. 1978)* , the government was granted leave to take the defendant's father's deposition even though the defendant had not been served. The court limited the deposition, however, to questioning about the defendant's whereabouts.

(n3)Footnote 3. Although the Federal Rules abolish priority, a court may issue an order setting priority to take depositions in appropriate cases. In *Daniels v. AMTRAK, 110 F.R.D. 160 (S.D.N.Y. 1986)* , the court granted plaintiff's motion to compel production of any photographs, movies, or videotapes of plaintiff in defendant's possession, but held that the disclosure of such surveillance material need not be made until after the plaintiff's deposition was taken. The court said that the plaintiff's testimony should be "frozen" before the plaintiff has an opportunity to review the defendant's surveillance material.

(n4)Footnote 4. *Connell v. City of New York, 230 F. Supp. 2d 432, 436-437 (S.D.N.Y. 2002)* .

(n5)Footnote 4.1. *See Morin v. Nationwide Fed. Credit Union, 229 F.R.D. 362, 363 (D. Conn. 2005)* .

(n6)Footnote 5. *See Riley v. Murdock, 156 F.R.D. 130, 132 (E.D.N.C. 1994)* (Rule 30(b)(1) allows party noticing deposition to select the place it will be taken).

(n7)Footnote 6. As to service, Rule 45(b)(2) provides as follows:

> Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be

> served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition ... specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition ... . When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place. ...

See 28 U.S.C. § 1782. An order to compel answers to a deposition or for contempt of court against a non-party deponent can only be issued by the court in the district where the deposition is taken, and the court in which the action is pending (if different) has no jurisdiction over it. *See First Nat'l Bank v. Western Cas. & Surety Co., 598 F.2d 1203 (10th Cir. 1979) . See generally Doe v. Hersemann, 155 F.R.D. 630 (N.D. Ind. 1994)* (service of subpoena pursuant to *Fed.R.Civ.Proc. 45(b)(1)* may be accomplished by certified mail).

(n8)Footnote 7. *Fed. R. Civ. P. 45(c)(3)(A)(ii)*. Subject to the provisions of Rule 45(c)(3)(B)(iii), an exception exists in the case of trial subpoenas requiring such a person "to travel from any such place within the state in which the trial is held."

(n9)Footnote 8. *Fed. R. Civ. P. 45(c)(3)(A)(iv)*.
In the case of a subpoena duces tecum, within 14 days after service, or before the time for compliance if such time is less than 14 days after service, the witness may serve written objections, in which case "the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued." The party serving the subpoena may move for an order to compel. An order to compel "shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded." *Fed. R. Civ. P. 45(c)(2)(B)*.

(n10)Footnote 9. *See Fed. R. Civ. P. 37(d)* Committee Note (1970).

> A statement of the rule controlling the deposition of a specified corporate official appears in *Less v. Taber Instrument Corp., 53 F.R.D. 645 (W.D.N.Y. 1971)* . The court noted that the deposition of a corporate party may be taken from a director named in the notice to the corporation even if the director is not personally served with a subpoena. The corporation must produce the named director or risk imposition of Rule 37(d) sanctions. *See also Continental Fed. Sav. & Loan Ass'n v. Delta Corp. 71 F.R.D. 697 (W.D. Okla. 1976)* (holding that notice by plaintiff was all that was necessary to require attendance of the officers or managing agents of the defendant at the deposition).

(n11)Footnote 10. *See Hyde & Drath v. Baker, 24 F.3d 1162, 1166 (9th Cir. 1994)* ("A district court has wide discretion to establish the time and place of depositions").

(n12)Footnote 11. *See Baker v. Standard Indus., Inc., 55 F.R.D. 178, 179 (D.P.R. 1972)* ; *Mitchell v. American Tobacco Co., 33 F.R.D. 262, 263 (M.D. Pa. 1963)* ; *Reliable Volkswagen Sales & Serv. Co. v. World-Wide Auto. Corp., 26 F.R.D. 592, 594 (D.N.J. 1960)* .

(n13)Footnote 11.1. *See McDougal-Wilson v. Goodyear Tire & Rubber Co., 232 F.R.D. 246, 249 (E.D.N.C. 2005)* (citing **Moore's Federal Practice**).

(n14)Footnote 12. *See Continental Fed. Sav. & Loan Ass'n v. Delta Corp. 71 F.R.D. 697, 699 (W.D. Okla. 1976)* . Rule 26(c) is intended to prevent imposition on the deponent of unnecessary trouble and expense by requiring him to travel a great distance to give his deposition. *Baker v. Standard Indus. Inc., 55 F.R.D. 178, 179 (D.P.R. 1972)* . The rule that the normal location for taking the deposition of a corporation is its principal place of business is not fixed or inflexible, but it does place the burden of justifying a change of location on the party that seeks to take a deposition at a different location. *See Cox v. Champion Int'l, 31 Fed. R. Serv. 2d 423 (W.D. Pa. 1981) . Accord Baker v. Standard*

Indus., Inc., 55 F.R.D. 178, 180 (D.P.R. 1972) .

(n15)Footnote 13. If the plaintiff designates some place other than the residence or principal place of business of the corporate deponent and the defendant files a timely objection, "the objection should be sustained absent some unusual circumstance to justify putting the defendant to such inconvenience." *Continental Fed. Sav. & Loan Ass'n v. Delta Corp. 71 F.R.D. 697, 699 (W.D. Okla. 1976)* (*quoting Grey v. Continental Marketing Assocs., Inc., 315 F. Supp. 826, 832 (N.D. Ga. 1970))* ; *see also Producers Releasing Corp. de Cuba v. PRC Pictures, Inc., 176 F.2d 93 (2d Cir. 1949)* ; *Detweiler Bros. v. John Graham & Co., 412 F. Supp. 416 (E.D. Wash. 1976)* .

(n16)Footnote 14. For example, in *Ellis Air Lines v. Bellanca Aircraft Corp., 17 F.R.D. 395, 396 (D. Del. 1955)* , the court observed that the "principle [that plaintiff may be brought to the forum] loses some weight where the plaintiff has no choice of forum but, as here, the plaintiff must bring his suit in one particular jurisdiction or not at all." Because the deponent in *Ellis,* the president of the plaintiff corporation, probably would not be called by plaintiff to testify at the trial, the court labelled it "an act of annoyance and oppression" to compel him to come from Alaska to Delaware for deposition. *Id. at 397* . The court gave the defendant 10 days to choose one of the following alternatives: (1) take the deposition in Alaska; (2) offer to pay for the deponent's trip to Delaware; or (3) use written interrogatories instead.

(n17)Footnote 15. *Hyde & Drath v. Baker, 24 F.3d 1162 (9th Cir. 1994)* .

(n18)Footnote 16. *See Salter v. Upjohn Co., 593 F.2d 649, 651 (5th Cir. 1979)* ; *accord Cox v. Champion Int'l, 31 Fed. R. Serv. 2d 423 (W.D. Pa. 1981)* ; *Continental Fed. Sav. & Loan Ass'n v. Delta Corp. of Am., 71 F.R.D. 697 (W.D. Okla. 1976)* . Of course, this general rule is subject to the discretion of the court to designate the place for taking a deposition. *Leist v. Union Oil Co. of Cal., 82 F.R.D. 203 (E.D. Wis. 1979)* (in view of the comparative burdens on the parties and the fact that all counsel were in the forum district, defendant's request for a protective order was denied); *Thompson v. Sun Oil Co., 523 F.2d 647 (8th Cir. 1975)* ; *Powell v. International Foodservice Sys., Inc., 52 F.R.D. 205 (D.P.R. 1971)* .

> *See also Afram Export Corp. v. Metallurgiki Halyps, S.A., 772 F.2d 1358 (7th Cir. 1985)* (a district court does not abuse its discretion by ordering the deposition of a foreign company president in the United States, where the foreign company maintains an office in the United States and its president frequently travels there). The general rule also may not apply where the defendant has asserted a counterclaim--at least if it is a permissive counterclaim. *See Continental Fed. Sav. & Loan Ass'n v. Delta Corp. of Am., 71 F.R.D. 697 (W.D. Okla. 1976)* .

(n19)Footnote 17. *See, e.g., Financial Gen. Bankshares, Inc. v. Lance, 80 F.R.D. 22, 23 (D.D.C. 1978)* (plaintiff offered to pay the defendant's expenses to the forum district); *Tomingas v. Douglas Aircraft Co., 45 F.R.D. 94, 97 (S.D.N.Y. 1968)* (defendant could easily arrange transportation to the forum); *Connell v. Biltmore Sec. Life Ins., 41 F.R.D. 136 (D.S.C. 1966)* .

(n20)Footnote 18. For example, if the case is one in which documents play a significant role, the course of the examination may reveal the existence of documents which have not been produced and which should be. Thus, if the witness discloses that he kept memoranda of his telephone calls, and it appears that he did not supply them to his own lawyer, the course of the deposition is simplified if those memoranda can be reviewed and produced over a lunch hour, or overnight, because they are close at hand rather than far away.

(n21)Footnote 19. Courthouses often have facilities for taking depositions. The quality and availability of such facilities vary, of course, from courthouse to courthouse. Before planning to use courthouse deposition facilities, you should inquire of the clerk's office about the facilities.

(n22)Footnote 20. Since a growing, and significant, portion of the population is elderly, many attorneys have been required to deal with treatment or "right to die" issues in non-traditional settings. Taking depositions in nursing homes,

hospitals and similar sites presents unique problems. Even more importantly, questioning the deponent and recording responses is a challenge for the attorney.

(n23)Footnote 21. Do not overlook the possibility of taking a deposition by telephone or other remote electronic means, which is specifically authorized under Rule 30(b)(7) upon written stipulation of the parties or court order. An obvious disadvantage of a telephone deposition is that it does not permit the examiner to observe the demeanor and non-verbal cues of the deponent. Furthermore, the examiner cannot observe whether the deponent is relying on notes or documents or consulting with other persons for assistance. It also makes the use of documents in the examination difficult unless duplicate sets are prepared and transmitted ahead of time to the place of deposition. Fax machines have been used to lessen this hurdle. *See Bywaters v. Bywaters, 123 F.R.D. 175 (E.D. Pa. 1988)* .

(n24)Footnote 22. The considerations for the deposition site are generally simple and are usually the responsibility of the attorney taking the deposition. The deposition should be taken in an adequate room with a table that will accommodate all the people that will attend the deposition. If possible, there should be access to copying services. The deposition site should be a location where there will be few interruptions. If the deposition is taken in another city, you should arrange to use a conference room in a local law firm or hotel. If the witness has access to a suitable site, you may wish to use that site, particularly if the witness is a non-party who is accommodating the examining counsel. You should urge the witness, or the witness's lawyer, to pick a site that will reduce the risk of interruption.

* Chapter 17 revised in 1999 by Peter Kearns, Esq., San Francisco, California.

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CHAPTER 17 Taking Depositions *

2-17 Federal Litigation Guide § 17.04

§ 17.04 Evaluating Basic Principles of All Depositions

[1] Understanding Importance of Deposition Transcript

[1.--1] Determining Method of Recordation

The lawyer taking a deposition must arrange for the deposition to be recorded. Traditionally, most deposition proceedings have been recorded by a stenographer and later transcribed into text. Increasingly, however, depositions are being videotaped in addition to the stenographic recording. Rule 30(b)(3) requires the deposition notice to state the method by which the testimony will be recorded; unless otherwise ordered by the court, the deposition may be recorded by audio, audiovisual or stenographic means, and the noticing party bears the recording costs. n1

If the deposition is taken by nonstenographic means, any party may arrange for a transcription to be made from the recording. Further, if prior notice is given, any party may, at its own expense, designate an additional method of recording. n2

Now that most courts do not require original deposition transcripts to be filed with the court unless they are actually used at trial, be aware that counsel who took the deposition may not necessarily have asked that the deposition be transcribed and that you, therefore, cannot assume that the original deposition transcript will be available in the courtroom. Thus, if you anticipate using the deposition at trial, you should check with the court reporter ahead of time to be sure that a transcription has been made and to determine where the original transcript is located. n3

[1.--2] Developing a Clear Record

A primary goal of examining counsel during a deposition is the creation of a clear and usable record. You must continually assess how the transcript will look. In preparing for and conducting a deposition, you must be conscious of the fact that some of the most important purposes of the deposition can be served only if the written transcript is unambiguous and logical when read. Unlike information that is gained from interrogatory responses or documents that are produced, your freedom to rearrange deposition testimony is sometimes constrained. Since a deposition is given in the witness's own words, testimony often cannot be rearranged without appearing disingenuous. Thus, the transcript should be sufficiently clear so that there is no need for rearrangement or embellishment in the event the testimony is read at trial or incorporated in a motion.

Make sure that exhibits are clearly identified, all answers are verbal, and that only one person speaks at a time so that

the reporter can obtain a complete record. Particularly because pauses are usually not recorded on the transcript, you should take the time necessary to frame careful questions. Between lines of questioning, pause to consider whether all necessary questions have been asked to ensure a clear and complete record. If you are going to use demonstrative evidence in the deposition, consider taking photographs with a camera that develops the film instantaneously. Then, have the photographs authenticated and make them part of the exhibits in the record.

In the case of an adverse witness who will appear at trial, the deposition will provide material from which you build a cross-examination. It will supply ammunition for impeachment. If the deposition involves "offensive" discovery--the establishment of points helpful to your case--the deposition record can be the basis for your direct examination of the witness at trial. Obviously, the testimony will have the most impact if the transcript can be clearly understood.

In the case of a witness who does not appear at trial, the deposition questions and answers may be read to the jury, or, in the case of a bench trial, read to or by the judge. One need only sit through a trial at which depositions are read at length to know that, under the best of circumstances, it is difficult to hold the interest of the listeners. Thus, in these situations, it is especially important that the testimony be clear and in a logical sequence.

Similarly, a deposition of a friendly witness will often be used as direct testimony at trial or submitted to the court in connection with a motion. Since the reason for taking such a deposition in the first place is your expectation that the testimony will help your client's position, it follows that you must strive for the most lucid transcript so that the favorable testimony is easily followed.

[1.--3] Going "Off the Record"

The Federal Rules do not have any provisions governing when a deposition is to go"off the record." Generally, you should consider going "off the record" at a deposition only to resolve certain types of procedural problems that may arise. For instance, sometimes when the witness is confused by a line of questions or a document, it may make sense to go "off the record" to clear the confusion before the record itself becomes confused. By resolving such problems off the record, you may be able to keep the record both clear and concise.

Typically, a reporter will stop recording when a lawyer prefaces a statement with the words "off the record." The better practice, however, is to have a stipulation with opposing counsel at the outset that everything said during the deposition will be recorded unless all counsel agree to go "off the record." Even when "off the record," you should, nevertheless, be cautious about what is said during such an interlude. So that both you and your witness may avoid embarrassment, you should advise your witness, during preparation, that nothing is ever really "off the record." Even though the words are not being recorded, opposing counsel may reduce an imprudent statement by the witness to a subsequent question and answer on the record, or purport to recite for the record something you have said while off the record. Of course, a productive off-the-record discussion between counsel often leads to an agreement which should then be recited for the record.

To the extent that an off-the-record discussion involves the witness, it should be closely controlled. If you believe that defending counsel may use the off-the-record discussion to help shape the witness's testimony, you may request that the witness leave the room. If you are deposing your own witness and wish to go off the record to consult with the witness, consider consulting with the witness out of the hearing of other counsel.

Excessive off-the-record discussions at a deposition are undesirable for a number of reasons. They consume time which should be spent questioning the witness. Going off the record may annoy the witness, particularly one who already resents the imposition of a deposition. An overreliance on off-the-record discussions may undermine the impression of control and formality which you intend to convey. So long as you are aware of these concerns, however, the resolution of substantial "technical" confusion in the testimony, or discussions which involve scheduling issues or further document production, should normally be kept off the record to reduce its bulk and expense and make it more readable.

[1.--4] Concluding the Deposition

In concluding the deposition, determine whether the witness will review, correct and sign the deposition under Rule 30(e), which requires review by the deponent only if requested by the deponent *before* completion of the deposition. n4 If such review is requested, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. For purposes of making the deposition most useful, it is almost always advisable to have the witness read and sign the transcript. At trial, the fact that the witness had an opportunity to review and make corrections to the transcript makes the deposition testimony that much more important. n5 Indeed, when impeaching a witness at trial based on deposition testimony, trial lawyers usually ask a litany of questions that underscore that the inconsistent testimony was given under oath and later signed by the deponent after an opportunity to read it. Even if the witness does not sign the deposition, the fact that the witness had an opportunity to review the transcript may underscore that the witness is bound by the testimony.

Second, just as the officer is required to begin the deposition with a prescribed statement, so the officer must make a statement at the conclusion of the deposition: that the deposition is complete and must set out any stipulations made by the attorneys about the custody of the transcript or recording and of the exhibits, or about other pertinent matters. n6 Thus, it is crucial that the officer's statement accurately reflect counsel's understandings and intentions. For example, if the deposition was taken for a limited purpose, such as preparation for a hearing on interim relief, the officer should recite that fact before the deposition is concluded. n7

[2] Determining Who May Attend Deposition

Courts have disagreed over whether other potential witnesses can attend a deposition. n8 Rule 30(c) excepts application of witness exclusion under *Fed. R. Evid. 615* during a deposition. n9 Thus, a party cannot unilaterally invoke *Fed. R. Evid. 615* to exclude a witness. Still, exclusion is available under Rule 26(c)(1)(E), which allows a court for good cause shown to order that discovery be conducted with no one present except persons designated by the court. Exclusion of a witness (whether party or non-party) from a deposition is within the court's authority. n10 Generally, exclusion will be ordered only in situations where "more than ordinary garden variety or boilerplate'good cause' facts" exist. n11

Civil depositions are generally not open to the public, n12 however, and pretrial discovery is not ordinarily public information until introduced into evidence or filed with the court. "[D]uring the last 40 years in which the pretrial processes have been enormously expanded, it has never occurred to anyone ... that a pretrial deposition or pretrial interrogatories were other than wholly private to the litigants. A pretrial deposition does not become part of a trial' until and unless the contents of the deposition are offered in evidence." n13 The United States Supreme Court in *Seattle Times Co. v. Rhinehart* n14 has also held that there is no absolute *First Amendment* right to access to discovery materials before trial. The Court recognized both that the scope of discovery under Rule 26 is extremely broad and, therefore, allows the introduction of matters that may be inadmissible at trial and that discovery is traditionally a private affair between litigants and the custodians of the information they seek. The court in *Amato v. City of Richmond* n15 agreed with the Supreme Court's rationale in *Seattle Times* and noted that courts have generally denied requests of reporters to attend depositions.

On the other hand, the court in *Avirgan v. Hull* n16 allowed the press to attend a deposition where the witness failed to demonstrate "good cause" under Rule 26(c) to justify a protective order. The court concluded that the Rule contains an inherent presumption that discovery should be open, and that the deponent's conclusory allegations of harm were insufficient to overcome the press' *First Amendment* interests.

[3] Using Professional Demeanor in Deposition Practice

In taking any deposition, you should prepare to do a professional job. Be certain that the room is available at the time

planned, that the court reporter has been retained and will attend, and that any necessary exhibits or equipment (in the case of a deposition recorded by video equipment or other non-stenographic means) are ready.

The tone of the deposition often is set even before the examination begins. Encounters before the deposition can be used to reinforce the impression that you are in control of the deposition and that the deposition is a serious matter.

Maintain a professional bearing. Be sure that your demeanor is not surly or combative. Circumstances will cause enough witnesses to be angry as they begin their depositions. In many cases, a combative examiner will create a hostile and uncooperative witness. n17 In the case of an unsophisticated witness who is uncomfortable in the deposition setting and who is expected to give favorable testimony, you may need to be especially gentle. Here, some effort to put the witness at ease is appropriate. Similarly, when you are deposing a friendly witness and the witness is unduly nervous, some effort to break the tension may be appropriate. n18

Occasionally, the lawyer will encounter a witness who livens up the pre-questioning exchanges by expressing indignation that the deposition is being taken. For example, the witness may say, "I don't see why any of this is necessary; I put everything I know in my written report," or "I don't know anything about this case." Although you may do well to express some sympathy with the witness's concerns, usually you should not allow yourself to be drawn into a squabble about the wisdom of the deposition or the merits of the litigation. You should proceed with the questioning and accommodate the witness only to the extent that such accommodations do not interfere with the questioning.

As a general practice, you should not discuss scheduling and adjournment with an adverse witness even when the witness raises the question. Rather, such matters should be resolved among counsel.

[4] Positioning the Participants at Deposition

The positioning of the witness, the reporter, counsel, and others present at a deposition, such as parties, should be arranged by examining counsel. If the room used for the deposition has a rectangular table, the reporter will usually sit at one end of the table. The witness will usually sit on one side of the table adjacent to the reporter and the lawyer taking the deposition will sit across the table from the witness. The witness's lawyer is normally seated next to the witness. If either lawyer has an assistant or client present, that person can be seated next to the lawyer. This positioning allows examining counsel to consult with the assistant or client. Counsel for other parties will arrange themselves around the remaining available space.

[5] Evaluating Special Considerations for Videotaped Depositions

Videotaped depositions are becoming increasingly common as the technology ofvideotaping becomes more accessible and cost-effective. n19 Unless the court orders otherwise, deposition testimony may be recorded by audio, audiovisual, or stenographic means. n20 [FN:] n21 A deposition may be taken by various means as routine practice. n22 If the deposition is recorded by videotape alone, the nonstenographic recording may be offered as evidence at trial or on a dispositive Rule 56 motion, but a transcript will also be necessary. n23 The decision to videotape a deposition is frequently made when the witness is a non-party who is not subject to subpoena for trial and cannot be persuaded to come to the trial to testify. If you believe that the witness's account of events is important to the case and sufficiently favorable, a videotape may give the testimony greater potential impact than would readings from the deposition transcript.

There may be considerable risk involved in videotaping the deposition of an adverse witness. Such a deposition should be videotaped if the hostile witness will not be subject to a subpoena for trial and the testimony will be sufficiently favorable that the testimonial impact should be maximized. If you have documents that will ensure an effective examination, the risks may be worth assuming. If the testimony is not favorable, opposing counsel can elect to use the videotape, and if the testimony is favorable, opposing counsel can bring the witness to trial in an effort to lessen the

favorable impact of the videotaped deposition. Of course, such risk is diminished if counsel has already seen the witness testify either at a trial or previous deposition. At least one court has held that, where a deposition is adjourned to a later date, counsel may choose to use videotape recording, even though the earlier testimony was not recorded in that manner. n24

The mechanics of a videotaped deposition warrant brief mention. First, videotaping usually does not replace a stenographic record and transcript. Most lawyers still want the traditional typed transcript for possible use in motion practice and trial preparation. n25 Under Rule 30(b)(3), a party can designate an additional method of recording the deposition. Thus, if a deposition is to be recorded on videotape, a stenographic recording could also be requested. However, prior notice must be given to the deponent and the other parties, and, absent court order, the additional record or transcript must be made at the requesting party's expense. n25.1

Second, the arrangement of the participants usually differs when a deposition is videotaped. The most "neutral" staging is for only the witness to be on camera with a single camera recording a direct frontal shot from the waist up, without special lenses. The camera will normally show the lawyers only when they introduce themselves. During the questioning, remember that the camera is on the witness. If the witness is confused or puzzled by a question, it may show on the witness's face. Hence, you should be especially sure that questions are clear. A pause that goes unnoticed in a typed transcript may seem longer than it really is on videotape. Just as videotape enhances the impact of deposition testimony, it can also exaggerate a witness's nervousness or confusion. Therefore, with a friendly witness you should consider a dress rehearsal of the deposition to increase the deponent's effectiveness.

Third, if a deposition is videotaped, the recording officer must repeat on the record certain information at the beginning of each tape. n26 Specifically, the officer must state the officer's name and business address, the date, time and place of the deposition, and the name of the deponent.

Fourth, in a videotaped deposition you will also act as producer and director. Camera angles, lighting, and setting can affect the jurors' impressions of a witness's demeanor. The witness should look at the interrogator when questions are posed to avoid being perceived as evasive. Videotape may enhance or detract from the credibility of a witness. Without the proper safeguards, a videotaped deposition can be used to present slanted or distorted testimony. Indeed, given the potential for abuse in the use of videotape and audiotape, Rule 30(b)(5)(B) admonishes that "[t]he deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques."

If the tape contains admissible and inadmissible evidence, it may have to be edited. Care should be taken that the tape does not appear altered. Concern regarding the admissibility of evidence and editing can inhibit questioning. Therefore, you should consider whether the testimony is for discovery or for trial use. Tape is a better format for trial use. On the other hand, if the purpose of the deposition is solely for discovery, then a written record is usually more suitable.

Videotaped depositions are especially effective when used to question a witness at the scene of an accident, nuisance, and the like. They help portray appearances and distances much better than oral testimony. They may also be utilized when seeking to question a witness about an alleged product defect. Thus, in *Gillen v. Nissan Motor Corp.*, n27 the court ordered the plaintiff to appear for a deposition with an automobile which she alleged contained a defective seat belt. However, a court may refuse to allow a tape to be shown if it is shot under conditions different from those that gave rise to the incident or under conditions that are unduly prejudicial, playing on thejurors' emotions. n28

The true advantage of a videotaped deposition is to enable the trier of fact to observe the witness's demeanor and to assess truthfulness. Such testimony holds the interest of a jury much more than reading from a transcript.

Apart from its use at depositions, videotape is also an excellent witness preparation tool. It may be helpful to tape the witness and then have secretaries, law clerks, and other non-lawyers view the tape. Their comments may help you improve the image projected by the witness.

[6] Seeking Protective Orders

A motion for protective order under Rule 26(c) may be made by a party or by a non-party witness ("the person from whom discovery is sought"). Protective orders impose serious burdens upon a party, and they should not be issued lightly. n29

Before the deposition begins, you should raise any relevant issues presented by protective orders in the litigation. If, for example, documents covered by a Rule 26 protective order previously entered in the case will be used at the deposition, any non-party witness should agree to be bound by the terms of the protective order. Such matters should generally be attended to in advance of or at the outset of the deposition, n30 so that there is no confusion about the applicability of the protective order.

Protective orders may be entered by the court concerning many aspects of a deposition. Although Rule 26(c) provides that the court may order that "discovery be conducted with no one present except persons designated by the court," courts usually allow a party to attend all depositions. In a case of extreme hostility between the parties, it may be possible to obtain a protective order to prevent a party from attending a deposition. Sometimes, in actions that involve many parties, a party that seeks to take depositions of numerous parties can obtain a protective order to prevent those parties who will be deposed from attending the prior depositions of other parties. n31

A motion under Rule 26(c) is the appropriate procedure before a deposition commences. Such a motion must be accompanied by a certification that the movant, in an effort to resolve the dispute, has in good faith conferred, or attempted to confer, with other affected parties. A motion for a protective order may serve to protect a party who receives minimal notice of a proposed deposition and is unable to obtain a court ruling on its motion for a protective order. Under Rule 32(a), n32 where a party receives less than 14 days notice of a deposition and promptly files a motion for a protective order, the deposition cannot subsequently be used in court against the moving party, provided the motion is pending at the time of the deposition. n33

In one case, the opinion of plaintiff's psychiatrist that videotaping plaintiff's deposition would "increase her anxiety and not allow her to answer questions as clearly and directly as she could with less anxiety" did not establish good cause for the issuance of a protective order precluding the videotaping of her deposition. n33.1

During a deposition, a motion under Rule 30(d) is the appropriate procedure to terminate or limit the deposition. n34 The motion may be made by any party or by the deponent, and the deposition is suspended for the time necessary to make the motion. In accordance with Rule 37(a)(5), expenses incurred in making the motion may be awarded. n35

[7] Entering Into Deposition Stipulations

Rule 29 was revised in 1993 to give litigants the opportunity to agree upon modifications to the procedures governing discovery or to limitations upon discovery. n36 Even prior to this revision, however, the parties were given the authority to vary the rules concerning depositions by stipulation. As stated early on, "if the parties desire to be relieved of such restraints as the Rules impose, and so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner." n37 Thus, a wide variety of stipulations concerning the conduct and useof the deposition are possible. n38 Among those sometimes encountered are:

- Stipulations regarding deferral of filing of the deposition (a subject also affected in many instances by local rules).
- Stipulations waiving notice of filing.
- Stipulations altering the standard practice by which objections are waived and reserved.

- Stipulations limiting the scope of examination (*e.g.,* an understanding that, where a deposition is being taken in connection with an issue of personal jurisdiction, the questioning will be confined to those jurisdictional matters, as opposed to the merits, and that the conduct of the deposition subject to this restriction will be without prejudice to examining counsel's right to examine on the merits at a later time).

- Stipulations that, in the case of an imminent hearing, the unsigned transcript may be used in that hearing without prejudice to the witness's right to correct and sign it under Rule 30(e) at a later time.

- Stipulations having to do with limits on the duration of the deposition and/or resumption at a later date.

- Stipulations varying the rule with respect to the number of depositions allowed per side.

- Stipulations concerning multiple depositions of the same witness.

- Stipulations providing the ultimate cost of the depositions be borne by the losing party.

If you practice in various federal districts, you must be especially alert to any blanket statement that the deposition is subject to the "usual stipulations." You should request that each of the intended stipulations be spelled out so that there is no uncertainty about what will be included in the record. In a situation where you are the only outsider in a group of local practitioners who do not question the "usual stipulations," you may apologize for any delay, but insist that the exact stipulations be articulated so that there is no uncertainty.

At the conclusion of the deposition, the officer is to state on the record the various stipulations between counsel. Under Rule 30(b)(5)(C), "[a]t the end of the 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."

[8] Understanding Opening Statements at Deposition

Unless the parties agree otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin with a statement on the record that includes the following: the officer's name and business address; the date, time, and place of the deposition; the name of the deponent; an identification of all persons present; the administration of the deponent's oath or affirmation. n39

Once the witness is sworn and the officer has made the requisite statement, many lawyers will introduce themselves to the witness on the record. This introduction includes the examining lawyer's name and the name of the party the lawyer represents. (Typically, the examiner states that the deposition is being taken in the case of *X v. Y,* No. 91 C 123, pursuant to the Federal Rules of Civil Procedure, and pursuant to either a notice of deposition or subpoena, which is then briefly described.)

As part of the introductory remarks, many examiners describe the deposition procedure. The witness is told that questions will be asked about various matters and that if a question is not understood, the witness should ask for a clarification. It is sometimes added that if a question is answered, it will be assumed that the witness understood the question. Many lawyers will advise that if the witness wants to interrupt the deposition to consult counsel or simply to take a break, a break may be requested at the conclusion of an answer. Many lawyers also advise witnesses that if they wish to modify, change, or amplify any answer they have given, they will be given the opportunity to do so. Some lawyers will also ask if the witness has been deposed before, and if the answer is "yes," inquiry may be made to find out the nature of the previous deposition. n40

The nature of introductory statements is to some extent a matter of personal style. They probably serve a greater

purpose in informing a witness who is not represented by counsel; when the witness is represented, defending counsel has probably already provided the witness with the same information offered by the examining counsel. Nonetheless, for most lawyers these questions serve some purpose in beginning the flow of dialogue. In addition, introductory statements of this nature are sometimes useful in estopping a witness from subsequently claiming a lack of understanding of the procedures under which the deposition was conducted.

[9] Considering Form of Questions

When the preliminaries are completed, the examining lawyer will ask the witness a question. In any deposition, questions should be phrased as simply as possible, without legalese or extensive preambles. Compound questions, which are objectionable onground of form anyway, should be avoided. Questions that use pronouns should be avoided because, out of context, pronouns can lead to ambiguity when the subject of the question is not identified. If a question refers to a particular meeting or document, the information should be included as simply as possible in the question. If the question refers to a limited part of the document, the relevant part of the document may be identified. Very often, the traditional newspaper reporter questions, such as "who," "what," "when," "where" and "how," provide the clearest structure to follow when asking questions. These questions are direct and easily followed.

If a line of questioning is dependent on chronology, it is frequently best to proceed in chronological order. Although some lawyers may believe it is advantageous to confuse a witness by not adhering to a chronological order, a confused witness often creates a confused transcript.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersCourt ReportersGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsStipulations

FOOTNOTES:
(n1)Footnote 1. Given the option of nonstenographic recording of depositions, Rule 30(b)(5) provides certain safeguards. It requires that, unless otherwise agreed by the parties, the deposition is to be conducted before an officer appointed or designated under Rule 28. The officer must begin with a statement on the record that includes certain basic information relating to the deposition and those present.

(n2)Footnote 2. *Fed. R. Civ. P. 30(b)(3)(B).*

(n3)Footnote 3. In those instances where the deposition transcript is not filed with the court, the recording officer is to 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. *Fed. R. Civ. P. 30(f)(1).*

(n4)Footnote 4. *Fed. R. Civ. P. 30(e)(1).*

(n5)Footnote 5. *Fed. R. Civ. P. 30(e)* places no limitations on the type of changes that a witness may make to a deposition transcript before signing it. *See Allen & Co. v. Occidental Petroleum Corp., 49 F.R.D. 337 (S.D.N.Y. 1970)* . However, if the correction involves a substantive change, the original answer can be used at trial by the opponent, although the witness would then be free to introduce the amended answer and explain the reasons for the change. *See Usiak v. New York Tank Barge Co., 299 F.2d 808 (2d Cir. 1962)* .

(n6)Footnote 6. *Fed. R. Civ. P. 30(b)(5)(C).*

(n7)Footnote 7. It is important to note that Rule 32 does not distinguish between depositions taken purely for discovery purposes and depositions taken for the preservation of testimony. *See, e.g., United States v. IBM, 90 F.R.D.*

377, 380 (S.D.N.Y. 1981) .

(n8)Footnote 8. *See Fed. R. Civ. P. 30* Committee Note (1993).

(n9)Footnote 9. *Fed. R. Civ. P. 30(c).*

(n10)Footnote 10. *See Galella v. Onassis, 487 F.2d 986, 997 (2d Cir. 1973)* ; *Beacon v. R.N. Jones Apt. Rentals, 79 F.R.D. 141 (N.D. Ohio 1978)* ; *Dunlap v. Reading Co., 30 F.R.D. 129 (E.D. Pa. 1962)* .

(n11)Footnote 11. *BCI Communication Sys., Inc. v. Bell Atlanticom Sys., Inc., 112 F.R.D. 154, 160 (N.D. Ala. 1986)* (*Fed. R. Evid. 615* not applicable to depositions; sole remedy for exclusion of witnesses is *Fed. R. Civ. P. 26(c)*, under which burden is on party seeking exclusion and obtaining court order before deposition is taken). *See also In re Levine, 101 B.R. 260 (Bankr. D. Colo. 1989)* (deposition issues included fraud and conspiracy to commit fraud).

(n12)Footnote 12. Note that the 1993 revision of Rule 30(c) addresses only the attendance of potential deponents; it does not address the attendance of others, including the public and the press. *See Fed. R. Civ. P. 30* Committee Note (1993).

(n13)Footnote 13. *Gannett Co. v. De Pasquale, 443 U.S. 368, 396, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979)* (Burger, C.J., concurring).

(n14)Footnote 14. *Seattle Times Co. v. Rhinehart, 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984)* .

(n15)Footnote 15. *Amato v. City of Richmond, 157 F.R.D. 26 (E.D.Va. 1994)* .

(n16)Footnote 16. *Avirgan v. Hull, 118 F.R.D. 252 (D.D.C. 1987)* .

(n17)Footnote 17. The deposition may take the witness into memories of traumatic events, and counsel must be prepared to deal with such situations.

(n18)Footnote 18. Unless the need is compelling, taking the deposition of one's own witness who is frightened can be questionable tactically. Clearly, one must evaluate whether a timid witness should be exposed to questioning at this stage. A videotaped deposition will generally only be used in a jury trial. Such an enhancement of testimony usually is not as useful when the case is tried by a judge, who may prefer to read the transcripts.

(n19)Footnote 19. For a thorough discussion of the issues involved in videotaping depositions, see Henke, *The Taking and Use of Videotaped Depositions*, Defense L.J., Fall 1993 at 559-580

(n20)Footnote 20. *Fed. R. Civ. P. 30(b)(3)(A)*

(n21)Footnote 21. Reserved.

(n22)Footnote 22. *Gillen v. Nissan Motor Corp. in USA, 156 F.R.D. 120, 122 (E.D. Pa. 1994)* .

(n23)Footnote 23. *Fed. R. Civ. P. 32(c); see also Fed. R. Civ. P. 26(a)(3)(A)(ii)*

(n24)Footnote 24. *Riley v. Murdock, 156 F.R.D. 130, 131 (E.D.N.C. 1994)* (nothing in Rule 30(b)(2) or elsewhere in law to prevent deposing party from switching to different medium for subsequent portion of deposition).

(n25)Footnote 25. Under Rule 32(c), if a deposition in nonstenographic form is offered into evidence, the party must also provide the court with a transcript of the offered portions."

(n26)Footnote 25.1. *Fed. R. Civ. P. 30(b)(3)(B)*

(n27)Footnote 26. *Fed. R. Civ. P. 30(b)(5)(B).*

(n28)Footnote 27. *Gillen v. Nissan Motor Corp., 156 F.R.D. 120 (E.D. Pa. 1994)* .

(n29)Footnote 28. *See Carson v. Burlington N., Inc., 52 F.R.D. 492 (D. Neb. 1971)* .

(n30)Footnote 29. *See Davis v. Romney, 55 F.R.D. 337, 340 (E.D. Pa. 1972)* (Rules of Civil Procedure designed to encourage free and open discovery; burden is on movant to establish good cause).

> To establish good cause under Rule 26(c), the courts have generally required a "particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *See United States v. Exxon Corp., 94 F.R.D. 250, 251 (D.D.C. 1981)* (on claim of confidential business information, this standard demands that company prove that disclosure will result in "clearly defined and very serious injury to its business").

(n31)Footnote 30. Typically, obtaining consent to the terms of a protective order will not be difficult in the case of a party witness. The problem can be greater in connection with the deposition of a non-party witness.

(n32)Footnote 31. In *Milsen Co. v. Southland Corp., 16 Fed. R. Serv. 2d 110 (N.D. Ill. 1972)* , the court granted defendants' motion for a protective order to prevent plaintiff franchisees from attending the depositions of any other plaintiffs. The court held that the defendants were entitled to obtain the independent recollection of each deponent.

(n33)Footnote 32. The Rule states, in relevant part:
[N]or shall a deposition be used against a party who, having received less than 11 days notice of a deposition, has promptly upon receiving such notice filed a motion for a protective order under Rule 26(c)(2) requesting that the deposition not be held or be held at a different time or place and such motion is pending at the time the deposition is held.

(n34)Footnote 33. According to the Committee Note, it follows that when the scheduled deponent is the party moving for the protective order, such deponent will have "just cause," under Rule 37(d)(1), for failing to appear at the deposition. *Fed. R. Civ. P. 32(a)* Committee Note (1993).

(n35)Footnote 33.1. *Fanelli v. Centenary College, 211 F.R.D. 268, 270 (D.N.J. 2002)* .

(n36)Footnote 34. *Fed. R. Civ. P. 30(d)(3)*

(n37)Footnote 35. *Fed. R. Civ. P. 30(d)(3).*

(n38)Footnote 36. *Fed. R. Civ. P. 29* Committee Note (1993).

(n39)Footnote 37. *Spaeth v. Warner Bros. Pictures, Inc., 1 F.R.D. 729 (S.D.N.Y. 1941)* .

(n40)Footnote 38. *See generally Fed. R. Civ. P. 29.*

(n41)Footnote 39. *Fed. R. Civ. P. 30(b)(5)(A).*

(n42)Footnote 40. The inquiry into the deponent's previous deposition experience should, in most cases, be minimal. Because the witness's previous deposition experience is often not relevant to the current litigation, you are usually well advised to learn the nature of the previous lawsuit before asking more detailed questions. Only after it becomes clear that the issues in the two litigations are similar, or if you suspect further inquiry may be relevant on matters of credibility, should you make further inquiry. Of course if the earlier deposition seems relevant, you should try to elicit enough information to enable you to obtain a copy of the earlier transcript.

* Chapter 17 revised in 1999 by Peter Kearns, Esq., San Francisco, California.

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CHAPTER 17 Taking Depositions *

2-17 Federal Litigation Guide § 17.05

§ 17.05 Taking the Deposition of an Adverse Witness

[1] Understanding Purpose of Deposition of Adverse Witness

[1.--1] Evaluating Adversary's Case

The basic purpose in the deposition of an adverse witness is usually to learn everything that the witness knows about the facts in the lawsuit. Such "defensive" discovery generally seeks to uncover all of the relevant facts, helpful as well as harmful, that the witness knows. In the course of a "defensive" deposition, you will probe the witness's recollection in order to learn everything that the witness may say at trial. By acquiring a complete understanding of the adverse witness's knowledge, you will acquire a better understanding of the adverse case that can provide the basis for developing an effective strategy for meeting the opposition at trial. In addition, you should then be better able to evaluate realistically the strength of the adverse party's case for purposes of a possible settlement.

Because the deposition may be your only opportunity to explore the weaknesses of adverse testimony that may be offered at trial, you should probe adverse testimony to determine whether it is based on firsthand knowledge or mere hearsay. You should persistently question the adverse witness about the basis for adverse testimony. Under persistent questioning, an adverse witness may testify about additional facts or bias that can soften the impact of the adverse testimony. Although such questioning may also educate adverse counsel about the witness's knowledge, you usually should assume that counsel would eventually uncover the information anyway.

After the deposition, armed with knowledge of the alleged statements, you can further investigate the facts so as to construct the best possible defense. By learning about the unfavorable testimony as early as possible, you can try to uncover additional facts that will minimize the impact of the unfavorable testimony at trial.

[1.--2] Limiting Scope of Adversary's Testimony

In addition to hearing a witness's unfavorable testimony and trying to uncover weaknesses in the testimony, you usually should try to limit the subjects on which an unfavorable witness can testify. The deposition record should be developed to limit the scope of the witness's knowledge and to show relevant areas in which the witness has no knowledge. By limiting the scope of the witness's knowledge at the deposition, you may prevent the witness from becoming either a surprising or "all purpose" trial witness.

[1.--3] Asking Leading Questions

When taking the deposition of an adverse witness, you are permitted to ask leading questions. Because you may question at the deposition as at trial, leading questions are permitted to the same extent that they may be used at trial. Under *Fed. R. Evid. 611*, a party may use leading questions at trial when the witness is hostile, an adverse party, or a witness identified with an adverse party. Thus, if the witness falls within any of these categories, you may use leading questions at the deposition.

As a general rule at depositions, leading questions should not be used before answers have been sought to more open-ended questions. Because leading questions tend to limit the range of answers, they should be used only after the witness has already been asked more general questions. By using leading questions after the witness has already given broad answers, you will not be deprived of the opportunity to learn more general information that may lead to new areas of useful questioning.

[1.--4] Using Outline to Organize Deposition

To ensure that all relevant subjects are covered, you should use an outline so that after the questions are asked and answered each item on the outline can be checked. Although inexperienced counsel may feel a need to write out questions in advance, the disadvantage of doing so is that it undermines the flexibility of the deposition process. If you feel obligated to adhere to a predetermined list of questions, you may be less inclined to pursue the witness's answers.

[2] Understanding Methods of Questioning Adverse Party

[2.--1] Determining Bases of Questioning

To learn what a witness knows, you cannot simply say to the witness "Tell me everything you know about the issues in this case," sit back, and listen to a narration. Rather, you must systematically question about the witness's background, bias, and knowledge of relevant facts. For purposes of such questioning, you must break the testimony into manageable parts.

As discussed in greater detail in Chapter 16, *Preparation for Depositions*, the pleadings, answers to interrogatories, and documents produced in the course of discovery should be used to create a chronology of the facts in the case. You can often lead a party-deponent through each of the factual allegations of the pleadings by asking whether the witness is familiar with the facts underlying an allegation and then exploring the substance and basis of the witness's knowledge. If you have obtained answers to interrogatories that go beyond the identity of witnesses and the sources ofrelevant documents, these answers can provide a basis to explore further the party's contentions. Documents supplied to you both by your client, and by an adverse party in the course of discovery, also provide a basis for questioning. Finally, interviews with your client prior to the deposition can arm you with an understanding of the sequence of events into which the deponent's testimony will fit.

[2.--2] Questioning About Background

In many instances, the deposition of an adverse witness begins with a number of general questions about the witness's education and job experience. When asking about the witness's education and experience, you may wish to ask whether the witness has a resume or employment history. Such a summary of the witness's experience is a legitimate subject for documentary discovery. Sometimes, counsel for the witness will be pleased to supply such a summary because it may speed up the deposition.

Rather than starting the deposition by asking questions about post-high school training and then trace all of the witness's work history, an attorney may begin by questioning about the witness's current job and then asking the witness to go back and fill in the steps that led to it. This approach may lessen the danger that the witness's counsel will object on relevancy grounds to background questions that are far removed from the subject matter of the lawsuit. Some

background questions are proper and they may seem more relevant when asked in this manner. Remember that background questions may be more or less relevant depending on the nature of a case.

Background questions are also useful because they put the deponent in a relaxed mood (most people are comfortable and even enjoy talking about their personal history). Moreover, they get the deponent acclimated to talking in a narrative, conversational manner and may set the format for the rest of the deposition.

Having obtained answers to background questions about the witness's position and experience, questions are sometimes asked about the witness's knowledge of the lawsuit. Often, the transition from background questions to questions about the lawsuit can be made by probing how and when the witness learned of the lawsuit. In addition to inquiring when the witness learned of the suit, you should probe what was learned and how it was learned. You may also inquire as to what the witness has done to prepare for the deposition, n1 and particularly what documents and written material the witness has read in preparation for the deposition.

[2.--3] Determining Sequence of Questioning

Although the sequence of questioning about the issues in the case is largely a matter of individual discretion and depends on the facts of the case, this section describes some of the more common sequences of questions that are used at depositions.

As noted, a chronological inquiry into the facts is often the best way to probe a witness's knowledge. While lawyers sometimes are inclined to skip back and forth, changing abruptly the subject of questioning, such changes are often more likely to confuse the witness than to lead to revealing answers. Moreover, while lack of a clear sequence in the conduct of the deposition may not impede its effective use for cross-examination and impeachment, if at a later time the transcript must be read in sequence, you may regret the absence of a simple and consistent pattern.

In a case where the witness was involved in many events that overlapped in time, it may be advisable to pursue each event fully without regard to chronology. Counsel should decide whether the testimony will be clearer if chronology or subject matter is the organizing principle. Even in depositions where chronology is not the organizing principle, questions should leave no doubt about the time frame.

Although most deposition questioning proceeds from the beginning to the later events in a lawsuit, some lawyers begin questioning by examining the witness on the central event underlying the lawsuit, and then, having established the involvement of the witness in that event, move backward or forward to complete the story. For example, if the litigation involves a contested termination of a contract, examining counsel might begin by questioning the witness about the actions and documents at the time of, and immediately preceding, the termination, and then take up the origins and course of the contractual relationship.

Consider carefully what tactics to pursue when the witness gives deposition testimony which is contradicted by documentary evidence. In some cases, it may be advisable to confront the witness with the contradiction in order to discover how the witness will seek to explain the discrepancy. In other cases, it may be better not to focus on the contradiction during the deposition but to reserve the confrontation for the trial. Particularly if the witness has not corrected the discrepancy while reading and signing the transcript, the witness's attempts to explain the discrepancy may be less convincing at trial than if undertaken at the deposition immediately after the contradiction arose. The appropriate tactics will depend on your assessment of the importance of and reason for the contradiction and the likelihood that the witness can somehow explain it.

[2.--4] Exhausting the Witness's Knowledge

One of the most important purposes of an adverse deposition is to learn all that a witness knows about the facts of the

lawsuit. Because the events a witness is being deposed about sometimes occurred long before the deposition and may not have been considered by the witness for a long time, many witnesses need to be questioned in detail about the events in which they participated.

There are certain techniques that you can use to prompt the reluctant or forgetful witness. You may ask whether there are any documents that the witness could look at, or other persons the witness could talk to, that might refresh the witness's recollection. If the witness says there are, you can ask that the witness look at such documents andif other persons are mentioned, you can consider talking to or deposing them. If the documents are available at the deposition, the witness can be given a chance to review them and answer the question. If the documents are not immediately available, you may ask that the witness fill in such information when the witness reviews the deposition transcript. n2 You should, of course, be sure to learn what documents the witness will look at in the event that you want to discover them.

In a case where documents play a significant role, you may use documents, especially material written by the deponent, to prompt recollection. This can be done by showing the witness the document, asking whether the witness can identify it, and asking if it refreshes the witness's recollection. Even the most forgetful or reluctant witness may find it more difficult to give a meaningless answer when confronted by a document.

[2.--5] Dealing with Vague, Evasive or Ambiguous Answers

A recurrent and frustrating problem at depositions is the witness who regularly gives vague, evasive, or ambiguous answers. When such a situation occurs at trial, examining counsel can enlist the help of the court. The problem in a deposition is more difficult. Although the help of the court may be sought in the most extreme cases, counsel must have been diligent in questioning the witness before a court will intervene.

When you are confronted by a witness who is answering a question evasively, you should first tell the witness that he or she has not answered the question and then ask it again. It may be appropriate to ask if there is something the witness does not understand about the question. If the witness is forthright, it may be possible to obtain a truthful answer by simply rephrasing the question to eliminate what the witness does not understand. Sometimes, if you can break the question into smaller segments that call for a simpler answer, this may either help the witness understand the question or show that the witness is being deliberately evasive. If appropriate, you may use a leading question to obtain a more responsive answer.

Finally, if you believe the witness is being deliberately evasive, you should object to unresponsive answers. While you may think of objections during the course of a deposition as the province solely of defending counsel, objections to the narrative form of an answer and to unresponsive answers may be made. n3 Prompt objection to such answers serves multiple purposes. Apart from reducing the risk that those answers might be used at trial, such an objection also provides a basis for repeating the question and reducing the concern that an "asked and answered" objection will be sustained at a later time. Such objections also give you an opportunity to communicate with the witness about his or her evasive attitude.

[2.--6] Handling Interruptions

Try to ensure that the examination is not interrupted unnecessarily. Although witnesses should generally be afforded a break when they request one, the continual use of such breaks to interrupt the questioning should not be tolerated. If necessary, you should object to such interruptions on the record and state that if such obstructionist conduct continues, it will become the subject of a communication to the court.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersCourt ReportersGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsEvidenceTestimonyRefreshing RecollectionGeneral Overview

FOOTNOTES:

(n1)Footnote 1. In *United States v. International Business Mach. Corp., 79 F.R.D. 378 (S.D.N.Y. 1970)* , the court considered the permissible scope of the examiner's inquiry into discussions between a non-party witness and IBM's counsel. The court held that questions about what the deponent told IBM's counsel did not involve counsel's work product.

(n2)Footnote 2. In such a situation, you should ask the court reporter to leave a space in the transcript so that the answer to the question may be filled in after the witness has had an opportunity to refresh his or her recollection. In addition, the reporter should be asked to prepare a separate page listing all of the pages containing blank spaces to be filled in by the witness.

(n3)Footnote 3. *Kirschner v. Broadhead, 671 F.2d 1034, 1037-38 (7th Cir. 1982)* .

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CHAPTER 17 Taking Depositions *

2-17 Federal Litigation Guide § 17.06

§ 17.06 Considering Special Issues Under Rule 30(b)(6) Depositions

[1] Using Rule 30(b)(6) Deposition Notices

Rule 30(b)(6) provides:

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.

The phrase, "known or reasonably available" to the organization suggests that the witness has some affirmative duty to be familiar with the subjects about which testimony is expected. This is contrary to the traditional rule that a witness need only testify from personal knowledge and need make no attempt to become knowledgeable prior to the deposition. n1

[2] Considering Advantages of Noticing a Deposition Under Rule 30(b)(6)

Once a corporation has designated a representative to answer questions in a particular area, decisional law suggests that the representative is responsible for answering all questions for the corporation in that area. n1.1

Although there is nothing inherently startling about asking questions of a corporate entity and in fact, interrogatories are used for that purpose all the time, the opportunity to obtain oral testimony from someone charged with the knowledge of the corporationcan be very attractive. A Rule 30(b)(6) deposition can be an appealing alternative when the appropriate witnesses are difficult to identify. In a case where costs are a significant concern, the use of Rule 30(b)(6) reduces the problems that arise when witnesses disclaim knowledge so as to require the depositions of numerous witnesses to obtain needed testimony. To some extent, Rule 30(b)(6) shifts the burden of inquiry to the adverse party to determine who has relevant knowledge within the corporation.

A Rule 30(b)(6) deponent may testify both to matters within his or her personal knowledge and matters known or reasonably available to the organization. The deponent is free to testify to matters outside his or her personal knowledge

as long as they are within "the corporate rubric." n1.2

An entity that appoints counsel as its designated Rule 30(b)(6) deponent to testify runs the risk that the testifying attorney would subsequently be disqualified from serving as trial counsel. n1.3

[3] Considering Disadvantages of Noticing a Deposition Under Rule 30(b)(6)

Rule 30(b)(6) depositions can have disadvantages. First, an adversary may be careful to designate a witness who is especially strong. Second, a Rule 30(b)(6) deposition sometimes leads to internal consistency that can be lacking when multiple witnesses are probed about a topic. If you want to establish that different parts of a corporation acted differently, it may be appropriate to take depositions of various individuals that will underscore the diverse actions of the corporation.

Sometimes the deposition of a high-ranking corporate officer, such as the CEO, is noticed without regard to what information the officer can actually contribute to the case. Such a witness will not usually be excused from attending the deposition simply because he or she is "too busy". n2 As stated in, *Salter v. Upjohn Co.*, n3"it is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error." Moreover, mere lack of knowledge is not sufficient grounds for a protective order, n4 and a party seeking discovery is allowed to test a claim of ignorance by deposing the witness. n5 Thus, where a corporation claimed it was unable to provide a witness who had knowledge on twenty-two of twenty-five topics dealing largely with the contentions and affirmative defenses detailed in its answer and counterclaim, the court found it not unreasonable to conclude someone at the corporation believed there were factual bases for the matters contained therein and required the corporation to produce an appropriate witness. n6

However, Rule 26(d) authorizes the court to control the sequence and timing of discovery "for the convenience of parties and witnesses and in the interest of justice." Thus, a court may order that other discovery proceed first to determine if the deposition of the particular corporate officer is really necessary. n7 The court may also require that the party seeking discovery serve written interrogatories upon the company before taking the depositions of its officers. n8 The court can then determine from the interrogatory answers whether the officer does, in fact, have relevant information that cannot be obtained elsewhere in a less oppressive manner. n9

[4] Using Rule 30(b)(6) Deposition for Non-Party Witnesses

A Rule 30(b)(6) deposition can also be used to obtain discovery from non-parties. While Rule 33 provides for interrogatories only to parties, Rule 30(b)(6) clearly contemplates designation by a non-party (*i.e.*, subpoenaed) entity of a representative witness or witnesses in response to a subpoena which advises the "non-party organization of its duty to make such designation." Thus, you should keep this provision in mind when seeking meaningful discovery, without unnecessary commitment of time and money, from a non-party entity.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureRemediesCosts & Attorney FeesCostsDepositions & Transcripts

FOOTNOTES:
(n1)Footnote 1. *See PPM Finance, Inc. v. Norandal USA, Inc., 392 F.3d 889, 894 (7th Cir. 2004)* .

(n2)Footnote 1.1. *Atlantic Cape Fisheries v. Hartford Fire Ins. Co., 509 F.2d 577 (1st Cir. 1975)* ; *Mitsui & Co. (U.S.A.), Inc. v. Puerto Rico Water Resources Auth., 93 F.R.D. 62 (D.P.R. 1981)* .

See also In re Anthracite Coal Antitrust Litig., 82 F.R.D. 364 (M.D. Pa. 1979) (the court awarded sanctions based on defendants' failure to comply with its previous order requiring further inquiry on the part of corporate representatives designated as deponents under Rule 30(b)(6)).

(n3)Footnote 1.2. *See PPM Finance, Inc. v. Norandal USA, Inc., 392 F.3d 889, 894 (7th Cir. 2004)* .

(n4)Footnote 1.3. *See Cartier, Div. of Richemont N. Am., Inc. v. Bertone Group, Inc., 404 F. Supp. 2d 573, 574 (S.D.N.Y. 2005)* .

(n5)Footnote 2. *But see Mulvey v. Chrysler Corp., 106 F.R.D. 364 (D.R.I. 1985) . See also § 16.03[3] supra.*

(n6)Footnote 3. *Salter v. Upjohn Co., 593 F.2d 649, 651 (5th Cir. 1979)* .

(n7)Footnote 4. *See Mitsui & Co. (U.S.A.), Inc. v. Puerto Rico Water Resources Auth., 93 F.R.D. 62 (D.P.R. 1981)* .

(n8)Footnote 5. *Less v. Taber Instrument Corp., 53 F.R.D. 645, 647 (S.D.N.Y. 1971)* .

(n9)Footnote 6. *AMP, Inc. v. Fujitsu Microelectronics, Inc., 853 F.Supp. 808 (M.D. Pa. 1994)* .

(n10)Footnote 7. *See Marrese v. American Academy of Orthopaedic Surgeons, 726 F.2d 1150, 1161 (7th Cir. 1984)* (en banc), *rev'd on other grounds, 84 L. Ed. 2d 274 (1985)* (*Fed. R. Civ. P. 26(d)* should be used to "schedule the sensitive and highly questionable discovery last").

(n11)Footnote 8. *See Mulvey v. Chrysler Corp., 106 F.R.D. 364 (D.R.I. 1985)* ; *Community Fed. Sav. & Loan Ass'n v. Federal Home Loan Bank Bd., 96 F.R.D. 619, 621-22 (D.D.C. 1983)* ; *Mitchell v. American Tobacco Co., 33 F.R.D. 262, 263 (M.D. Pa. 1963)* .

(n12)Footnote 9. *See also Colonial Capital Co. v. General Motors Corp., 29 F.R.D. 514, 518 (D. Conn. 1961)* ; *Armstrong Cork Co. v. Niagara Mohawk Power Corp., 16 F.R.D. 389 (S.D.N.Y. 1954)* (defendant served "shotgun" notice on corporation, naming nine officers and six directors, one of whom was dead and one long since retired).

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CHAPTER 17 Taking Depositions *

2-17 Federal Litigation Guide § 17.07

§ 17.07 Understanding Objections

[1] Objecting to Form of Question

Rule 32(d) requires that the defending counsel at a deposition make an objection if the objectionable matter can be cured at the deposition. Most commonly, this means that if defending counsel has an objection to the form of the question, or the answer, the objection must be made because the objection may be cured if the examiner rephrases the question. n1

What form of question is objectionable? Certainly, questions that are improperlyleading, argumentative, ambiguous, ungrammatical, or compound may be objectionable because they are susceptible of being properly rephrased. But you should also be alert to questions that assume facts "not in evidence," which in a deposition context is a question that assumes unproved or unprovable facts to be true. A question that begins: "Did you know that ..." is also usually objectionable. A question that misstates what a witness has previously said is another objection going to the form of the question. An objection based on "lack of foundation" is a closer call; the deficiency may be obviated or cured at the time or it may simply be another objection based upon relevancy which is not waived by failing to make the objection during the deposition. n2 In a close call, of course, the safer practice is to make the objection.

[2] Objecting on Basis Other Than Form

With respect to objections that cannot be cured at the deposition, such as relevancy or hearsay objections that must be resolved by a court, these need not be made at the time of the deposition. If such objections are made, examining counsel should usually insist that the witness answer the question despite the objection. n3

An attorney's objections should be succinct and verbally economical, stating the basis of the objection and nothing more. n3.1 According to the Committee Note, ordinarily objections should be limited to those that under Rule 32(d)(3) might be waived if not made at that time. n4

Generally, the proper procedure to follow when an objection is raised to a question propounded in a deposition is for the attorney who raises the objection to note it, but to allow the question to be answered. n4.1

A party may instruct a deponent not to answer in only three instances--when necessary:

- To preserve a privilege.

- To enforce a limitation on evidence directed by the court.
- To present a motion for a protective order under Rule 30(d)(3).

[3] Dealing With Objections

There are several tactical reasons why opposing counsel may make objections. They may signal an especially sensitive area, and a deponent may be put on the alert to be especially cautious when answering the line of questions. Objections may dissuade the examining counsel from pursuing a line of questioning. Objections also break the rhythm and rapport between the deponent and the examining counsel.

On the other hand, too frequent objections may undermine the deponent's confidence. The deponent may feel that there are hidden issues he or she is missing. Objections may also tip off examining counsel that this is a sensitive area.

Finally, an over-abundance of objections may be sanctionable. Indeed, under Rule 30(d)(1), objections are to be stated concisely and in a non-argumentative and non-suggestive manner. n5

When an objection is made to a question that you can recast, you must decide whether to attempt to correct the question. In order to make this decision, the strength of the objection must be determined. If you conclude that the objection is likely to be upheld, you should attempt to modify the question.

Leading questions are frequently objected to at depositions. While a lawyer examining an adverse witness may ask leading questions, the use of leading questions when deposing a neutral witness, or one affiliated with your client, may be challenged. While the courts recognize that leading questions are an efficient way to establish uncontroverted or preliminary matters, the sound course when faced with an objection to the use of leading questions with a friendly or neutral witness is often to recast the question and proceed just as one would at trial.

Opposing counsel may object to questions as being "compound," "ambiguous," or "excessively broad." The basis for the objection in each of these cases is similar--these types of questions may confuse the witness, thereby causing him or her to provide an answer which may or may not accurately represent the facts or which may be confusing to judge or jury if ultimately admitted at trial. It generally is not difficult to rephrase such questions, for example, by breaking down a compound question to more than one question or eliminating any ambiguity.

Similarly, an objection that the examining lawyer has not laid an adequate foundation for a question is one that should often prompt the questioner to backtrack. An objection to lack of foundation bears a relationship to the competency of the witness and Rule 32(d)(3)(A) generally preserves questions of competency. Nevertheless, an examiner's failure to lay a foundation for testimony about a particular conversation or meeting may be easily corrected if the objection is presented in a timely manner.

Another category of objections that must be made in a timely manner is objections toargumentative questions and questions which assume facts in issue in the lawsuit. n6 When such objections to the form of the question are made, an effort to rephrase the question is probably worthwhile.

Similar considerations apply to questions which call for opinion from, or speculation by, the witness. An argument can be made that no change in the form of a question which calls for opinion or speculation will alter the nature of what is sought. Nevertheless, there is some authority that defending counsel should object to such questions at the deposition. n7 Under these circumstances, the best alternative may be to establish, as well as you can, the credentials of the witness to have an opinion or to speculate in an informed manner, and then ask the question again.

Rule 30(c) provides that objections shall be noted by the officer upon the record of the deposition, but the examination still proceeds, and the testimony is taken subject to any objection with the testimony being taken subject to the objections. Accordingly, instructions not to answer may be given only in three instances--when necessary (i) to preserve a privilege, (ii) to enforce a limitation on evidence directed by the court, or (iii) to present a motion under Rule 30(d)(3). n8 A privilege will be waived if the answer is given. n9 In the case of a privilege objection, you can invite objecting counsel to give a limiting instruction. Also, it is permissible for examining counsel to test for the presence of factors which will determine if there really is a privilege: who was present at the meeting; was the meeting for the purpose of obtaining legal advice; and was anyone outside of the meeting told about what was discussed and what advice was given? Obviously, instructing a non-client not to answer a question is particularly dangerous. n10 Refusal to answer gives the examiner the right toadjourn the deposition in order to seek a court ruling under Rule 37(a)(2), although the better practice is to conclude the remainder of the deposition and seek a court order later.

Before going to court, counsel should be sure that there is an instruction not to answer on the record. Often the examiner will be interrupted and then neglect to reiterate the question. This can make it appear as though the question has been abandoned.

It may be possible to obtain an answer to an objectionable question with follow-up questions. You can ask the deponent about how the information can best be obtained. Such questions may lead to indirect discovery of information that cannot be asked for directly. If a witness is instructed not to answer a question, it may also be advisable to ask the witness if he possesses the information necessary to answer the question. If he says no, it would be pointless to seek a ruling from the court. If he says yes, the court may be more inclined to rule that he must answer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsEvidenceTestimonyExaminationGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *But see Hall v. Clifton Precision, a Division of Litton Systems, Inc., 150 F.R.D. 525 (E.D. Pa. 1993)* (objections which suggested the answer to the client were not allowed).

(n2)Footnote 2. *Fed. R. Civ. P. 32(d)(3)(A).*

(n3)Footnote 3. Ordinarily counsel cannot instruct a witness not to answer a question. *See* Morris, et. al. *Recent Developments in Deposition Practice and Document Discovery*, at 7, in Resource Materials on Civil Practice and Litigation in Federal and State Courts (Sixth Edition, 1994 ALI-ABA).

(n4)Footnote 3.1. *See Fed. R. Civ. P. 30(c)(2)*; *see also Birdine v. City of Coatesville, 225 F.R.D. 157, 158 (E.D. Pa. 2004)* .

(n5)Footnote 4. The Committee Note observes that "[d]epositions frequently have been unduly frustrated by lengthy objections and colloquy, often suggesting how the deponent should respond."

(n6)Footnote 4.1. *See In re Omeprazole Patent Litig., 227 F.R.D. 227, 230 (S.D.N.Y. 2005)* .

(n7)Footnote 5. The 1993 Committee Note observes that depositions frequently have been "unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond." Objections are permissible, but ordinarily they should be limited "to those that under Rule 32(d)(3) might be waived if not made at that time ... ."

(n8)Footnote 6. Objections that questions are argumentative and amount to cross-examination of the witness concern the form of the questions. *See Bahamas Agricultural Indus. Ltd. v. Riley Stoker Corp., 526 F.2d 1174, 1180-81 (6th Cir. 1975)* . In *Oberlin v. Marlin Am. Corp., 596 F.2d 1322, 1329 (7th Cir. 1979)* , the trial court was held to have properly admitted responses to leading questions which were not objected to at the deposition. However, the trial court's exclusion of a response to a question which assumed the existence of a fact in issue in the case was erroneous.

(n9)Footnote 7. For example, in *Bahamas Agricultural Indus., v. Riley Stoker Corp., 526 F.2d 1174 (6th Cir. 1975)* , the Sixth Circuit held that the trial judge erred in sustaining objections to deposition questions that were argumentative or elicited incompetent opinion testimony.

(n10)Footnote 8. Note that before the 1993 amendment to Rule 30(d), the Federal Rules did not provide for an instruction not to answer. *See Ralston Purina Co. v. McFarland, 550 F.2d 967 (4th Cir. 1977)* (the court held that "the action of plaintiff's counsel in directing [his principal witness] not to answer the questions posed to him was indefensible and utterly at variance with the discovery provisions of the Federal Rules of Civil Procedure. ... The action of plaintiff's counsel in directing the deponent not to answer was highly improper."); *Coates v. Johnson & Johnson, 85 F.R.D. 731 (N.D. Ill. 1980)* .

(n11)Footnote 9. *See, e.g., Securities and Exchange Comm'n v. Parkersburg Wireless Limited Liab. Co., 156 F.R.D. 529 (D.D.C. 1994)* (*Fifth Amendment* privilege must be invoked at time question asked or it is waived).

(n12)Footnote 10. *See, e.g., Shapiro v. Freeman, 38 F.R.D. 308 (S.D.N.Y. 1965)* .

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CHAPTER 17 Taking Depositions *

2-17 Federal Litigation Guide § 17.08

§ 17.08 Dealing with Documentary Exhibits

[1] Identifying Documents

An essential skill in taking a deposition is the coherent and effective use of documents. To make effective use of documents at a deposition, the documents should be copied prior to the deposition and organized for easy access.

It is sometimes possible for you to have the court reporter mark in advance the exhibits that you expect to use. This is easiest in the deposition of your own witness where an unexpected exhibit should be a rare event. Such advance marking is sometimes also fairly easy with a "neutral" or hostile witness because, if thorough preparation has been done, you usually know the documents that will be used. By marking the exhibits in advance, you can avoid the loss of the momentum of questioning and avoid irritating a witness by frequent delays.

It should be pointed out, however, that during intense questioning, the marking of exhibits provides defending counsel and the witness with a useful break to review the testimony. In addition, the testimony given at the deposition may cause you to alter the sequence of documentary exhibits or to refrain from using a particular document. A too-rigid advance organization of the documents may undermine your ability to be flexible.

The method of marking exhibits should be agreed upon by counsel. It is usually better to identify exhibits with the name or status (*e.g.,* plaintiff, defendant) of the introducing party and a sequential number. Thus, a given document should be called:

Smith Deposition Exhibit 3 or Plaintiff's Deposition Exhibit 29.

After the exhibit has been marked, you should, in your first reference to the document, identify it by the exhibit number and give some further description. Thus, you may begin by saying:

Q:

Mr. Smith, I show you a five-page document which the reporter has marked Smith Deposition Exhibit 3. Would you please look at it?

[2] Using Documents Effectively at Deposition

To make effective use of a document at a deposition, you should consider the purposes for which the document is being used at the deposition. Thus, as a general proposition, you should first ask questions that establish the relationship of the witness to the document (authorship, participation in preparation, receipt, recollection, total ignorance), and then proceed further, making clear whether the questions seek:

- Meaning and intent (in the case of an author or participant).
- Understanding and response (in the case of a recipient).
- Independent recollection (in the case of a document used to refresh).
- Agreement (in the case of a document seen for the first time).

Effective use can be made of documents which were not composed by the deposition witness. A written narrative may serve to refresh the recollection of the witness about events in which the witness participated. Thus, when a witness has disclaimed any knowledge (or any further knowledge) of some series of events, examining counsel may show the witness an account written by someone else, and ask if reviewing it refreshes the witness's memory. n1

A variation on a simple chronological approach may be used in cases involving extensive documents. Examining counsel may first take the witness through the sequence of significant events without the use of documents, and then refer to the documents. Done effectively, this technique allows counsel to probe the witness's memory once without documents and once with documents. This can lead to more thorough testimony that fully explores the witness's memory without fostering an over-reliance on the documents. Moreover, the witness may be prevented from retreating into an inability to recall details when confronted with relevant documents.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsEvidenceDocumentary EvidenceWritingsGeneral OverviewEvidenceTestimonyRefreshing RecollectionGeneral Overview

FOOTNOTES:
(n1)Footnote 1. As a general rule, examining counsel is entitled to obtain any document that the witness uses during the deposition. Thus, if a witness comes to the deposition with notes and consults the notes when answering questions, you should ask to see the notes and may question about them. In addition, you may ask that the notes, or copies of them, be marked as a deposition exhibit.

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CHAPTER 17 Taking Depositions *

2-17 Federal Litigation Guide § 17.09

§ 17.09 Taking the Deposition of a Non-Party Witness

[1] Determining When to Take Non-Party Deposition

The deposition of a witness who is not affiliated with a party is subject to a number of considerations that differ from those for an adverse witness. In general, the deposition of a non-party is taken when counsel concludes that either:

- The witness's favorable testimony should be put into evidence.

- The risk of the witness's testifying unfavorably at trial is great enough to justify learning what the witness has to say.

- The witness played such an important role in the events leading to the lawsuit or had such an important opportunity to observe the events that the witness'ss testimony is critical.

To a large extent, the deposition of a non-party witness will vary depending on how cooperative the witness may be.

[2] Deposing the Cooperative Non-Party Witness

A lawyer usually takes the deposition of a cooperative non-party witness to put evidence in the record which may not be available at trial. Such a deposition may be required because, while the witness is prepared to testify helpfully, the witness is not willing or able to appear at trial. Another reason for such a deposition is that the deposing lawyer may want to have the witness's testimony available before trial to support a motion to dismiss or for summary judgment or to assist in settlement negotiations. As a general rule, you should only take such a deposition after you have determined that the reasons for the deposition outweigh the benefits of saving the witness's testimony for trial. Of course, where the witness refuses to appear or will be unavailable for trial, you may have little choice in the matter.

When deposing a friendly non-party witness, you should note that the preparation of the witness for the deposition is a legitimate subject of inquiry by adverse counsel. Despite adverse counsel's ability to inquire into the nature of the witness's preparation, detailed preparation for the deposition is often still advisable. The preparation, however, should stick to the facts and you should be careful not to explore unnecessary topics with the witness or editorialize about the case.

When taking such a deposition, you should be especially well prepared. Because the deposition will presumably be read

at trial, you must be particularly careful to ask questions that highlight the witness's favorable testimony. It is likely that leading a friendly non-party witness will be challenged by adverse counsel.

When you prepare a friendly non-party witness for a deposition, you should also prepare the witness for cross-examination. You should question the witness about any unfavorable areas of the witness's testimony so that the witness is not caught by surprise. Obviously, if the witness may give unfavorable testimony in important areas in response to cross-examination, you should be certain that the favorable testimony outweighs any dangers that may be presented by the witness's unfavorable testimony.

[3] Deposing the Non-Party Witness Expected to Testify For an Adverse Party

Before taking such a deposition of an adverse nonparty witness, you should evaluate whether the witness will be called at trial. The risk in taking such a deposition is that, in exploring the witness's position, your adversary will be educated about evidentiary material that otherwise might not be discovered. For this reason, you may elect to postpone taking such a deposition until the witness is identified in a pretrial list of trial witnesses, as long as you do not lose your opportunity to take the deposition. Of course, if the unfavorable witness will not be able to attend trial, and is not deposed, there will be no written record of the witness's testimony. Therefore, taking the deposition will only preserve testimony that may damage your case.

Once you are satisfied that the risk of deposing such a witness is justified, you should proceed much as if it were the deposition of a witness under the control of an adverse party. You should, however, take a few steps to confirm your impression that the non-party witness is as hostile as anticipated. Thus, an attempt to confer with the non-party witness prior to the deposition is sometimes worth the effort. In some cases, a non-party witness may be more disinterested than you suspected. Such an effort at informal contact may confirm the adverse alignment of the witness, shed some light on the witness's personality, and contribute to your decision whether or not to proceed to take testimony.

Having decided to proceed with the deposition, you should make the most of this discovery opportunity. First, you should consider serving a request for documents with the subpoena for the deposition. Second, you should ask questions that show the witness is affiliated with the adverse party so as to warrant the use of leading questions. Along these lines, you should ascertain at the beginning of the examination whether the witness has discussed the impending deposition with opposing counsel, what was said, whether the witness discussed the deposition or the lawsuit with the adverse party and, again, what was said. You should also ask whether the witness has agreed to testify at trial or has discussed with anyone the possibility of being subpoenaed for trial. In addition, you should ask whether the witness is being compensated in any way or has any financial, legal or other ties to any of the parties in the litigation. Apart from further clarifying the witness's affiliations, the responses to these questions will give you a clearer idea of how to proceed with the questioning.

If the witness seems likely to appear at trial, your objective in taking the deposition should be, as with an adverse party witness, to explore the deponent's knowledge in order to anticipate the adverse testimony to be provided at trial and to lay a foundation for effective cross-examination. Similarly, as with an adverse party, you should try to limit the use of the witness by the other side at trial.

[4] Deposing the Neutral Non-Party Witness

A third category of non-party deposition is that of the witness who is neither a helpful ally nor allied with an adverse party. For instance, an individual may be identified who has firsthand knowledge of the facts underlying a lawsuit such that his or her account of events should be explored. In many instances, such a deponent will be an "occurrence" witness. For example, in a personal injury suit, a disinterested witness may have observed the accident. In a commercial dispute, such a witness may have had a unique opportunity to be privy to the discussions surrounding the transaction.

Such a deposition may be taken where the testimony of the witness is an essential part of the affirmative case of the party taking the deposition. If, for example, a discontinued distributor is claiming that the defendant-manufacturer terminated it because of urging from competing distributors, testimony from other distributors may be essential to support an antitrust violation. If the deposition does not develop such proof, counsel must look elsewhere for proof, but if the deposition is a success, counsel will have gone a long way toward establishing the client's case.

In addition, if the non-party witness has important information that is central to the issues in the lawsuit, the testimony should be obtained promptly in order to enable you and your client to assess the case intelligently. Of course, if such a deposition yields unfavorable proof, it can have a devastating effect on the client's position. For this reason, the delay of the deposition may be advisable if the object is to maneuver for a while pending a settlement. On the other hand, a desire to hold down the costs of litigation and compel a prompt resolution may commend the early scheduling of an important non-party deposition that you believe will be favorable.

In taking such a non-party deposition you will, at least initially, be operating in an offensive mode, trying to obtain from the witness clear, affirmative testimony. If documents are likely to be significant, you should precede the deposition with a well thought-out subpoena for documents and should try, if possible, to use the documents to bolster the favorable deposition testimony.

After you obtain the needed testimony, it may be appropriate to shift to a more conservative approach, recognizing that excessive inquisitiveness may undermine the favorable testimony. It should be left to opposing counsel to try to nullify or reduce the effect of what has been learned.

[5] Deposing the Adverse Expert

Deposing the adverse expert poses great difficulties for trial counsel. The self-confident and often aggressive demeanor of the expert, his knowledge of the subject matter, and his partisanship all combine to create discomfort and problems for examining counsel. Yet this deposition is often critical for effective trial preparation and adequate assessment of the case in order to engage in meaningful settlement negotiations.

Once it is determined who is a testifying expert, preparation for the deposition should begin. Examination of such a witness presents daunting challenges to the deposing attorney. Clarity in goals is essential in meeting these challenges. While the specific facts of each case and each deposition will determine what aim the deposing attorney has, the general purposes of such depositions may be summarized as follows: discovering the expert's opinions and the facts underlying those opinions; "freezing" the expert to positions from which he may not deviate later in the pretrial or trial proceedings; discrediting or weakening his opinions; harvesting information from the adverse expert which may be useful to your own expert; demonstrating bias of the expert or other reasons which undermine his credibility to the fact-finder. These general goals will require a subtle and nuanced questioning strategy, often balancing one goal against another.

Before attempting to depose the expert, the examining attorney must achieve some degree of mastery of the body of knowledge upon which the expert will testify. This will require extended research and an immersion into the literature. Since the expert's testimony is likely to be limited to specific details of the general body of information at issue, you must hone in on these relevant areas. In addition, investigation of the expert's credentials is critical. This requires study of information regarding his education, experience, publications, prior testimony as an expert, etc. These qualifications may be shown to be so deficient that a court will not allow the expert to state an opinion. This is rare, and indicates either a desperate or amateurish opponent. More likely, the qualifications may offer opportunities for challenging the credibility of the expert's opinions. Before entering the deposition, you should study writings of the expert on relevant topics, prior depositions and/or trial testimony given by the expert, answers to interrogatories and other information offering a glimpse into your adversary's thinking and views.

During the deposition, several goals must be achieved. Examination must specifically focus on the opinions that the

witness has formed. Those opinions, of necessity, will be based upon facts and assumptions and each of those elements may be undermined with appropriate investigation and questioning. The theoretical basis for the opinions expressed and the work done to arrive at the opinion must be ascertained. This may suggest alternative methodologies which would produce contrary results. The amount of time spent on the case, the persons who have assisted the expert, what documents and information he has used to reach the opinion, etc., must all be probed. If the expert's work is not finished, this should be determined, together with what additional work will be done.

The most common, but often the most unsuccessful, attack upon the expert is bias. Such bias may be suggested by the amount of compensation being paid for his work, prior relationships with the party, the amount of income derived from expert testimony generally, the writings and philosophical positions of the expert which may show an unalterably closed mind on the subject, etc.

Perhaps the most difficult task of the deposing attorney is to maintain control of the examination, which often functions as cross-examination. The phrasing of questions and the rhythm of the questioning will often determine whether you or the expert has control over the deposition. Careful preparation, and indeed rehearsal with someone familiar with the subject area, will help to gain maximum advantage from this expensive proceeding.

Trial counsel ultimately is the buffer between the expert's purported expertise and the fact-finder. Preparation, logic, and skill will be the basis for protection of your client's interests at the deposition and, ultimately, at trial.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureRemediesCosts & Attorney FeesCostsDepositions & TranscriptsEvidenceTestimonyExpertsCredibilityImpeachment

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CHAPTER 17 Taking Depositions *

2-17 Federal Litigation Guide § 17.10

§ 17.10. Deposing One's Own Witness

[1] Deposing Witness Due to Unvaliability for Trial

The final category of depositions is that of persons who are your own witnesses. In most cases, deposing one's own witness is unnecessary because you can obtain information from the witness without a deposition. There are, however, a limited number of situations in which you may wish to consider deposing your own witness.

The usual reason for deposing your own witness is the preservation of needed testimony which may not be available at the time of trial. Sometimes, a witness's serious illness may make it uncertain whether the witness will be available at the time of trial. In addition, if a corporate employee is about to retire or be transferred to a distant location, you may choose to take that employee's deposition. If litigation is likely to be protracted, you may wish to consider whether helpful testimony may be lost if it is not preserved by a deposition.

[2] Deposing Witness for Purpose of Motion Practice

A deposition of your own witness may be used in support of, or in opposition to, a summary judgment motion under Rule 56. While Rule 56(a), addressing summary judgment for claimant, and Rule 56(b), addressing summary judgment for the defending party, speak only to "supporting affidavits," Rule 56(e) specifies that "[t]he court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits." The rule goes on to provide that the party opposing summary judgment may not rely on its pleadings but must respond "by affidavits or as otherwise provided in this rule" to show the existence of a genuine fact issue. While typically depositions used to support a summary judgment motion will be those of an adverse party, you may wish to use the deposition of your own witness. You may believe such a deposition is more persuasive than conventional affidavits.

Similarly, a deposition may be used in support of, or in opposition to, a motion for a preliminary injunction.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureSummary JudgmentSupporting MaterialsGeneral Overview

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Appendix 17: Appendix to Chapter 17

2-App. 17 Federal Litigation Guide Appendix 17:.syn

§ App. 17.syn Synopsis to Appendix App. 17: Appendix to Chapter 17

Appendix 17: Scope

[PART I] EXAMINATION OF OCCURRENCE WITNESS BY COUNSEL FOR DEFENDANT

[PART II] EXAMINATION OF DEFENDANT'S EXPERT BY COUNSEL FOR PLAINTIFF

DEPOSITION TRANSCRIPT AND COMMENTARY: PRODUCTS LIABILITY CASE

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2-App. 17 Federal Litigation Guide Scope

Scope

DEPOSITION TRANSCRIPT AND COMMENTARY: PRODUCTS LIABILITY CASE

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2-App. 17 Federal Litigation Guide [PART I]

[PART I] EXAMINATION OF OCCURRENCE WITNESS BY COUNSEL FOR DEFENDANT

Products Liability Case:
Alleged Manufacturer's Design Defect and Failure To Warn
Resulting in Death of Rider of All Terrain Vehicle

FACTS

Plaintiff's decedent, Mrs. Westrum, a wife and mother, was killed in an accident involving a three-wheel, all terrain vehicle (ATV). Mrs. Westrum was riding her ATV up a small dirt hill on an abandoned railroad right-of-way, customarily used by the public for dirt bikes, ATVs, hiking, etc. After going up part of the hill, she attempted to back down, and the ATV flipped over, resulting in her death. Plaintiff filed suit against the manufacturer, Kawasaki, Inc., based on design defects and failure to warn of hazards. Kawasaki claims that the vehicle was properly designed and that plaintiff (i) failed to follow its warnings, (ii) failed to wear a helmet, and (iii) failed to turn the vehicle around rather than back down the hill.

OVERVIEW AND STRATEGY

This is a deposition of an eyewitness to the accident, decedent's daughter, taken by defendant's counsel in his office. The choice of site is important: It gives deposing counsel maximum control, allows the opportunity to retrieve necessary documents, etc. Counsel's specific goals in this deposition are (i) to learn as much as possible about the accident, (ii) to commit the witness to a specific version of the facts, (iii) to assess the demeanor and credibility of this crucial witness, and (iv) to develop a record for defendant's expert witnesses to use in their analysis of the cause of the accident. In addition, deposing counsel is attempting to establish an affirmative defense: that the decedent was an inexperienced rider who lacked the ability to ascend or descend the dirt hill. A crucial element will be to locate the position of the head injury so as to strengthen the claim that a helmet would have prevented or ameliorated the injury.

Counsel's overarching goals for deposition are to assist in evaluating the case for settlement purposes and to prepare for actual trial of the case. These goals, often conflicting in practice, pose substantial challenges for deposing counsel.

SUMMARY OF EXAMINATION

Introductory Questions (Questions 1-16)

Preparation by Witness for Deposition (Questions 17-18)

Purchase of ATV (Questions 19-45)

Safety Equipment (Questions 46-57; 96-98)

Experience ATV (Questions 58-61; 66-75; 79-95; 99-100; 164-170)

Location of Accident (Questions 62-65; 121-134; 152-163; 171-174; 180-206; 313-315; 324-334)

Knowledge of Dangers in Riding (Questions 76-79; 175-179)

Description of Accident and Injuries (Questions 101-120; 135-151; 207-312; 315-338)

DIRECT EXAMINATION

PRELIMINARY MATTERS: The examination should begin with a host of preliminary matters. The attorney will traditionally introduce himself and the other people at the deposition, including the reporter. He will ask the deponent whether she has ever given a deposition and whether she is familiar with the process. The examining attorney will also want to assure the witness of fair treatment and explain his expectation of the witness's role in the examination. Whatever stipulations may be agreed to, such as reservation to objections except as to form, will be placed on the record. It's also helpful to place on the record whether the deponent had agreed to the examination or was present subject to a deposition notice. Sequestration of other potential witnesses to avoid their hearing the testimony of the deponent may also occur. Fed. R. Evid. 615; Fed. R. Civ. P. 30(c). This introductory material is here omitted. See § 17.03[1-8] regarding beginning of deposition.

DIRECT EXAMINATION BY MR. KENNEDY:

LORRAIN WESTRUM, CALLED AS A WITNESS BY DEFENDANT, BEING DULY SWORN, TESTIFIED AS FOLLOWS:

1. Q. Would you please state your full name?

A. Lorrain Westrum.

2. Q. And what is your address?

A. 348 E. 82 Place, Plymouth, Minnesota 55356.

3 Q. How long have you resided there?

A. Since October of'94.

4. Q. Who else lives at that address with you?

A. My father, my sister and my brother.

5. Q. What is your age?

A. Twenty-one.

6. Q. And your date of birth?

A. May 20, 1974.

7. Q. And where did you live immediately prior to moving to Plymouth?

A. Modesto, Minnesota.

8. Q. And your address there?

A. 15 Maple Road.

9. Q. And who lived at that address with you?

A. I lived with my roommate.

10. Q. What is your educational background?

A. I have one (1) year of college behind me.

11. Q. When did you graduate from high school?

A.'91.

12. Q. And what school was that?

A. West High School.

13. Q. And where did you attend college?

A. University of Minnesota.

14. Q. What was your major?

A. Business.

15. Q. Have you ever been employed?

A. Several part-time jobs.

NOTE:

The deposition begins with background and introductory material. This releases tension and lets the attorney and the deponent get into the rhythm of the question and answer format. Additional questions on education, employment and other introductory matters are here omitted.

16. Q. Have you reviewed any documents or anything for today?

A. No.

17. Q. Haven't read anything or looked at any pictures or anything?

A. No.

18. Q. Obviously, we are here about an accident that involved a three (3) wheel cycle. It was, I believe an ATV Kawasaki 100 and I will just probably refer to it as the ATV, if that is okay?

A. Uh huh.

19. Q. Do you recall when that was purchased?

A. May of'93.

20. Q. Do you recall where it was purchased?

A. No.

21. Q. Was it somewhere in Plymouth?

A. Yes.

22. Q. Were you present when it was purchased?

A. No.

23. Q. Do you know why it was purchased?

A. Recreation.

24. Q. Whose idea was it to purchase the ATV?

A. I don't know.

25. Q. Was there any discussion about it before it just appeared one (1) day?

A. I don't know.

NOTE:

The witness is clearly uncommunicative, even in these introductory matters. These one word or noncommittal responses should immediately alert counsel that he faces an uncooperative witness--one who has been clearly warned not to volunteer information, and is in fact heeding this advice. Often witnesses assume the examiner's goal is to trick or trap them. Counsel's task is, by his conduct, to convince the witness he is fair and honest.

26. Q. Had the family or anybody in the family previously owned an ATV?

A. No.

27. Q. Had they, the family, or anybody in the family previously owned a motorcycle?

A. No.

28. Q. Did anyone you know own an ATV?

A. The next door neighbor.

29. Q. Do you recall their name?

A. Dr. and Mrs. Spiegel.

30. Q. Do they still live in Plymouth?

A. Yes.

31. Q. What kind of an ATV did they own?

A. I don't know.

32. Q. Was it a three (3) wheel?

A. Yes.

33. Q. Did they own that before your family purchased one?

A. Yes.

34. Q. Did anyone else in your neighborhood own an ATV?

A. Yes, Capehart.

35. Q. Do you know if your mother had ridden any of these vehicles prior to May of'93?

A. I don't know.

36. Q. Had you ridden any of them?

A. Yes.

37. Q. On more than one occasion?

A. No.

38. Q. Do you recall how the ATV that was purchased by your family got to your home?

A. It was delivered by the dealer.

39. Q. Were you home when it was delivered?

A. No.

40. Q. Did you or anyone in your family receive any instructions or training from the dealer about how to operate the ATV?

A. I wasn't there, I don't know.

41. Q. Do you know who the salesman was, by chance?

A. No.

42. Q. Did the ATV come with an owner's manual?

A. I don't know.

43. Q. Did you ever see an owner's manual?

A. No.

44. Q. Safe to assume you didn't read it either? Did your mother, to your knowledge, if you know?

A. I don't know.

45. Q. Did your mother have the owner's manual or read it?

A. I don't know.

NOTE:

Counsel is searching for information to support a theory that decedent should have read warnings in the Owner's Manual about not riding on terrain above the skill level of the driver. The deposition of this crucial witness is the time to test whether sufficient facts can be developed to support such a theory. Note that the failure to secure this information does not mean the deposition is a failure; to the contrary, the deposition is the time to ascertain all facts, positive, negative, or neutral. If the witness's testimony is negative, it is better to learn this in advance of trial. See § 17.04[1]

46. Q. Did the family have any safety equipment relative to the ATV and by that, I'm talking about a helmet or goggles or something along that line?

A. Not relating to the ATV.

47. Q. Did the family have a helmet?

A. Yes.

48. Q. Why?

A. For the use of snowmobiles.

49. Q. How many helmets did the family have?

A. I don't know. Approximately three (3) to four (4).

50. Q. Were these full helmets? I mean by that, did they come around the ears and across the forehead?

A. I will say as much as covering the ears.

51. Q. Did they have face plates on them?

A. I don't know.

52. Q. Did the family use the helmets when they drove the snowmobiles?

A. Yeah, occasionally.

53. Q. When you would ride the snowmobile, would you wear a helmet?

A. Occasionally. Prior to the accident, not much at all.

54. Q. And did your mother ever ride the snowmobile?

A. Yes.

55. Q. Did she wear a helmet when she rode the snowmobiles?

A. That I don't know.

56. Q. You have no personal knowledge at all on that?

A. No.

57. Q. Are you sure?

A. Yes.

NOTE:

Deposing counsel must insist on a definitive answer to questions posed. An "I don't know" answer often should be probed to ascertain if further refreshing of memory may help. On the other hand, counsel may not wish elaboration of favorable answers. Deposing counsel typically face numerous strategic choices during a deposition. While not determinative, or possibly even admissible, this material about helmet use during snowmobiling is certainly relevant at this discovery proceeding. The test for relevance in discovery is different from the test for admissibility of evidence at trial. See Fed. R. Civ. P. 26. Now counsel switches to the family's use of the ATV.

58. Q. Who in the immediate family rode the ATV the most?

A. My brother Bob.

59. Q. Now, who else rode it quite a bit other than Bob?

A. I would say my mother.

60. Q. When would she ride it and what I mean by that, was there any regular, what do I want to say, schedule she had or route, anything like that?

A. She rode it in order to exercise our Doberman.

61. Q. Would that be about every day?

A. Yes.

62. Q. Where would she ride it with the dog?

A. In the location of the accident, that area, the railroad track right-of-way.

63. Q. Just so we are both talking about the same place, that is on the east side of Oakbrook subdivision and the right of way goes from north to south?

A. Yes.

64. Q. And there were and are no railroad ties there, are there?

A. No.

NOTE:

The testimony of this witness is critical because the mound of dirt on which the accident occurred has since been removed. Counsel must thus get a detailed description of the scene at the time of the accident because it is now permanently altered. The deposition provides the opportunity to get details about timing, topography, and specific events.

65. Q. Those have been taken up, so there is just a dirt path, is that true?

A. Yes.

66. Q. When she was exercising the dog, how would she keep the dog with her?

A. The dog had an instinct to stay with its owner.

67. Q. Was the dog on the leash?

A. Once the dog was back on the railroad bed, the dog was off the leash.

68. Q. But getting over there, from your house, it would be on the leash?

A. Yes.

69. Q. And your mother would ride the ATV while holding the dog on the leash, is that correct?

NOTE:

The rider's position on the ATV and her freedom to use her hands could be important issues in this litigation. Moreover, the leash itself could possibly have become entangled in the wheels, creating instability and hastening or causing the tipping of the ATV. The facts about the dog and the leash will require further elaboration, which will occur later in the deposition. Note the examiner's use of leading questions for this adverse witness. See § 17.04 [1] for a discussion of the use of leading questions.

70. Q. Other than exercising the dog, did your mother have occasion to ride the ATV that you are aware of?

A. No.

71. Q. Was there a normal route that she followed to get over to the railroad right-of-way from your home?

A. Yes.

72. Q. What was that route?

A. Down Maple Road, across Hickory Road, across the field, finishing up across the field, down the trail and then to the left which is the railroad track.

73. Q. Would she get onto the railroad right-of-way and go from the south to the north and then turn around and come back to where she had gotten on?

A. That varied.

74. Q. Were there any family rules about the ATV and its use?

A. The only thing was to stay off the roads.

75. Q. Off the paved roads?

A. Exactly, away from traffic.

76. Q. Were you aware of any dangers associated with riding the ATV before this accident?

A. No.

77. Q. Do you know if your mother was aware of any dangers associated with the ATV?

A. I don't know.

78. Q. Did you and your mother ever talk about the ATV?

A. No.

79. Q. Did anyone in your family ever have an accident or a near accident on the ATV before your mother's accident?

A. Not that I know of, no.

80. Q. Who took care of the ATV for the family? If it needed oil or needed to have gasoline, who did that?

A. Bob and Dad.

81. Q. Do you know if the ATV was ever taken back to the dealer for any purpose?

A. Yes.

82. Q. When was that?

A. A week prior to the accident it was taken in for a tune-up.

83. Q. Do you happen to know why it was taken in?

A. Precaution, just to check things out.

NOTE:

The deposition is here proceeding in a traditional "defensive" mode, gathering as much information as possible. The mechanical condition of the ATV and its maintenance is of obvious relevance to the defendant.

84. Q. Were there any problems with its operation that led up to that?

A. I don't know.

85. Q. You're not aware of any?

A. No, I don't know.

86. Q. Do you recall any discussions about the rear tires being worn?

A. No.

87. Q. Do you know if your mother felt comfortable operating the ATV?

A. I don't know. I am assuming.

88. Q. Did she ever express any concerns to you about operating the ATV?

A. No.

89. Q. When she was riding it, did she seem to know how to operate it?

A. Yes.

90. Q. Did she start it herself?

A. Yes.

91. Q. Do you know if she received any training or instructions in how to operate it?

A. No.

NOTE:

The form of this question allows an ambiguous answer. It is unclear whether the "no" means she didn't receive training or that the deponent doesn't know. See § 17.03[9], Form of Questions.

The attorney continues to collect information about the decedent's knowledge and/or instructions in operating the ATV. He is probing for any information that supports his theory of the case.

92. Q. When you rode the ATV, what was your purpose? Why did you ride it?

A. Just fun, and seeing the neighborhood.

93. Q. Where did you go?

A. In Woodmont.

94. Q. On how many occasions?

A. Five (5) to ten (10), approximately.

95. Q. You stayed within the subdivision?

A. Yes.

96. Q. Did you ever wear a helmet on any of those five (5) to ten (10) occasions?

A. No.

97. Q. Did you ever shift while you were riding?

A. Yes.

98. Q. And did you understand how to do that and did it work okay?

A. Yes.

NOTE:

This demonstrates the difficulty with compound questions. It is unclear which part of the question the witness answers. Not only does this create a confusing record, it leaves the questioning attorney without a definitive response to either question. See § 17.03[9].

99. Q. Had your mother ever had any accidents or falls off of the ATV prior to this incident in August?

A. I don't know.

100. Q. You are not aware of any?

A. No.

101. Q. Now, correct me if I'm wrong, but it is my understanding this accident happened on September 25, 1994.

A. Yes.

102. Q. Around 12:20 in the afternoon?

A. Late morning.

103. Q. What was the weather like that day?

A. Humid, hot. I would say in the mid to upper mid 80's.

104. Q. Was it sunny or overcast, if you recall?

A. If I recall with the humidity, it would tend to lean on the overcast side.

105. Q. And where did this accident happen?

A. On the railroad bed that we discussed earlier.

The questioning here continued to probe the witness's recollection and perception of conditions on the day of the accident. This portion of the deposition is here omitted.

106. Q. Who was present when the accident occurred?

A. I was.

107. Q. Anyone else?

A. And my dog. My dog and I.

108. Q. What was the purpose of this trip?

A. To exercise the Doberman.

109. Q. What were you wearing?

A. I was jogging, so I had jogging attire on, running shorts, T-shirt, tennis shoes.

110. Q. Had you ridden the ATV at all on that trip?

A. No.

111. Q. Did you intend to?

A. No.

112. Q. What did your mother have on generally?

A. Walking shorts down to the knees, T-shirt, socks and tennis shoes.

113. Q. Did she have on glasses?

A. Yes.

114. Q. Did she wear prescription glasses?

A. Yes.

NOTE:

Now counsel attempts to reconstruct the accident's details. This witness is the only occurrence witness, so her version of the events will be the only one concerning the actual accident. Counsel will attempt to find support for defendant's theories in the facts as retold by this witness. Specific factual detail is critical; she will be less able to change the story later if the particulars are fixed in the deposition transcript. Counsel's purpose here must be to exhaust the witness's recollection and knowledge, to avoid surprise at trial, and get ready for cross examination. See § 17.04.

115. Q. Did she have a helmet on?

A. No.

116. Q. Did she have a helmet with her?

A. No.

117. Q. Do you recall when you left the house that morning?

A. Mid to late morning. Somewhere in the vicinity between 10:00 and 12:00. I don't remember precisely.

118. Q. How long had you been gone from the house prior to the accident occurring?

A. Approximately a half hour.

119. Q. Do you know if anyone else had ridden the ATV earlier that day?

A. I don't know.

120. Q. Did your mother ride the entire time, about half hour from the time you left the house until the accident?

A. Yes.

121. Q. Let me show you something. I will show Mr. Cohen (defending counsel) this. I believe this is a division map of your subdivision and you might want to look at it to get your bearings. I believe this is your street, I believe the address is rather hard to read. I think that is your address, 15.

DEPOSITION EXHIBIT NUMBER 1 MARKED AT THIS POINT BY THE REPORTER

NOTE:

Documents are commonly used in depositions. They should ordinarily be marked in advance and identified clearly. The record must reflect each document with a coherent marking system. See § 17.07[1].

122. Q. Miss Westrum, I will hand you what the court reporter has marked as Deposition Exhibit 1 and I will ask if you can identify this as a map of the subdivision. Is it familiar enough that you feel comfortable with that?

A. Yes.

123. Q. Are you able to locate your house in Plymouth?

A. Yes.

124. Q. And are you also able to locate the general area where the accident occurred? This is the Pacific Central Railroad right-of-way.

A. Yes.

125. Q. Would you take this? If you could, take a red pen and start at your house and just trace the route that you and your mother took on September 25, prior to the accident.

A. This is where we got on.

126. Q. Make a big X, okay?

A. Uh huh.

127. Q. And would you note on your home, would you just write home?

A. Yes.

128. Q. And the lake was there at the time of the accident?

A. Yes.

NOTE:

The map will become part of the record of this deposition. It is marked as an exhibit for that purpose. Although the witness has not seen this map before, she agrees that she can locate certain places on it, and thus its use is appropriate for marking locations and for the places identified by the witness. See § 17.07.

Additional questions and answers on this are here omitted.

129. Q. Now, okay. You put an X and have written the word Enter where you got onto the railroad right-of-way. Would you continue to draw until where the accident occurred, if that is shown on this exhibit?

A. If you could tell me what number lot Jones' is, then I can say where the accident was. (Marking Jones and another house).

130. Q. And if you want to connect those two (2) to show the route, please make a real big X. (witness draws X)

131. Q. And so the accident happened approximately behind the Jones' residence?

A. Yes.

132. Q. But it was not on their property?

A. No.

133. Q. It was on the railroad right-of-way?

A. Yes.

134. Q. Now, what you have drawn for me shows that you and your mother came out the front of your house and traveled down Maple Road.

A. Yes.

135. Q. Now, prior to getting on the railroad right-of-way, had you or your mother stopped for anything?

A. I was separate from her. I left ten (10) minutes earlier than she did because I jog, but we met later. Where she entered is where we met.

136. Q. So, you left first?

A. Yes.

137. Q. And were running?

A. Yes.

138. Q. And who had the dog?

A. I don't remember.

139. Q. Let me ask a question that may jog your memory. I am not trying to suggest to you which one had the dog. Do you recall the leash -- was the dog still on the leash when the two of you met?

A. I don't remember.

NOTE:

The attorney is about to enter very sensitive territory as he begins to asks for details of the accident. This witness has watched her mother die in a horrifying tragedy. If counsel wants details from her, he must be sensitive to deponent's feelings. Under any circumstances it is difficult to remember specific details of an accident. Because of the trauma involved here, the attorney's task is particularly difficult. He asks about details concerning the dog and the leash to try to create memory chains in the witness. Moreover, the leash may emerge as an issue relevant to causation. Since the purpose of the deposition is to ascertain all details of the accident, deposing counsel must elicit all foundational information. Subsequent follow-up questions are here omitted.

140. Q. Then what did you do when the two (2) of you met?

A. Continued our trail.

141. Q. Going north?

A. Yes.

142. Q. And how far is it approximately in feet from where you got onto the railroad right-of-way until where the accident happened?

A. The accident happened on the way back, but from here to here, it is approximately 200 yards.

143. Q. 200 yards?

A. Uh huh.

144. Q. And was there any obstruction on the path where the accident occurred?

A. Yes.

145. Q. What was it?

A. There was dirt.

146. Q. Well, the path itself was dirt, so what distinguished this point?

A. There was extra piles of dirt that had been dumped there by the Jones'.

147. Q. And you indicated though that you and your mother went past this point further north and had turned around and were coming back south when the accident actually occurred, is that correct?

A. Correct.

148. Q. Where had you gone on further up north?

A. Approximately a mile to a mile and a half.

149. Q. Did you cross any streets?

A. No.

150. Q. Did you see anybody while you were on the railroad right-of-way?

A. No.

151. Q. That you saw or that saw you?

A. No.

NOTE:

The attorney is clarifying and confirming that there were no other potential witnesses to the accident. Therefore, as far as the details of the occurrence, this witness's rendition will be the sole account.

152. Q. Let me ask you about that dirt pile. Do you know how long it had been on the path?

A. No.

153. Q. And I think you have already indicated, but do you know where it came from?

A. The construction.

154. Q. What construction?

A. The construction on the Jones' lot.

155. Q. And the Jones' lot is the one that we have identified as lot 90 and you have put a J on Exhibit One?

A. Yes.

156. Q. What was being constructed on the Jones' lot?

A. An addition to their home.

157. Q. Do you know who put the dirt there?

A. No.

158. Q. Do you know why the Jones' had the dirt put on the path?

A. No.

159. Q. Have you talked to the Jones' about this?

A. No.

160. Q. Have you talked to the Jones' at all since this accident?

A. No.

161. Q. Now, I asked you how long the dirt had been on the path and you said you didn't know. Did you know that it was there before you left home that day?

A. Yes.

162. Q. Had you been on the path on a previous day when the dirt was there?

A. Yes.

163. Q. Had it been there for at least a week before this accident?

A. Yes.

NOTE:

The witness responds with one word answers, while the attorney struggles to extract her story. He tries a series of closed-ended questions in order to elicit testimony from her. Open-ended questions might have been tried to get the witness to answer with a longer narrative. The choice of type of question is an important strategic decision for the attorney. See § 17.03[9] for a full discussion about form of questions.

164. Q. Had your mother been over the dirt pile previously, that is before the accident?

A. Yes.

165. Q. How do you know that?

A. She told me she exercised the dog.

166. Q. When she went over the dirt pile previously was she on the ATV?

A. Yes.

167. Q. On those -- was it more than one (1) occasion?

A. Yes.

168. Q. So, you have previously indicated that it was her normal routine to take the dog out once a day?

A. Yes.

169. Q. So, is it your belief that she had probably been on the ATV over the dirt pile each day for those two (2) weeks or so that the dirt was there?

A. I don't know.

170. Q. But she had at least told you that she had been over it before September 25?

A. Yes.

171. Q. During the two (2) weeks or so that the dirt pile was there, on those occasions when you were also on the path, did you see anybody else on a vehicle going over the dirt pile?

A. Yes.

172. Q. Did you know the people?

A. No.

173. Q. It wasn't your neighbor, the Spiegels?

A. No.

174. Q. What vehicles do you recall seeing on those prior occasions?

A. I recall seeing a bicycle and a motorcycle.

175. Q. At any time prior to the accident, did your mother express any concern about that dirt pile there?

A. Yes.

176. Q. What did she say?

A. She didn't like it.

177. Q. Do you recall what she said?

A. She didn't like it because it was her place to exercise the dog and somebody else had invaded that place.

178. Q. It was an invasion?

A. Yes, a big inconvenience.

179. Q. Did she express any concern about her ability to maneuver the ATV over it?

A. Not to me.

180. Q. Was this path used during the winter time for snowmobiles also?

A. Yes.

181. Q. Was that kind of a favorite place for snowmobiles since it was flat and straight?

A. Yes.

182. Q. Would you now describe for me the dirt pile as it was of the 25th of September as best that you can recall?

A. I can't recall exact dimensions. I was not there with a measuring stick at the time of the accident. I didn't go back with a measuring tape or a camera.

NOTE:

The details about the dirt pile are very important. Because the decedent's inability to go over the dirt pile was part of the cause of the accident, every dimension and an exact description will be necessary for the defendant's case. Defendant's expert will use this description, as will the accident reconstructionist. The witness continues to resist the attorney's request for details and more extensive testimony. Open-ended questions should have been tried in an attempt to extract more details. See § 17.04[2.--4].

184. Q. How high was the dirt pile?

A. Recalling from my own memory, I'm going to guess the height was around somewhere between three (3) to four (4) feet.

185. Q. Did it completely cover the path or was there room to get around?

A. There was room to get around.

186. Q. How wide was it at the top?

A. However wide the trail was.

187. Q. Was it three (3) feet wide, five (5) feet wide?

A. It was about three to four feet wide. It did not come up to a so called peak. People were going over it with all kinds of vehicles.

188. Q. It was more or less flat on top?

A. Yes.

189. Q. Was it wide enough for the ATV to sit up on top?

A. By all means.

190. Q. Do you know whether there had been other traffic over this pile before the 25th?

A. Yes.

191. Q. Do you have an opinion as to whether there had been only a few people over or quite a few over it?

A. I don't have an opinion.

192. Q. Was it basically packed dirt?

A. Yes.

193. Q. Was it dry?

A. Yes.

194. Q. Do you have any knowledge as to how the dirt got there? Did it appear that a dump truck had come out and just dumped one (1) pile or did it appear there had been several dumpings of dirt there by whatever machine?

A. It appeared to be two (2) to three (3) dumpings.

195. Q. I would appreciate it if you would try and draw for me what you recall of the mound. (Handing her paper)

A. What view do you want?

BY MR. COHEN:

Identify that as Exhibit 2, please.

196. Q. First, if you would draw for me the wound as it appeared, as you were standing in the middle of the path on the south side, looking north, so that you'd be drawing it as it appeared as you would go over it going down the path.

DEPOSITION EXHIBIT NUMBER 2 MARKED AT THIS POINT BY THE REPORTER.

197. Q. Now I will hand you what the court reporter has marked as Deposition Exhibit 2. It shows the dirt pile as it appeared when you were standing in the path on the south looking north, is that correct?

A. Yes.

198. Q. Now, were there any ridges or ruts in the dirt pile on the 25th from people riding up this and going over?

A. From this standpoint, from north to south, from here to here, no.

199. Q. Could you estimate if an ATV could sit on top of that dirt pile?

A. Oh, yes.

200. Q. Now, let me have the court reporter mark this. (Handing paper)

DEPOSITION EXHIBIT NUMBER 3 MARKED AT THIS POINT BY THE REPORTER.

BY MR. KENNEDY:

201. Q. Miss Westrum, I would like for you to draw me a side view of that dirt pile.

A. Yes.

202. Q. In drawing this, I would like for you to show me the slope on the north side and the slope on the south side as best you recall.

A. First of all, angles and slopes I am not going to be able to draw very well.

203. Q. Just do the best that you can.

A. Draws on Deposition Exhibit 3.

204. Q. You just want to label the dirt pile again like you did? Now, do you have any recollection as to how far across the dirt pile from south to north?

A. I would guess anywhere between eight (8) and sixteen (16) feet.

205. Q. There is plenty of room again on top for the ATV to sit up there?

A. Yes.

206. Q. Was the slope on the dirt pile steeper on one end than on the other?

A. I don't know.

207. Q. Now, on the 25th, as you and your mother and the dog were going from the south to the north, did your mother ride the ATV over the dirt pile?

A. Yes.

208. Q. Did she have any problems?

A. Not that I recall, no.

209. Q. You were there when she went over it?

A. Yes.

210. Q. To your knowledge, she made it on her first attempt?

A. Yes.

211. Q. And on coming down, did she have any problems that you are aware of, and by coming down, I'm saying off the dirt pile on the north end?

A. I was ahead of her.

212. Q. So, if she had any, you are not aware of any anyway?

A. Correct.

213. Q. She didn't say anything and you didn't hear anything, true?

A. Correct.

214. Q. All right now, you have gone down that trail, turned around a mile or mile and a half down the road and are coming back. Where were you as you approached the dirt pile? Were you still ahead of her?

A. I was ahead of her.

215. Q. Tell me what happened.

A. I jogged up the hill or shall I say dirt pile. I was standing in the middle of the top of the dirt pile. She ascended, but she did not have momentum to get over the top of the dirt pile. She went backwards and it came over on top of her.

NOTE:

Reaching the most sensitive part of the testimony--the actual accident--the attorney should have begun this with a preface. He might have referred to the tragic aspect of the case, showing some empathy for the witness and her difficult task in retelling the story of her mother's death. He makes no attempt to relate to her difficult situation and her alienation makes her very guarded and closed. A more sensitive, humane approach would have encouraged her to be more cooperative.

216. Q. All right. So, the accident happened on her first attempt to get up onto the dirt pile as she came from the north to the south?

A. Yes.

217. Q. How far did she get up, what I will call the northern slope, before she lost momentum?

A. I don't know. I would guess somewhere in the area of almost being there (pointing), but not quite, because she did not have momentum to get over.

218. Q. First of all, let me ask, you were standing on top of the dirt pile, were you watching her?

A. Yes.

219. Q. Where was the dog when this was going on?

A. I don't know.

220. Q. Now, you indicated to me something, we don't have a mark here on Exhibit 3 yet, was that the front wheel, is that the furthest point of the front wheel, is that what you were indicating? Make a mark here how far her front wheel came.

A. (Marking exhibit) This is just a guess. It has been a long time, a lot happened in those few seconds.

221. Q. Okay. Now, you have placed an X which is, as best you can recall, the furthest progress of her front wheel on the ATV?

A. Yes.

222. Q. Now, what happened next? She had lost momentum and you indicated she came to a full stop?

A. She didn't come to a stop. The machine came to a stop. She had put the brakes on, the machine didn't have momentum to keep going. It stopped.

223. Q. Then what happened?

A. She slid back.

224. Q. Was it beginning to roll backwards? Were the wheels actually rolling backwards for some distance?

A. Yes.

225. Q. And then what happened?

A. Machine flipped over on top of her.

226. Q. At what point did that happen, and what I'm trying to get at, how far had it rolled backwards before it flipped?

A. Not far at all. I don't know.

227. Q. What do you recall about the wheels? Were they straight?

A. Yes.

NOTE:

These details will be important for the expert's opinions on causation, so thorough questioning is important here. Counsel should prepare specific questions in advance for this critical part of the story. Follow-up questions will flow naturally. See § 17.08.

228. Q. Was she in the middle of the dirt pile or off to one side?

A. The middle.

229. Q. Had the rear wheel gotten back down on the path when it flipped or were they still going back down the slope?

A. I don't know.

230. Q. What about the front wheel, was it still on the slope when she flipped?

A. The front wheel was still on the slope.

231. Q. But you don't have a recollection as to how far up or down the slope that front wheel was when it flipped, is that true?

A. That is true. Things were in slow motion in my mind.

232. Q. Where were her hands?

A. Holding onto the places where you hold on, the grips.

233. Q. Where was she on the bike?

A. On the seat.

234. Q. She was on the vehicle by herself?

A. She was on the vehicle by herself.

235. Q. I'm asking where on the seat she was, if you recall?

A. The correct place to be on a seat, the most comfortable normal position.

NOTE:

The rider's position on the seat is important. The plaintiff's expert's theory was that the seat was too large, and therefore the rider had to make weight shifts which would increase the tendency of the vehicle to flip over. This will be a matter for expert opinion testimony, but those opinions must be based on the facts established.

236. Q. Was she leaning either forward or backward?

A. I don't recall.

237. Q. Did she change position at any time as she was coming up the slope or as she was beginning to roll backwards?

A. I don't recall.

238. Q. Do you know what gear she was in as she approached the hill?

A. I do not recall.

239. Q. Do you know if anyone checked that after the accident?

A. No, I don't know.

240. Q. Now, tell me what you saw in describing the flip.

A. (Pause) (Crying)The ATV just flipped over and landed on top of her and the gas tank landed on her face and the gas cap crushed her nose and her forehead.

241. Q. You're indicating the front wheel came up off the ground, is that correct?

A. Yes, the front wheel came over and flipped over.

242. Q. Where did she go as that was happening? Did she go backwards?

A. Yes.

243. Q. And did she continue to hold onto the grips?

A. Yes.

244. Q. Did she ever let go of them during the accident sequence?

A. I don't remember.

245. Q. Now, you indicated that the gas tank and the gas cap in particular hit her in the face?

A. Yes.

246. Q. Did you see that?

A. I saw the entire accident occur.

247. Q. The accident, as you were on top, was going away from you, is that correct?

A. Yes.

248. Q. I am curious what you really saw happen.

A. From the angle I was standing, I saw everything happen.

249. Q. Did you see the gas tank actually hit her in the face?

A. (Crying) All I know is that I saw the machine flip over and I saw her go backward and I knew that the machine had impact on her. As to what extent and impact-wise, I did not find that out until I saw the results.

250. Q. After you came down to help her?

A. Yes.

251. Q. Did she come off of the seat at any time as it was flipping backwards or did it basically end up with her on her back on the ground and the ATV on top of her?

A. The second one.

252. Q. So, she stayed on the seat the whole time holding onto the grips all the way back as far as you know and until she hit the ground?

A. As far as I know.

253. Q. Now, did you hear anything while this was going on?

A. Just the machine running.

254. Q. The motor was running? Okay. Do you have a recollection as to how fast she was traveling as she came up to the slope?

A. I don't have a recollection of how fast she was going.

255. Q. Did it seem like she was moving fast or was just moving slowly or do you have an opinion?

A. She was not moving fast.

NOTE:

Counsel continues a series of specific questions concerning the details of the accident. He presses the witness for answers and persists in restating questions and probing even when she responds that she doesn't know. See § 17.04[1]. Counsel would have been better advised to show sympathy for deponent's feelings.

256. Q. Had she stopped anywhere near the dirt pile?

A. I don't know.

257. Q. Now, at the time during this sequence, did you and she have a discussion about her not being able to get up the hill?

A. Words were exchanged when she was briefly stopped on the hill.

258. Q. What was said?

A. I said, jokingly, Mother, you have to go faster to get over these hills. (Crying)

259. Q. Did she say anything to you?

A. No. And then I said do you want me to continue to get it over and she said no, I will just start over and do it myself.

260. Q. And this conversation all occurred while she was stopped?

A. Those few seconds. (Pause -- crying) Momentum had been lost and she was at a fixed position.

261. Q. So, she wasn't moving at all during that conversation?

A. No.

262. Q. Did she take the ATV out of gear before she began to back down the hill?

A. I do not recall.

263. Q. Did you see her move her feet at all?

A. I do not recall. (Crying).

BY MR. KENNEDY:

Now, if you'd like to take a break now, we can.

RECESS TAKEN AT THIS POINT.

NOTE:

This is a strategic break. It allows counsel to review the testimony and lets the witness compose herself before getting into the details of the death. It is generally a wise policy to save the most difficult questions or those that will cause most offense for later in the deposition.

BY MR. KENNEDY:

264. Q. Now, I think we are at the point where the flip has occurred and you are going down to help your mother. Would you describe for me how you found her?

A. First of all, I have a hard time recalling as to whether the ATV rolled off of her, or if I rolled it off of her, because I was in a state of shock at that point in time. Doing what had to be done instantaneously. The state that I found her in was her glasses flung off the face and smashed and her entire face had been crushed flat and she was unconscious.

265. Q. I don't want to make this more difficult for you than it has to be, but I would like to know, as specifically as you can be, her injuries.

A. Okay. (Crying) The weight of the gas tank and gas cap hitting her face obviously caused her face to go flat. Her face was -- her nose was flat, crushed -- her forehead had a huge, huge flat crushed groove, and a lot of crushed bones. All of these bones were completely crushed (indicating), her jaws were crushed, broken.

266. Q. Had her teeth been broken?

A. No.

267. Q. And what kind of a groove are you talking about on her forehead? Did it have an impression of some kind?

A. Just you imagine! (Crying).

268. Q. Was it to one side or the other?

A. It was right in the center.

269. Q. Was it a puncture?

A. All I am going to say is that something solid hit her entire face. The gas cap, for what it is worth, hit

this part and caused the extra indent. See, the entire face was indented. Where the gas cap went in, it was a further indentation.

NOTE:

Counsel has continued to demand difficult details with a series of close-ended questions. He now employs an open-ended question, hoping to get a narrative flow from the witness. The assessment of how this occurrence witness will relate this story in court will help defendants evaluate the case for possible settlement. On Form of Questions, see § 17.03[9].

270. Q. Describe your mother's condition when you got to her?

A. She was unconscious.

271. Q. What did you do next?

A. I yelled and said if you are alive, do not move. I am running for help. And I said it over and over. I thought she was dead. I said, if there is any life there, please don't move.

272. Q. She was unconscious until you left to get help?

A. She was unconscious when I left. I didn't know what I was leaving behind.

273. Q. Now, where were her feet in relation to the dirt pile? How did her body line up? Was her head toward the dirt pile or her head toward the north?

NOTE:

Again, counsel asks multiple questions, leaving a less than clear record. See § 17.03.

A. I am just recalling to the best of my knowledge. Her head was facing south in my remembrance and her feet were facing north.

274. Q. That is your best recollection?

A. That is how I remember.

275. Q. And that is before you left?

A. Before I left.

276. Q. To get help? Were there any other injuries other than her face?

A. No.

277. Q. Now, where did you go?

A. I came out of the woods yelling for help.

278. Q. Did you go to a house?

A. No. Luckily Mrs. Jones came out her backyard. I said I need help. I said is there a man around. She said I don't know. I said is there a doctor -- are there any doctors around our neighborhood and she said I don't know and she was very difficult.

279. Q. Do you know why she was difficult?

A. Because she kept saying I am holding my baby.

280. Q. Did you tell her what had happened?

A. I said my mother has had an accident. I think she is dead, call an ambulance now. She said no, I can't, I am holding my baby. I said call an ambulance now, Mrs. Jones. She said I can't, I am helpless. I am holding my baby. I said a few more words and I said do it, she is dead. Finally she went in the house and called the ambulance.

281. Q. Now where did you go after that?

A. Back to the scene of the accident.

282. Q. Was anyone else around when you had the conversation with Mrs. Jones?

A. No.

283. Q. Tell me what happened next when you got back?

A. Mother had gained consciousness. To the best of my knowledge, she was struggling to turn over and was on her front side laying down, struggling to look up, bleeding profusely.

284. Q. Was she in the same relative positions when you left? By that I mean, was her head to the north still and her feet towards the dirt pile?

A. Yes.

285. Q. But she had turned over on her stomach?

A. Yes.

286. Q. So, all she had done was turned over on her stomach since you left and had become conscious?

A. Uh huh.

287. Q. What happened next?

A. I asked if she could breathe.

288. Q. Was she able to talk to you?

A. No, not really.

289. Q. Did she nod her head or anything so that you knew she understood what you were saying?

A. There was an understanding there and I knew that there was difficulty breathing.

290. Q. You left her on her stomach?

A. No, I turned her over.

291. Q. How long was it until the first person arrived to help?

A. I ran out to the Jones residence again to get towels and ice and water and blankets to wrap up my mother who was becoming very cold because of the state of shock she was in. And Mrs. Jones said that the ambulance would be there in three (3) to four (4) minutes.

292. Q. Who was the first one to arrive?

A. The ambulance was first to the scene.

293. Q. Did you know any of those people?

A. Yes.

294. Q. Who did you know?

A. One of the volunteer firemen.

295. Q. Do you know his name?

A. Uh huh.

296. Q. What is his name?

A. Yes, I know his name. It is Jim Bouton.

NOTE:

Each person at the scene must be identified and interviewed and deposed, if possible. An important function of the deposition is to gather such identifications for later investigation.

297. Q. And does he live somewhere in your neighborhood?

A. He lives in Hunter Town.

298. Q. He knew you?

A. He knew of our name.

299. Q. Do you recall your mother discussing there, at the scene, with anyone how the accident happened?

A. No.

NOTE:

If any discussions took place, counsel must get the substance now. A series of questions now probes this topic.

300. Q. Did your mother at any time tell you how this accident happened or why it happened?

A. No.

301. Q. I am not just saying at the scene, at any time in the hospital, for example?

A. No.

302. Q. Do you know if she ever told anybody how it happened or why it happened?

A. No.

303. Q. Did you talk to a police officer?

A. Let me think a minute. No.

304. Q. Did you ever talk to the Sheriff about this accident?

A. Yes.

305. Q. When did you talk to him?

A. In the emergency waiting room.

306. Q. At the hospital, at Parkview?

A. Yes.

307. Q. Do recall what you told him?

A. No.

308. Q. Have you seen the accident report?

A. No.

309. Q. Do you recall telling him that your mother apparently hit the brakes?

A. No.

310. Q. Now, am I correct that you went to the hospital in the ambulance with your mother?

A. Correct.

311. Q. Was she able to talk to anyone in the ambulance?

A. Are you asking -- I don't know. I was in the front seat. She was in the back.

312. Q. Okay. Do you know of any witnesses other than yourself to this accident?

A. No.

313. Q. Do you know when the dirt pile was removed?

A. No.

314. Q. Am I correct that it was removed?

A. Yes

315. Q. Was it removed shortly after this accident?

A. Yes, several days later.

316. Q. Now, I understand you have given two (2) statements concerning this accident to the police and to the insurance company, is that true? Tape recorded statements?

A. Correct.

317. Q. Have you -- did you cover anything in those statements we haven't discussed here?

A. No.

318. Q. Do you know if anyone has ridden the ATV since the accident?

A. No one has ridden the ATV since the accident.

319. Q. Do you know where it is now?

A. It is in Plymouth?

320. Q. Have you told us everything you remember about the accident?

A. Yes.

321. Q. Having thought about the events that occurred, is there anything else which you have not told us today.

A. No.

NOTE:

At the conclusion of the inquiry regarding this aspect of the contested events, counsel employs a "closer" question to ensure the witness will not be able to add to her testimony later. See § 17.04[20.--4].

Counsel abruptly shifts to the subject of damages. This material, again, is relevant and important for defendant's evaluation and trial of the case.

322. Q. Was your mother ever employed outside of the home?

A. No.

323. Q. Okay. Did your mother have a maid prior to the accident?

A. We had someone come in once every two (2) weeks one day.

324. Q. Did she have a cook?

A. No.

[Further questions and answers about damages here omitted.]

DEPOSITION EXHIBITS NUMBERS 4 THROUGH 12 MARKED AT THIS POINT BY THE REPORTER.

BY MR. KENNEDY:

325. Q. I'm going to hand you some photographs, Miss Westrum that the court reporter has marked and hand them to you as a group to begin with. They are marked as Deposition Exhibits 4 through 12. I am going to ask you if you have ever seen those pictures before?

A. No, no, no. (Crying).

AT THIS POINT A RECESS WAS TAKEN.

NOTE:
Again this difficult material is saved for the end of the deposition.

BY MR. KENNEDY:

326. Q. Miss Westrum, I will ask you to look at the pictures that have been identified as 4, 5, 6, 7, 9 10, 11 and 12. I have pulled 8 out because it is of the vehicle. First of all, am I correct these were taken at some point after the accident?

A. Correct.

327. Q. And those pictures that show the area where the dirt pile was, show that the dirt pile has been removed when the pictures were taken, correct?

A. Correct.

328. Q. Am I correct that Exhibit 10 shows the back of the Jones' house?

A. Yes.

329. Q. And was that about how the house looked at the time of the accident? Was it about that far along?

A. If I recall right, this construction had not been built up yet.

330. Q. Does Exhibit 5, a picture taken at the point where the dirt pile was, show the mound looking north?

A. Yes.

331. Q. Exhibit 7, is that a picture taken somewhere to the south of where the dirt pile was, looking back toward where the lake was?

A. This is taken on the south side of the location of the accident, facing south toward the lake.332. Q. Now, let me hand you Deposition Exhibit 8 and let me ask if you can identify that. What is that a picture of?

A. That is the gas tank of the ATV.

333. Q. And is that the way that the gas tank area appeared as best you can recall after the accident or do you have an opinion?

A. I have no opinion.

334. Q. Did the ambulance actually come out onto the railroad right-of-way?

A. Yes.

335. Q. Did it have any difficulty getting back there?

A. I don't recall.

336. Q. You probably don't know if the ambulance was a four (4) wheel drive or not, do you?

A. I don't know.

337. Q. By the way, what was the Doberman's name?

A. Lexi.

338. Q. You still have the dog?

A. No, we gave it away.

BY MR. KENNEDY:

That is all the questions I have.

NOTE:

The attorney concludes with a simple and direct statement. He avoids a commitment that the deposition

is concluded in its entirety and for all time. Omitted here are comments about whether the witness will review the transcript, mechanics about signing, etc. See § 17.03[1.--4].

DEPOSITION CONCLUDED AND WITNESS EXCUSED.

Federal Litigation Guide
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Appendix 17: Appendix to Chapter 17

2-App. 17 Federal Litigation Guide [PART II]

[PART II] EXAMINATION OF DEFENDANT'S EXPERT BY COUNSEL FOR PLAINTIFF

Products Liability Case:
Alleged Manufacturer's Design Defect and Failure To Warn
Resulting in Death of Rider of All Terrain Vehicle

(See Facts in Part I, supra.)

OVERVIEW AND STRATEGY

The deposition of an adverse expert is a daunting challenge for even the most experienced trial lawyer. Before deposing an expert, counsel must have thoroughly mastered the facts of the case and the technical knowledge relevant to it. In addition, he should have read writings by the expert on matters pertaining to this case, prior depositions and trial testimony given by the expert, reading lists of courses taught by the expert, etc., *i.e.*, counsel must become an expert on the expert as well as the subject matter. Furthermore, counsel should have read and mastered any prior written discovery. For a general discussion of deposition of an expert witness, see *§ 17.08[5]*.

This deposition by plaintiff's counsel of the defendant's expert will concentrate on (i) discovering the expert's opinions and "freezing them," (ii) uncovering the assumptions upon which the opinions are based, (iii) establishing the witness's bias, and (iv) making explicit his criticisms of the plaintiff's expert's theories of the accident. Counsel will use information gained at this deposition to prepare his own expert for examination at trial.

SUMMARY OF EXAMINATION

Introduction & Background (Questions 1-8)

Initial Contact by Defendant (Questions 9-23)

Expert's Function & Materials Reviewed (Questions 24-46)

Expert's Qualifications for ATV Design Evaluation (Questions 47-68)

Expert's Opinion of Design of Kawasaki 100 (Questions 69-73)

Bases for Expert's Opinion and Opposing Expert's Opinion (Questions 74-95)

Explanation of Cause of Accident (Questions 104-119)

Expert's Examination of ATV (Question 120)

Operator Error Theory (Questions 121-126)

Further Work (Questions 127-128)

Bias of Expert (Questions 129-138)

Opinion and Production of Documents (Questions 139-140)

DIRECT EXAMINATION

PRELIMINARY MATTERS: See §§ 17.02 and 17.03 and Part I of this Appendix.

DIRECT EXAMINATION BY MS. PATTON:

EMLEN TUNNEL CALLED AS A WITNESS BY PLAINTIFF, BEING DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

1. Q. Would you state your full name for the record?

A. Emlen Tunnel.

2. Q. Do you mind if I call you Emlen during the deposition?

A. That's fine.

3. Q. Emlen, I am sure that you have been through a deposition before. You understand that I will be asking you a series of questions. If you don't understand my question, or you can't hear me, please let me know. Otherwise, I will assume, if you answer, that you did understand the question. Is that okay?

A. Fine.

4. Q. Where are you employed?

A. Giant Engineering Associates.

5. Q. And where is Giant Engineering Associates?

A. We are located in four principal locations. I, personally, am located in Albany, New York.

6. Q. And what is your job position with Giant Engineering?

A. I am the director of technical services for the Albany office.

7. Q. Can you tell me roughly how many engineers you have in your Albany office?

A. In the Albany office we have roughly four scientists or engineers, and about six or seven associates.

8. Q. How about Giant Engineering overall?

A. I would estimate that there are approximately 400 people in the corporation total, and of that about 300 are either engineers or scientists by degree.

NOTE:

The deposition begins with introductory comments and questions. This is important in establishing control over the examination and in relaxing the deponent. Note especially the use of first names and the relaxed, informal atmosphere created by the deposing attorney. Extensive questions concerning the expert's educational background, professional associations, experience, etc. are customary in deposing an adverse expert and are here omitted.

9. Q. Emlen, when were you first contacted with regard to this case?

A. May of 1995.

10. Q. And was this a direct contact to you or simply to Giant Engineering?

A. I directly talked to Attorney Kennedy (Defendant's Counsel) shortly after the initial contact.

11. Q. And what was said at the initial contact?

A. As best as I can recall, Kennedy indicated that there had been an accident involving an ATV, that it occurred in an area north of Plymouth, that they were at that point just starting to gather information.

12. Q. What was the purpose of the contact?

A. It was my understanding that Mr. Kennedy wished to retain Giant Engineering's services as consultants to him on the matter.

13. Q. What I am asking is why was Randy talking to you as opposed to someone else?

A. I would guess in a general sense that of all the engineers at Giant Engineering I probably have more experience in evaluating accidents and evaluating design of motorcycle type vehicles than the other engineers.

14. Q. So at that initial point then you weren't asked to do anything?

A. I believe at that point they said they didn't have or at least had not looked at the vehicle or anything like that. So there was not any background material, and I think we left it at that.

15. Q. Did you obtain any facts of the accident at that point?

A. Other than the above, no.

16. Q. Did you make any notes of that initial conversation?

A. They would be in a correspondence file.

17. Q. Is that correspondence file with you today?

A. No.

18. Q. If you have some notes of that initial conversation would you produce it to Mr. Kennedy?

A. If he would like me to I can.

NOTE:

The deposition often leads to additional information, either through formal discovery devices (e.g., Motions to Produce Documents under Fed. R. Civ. P. 34) or, as here, through informal means. This is an important function of the deposition. The deponent agrees to provide any documents to attorney for the defendant.

19. Q. Was any agreement entered into at that point?

A. No. We agreed to assist Mr. Kennedy in a technical evaluation of the accident, but no formal agreement at this point. Just an oral agreement.

20. Q. After this initial contact in May, 1995, when did you next have any conversation or contact regarding this accident?

A. I don't recall specifically, but over the course of the time since that date until today I have received pictures and background information in various forms at various times.

21. Q. What have your brought with you today?

A. Basically the material that was in my investigation file has been consolidated for carrying purposes.

22. Q. I understand you also have a correspondence file which you have not brought with you?

A. That's correct.

23. Q. Do you have any other files with reference to this case?

A. No.

24. Q. As a consulting expert, what were you asked to do with reference to this case?

A. In general I was asked to investigate and determine the cause of the accident and to evaluate the design of the Kawasaki ATV involved, to review the technical work done by various other parties in the matter, to review their work and to provide technical input to Mr. Kennedy and his firm.

NOTE:

Many discovery problems emerge when an expert assumes more than one role, e.g., researcher and consultant for the attorney, advisor, as well as trial witness. The scope of discovery from an expert depends on his status--from none to nearly full disclosure. See Fed. R. Civ. P. 26(a)(2) and 26(b)(4).

25. Q. As I understand it, you were asked to do basically three things: an accident reconstruction, second, an evaluation of design, and third, to review technical work which has been done by others?

A. That's correct, in a very general sense.

26. Q. Have you done all three of those?

A. To the extent that information is available, yes.

27. Q. Is there any information that's not been available to you?

A. It's my understanding that there are some depositions, for example, scheduled that have not yet happened.

28. Q. What materials have you reviewed so far?

A. I have reviewed some photographs of the accident scene and accident vehicle. I have reviewed the Kawasaki ATV Redbook, the police report, some photographs of some helmets taken by Mr. Jamison, the ATV 100 owner's manual, and depositions. I have also reviewed some prior discovery and some legal correspondence.

29. Q. In terms of the depositions, have you simply reviewed those or do you have copies of them?

A. I have been provided copies of them.

NOTE:

Counsel must determine what materials this expert has used to formulate his opinions, and will now ask the witness to describe these items one by one. While an articulate expert's opinion may be difficult to undermine, astute counsel will seek to show that the facts upon which the opinion is based are different, or at least are subject to contrary interpretation.

30. Q. Let me start with the photos. Could I see the photos you have reviewed? (Items handed over.) Have you taken any of these photos?

A. No.

31. Q. Do you know who took the first group of photographs?

A. It's my understanding that they were taken by someone associated with the police.

32. Q. The next thing you mentioned was an ATV Redbook. Is this something that was provided to you in this case?

A. It was provided by Mr. Kennedy[defendant's counsel] in this case.

33. Q. The next thing was a police report. And then you have photographs of the helmets. Did you use the photographs of the helmets for any purpose?

A. Not up until this point.

34. Q. Do you have any plans to use them in the future for any evaluation?

A. Not specifically

35. Q. Then you had an owner's manual. Then the depositions themselves. Have you read those depositions?

A. Yes.

36. Q. Is there anything else you brought with you that is maintained in your files?

A. I have some notes that I took when I examined the ATV that supposedly was involved in this accident. I also took some photographs which are not processed yet, and also obtained a soil sample from the accident scene.

37. Q. And these notes and photographs and soil samples were from what date?

A. This morning.

38. Q. Could we mark the notes from this morning?

**PLAINTIFF'S EXHIBIT 1 WAS MARKED
FOR PURPOSES OF IDENTIFICATION.**

BY MS. PATTON:

39. Q. Emlen, I understand what we've identified as Plaintiff's Exhibit 1 are your notes from an inspection of the vehicle this morning.

A. That's correct.

40. Q. Had you ever examined the vehicle prior to this morning?

A. Not personally.

41. Q. Had anyone ever examined it on your behalf?

A. No.

42. Q. Have you made any type of a report up to this point?

A. No.

43. Q. And have you made any personal notes of any kind?

A. I don't believe so.

44. Q. So everything in your review of accident reconstruction, design, and review of other's technical

work is in your head, I take it?

A. Or contained in the file material.

45. Q. You mentioned part of what you've been hired to do is to review the technical work of others. Whose work have you reviewed in this case?

A. I have reviewed the deposition and notes of Dr. Rigney, the plaintiff's expert.

46. Q. In making your consultation have you relied upon any other papers, documents, studies?

A. No

NOTE:

Counsel employs a "closer" question here to ensure she has gotten a complete list of materials used by deponent as the basis for the onsultation. An open-ended question follows. See Form of Questions § 17.03 [9].

47. Q. What work have you done in the past that is relevant to your investigation of this accident?

A. Well, I have operated ATV's of various makes and types, both for investigation purposes and also for recreation. I have conducted certain evaluations of components and design alternatives on ATVs. I have been involved in evaluating the design of four wheel vehicles in the past, and I have investigated other accidents before, involving transportation equipment and involving off-the-road vehicles.

48. Q. Have you made any testing of this particular vehicle?

A. I have evaluated the Kawasaki 100, not this particular vehicle, from a handling standpoint. I have also examined the particular vehicle involved in the accident in this case.

49. Q. When you say you evaluated the 100, what have you done?

A. Among other things looked at how the vehicle is equipped, some of the size and dimensional characteristics of the vehicle, some of the features that the vehicle happens to have. I have operated one in the past.

NOTE:

An expert's credentials must be intensely scrutinized. As in this case, the expert's strength may not be apparent from his c.v. but rather emerges from his practical experience in the field.

50. Q. Have you made any report, written any papers,, anything like that concerning your evaluation?

A. Not specifically of the 100.

51. Q. Have you made any reports or written any papers regarding ATVs in general?

A. Yes, I have.

52. Q. Can you identify those for me?

A. I have been the principle author and researcher on a paper that was published by the SAE on ATV's.

53. Q. What is the name of that paper?

A. The Design and Operation of ATV's. It was published in our Society's Journal in May 1993.

54. Q. Have you done any other papers connected with off road vehicles?

A. Yes. I presented a paper as a part of both an oral and written submission to the Consumer Product Safety Commission. I have also written a paper that involved an off road vehicle and off road photogrometry.

55. Q. What is photogrometry?

A. It's a technique of analyzing, in this particular case, photographs for the purpose of accident reconstruction.

NOTE:

Each term used by the expert at the deposition must be defined. Deposing counsel will not be able to cross-examine this witness effectively at the trial unless she is familiar with all terminology used. In the preparation of a case like this, counsel must herself become expert in the subject matter.

56. Q. Have those two papers been published?

A. The CPSC submission is not, I guess, truly published but is a part of the CPSC's public record. The other paper has been published by, again, the Society of Automotive Engineers.

57. Q. Are there any other papers or textbooks that you relied on in making your investigation of this mater?

A. Nothing so significant that I'd cite it.

58. Q. How long have you yourself been operating ATV's?

A. I'm not sure exactly when the first time I rode one was. It's probably in the late 70's or early 80's.

59. Q. Is this for professional reasons or personal reasons?

A. Personal.

60. Q. Can you describe those vehicles for me?

A. We have a Honda 110, a Honda 200, a Kawasaki 100.

NOTE:

The deposition continued with questions about the company's role in evaluating ATV's. Bias may emerge from immediate fees paid, or long term business opportunities from the defendant or similar corporations. This part of the deposition is here omitted.

61. Q. Have you made a design evaluation of the ATV 100?

A. Yes, I have.

62. Q. And when did you make that evaluation?

A. I'm not sure I know exactly when. I have over the past couple of years obtained information such as specifications and manuals and things like that on the 100. I've looked at the design of the 100, its components, and how they are arranged. I have operated one in an off road environment and to a certain extent have done some evaluation.

63. Q. And were you hired to make this evaluation of the 100?

A. Not at that point in time.

64. Q. Have you been hired at any later point in time to make a design evaluation of the 100?

A. In this particular lawsuit, I've been asked to evaluate the design of the 100.

65. Q. Prior to this case, had you ever been asked to make such an evaluation?

A. I don't believe so.

66. Q. In making your evaluation of the 100, have you used or relied upon any documents or specifications other than what you've described for me today as being maintained in your file?

NOTE:

Counsel employs a "closer" question here to determine if anything other than the materials previously discussed has been used by the expert. This is an excellent technique since it will either produce additional information or back the deponent into a denial which will be difficult to disavow later. See generally § 17.03 [a] and § 17.08.

A. I may have reviewed things like a shop manual, but not necessarily have relied upon it. I, as a part of my design evaluation in this case, have reviewed some of the design material produced as a part of the interrogatory responses.

67. Q. What specifically?

A. The test documents referred to as AO documents.

68. Q. Did you rely upon those test documents in making your evaluation?

A. No, I've not relied upon them.

69. Q. What is your opinion as to your design of the 100 regarding safety?

A. I believe that the Kawasaki 100 is safe for its intended purpose. It provides users a vehicle which is well suited to function in an off road environment and to perform functions relating to recreation and to some limited extent racing. The design of the vehicle allows it to accomplish those functions in a

reasonable and safe manner.

NOTE:

The expert here sets out his opinion as to the ultimate issue in the case. This is perfectly proper under the Federal Rules of Evidence and similar state rules. Counsel now begins to probe the logic of the opinions by making explicit the assumptions upon which the opinion is based.

70. Q. When you say safe for its intended purpose, what is your understanding of its intended purpose?

A. Well, it is an off road vehicle, and it's intended to be operated in an off road setting over various kinds of terrains in an off road setting.

71. Q. When you say off road, what is your understanding of off road?

A. Hills, valleys, dirt, sand, snow, rocks, the type of terrain that one would find in nature.

72. Q. Is there any design problem in using the vehicle on a not off road, I guess what I'd call on road concrete, on asphalt?

A. I think that there is not a problem, per se, operating the vehicle on concrete or pavement or whatever. There are some differences in operating in that environment that change the operating characteristics -- more of the operator than of the vehicle, and there are some changes in handling characteristic of the vehicle on all terrains.

73. Q. Is there anything you would suggest changing to make the vehicle safer in any way?

A. Well, I think in the context of how a particular vehicle is going to be used, there may be some changes that one may want to make in power gearing and that type of thing. But as a general purpose, smaller sized ATV, I think the 100 is pretty much an optimization of that design for safety and for utility and the functional use of a vehicle.

NOTE:

The expert here delivers his expected opinion that defendant's product is safe and well designed. The remainder of the deposition will be spent probing the bases for this opinion and casting doubt on his conclusions. It is often difficult to frontally attack the credibility of an expert, but counsel here will attempt to create doubt about the expert's methodology.

74. Q. Did you perform any stability tests on the 100?

A. Not in the sense that I believe you are probably referring to.

75. Q. Then, describe what you have done.

A. I've operated the vehicle in a number of off road settings that dealt with how the vehicle handled those settings from both a maneuverability and controllability and stability standpoint.

76. Q. Have you ever flipped over any ATV vehicles?

A. Well, I fell off one vehicle, but it didn't flip over.

77. Q. Have you ever had the front tire leave the ground in your operation?

A. Yes. Intentionally as well as through normal acceleration characteristics, but not unexpectedly.

78. Q. Would you consider that a part of the normal operation of an ATV 100?

A. I've not had that experience on a 100. I guess people can and people do choose to operate the vehicle by accelerating it or maneuvering it in a manner that the front end leaves the ground and to some people that is some form of recreational enjoyment, I guess.

79. Q. Other than in acceleration have you ever experienced the front wheel leaving the ground?

A. I may have experienced it traversing terrain. I don't recall specifically with the 100.

80. Q. You mentioned you've evaluated the design of all the ATV vehicles. Have you, in your evaluation, reached the opinion that any of them are not safe for their intended purpose?

A. I think that there are some vehicles which have a limited usefulness in terms of their design safety.

81. Q. Have you found any problem with any of Kawasaki's ATVs regarding design safety?

A. I guess I don't specifically recall having evaluated any Kawasaki ATV that I felt was not, from a design standpoint, well suited for its intended purpose.

NOTE:

Once the expert has given a general statement, counsel follows up with more specific questions requiring more explicit answers. This is a crucial feature of good deposition technique, one which illustrates the basic difference between a deposition and other "paper" discovery. In addition, the questioning elicits the facts the expert has relied upon in forming his opinions.

82. Q. Any other manufacturing or other problems with any of the Kawasakis you've examined?

A. I examined one where there was a problem with the rear axle that presented a safety problem.

83. Q. Again, did you feel that was specific to that model or, to that machine or to the model in general?

A. I believe it was that particular machine.

84. Q. You've examined this particular machine involved in this accident?

A. That's correct.

85. Q. Did you identify any manufacturing problems in this particular machine?

A. No, I did not.

86. Q. How much time did you use to come to these conclusions?

A. Well, I've spent 62 hours on this project.

NOTE:
The expert should be asked the amount of time expended. This information may be useful in suggesting bias, or inadequate preparation.

87. Q. Have you reached any conclusion in terms of the Kawasaki models, are certain of the models easier to operate than other models?

A. Well, that depends a lot on who the operator is and where you are going to operate them.

88. Q. Say with an inexperienced operator of small size and weight. Is a smaller machine easier to operate than a bigger machine?

A. Well, it's not so much the size per se, but, for example, you said an inexperienced operator. I would not be surprised if an inexperienced operator would have difficulty handling the gearing system on a Kawasaki 250R for example, because it is a manual as opposed to a semi-automatic clutch system. It takes a little bit of a feel. Inexperienced operators in general probably take a little longer to learn how to handle a two stroke engine which has some difference in characteristics than a four stroke engine would.

89. Q. Say someone came to you and was looking for a Kawasaki ATV for their wife to use, who had never operated an ATV vehicle, to use in off terrain, hilly terrain. Would you recommend this specific model?

A. I guess it would depend on who it was, but I think in general I would recommend it.

90. Q. What feature is particularly useful for the entry level rider on the 100?

A. I think that the 100 has a key start which takes all the hassle of having to pull a rope to start it, which people might get discouraged operating. I think that in itself is probably a significant feature for an entry level operator.

91. Q. Anything else that you are thinking of?

A. I guess nothing in particular.

NOTE:
Where the expert's opinion is phrased in a general way, counsel must make him be specific, as above. The transcript of the deposition will be used by plaintiff's expert to prepare his testimony.

92. Q. Can you tell me what type of research you've done in the human performance as it pertains to an ATV?

A. I have observed people riding ATVs in a natural setting, riding their own ATVs without a bunch of engineers or scientists standing around and watching them, but rather going out and riding. Some people were very experienced and some were literal novices. I have conducted some experimental evaluations where I took individuals at various levels of experience, including either near novices or what I would call low timer, and then having them ride an ATV under my observation for the purpose of evaluating how they handled the vehicle. I have measured the performance of the ATV and the various control

functions of an ATV and compared that to basic human performance type data.

93. Q. Have you reached any conclusions in making these evaluations?

A. Yes, I have.

NOTE:

The expert will be able to give a narrative in support of his opinions. The deposition allows plaintiff's counsel to hear this, to assess the expert's credibility, and to prepare useful cross-examination for the trial.

94. Q. Can you tell me what those are?

A. That the ATV is an off road vehicle which imparts a significant amount of very useful information to the operator. This information allows a reasonable operator to first of all learn how to operate the ATV properly in a very, very short period of time, and to be able to successfully handle the vehicle through some pretty difficult maneuvers with minimal training.

NOTE:

The expert's narrative opinion continued with a lengthy explanation of the rationale concerning the importance of the design of the ATV, where the operator sits, the steering system feedback to the operator, etc. This material is here omitted.

95. Q. Is weight transferring normally required to operate an ATV?

A. It is sort of a chicken and the egg question. Because we live on the earth and because there is a gravity on the earth, there will be weight transfer when you operate the vehicle. We can't do anything about it. The weight transfer that occurs in natural operation of an ATV turns out to be exactly the right weight transfer that's necessary for safe operation of an ATV.

NOTE:

Plaintiff's counsel will now test his own expert's opinion that the center of gravity on the Kawasaki 100 was too high and, therefore, a design defect. It is important to hear defendant's expert's reaction to this since trials often are a battle of experts.

96. Q. In your evaluation of the ATV vehicles, have you made any testing as to the coefficient of gravity between the machine and the surface it's running on?

A. I have made some measurements of coefficient of friction at certain areas.

97. Q. Do you find those significant at all in evaluating the design of the machine?

A. Not from a safety standpoint, as Dr. Rigney [*Plaintiff's Expert*] chooses to apply the coefficient. The frictional characteristics of various surfaces typically are not stability problems. They do relate to braking characteristics and acceleration characteristics of the vehicle.

98. Q. I take it you've reviewed Dr. Rigney's deposition?

A. Yes, I have.

99. Q. And you've reviewed his testing results. Do you feel the data he's using is in any way inaccurate?

A. I have not specifically gone out and measured another comparable 100. Dr. Rigney's numbers look reasonable.

100. Q. What specific shortfall do you find in his application of this data?

A. Well, he has made a basic calculation of a generic center of gravity location and has defined safety and stability as how that center of gravity location is as a function of some moment as it relates to the coefficient of friction. And the dynamics of vehicles in the real world is far more complicated than that. That type of analysis is sophomoric and really doesn't have a place in the real world.

101. Q. What is Dr. Rigney leaving out that you feel comes into play in the real world?

A. In this particular case the list is literally hundreds of items long, and I'll try to narrow it down for you. Dr. Rigney has not taken into account specific body position and how the operator transfers weight other than by simple body position, for example by use of various muscles, by pushing on pegs, by pulling on the handlebars. He does not take into account the use of any form of control which affects acceleration or deceleration rates. He does not take into account use of any control which affects the longitudinal direction of the vehicle. That is critical in my opinion.

NOTE:

The opposing expert has now delivered his basic critique of plaintiff's expert's opinion and theory. Counsel must now attempt to probe and/or discredit the critique, taking up each element separately. These questions and answers are here omitted.

102. Q. You would feel that the theory is wrong because it doesn't flip every time?

A. No, I would think that the theory is amateurish, and just plain doesn't apply to this type of vehicle. It doesn't predict stability of vehicles. That's the whole purpose of physics formulas, to predict the behavior of bodies when used under a specific set of circumstances.

103. Q. Do you then disagree with his recommendation that the vehicle would be more stable by moving the center of gravity both forward and down on the ATV?

A. I think that if we were to build the Rigney ATV and if we were to test it as he tested it in a static sense, then the stability numbers, that he calculates would be closer to what he would want them to be. I don't think that's going to enhance the dynamic stability when you take the thing out to the real world, out of his mathematical formulas, and try to use it on terrain. There is a direct correlation of control and stability.

NOTE:

The witness has disputed key features of the theory advanced by plaintiff's expert to explain the accident. Counsel must now force this witness to give his explanation for the accident as clearly and as comprehensively as possible. This is critical testimony and will be the focal point at the trial.

104. Q. Why did this vehicle flip over?

A. I believe that the vehicle overturned because in the process of descending the hill some abrupt, in

engineering terms, a deceleration, was applied to the vehicle, whether the brakes were rapidly applied or the throttle was rapidly applied or something was struck on the terrain that allowed a sudden change in either deceleration or acceleration. There also could have been some longitudinal input to the vehicle which could have affected the overturning.

105. Q. Have you made an accident reconstruction?

A. Yes, I have.

106. Q. What are the results of your accident reconstruction?

A. What I have tried to do is look at the accident in terms of the operator of the vehicle and terrain, and my reconstruction basically is that in very simple terms Mrs. Westrum failed to get up the hill because of inappropriate use of power in taking a run up the hill or however you want to describe it. Her daughter described it as momentum, which is an accurate description, by reaching the point where she could no longer continue up the path she wanted to continue on as a result of inappropriate use of power. She then made some choices. She could have gotten off and allowed the vehicle to back down. She could have gotten off, turned the vehicle around and rolled back down. And she could have, and did in this case, choose to remain on the vehicle and back down the hill. In the process of backing down that hill something in either the terrain or her operation of the vehicle, or some external influence, caused the vehicle to not decelerate or accelerate, whatever way you want to describe it, in a uniform manner, but rather created an abrupt change. The brakes were applied suddenly. There may have been some influence from say the dog, for example; or use of the throttle in an inappropriate manner at the wrong time that caused a sudden change in the rate of acceleration or deceleration. Any factor out there relating to the operator's control of the vehicle and its interaction with the terrain that can cause a sudden change in the rate of acceleration and deceleration can cause the vehicle to overturn.

107. Q. What do you believe happened after one of those causes?

A. A sudden input of acceleration change caused the vehicle to rotate over backwards. And as a part of that rotation, the vehicle and Mrs. Westrum came to rest on the ground. Either she was struck by some part of the vehicle during the overturning, or struck the ground after the overturn occurred.

108. Q. In your reconstruction then, are you saying you don't know if the vehicle actually struck her?

A. I think there is a reasonable possibility that the vehicle struck her. There is no distinct physical evidence on the vehicle that suggests precisely what struck her, and what didn't strike her. There is also a possibility, I guess, that she could have struck something on the ground. It's likely that something on the vehicle was associated with the injuries in terms of that being the thing that she hit her face against.

A RECESS WAS TAKEN HERE.

NOTE:

The expert has given his analysis, and counsel pauses to prepare the next set of questions. Timing is under the control of deposing counsel. Maintaining control over the pace of the examination is an important part of good deposition technique. Counsel must have a basic outline of the goals and issues significant to this deposition and must periodically return to this basic outline for review. Counsel will now summarize the prior testimony and begin again.

109. Q. Emlen, you've identified in your report several possible causes of the accident. And you really don't have an opinion which is more likely, but I do understand it's your opinion one of these five factors caused the accident: the application of the brake, the application of the throttle, striking something on the terrain, backing at an angle, or the dog in some way. Am I summarizing what you've written and said correctly?

A. One of those things accounts for a sudden change in either the acceleration or deceleration rate of the vehicle as it is going back down the dirt pile. That is what's required in a dynamic sense for the accident to occur in the manner in which it occurred.

110. Q. Is that your opinion as to the cause of the accident?

A. I want to make clear that the cause of the accident is bigger than just one of those five things. It's a combination of backing down the hill and having the change in deceleration rate which accounts for the vehicle coming over backwards. I think it's misleading to oversimplify and say only one of these five things caused the accident.

NOTE:

Counsel consistently attempts to pin the expert down to one theory of the cause of the turnover, but Dr. Tunnel refuses to be more definitive. The duel between the attorney and the expert continues.

111. Q. Is there any direct evidence that you reviewed that supports any one of those five?

A. I think that each of those things are possibilities in light of what the various witnesses have said, and of the physical evidence at the accident scenario. We've got a vehicle overturning and we've got a thing coming to rest in certain relative positions.

112. Q. In reaching your opinion, have you made any factual assumptions in terms of the vehicle, the person, the scene, anything involved in the accident?

A. I've assumed that the vehicle I examined this morning was indeed involved in the accident. And I've assumed that the condition I saw it in this morning is the condition it was before the accident. I've assumed that Mrs. Westrum is what she's been described as in the depositions, and I've assumed the path and trip that was described by her daughter in her deposition.[*Editor's Note: See Part I of the Appendix.*]

NOTE:

Counsel will now attempt to challenge the expert by pointing out other possible causes of the accident and trying to get his reaction to those. This adverse witness will obviously resist these tactics and try to avoid any testimony favorable to plaintiff's theory of the case. The deposition continued with questions and answers concerning the incline of the hill upon which the accident occurred and the distraction potential of a dog upon the ATV operator.

113. Q. Is it your opinion that the dog was in any way a direct cause of the accident?

A. I guess it's a possibility, that somehow she and the dog interacted in some way, that she was afraid she was going to back down and hit the dog, let's say, and slammed on the brakes; or that the dog's leash may have been attached to the vehicle and it got run over by a tire and then actuated a brake or something. There are a lot of possibilities.

NOTE:

The expert now advances additional causes and factual scenarios, all of which would relate causation to factors outside the control of the defendants. Insofar as a jury credits these possibilities, this testimony is beneficial to defendants. Counsel has an excellent opportunity here to assess how persuasively this expert advocates his position.

114. Q. Have you seen any evidence that it's possible the leash was attached to the vehicle and a tire ran over that and it caused it to flip?

A. What I'm suggesting is a possibility, and it is simply that. I have no hard evidence.

115. Q. What's your understanding of the size of the hill?

A. That the hill is somewhere between two and-a-half and four feet high, and ranges from 30 to 45 degrees, according to eyewitness observation of it. There is no physical measurement that was done on it by anyone, that I know of.

116. Q. At the point the ATV was apparently backing down, are you making any assumption as to what gear it's in?

A. I have not made a specific assumption it even has to be in gear, or what gear it was in.

117. Q. Physically what's required to let the machine back down the hill? Is there a reverse gear?

A. No, there's not on this vehicle.

118. Q. How would one get the machine to back down?

A. You can roll down the hill in either neutral gear position or in some gear positions, depending on the hill incline.

119. Q. Are you making any other factual assumptions in your reconstruction?

A. I haven't, independent of that, dreamed up any of my own assumptions.

NOTE:

Expert opinions, based on logic, must be based upon facts and assumptions. If either is incorrect or can be challenged, the opinion's credibility is exposed to doubt.

120. Q. In terms of your investigation today, did you identify anything on the ATV that shows you where it overturned?

A. The left brake lever appears to be rotated, as you sit on the vehicle, down towards the ground, and would indicate that it either was in that position before the accident, which would have been a somewhat uncomfortable position to operate that brake lever with, or that during the course of rolling over that part of the vehicle struck the ground. There is also a mark associated with that side of the vehicle on the steering stock, which would indicate that part of the vehicle hit something pretty hard and it's not inconsistent with that part of the vehicle striking the ground.

NOTE:

A series of questions now focus on possible operator error, an issue of contributory or comparative negligence. Each such potential error is probed. Since depositions are quite expensive, a hallmark of good technique is logical order and completeness.

121. Q. In your opinion was there any operator error involved in the accident?

A. Yes. In each of the factors which may relate to what I believe caused the accident, there is an attribute of either operator error intentionally or inadvertently, or by omission.

122. Q. Let's see if you can define the specific errors for me. In terms of the brake application, what is the operator error involved there?

A. Applying the brakes at the wrong time while backing down the hill.

123. Q. What would be the right time to apply the brakes?

A. After the rear tires are fully on the flat ground. Or applying them at a moderate rate so that you don't get a sudden change in deceleration.

124. Q. The other thing you mentioned was a throttle activation. What operator error would be involved in that?

A. Backing down the hill or applying the throttle too rapidly to overcome for having not done it hard enough the first time.

125. Q. How would operator error be involved in striking something in the terrain?

A. Not noticing that there is something there that is going to capture the tire and cause it to trip, like ruts or tire tracks out there from other vehicles or from a natural rain.

126. Q. How does that lead to a flipover?

A. It will impart a sudden deceleration change in the vehicle. Instead of rolling down smoothly, all of a sudden it goes down and gets captured by this rut, and stops abruptly at that point, and then goes back over.

127. Q. Emlen, do you plan any future work or test in connection with this case?

A. I do not have any real specific plans, but there are some things that Mr. Kennedy and I have talked about to demonstrate some of the opinions that I have tried to communicate with words, in the form of pictures or something like that, that we may elect to do to make it easier for me to explain some of the concepts we've talked about here today.

128. Q. I take it that would be some type of an illustration on a blackboard, a diagram, or a computer simulation?

A. Yes, or possibly photographs demonstrating some of the things, or possibly a video demonstrating some of the things we've talked about.

NOTE:

Federal Rule of Civil Procedure 26(e) imposes broad supplementation duties on the expert and his counsel. Plaintiff's Counsel needs to know what further things the expert plans to do both in examining the accident and in presenting his findings. He may need to continue the deposition at a later time before the trial when the expert has completed supplementary tasks.

129. Q. Are you being paid for you time in this case, or is this part of your concern about ATVS?

A. No, the firm is billing Mr. Kennedy for my time on this particular case.

130. Q. What is your fee arrangement?

A. Two hundred dollars an hour.

NOTE:

The witness's credibility, of course, may be attacked on the basis of bias. Bias may be established by compensation, past history of testifying for the same side, personal interest in the subject matter, etc. Counsel now begins to probe for one of these or other bases to establish lack of neutrality, which may undercut the expert's effectiveness before a jury. Under the new federal rules the required expert's report under Rule 26 must include a list of cases in which he has testified in the preceding four years and publications offered by him in the preceding ten years. See § 17.08[5].

131. Q. You have worked on other ATV cases?

A. Yes, I have.

132. Q. How many others?

A. I really don't know, but I would guess it's in excess of 20 or so.

133. Q. How many of those have gone to the point where you testified?

A. Three.

134. Q. Have any of the other cases involved a 100?

A. I believe there is at least one that has. It's not a Kawasaki 100, but another manufacturer's ATV just like it.

135. Q. In all the cases you've been involved with, have you been hired by the manufacturer?

A. No.

136. Q. In how many cases have you been hired by the injured party?

A. I believe one, but I just consulted. No testimony.

137. Q. Can you tell me what manufacturer did that involve?

A. It involved a Honda.

138. Q. Have you ever concluded that a defective design caused the accident in any of the ATV cases you've been involved in?

A. I think, as I said earlier today, that it is my belief that the design of most of the ATVs out on the market are reasonable for their intended purpose.

NOTE:

The expert is forced to say that his findings in all the cases have been similar; i.e., no design defects have been found. The expert is now questioned on accident information compiled by the Consumer Product Safety Commission. These questions and answers are here omitted.

139. Q. Do you feel there is anything hazardous about a middle-aged housewife operating an ATV?

A. Certainly not.

NOTE:

Deposition concluded and witness excused. The attorney requests all documents mentioned in the testimony, recapping the document he expects to receive. There is no cross examination by plaintiff's counsel.

140. Q. While we're on the record, it's my understanding that Emlen will give to you and you will make available to me his SAE paper, and the CPSC paper and the photogrometry paper, and that's all I think that you asked for.

A. Yes.

MS. PATTON: No further questions.

MR. KENNEDY: I have no questions.

DEPOSITION CONCLUDED AND WITNESS EXCUSED.

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CHAPTER 18 Defense of Depositions *

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CHAPTER 18 Defense of Depositions *

2-18 Federal Litigation Guide Scope

Scope

SCOPE

This chapter covers defending depositions. It separately discusses defending depositions of clients, non-party witnesses, and adverse parties.

The chapter first considers defending a client's deposition as a party to the action. The chapter discusses what counsel should tell the witness about the deposition process and how to effectively prepare the witness to testify. It reviews the ways counsel can help the witness avoid the common pitfalls of deposition testimony. In addition, it discusses reviewing and evaluating the witness's substantive testimony about the lawsuit's factual issues.

After discussing the preparation of the client-deponent, the chapter considers the role of defending counsel during the witness's deposition. It includes consideration of how counsel can use objections to protect against abusive questions and avoid disclosure of privileged attorney-client communication. The chapter also reviews the ways that counsel can keep the witness alert and careful during the deposition. It then evaluates when and how defending counsel can make use of cross-examination, as well as the witness's opportunity to correct the transcript, to further insure accurate and effective testimony.

The chapter next discusses the role of "defending" counsel at the deposition of a non-party witness. It considers how counsel should prepare for the non-party witness's deposition and discusses how counsel's preparation and conduct at the examination will vary depending on whether the witness is friendly, neutral, or hostile, and on whether the witness's testimony is favorable or unfavorable. The appropriate use of objections and cross-examination at the various types of non-party depositions is then reviewed.

Finally, the chapter briefly examines defending counsel's role at the deposition of an adverse party. Although such depositions are relatively rare, the chapter considers how counsel should use objections and cross-examination during such depositions.

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CHAPTER 18 Defense of Depositions *

2-18 Federal Litigation Guide § 18.01

§ 18.01 Preparing to Defend Party Witness Depositions

[1] Review Facts of Case in Advance of Deposition

The principal goal when defending a deposition is to minimize the examiner's development of damaging testimony. Thus, far from playing a passive role, defending counsel must continually make important judgments about both the examiner's questions and the witness's testimony to insure that the deposition does as little as possible to undermine counsel's theory of the case.

Successful deposition defense requires counsel to be familiar with the facts of the case, the important issues, the witness's likely testimony, and any trouble spots that may exist. Because litigation costs and budgets can limit the time available for deposition preparation, counsel must be thoroughly familiar with the facts of the case and the likely areas of examination. This can be accomplished by, *inter alia*, reviewing relevant documents, pleadings, and prior deposition references to the witness. Once counsel is familiar with the likely areas of testimony and with the documents the witness is likely to confront, preparation time can be cut to a minimum. Of course, proper deposition preparation also requires counsel to be well versed in the elements that underlie each theory of relief. Proper preparation also requires counsel to consider the significance of issues concerning attorney-client privilege and whether the need exists to file for a protective order under Rule 26(c) to limit the scope of questioning.

[2] Achieving Successful Testimony

The impression that the witness makes on the examiner can greatly affect the examiner's assessment of the strengths of the case. While careful preparation cannot change the facts of the case, it can greatly improve the witness's ability to testify about the facts in the most favorable manner.

The witness must be educated about the deposition process and prepared to give accurate testimony that does not volunteer information, but is responsive to the examiner's questions. Although the number and extent of preparation sessions with each witness will vary depending on the nature and complexity of the testimony to be given, counsel must be ready to spend whatever time is needed to insure that the witness is well-prepared, both procedurally and substantively, for the deposition. Careful preparation of each witness will help to insure that the deposition testimony will be accurate and responsive. Only through these meetings with the deposition witness can counsel systematically review both the deposition procedure and the witness's substantive testimony.

A well-prepared witness who understands how to listen to and answer deposition questions is usually less likely to

become confused by the examiner's questions. At trial, opposing counsel will be sure to attempt to impeach the witness's credibility if she can highlight any inconsistencies between the testimony given at the deposition and at trial. Although preparation does not guarantee "successful" testimony, the well-prepared deponent is generally less likely to give confused and inconsistent testimony that will undermine the case.

[3] Explain to Witness the Nature and Uses of Deposition Testimony

Although it may seem obvious to counsel, most witnesses require an explanation of the basics of how a deposition operates. Thus, preparation should begin with an explanation that the witness's testimony will be taken under oath, verbatim. The witness should be told who will be asking questions, what defending counsel's role is, and other aspects of the process, including where people will sit.

Explaining what happens at a deposition will vary with the case and the witness. Generally, the more complex the case *and* the anticipated subject matter of the deposition, the greater the need to insure that the witness fully understands the deposition process. Another factor that affects deposition preparation is the deponent's experience with the legal and deposition processes. Most people have never been in court, let alone deposed. Many have only anecdotal views or worse, television-induced views, of the trial and deposition processes. Thus, counsel's first task is to discern the witness's experience and knowledge about depositions.

[4] Explain to Witness Permissible Scope of Deposition

Counsel should also explain what is permissible and what is impermissible at deposition. Thus, the witness should understand that the examiner can ask detailed questions at the deposition to uncover information that *may* be relevantto the case. The Federal Rules allow discovery of information, whether or not it would be admissible at trial, "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." n1

The witness should understand that just as the examiner had the opportunity to obtain relevant documents from both parties and non-parties prior to the deposition, the deposition entitles the examiner to further inquire about issues raised by those documents and other discovery.

However, counsel must be sure not to overly intimidate the witness. Thus, while it is essential to explain that the examiner may inquire about both the witness's personal background and knowledge of relevant facts, the witness should be told that there are limits in depositions. n2 Although those limits may not coincide with the witness's desire, counsel is not powerless to intervene on the witness's behalf if the examination runs far afield. The witness should know that while counsel cannot prevent all difficult or sensitive questions, defending counsel can seek to force examining counsel to justify the relevance of questionable interrogation.

[5] Explain to Witness the Uses That Can be Made of Deposition Testimony

It is generally useful to discuss at the beginning of a witness's preparation the uses that can be made of deposition testimony. Witnesses benefit greatly from placing their deposition in context. Thus, as part of preparing deposition witnesses, counsel should explain whether the deposition testimony will likely be used at trial, how the witness's probable testimony fits into the overall case theory picture, and the possibility that deposition testimony can be used to impeach the witness if testimony is inconsistent. Sophisticated witnesses also benefit from explanations of the legal causes of action involved and the reason their testimony is necessary in light of those causes of action.

The witness should understand that deposition testimony, like courtroom testimony, is given under oath and recorded. In a case involving multiple parties, the witness should be aware that all of the parties to the action are entitled to be represented by counsel at the deposition, and that each party's lawyer will have an opportunity to ask the witness questions. Moreover, the witness should be prepared for the possible presence of an adverse party. n3

[6] Explain to Witness the Role of Objections at a Deposition

[6.--1] Use Objections to Limit Damaging Testimony

One of the most useful tasks of deposition preparation is to explain the purpose of objections at a deposition. The witness should understand that decisions about whether to sustain or overrule objections at a deposition are made by the court at trial. Thus, unless counsel specifically directs that a question should not be answered, n4 the question must be answered *despite* an objection. n5 No matter how well a deponent knows this rule, the deponent is likely to ask if it is permissible to answer a question when an objection has been made. An important psychological advantage exists in promptly giving this guidance to your witness. It demonstrates that you, as defending counsel, are in control. If defending counsel does not speak up, examining counsel will often provide that guidance. If this occurs too frequently, the witness may begin to look for guidance from examining counsel, thus undermining defending counsel's credibility and control.

Even though decision on almost all objections is reserved until the time of trial, during preparation, counsel should encourage the witness to listen to the objections because they may caution the witness to avoid a problem area. When counsel objects to the form of a question, the witness should understand that counsel will sometimes indicate what is wrong with the question -- *i.e.*, the question is ambiguous, the question has been asked and answered, the question assumes facts not in evidence.

[6.--2] Review Attorney-Client Privilege

Counsel's most important task when discussing potential deposition objections with a witness is to explain the attorney-client privilege. To reduce the danger that the witness may inadvertently waive the attorney-client privilege when answering a question, carefully instruct the witness about the precise nature of the privilege. The witness should understand that, while this protection does not mean that a fact becomes privileged simply because it is told to counsel, the privilege does protect the substance of conversations the witness had with counsel for the purpose of obtaining legal advice. n6 Thus, any facts, advice, or legal theories learned from counsel during your discussions are likely to be protected from discovery.

When discussing the scope of the attorney-client privilege, explain that the deposition preparation sessions are generally privileged. Because many examinersroutinely ask whether the witness has discussed the deposition with counsel, the witness should understand that although he must acknowledge that a discussion took place, the *substance* of the discussions should not be divulged. In addition, inform the witness, just as you should have done during your first conversation, that your communications may become discoverable if they are disclosed to anyone else. If the party is a corporate entity, the witness's discussions must be limited to corporate employees, officers, and directors for the privilege to be preserved.

The witness should understand that examining counsel is entitled to know enough about privileged communications to allow him to assess independently the privilege claim. Rule 26(b)(5) states that for any "information" withheld on the basis of a claim of attorney-client privilege, the party claiming the privilege "shall make the claim expressly and shall describe the nature of the documents, communications, or things ... in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." The Advisory Committee's Note to Rule 26(b)(5) makes clear that the precise information that must be disclosed will vary from case to case. Moreover, this information need only be provided if the withheld information would otherwise be discoverable.

Rather than emphasize the theory of the attorney-client privilege when preparing the client, however, it is better to sensitize the witness to particular conversations that are privileged. By reviewing specific conversations, the witness will have a concrete understanding of what is privileged. Further, reviewing each privileged conversation allows

counsel to identify the specific privilege issues that are likely to arise in the course of the client's deposition.

Finally, the witness should clearly understand that when questions arise concerning the attorney-client communications, the witness should ask to speak with counsel rather than risk divulging privileged information. The protection of the privilege outweighs any negative inference that may be drawn from the fact that the witness appears unable to answer questions without consulting with counsel.

[7] Review Substantive Knowledge Before Deposition

[7.--1] Discuss Theory of Case With Witness

During preparation, in addition to discussing the nature and use of deposition testimony and the mechanics of answering deposition questions, the substance of the witness's testimony also must be reviewed. As an initial matter, it is generally helpful to the witness to set forth the theory of the case and the central issues that will be disputed at trial.

A witness who understands the theory of the case and the relevant issues may acquire a better understanding of the significance of deposition testimony. Moreover, the witness may help uncover facts that may support or conflict with the theory.

[7.--2] Limit Information Shared with Deponent

When setting forth a general view of the case, however, avoid sharing unnecessary information with the witness. Although it is important for the witness to have a basic understanding of the theory of the case, there is a risk that the witness may give testimony based on conversations with counsel if too many facts are explained to him. As a general rule, if the witness will not testify on a particular aspect of the case, it is usually unnecessary to discuss it with him.

Thus, prior to preparing the witness for a deposition, identify any subjects that should not be discussed with the witness. By isolating the areas on which the witness should not be educated, counsel can avoid inadvertently educating the adversary.

Regardless of the approach used, in addition to reviewing the issues raised in the pleadings, preparation should include review of the case chronology to insure discussion about each of the events on which there may be deposition questions. In fact, chronological discussion often helps resurrect witnesses' memories. Although it may seem preferable to leave well enough alone, in practice it is always better for defending counsel to know all of the likely testimony, good and bad.

During the course of this systematic review, questions calculated to uncover any gaps or inconsistencies in the witness's testimony are very effective. For instance, if the witness has no recollection of an attended meeting, refreshing the witness's recollection about the meeting with documents or other statements may help. Such efforts help the witness to avoid giving inaccurate testimony. They also let the witness know that you are very familiar with the facts of the case.

[7.--3] Use Documents to Review Substantive Testimony

Documents play an integral role when reviewing a witness's substantive testimony. While documents can be used effectively in witness preparation, as with deposition taking, documents should only be used *after* exploring the prospective witness's knowledge about the likely testimony. In fact, documents need not be used at all if the witness's recollection provides a positive result. During a deposition, a deponent may not read from a document when asked to recite his or her recollection of an event, but rather, is required to testify in his or her own words. n6.1

Often, a witness may know of documents that have not been produced, but are relevant to the litigation; or the witness may be able to anticipate the documents that are likely to be used during the deposition. Once the witness is aware of

the likely areas of inquiry, the witness may be able to identify other documents relevant to those issues.

Counsel should exercise caution when using documents to prepare a witness for deposition. Although the authority is split, it is possible that a court would require production of documents, including privileged documents, used to prepare a witness. Some courts have even required the production of *all* documents shown to a witness as part of preparation, brushing aside claims of work product. n7

[8] Evaluate the Need for a Protective Order

[8.--1] Seek Protective Order Promptly

Unless a protective order governing the entire case has already been entered, consider whether there is any reason to seek a protective order for the witness. Additionally, even when a general protective order exists, consider promptly moving for a more specific protective order if there are reasons to protect either the witness or possible testimony. In this context, "prompt" means not waiting until the last minute before seeking the court's assistance. n8

[8.--2] Review Grounds for Protective Order

Under Rule 26(c)(1), a protective order may be obtained to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense ... ." The grounds for a protective order must fit clearly within one of the permissible reasons provided in Rule 26(c)(1). Although these are broad, they are not limitless. For example, a witness's lack of knowledge alone is rarely sufficient basis for preventing a deposition. n9 The opposing party simply is not obligated to take your word that the witness has no relevant knowledge.

Rule 26(c)(1) provides eight types of protection that may be obtained through a protective order:

(A) That the disclosure or discovery not be had

(B) That the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place

(C) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery

(D) That certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters

(E) That discovery be conducted with no one present except persons designated by the court

(F) That a deposition, after being sealed, be opened only by order of the court

(G) That a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way

(H) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

Thus, protective orders can be issued to address many different concerns. For example, a number of courts will grant a protective order delaying depositions of senior corporate officials until after other employees are deposed. n10 In addition, protective orders are frequently issued to protect against the disclosure of confidential information such as

trade secrets. If no general protective order has been entered, and a particular witness's testimony may reveal trade secrets, counsel should move for a protective order as soon as the deposition is noticed. Trade secrets will generally be protected if the disclosure of the information poses a sufficient danger. However, if the need to protect trade secrets is not clear, courts may decline to enter a protective order. n11

[8.--3] Evaluate Risk of Seeking Protective Order

There are times when seeking a protective order before a deposition may not be desirable. For example, if the motion will alert opposing counsel to the existence of issues and facts which she might not otherwise raise during the deposition, defending counsel may make a tactical decision to wait and see if the topic is raised at the deposition. Because the Federal Rules allow an attorney to seek a protective order at any time, this strategy, though risky, is not unsound. Nonetheless, it requires weighing the potential for an adverse ruling due to delay in seeking the order against the tactical gain possible.

It is not likely, however, that this concern would apply to privileged information. Typically, counsel should wait until privilege issues arise in a deposition before seeking a protective order. Moreover, because privilege is a legitimate ground for instructing a witness not to answer, waiting until the deposition to assert privileges is acceptable.

It is neither necessary nor appropriate for defending counsel to seek a protective order with respect to every conceivable problem that may arise at a deposition. Instead, relief should be sought in advance of the deposition only if:

- It is reasonably likely that the problem will arise at the deposition, and

- The problem cannot be dealt with at the deposition itself or there is a likelihood that a motion made during the deposition will be denied.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsEvidencePrivilegesAttorney-Client PrivilegeGeneral OverviewEvidenceTestimonyRefreshing RecollectionRefreshing During Testimony

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(b)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 30(d)(3)* allows a party or deponent to move to stop a deposition "on the ground that is it being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party ... ."

(n3)Footnote 3. In extreme cases, defending counsel may seek a protective order prohibiting a party from attending a deposition. In *Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973)* , the Second Circuit upheld the trial court's protective order barring plaintiff from attending the deposition of the defendant. The court's decision turned, in part, on the plaintiff's violation of a previous order that was entered to protect the defendant. The court said that although such an exclusion is rarely appropriate, trial courts have authority under Rule 26(c) to exclude parties from a deposition. Parties or other persons also may be excluded when the deposition will deal with facts that are protected from disclosure by a protective order entered under Rule 26(c)(1)(G).
Under Rule 30, "other witnesses are not automatically excluded from a deposition simply by the request of a party. Exclusion, however, can be ordered under Rule 26(c)(1)(E) when appropriate ... ." *Fed. R. Civ. P. 30* advisory committee's note (1993).

(n4)Footnote 4. Under Rule 30(c)(2), a deponent may be instructed *not* to answer a question "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)."

(n5)Footnote 5. "An objection at the time of the examination ... must be noted on the record but the examination still proceeds; the testimony is taken subject to any objection." *Fed. R. Civ. P. 30(c)(2).*

(n6)Footnote 6. *Fed. R. Evid. 501.*

(n7)Footnote 6.1. *See Constand v. Cosby, 232 F.R.D. 494, 501 (E.D. Pa. 2006)* .

(n8)Footnote 7. When reviewing documents with a witness, avoid using any documents that you do not want toproduce. Some courts have held *Fed. R. Evid. 612* applicable to testimony at depositions, pursuant to *Fed. R. Civ. P. 30(c)*, and ordered production of a document used to refresh the witness's recollection. *See Sporck v. Peil, 759 F.2d 312, 317 (3d Cir. 1985)* , *cert. denied, 474 U.S. 903 (1985)* . This holding has been questioned. *See Omaha Pub. Power Dist. v. Foster Wheeler Corp., 109 F.R.D. 615, 616-17 (D. Neb. 1986)* . For authority that waiver occurs when recollection is refreshed at a deposition, *see Derderian v. Polaroid Corp., 121 F.R.D. 13 (D. Mass. 1988)* ; *S & A Painting Co., Inc. v. O.W.B. Corp., 103 F.R.D. 407, 408-09 (W.D. Pa. 1984)* .

Privileged material also may be subject to production when used to refresh a witness's recollection prior to a deposition. Although the court in *Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (S.D.N.Y. 1977)* , protected four notebooks prepared by counsel that were shown to an expert witness prior to his deposition, the court stated that production may be ordered in similar cases in the future. Since then, other courts have held that the use of privileged documents to refresh a witness's recollection prior to testifying waived the privilege. *See James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138 (D. Del. 1982)* ; *Wheeling-Pittsburgh Steel Corp. v. Underwriters Labs., Inc., 81 F.R.D. 8 (N.D. Ill. 1978)* .

Still other courts have held that while waiver occurs as to the portion of the documents relied upon by the deponent while testifying, waiver does not inexorably occur when reliance on documents occurs prior to testifying. In *Dederian v. Polaroid Corp., 121 F.R.D. 13, 16 (D. Mass. 1988)* , the court went to great length to explain that Congress intended for courts to treat refreshment before testifying in a different manner than refreshment *while* testifying. The court noted "those courts which hold that disclosure of materials reviewed before testifying is always 'necessary in the interest of justice' ignore the rather clear Congressional intent." *See Smith & Wesson v. United States, 782 F.2d 1074, 1083 (1st Cir. 1986)* (approving the exercise of discretion in ordering disclosure of materials reviewed prior to testifying; court affirmed ruling which refused to turn over a report which a witness had reviewed prior to testifying).

(n9)Footnote 8. Courts are sometimes less receptive when a protective order is sought on the eve of the deposition or after a deposition has begun. In *Stephens v. Sioux City & New Orleans Barge Lines, Inc., 30 F.R.D. 397 (W.D. Mo. 1962)* , the court denied a "motion to quash" a deposition notice on the grounds that it was not seasonably made. In *O'Brien v. International Bhd. of Elec. Workers, 443 F. Supp. 1182 (N.D. Georgia 1977)* , although the court granted the protective order, it criticized plaintiff for waiting until the "eleventh hour" before moving.

(n10)Footnote 9. *Transcontinental Motors, Inc. v. NSU Motorenwerke Aktiengesellschaft, 45 F.R.D. 37 (S.D.N.Y. 1968)* (an allegation that a deponent has no knowledge does not justify prohibiting the deposition); *but see Lewelling v. Farmers Ins. of Columbus, Inc., 879 F.2d 212, 218 (10th Cir. 1989)* (upholding district court's exercise of discretion in granting protective order to bar deposition of CEO, who lacked knowledge of any pertinent facts).

(n11)Footnote 10. In *Salter v. Upjohn Co., 593 F.2d 649 (5th Cir. 1979)* , the court upheld a protective order that delayed the deposition of the defendant's president until after employees with greater factual knowledge were deposed. The court stated that it was very likely that the plaintiff would forego the president's deposition after deposing employees with personal knowledge of the facts.

(n12)Footnote 11. For instance, in *United States v. IBM, 67 F.R.D. 40 (S.D.N.Y. 1975)* , a case in which the court refused the request of non-party deponents to keep under seal sensitive commercial information in their depositions, the

court noted that protection is appropriate only when disclosure will cause a clearly defined and serious injury. As the court said when determining that such injury would not be caused by disclosure, "[t]he disclosure of a secret formula will almost invariably result in this injury ... but thedisclosure of two-and-a-half-year-old sales data will not."

* This chapter was rewritten in 1999 by Peter Kearns, Esq., San Francisco, California.

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CHAPTER 18 Defense of Depositions *

2-18 Federal Litigation Guide § 18.02

§ 18.02 CHECKLISTS: Reviewing Basic Rules and Concepts with Witness Before Deposition

[1] CHECKLIST: Reviewing Basic Deposition Rules with Witness

The following checklist includes general rules that should be reviewed with the client before deposition. Counsel should be sure that the deposition witness understands each of the following rules on deposition testimony:

- ☐ Always tell the truth.
- ☐ Answer only the question asked.
- ☐ Do not volunteer information.
- ☐ Be sure you understand the question.
- ☐ Ask for clarification wherever required.
- ☐ Pause after the question is posed, and reflect on what is being asked.
- ☐ Take as much time as you need to formulate your answer before speaking.
- ☐ Listen to defending counsel's statements, either objections or instructions.
- ☐ Consult counsel whenever you feel the need.
- ☐ Answer vocally, as movements are not generally recorded.
- ☐ Do not try to win the case with your testimony.

☐ Do not try to explain your answers, unless absolutely necessary--the facts are the facts.

☐ Do not speculate or guess.

☐ If you are asked about a document, review the document carefully.

☐ If you need to refer to documents, ask.

☐ Do not engage in casual conversation during the deposition.

☐ Do not agree with attempts to re-characterize your testimony.

☐ If a question is compound, ask to have it separated into two or more questions.

☐ Do not agree with a question unless you agree with the whole question.

☐ Never get angry.

☐ Do not get upset if the examiner is rude or interrupts you.

☐ Remain dignified.

☐ Do not attempt to be humorous.

☐ Do not attempt to educate the examiner--it is his job to become educated.

☐ Never use obscenity, vulgarity, profanity, ethnic slurs, gender slurs, or derogatory personal references.

☐ If you need a break, request one--a deposition does not place the witness under arrest

[2] CHECKLIST: Reviewing Basic Deposition Concepts With Witness

The following checklist includes general concepts that should be reviewed with the client before deposition. Counsel should be sure that the deposition witness understands the importance of each of the following concepts:

☐ **Keep answers simple.** The witness's answer to each deposition question should be kept as simple as possible. The witness should volunteer no additional information. To avoid rambling or convoluted answers, she should give short, factual answers to each question.

☐ **Identify confusing questions.** Urge the witness to listen carefully to each question, making sure that the question is clearly understood before answering it. To allow the witness time to think carefully about each question before giving an answer, insist that she pause for a moment between the questionand answer. A pause forces the witness to think about the question and gives counsel an opportunity to object.

☐ **Listen to each question carefully.** A way to sensitize the witness to the need to listen carefully to each question is to review common objections to deposition questions. While the witness need not acquire a detailed understanding of each objection, she should be alert to the various types of objectionable questions. By taking the time to review common deposition objections, counsel can reduce the likelihood that the witness will become confused by such questions, or answer a question too quickly.

☐ **Avoid speculation.** Because a desire to be helpful to the examiner may lead the witness to speculate when she really does not have sufficient knowledge to testify, the witness must comprehend that she is not required to know the answer to every question. Some questions may call for facts outside the witness's knowledge, and others may call for facts that the witness does not remember. Even though witnesses are sometimes surprised by the gaps in their own knowledge, there are some occasions where the witness will simply have to state that she does not know the answer.

☐ **Correct Errors.** Make certain the witness understands that whenever an inaccurate answer has been given to a question, the answer can and should be corrected as soon as possible. If the witness immediately realizes that an error has been made, he should simply make the correction. If the questioning has already proceeded to a new topic by the time the witness realizes that a mistake has been made, the error should be brought to counsel's attention as soon as possible to determine how best to make the correction.

☐ **Avoid humorous and derogatory remarks.** A deposition witness should always avoid making any unnecessary statements, such as jokes, or editorial remarks or worse, derogatory remarks. No matter how tempting it may be to answer a question in an argumentative or editorializing manner, such answers are often counter-productive and distract the witness from giving careful testimony. Moreover, a comment or joke that seemed funny at the time often looks foolish or terribly out of place at a later date. The deponent should appreciate that gratuitous remarks invite the examiner to ask additional questions to explore the basis for the remarks. The examiner is free to ask questions to better understand any remark.

☐ **Remain calm and patient.** The deponent should be encouraged to remain calm and patient during the deposition. It is useful to emphasize that excessive emotion usually undermines the quality of the witness's answers. Much like the witness who tries to be humorous, the angry or bitter witness unwittingly gives the examiner a tactical advantage because the witness's emotions may interfere with his ability to concentrate. Indeed, in most cases, the best way to frustrate an examiner who asks taunting questions is to remain calm and supply careful answers.

☐ **Understand the examiner's personal style.** Counsel should warn the witness about any known habits of the examiner. Even if you don't know the particular examiner, review the approaches that some examiners use to disarm, or obtain more testimony from, a witness. Warn the witness not to be lulled into less guarded answers by an examiner's friendly style.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryRelevanceEvidenceTestimonyGeneral Overview

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CHAPTER 18 Defense of Depositions *

2-18 Federal Litigation Guide § 18.03

§ 18.03 Defending Party Witness Depositions

[1] Consider Whether and How to Intervene

Defending counsel's role at the deposition will vary depending on the examiner's questions and the witness's responses. So long as examining counsel asks proper questions and the witness answers accurately and does not divulge privileged information, defending counsel's objectives are probably best served by saying as little as possible at the deposition. Rarely, however, is this the case. More often, defending counsel will play an interactive role in the deposition process; defending counsel's role generally will be fluid, changing as the examiner's or witness's actions change.

Throughout a deposition, defending counsel must consider whether and how to intervene. Defending counsel can intervene in a variety of ways, including objecting, instructing a witness not to answer, requesting clarification from the examiner, and asking for a recess. Regardless of the method of intervention, defending counsel must continually weigh the costs and benefits of intervening. In one case, the court found that defense counsel acted improperly under the guidelines for attorney conduct at depositions when, during four depositions, she made repeated objections, instructed witnesses not to answer certain questions, and left the deposition while a question was pending to confer with the deponent. n1 Counsel should actively intercede where intervention is necessary to protect privileged information, avoid damaging confusion, or protect the witness from harassment or embarrassment. As a general rule, a deponent and the deponent's attorney have no absolute right to confer during a deposition except for the purpose of determining whether a privilege should be asserted. n2

In some circumstances, defending counsel's intervention can actually cause harm. For instance, an objection, a request for a recess, or a statement on the record can send a signal that examining counsel has touched on a sensitive area and may encourage a deeper probe to insure that no important details are overlooked. This type of signal is especially clear where a quiet defending counsel suddenly perks up and begins to assert consistent objections. Persistent obstructions also may affect the witness's credibility if the deposition must be used at trial. Overly active intervention by defending counsel may lead a trier of fact to conclude that the deposition testimony is more counsel's than the witness's. Further, frequent interruptions that lead to extensive discussions among counsel can lengthen a deposition and tire, upset, or distract thewitness so much that she gives less effective testimony. In many cases, getting the witness through a deposition as quickly as possible will keep the witness happy and will decrease the likelihood that damaging testimony will come out. Thus, while intervention is sometimes unavoidable, counsel must continuously assess whether action is desirable.

[2] Avoid Undue Aggression

If counsel must intervene to protect his client's interests or to protect the witness, the best strategy is to insure that the level and frequency of intervention are consistent. For example, counsel may need to object to prevent the witness from revealing information protected by the attorney-client privilege, since without counsel's interruption, inadvertent disclosures can easily occur. Although protection of privilege must be aggressive, counsel should assess the tone of the deposition before asserting an across-the-board aggressive posture. In many cases, this will be unnecessary. Further, undue aggression may create an uncomfortable environment for the witness, and can even lead to a lack of confidence in defending counsel, especially when the examiner remains calm. Similarly, while it can be beneficial to object in unimportant areas to feign importance, excessive objections are neither permissible nor desirable.

There are a number of styles applicable to deposition defense. While none is clearly right for all situations, some are more wrong. For example, some lawyers view depositions as a battlefield, with objections as hand grenades or bullets to be randomly and frequently tossed or sprayed across the deposition landscape. Under Rule 30, "[a]n objection must be stated concisely in a non-argumentative and non-suggestive manner." n1

[3] Raise Objections at Deposition

[3.--1] Evaluate Whether to Raise Objection

As a general rule, the only objections that need to be made are those that must be preserved under Rule 30(c)(2). n1 Deposition objections are a more complex subject than the Federal Rules might suggest, however. Despite the apparently limited nature of deposition objections, many courts and lawyers take a broad view of objections that concern the "form" of a question. Thus, to provide a practical guide to deposition objections, this discussion will review the most common objections, including those that may technically go beyond the "form" of a question.

The objection is the principal tool for insuring that deposition questioning is fair to the deponent and to the facts. By properly using objections, the examiner can be encouraged to frame fair and proper questions. Objections also serve to communicate to the witness the dangers posed by unfair questions. But just as counsel should not sit silently while the examiner unfairly attacks the witness, counsel should avoid excessive, unwarranted objections designed either to coach the witness or to break up the examiner's flow.

During the course of a deposition, counsel must make many tactical decisions in favor of or against raising objections. The frequency of objections will vary depending, in part at least, on the examiner's competence. If the examiner is a skilled questioner who consistently asks proper questions, few objections will be necessary during the examination. If a skilled examiner occasionally asks an improper question, the proper response is to state any objection and rely on the examiner to rephrase it.

On the other hand, if the examiner consistently asks improper questions, either because of a lack of skill or for the purpose of confusing the witness, objection strategy becomes more complex. If the examiner asks improper questions that the witness is handling well, counsel may choose to make few objections. Often it is better to let the examination continue than to prompt the examiner to ask more careful questions. There is no need to invite the examiner to ask better questions when the witness is already giving strong testimony. If, however, the examiner asks numerous objectionable questions that are causing the witness difficulty, defending counsel is usually well-advised to object. To the extent that the examiner elicits damaging testimony, counsel's objections may slow the process and remind the witness to be more careful. Such objections also may help prevent the witness from giving ambiguous answers to improper questions and may warn the examiner that such questioning will not go unchallenged. Particularly because many courts are reluctant to exclude potentially useful testimony long after a deposition is taken, the transcript should contain a clear, contemporaneous record of consistent objections where necessary. If examining counsel's behavior is particularly egregious, defending counsel can call a halt to the deposition and seek a protective order from the court. n4

[3.--2] State Objection in Non-Aggressive Manner

Generally, an objection should be stated in a way that does not coach the witness to give a particular answer. As instructed by Rule 30(d)(1), an objection must be stated in a non-argumentative *and* non-suggestive manner. Moreover, a court may be less likely to sustain an objection that appears to instruct the witness, for it may find that the objection obviated the danger of the question. Sometimes, however, counsel may feel compelled to make an objection that in essence coaches the witness. If at all possible, resist this urge. If the examiner's question as posed has trapped the deponent, and the deponent may give an answer prejudicial to the case absent some type of guidance, counsel need only object. The objection may clue the deponent to the trap the examiner is setting up. But whether the witness catches on is irrelevant. A reasoned objection should provide grounds to argue for the inadmissibility of the witness's answer. Further, if the examiner's question was truly a trap, the judge or jury is likely to see it.

[3.--3] Objecting to Form of Question

Depending on the nature of the objection, counsel may wait until a later time to raise it. Under Rule 32(d)(3), objections are reserved to the time of trial unless they might have been eliminated if they had been presented at the deposition. n5 The purpose of Rule 32(d)(3) is to require that curable objections be stated during the deposition at a time when examining counsel has an opportunity to cure the cited defects. n6 The most common objection in this category is the objection to the "form" of the question. After an objection to the form of a question, the examiner can immediately correct it and the witness can answer the amended question. However, even if the examiner declines to amend his question, it still must be answered. In fact, the witness should understand that questions that involve more substantive objections, such as relevance or hearsay, must be answered by the witness at the deposition even though the court may later sustain the objection.

Note

that during a deposition, objections to the "form" of a question are often used to resist questions that are confusing, seek information outside the witness' knowledge, are repetitive, or are irrelevant.

[3.--4] Objecting to Confusing Questions

Questions can be confusing for many reasons. Some questions are so convoluted that what the examiner has asked is not clear. For instance, the examiner's use of a double negative or unattributed pronouns may make a question difficult to comprehend. Sometimes, a question may be confusing because it is composed of several parts that really ask two or more different questions. n7 Frequently, a question is confusing because it assumes facts outside the witnesss's testimony, n8 or because the examiner phrases the question so as to make an argument rather than to elicit information. Whatever the reason that a question is confusing, it should be objected to at the deposition. Later attempts to explain an answer because the question was confusing will not garner much sympathy if no objection was made during the deposition.

[3.--5] Objecting to Questions Outside Scope of Witness's Knowledge

A question that calls for information outside the witness's knowledge is objectionable. Although many attorneys will state in an objection that the question seeks information outside the witness's knowledge, in reality the objection is one under *Fed. R. Evid. 602* -- that the witness is not competent to testify on the subject because she lacks personal knowledge. Because examining counsel is entitled to learn what the witness knows, the examiner should establish the witness's personal knowledge of relevant matters if he hopes to use that testimony at trial. Thus, the examiner generally should not ask a witness about a meeting or telephone conversation without first establishing the basis for the witness's knowledge. However, because this is discovery, and not all depositions are taken for the purpose of admission at trial, examining counsel may wish to pursue a line of questioning even if the witness does not have personal knowledge about the topic. Even though the examiner is permitted to ask these questions, defending counsel should record an objection to prevent use of the witness's answers at trial.

Questions that call upon the witness to interpret what someone else meant by a phrase in a document generally are objectionable because they call for speculation beyond the bounds of the witness's knowledge. n9 Similarly, questions that call upon the witness to use documents to reach answers may call for testimony that is too speculative to be proper and may be objected to. n10 Arguably, an objection that a question calls for speculation need not be made at the deposition. However, many lawyers make the objection at that time because a court may later rule that the objectionable nature of the question could have been cured if the examiner had been asked to lay a proper foundation for the question. Moreover, this objection serves to warn the witness about the dangers of the question.

Another type of question that calls on the witness to speculate beyond the range of the witness's knowledge is the question that "calls for a legal conclusion." For instance, the examiner who asks "Was Mr. Brown negligent?" or, "Did the XYZ Corporation breach its contract?", asks the witness to draw a legal conclusion. Again, this question need not be objected to at the deposition, but many lawyers will not wait until trial for fear that an unfavorable answer might be included in the deposition transcript and potentially used at trial. Further, by objecting at the deposition to a question that seeks a legal conclusion, the witness may realize she need not answer the question, avoiding problems altogether.

Some lawyers improperly use the "legal conclusion" objection to prevent a witness from giving testimony about the witness's own understanding of the significance of what the witness did. For example, in a contract case in which the parties' understanding of their words and acts has legal significance, examining counsel can properly ask what the witness sought to achieve by taking a particular action, such as sending a letter to cancel an order. Even though the witness should not be asked to testify to the legal significance of the letter, the witness can testify to what the letter was *intended* to accomplish. Courts often lose patience with lawyers who try to inhibit inquiry into the understanding and intent of an actor in a commercial transaction. Thus, while an objection may sometimes be appropriate, it should not be used to inhibit proper questioning.

[3.--6] Objecting to Repetitive Questions

Questions that are repetitive of previous questions are objectionable for that reason. Although the objection that a question is repetitive arguably need not be made during the deposition to be preserved, counsel will commonly object when a question has already been "asked and answered." Often, this objection is made in response to an examiner who is tinkering with the precise form of the question so as to confuse the witness. This type of objection made during the deposition not only records counsel's reasoning for the court, it also prompts the witness to recall prior testimony before answering the question a second time. If the objection is made without appearing to coach the witness, it can very effectively reinforce the witness's testimony.

The asked and answered objection can be especially effective when examining counsel is a skillful questioner. The experienced examiner will often present the witness with substantially the same question a number of times in the hope that he will eventually get the right answer. By objecting, defending counsel keeps the witness aware of this threat.

[3.--7] Objecting to Questions Based on Relevance

Irrelevant questions are frequently asked at a deposition. Counsel commonly will object even though such an objection is reserved for later resolution. Many attorneys use the objection to relevance to try to prevent inquiry into topics that are unrelated to the litigation. Since this is almost never adequate grounds to instruct a witness not to answer, a better strategy is to avoid the objection at a deposition or to use it sparingly. n10.1

In any event, objections to relevance made at the time of the deposition are often counterproductive. First, the objection may provoke the curiosity of examining counsel, who may believe that the objection signals a sensitive subject. Second, if the question is actually irrelevant, counsel may be well-advised to allow the witness to answer and waste the examiner's valuable deposition time with questions that have no application to the case. n11 Finally, because trial judges

are interested in limiting material admitted at trial to facts that bear on the contested issues, courts generally will be receptive to an objection made at trial if the deposition questions were truly irrelevant. At the deposition, the objection merely gets recorded in the transcript, while the witness still must answer. Thus, relevance objections accomplish little.

An exception to this rule can arise where examining counsel strays out of relevant matter into areas that are sensitive for other reasons. For example, where an irrelevant line of questioning threatens to disclose unrelated trade secrets, defending counsel may wish to take a stand against further inquiry.

[3.--8] Objecting on Basis of Attorney-Client Privilege

Perhaps the most important objection at a deposition is the one that protects the attorney-client privilege. Under the Federal Rules of Civil Procedure, defending counsel may direct a witness not to answer questions that require or could lead to the disclosure of privileged attorney-client communications. Rule 30(d)(1) states:

Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3).

The foundation for Rule 30(d)(1)'s protection of privilege can be found in Rule 26(b)(1) which provides in pertinent part that "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party... ." Thus, when a line of questioning is likely to call for the disclosure of privileged communications, counsel may and should caution the witness that the substance of any attorney-client communications should not be divulged. Moreover, if a question clearly seeks privileged information, defending counsel should instruct the witness not to answer the question.

If it is not clear whether an answer to a pending deposition question involves privileged material, counsel may intervene to consult with the witness to explore the issue more fully. If the examiner attempts to interfere with this consultation, an effective strategy is to apply the privilege strictly and direct the witness not to respond.

Attorney-client privilege issues usually appear in one of three ways during a deposition: a clearly privileged document is shown to the witness; a document shown to the witness turns out to contain privileged information based on the witness's testimony; the witness's testimony reveals privileged communications.

Any waiver is limited to actual material disclosed and does not extend to other material on the same subject, unless the disclosure is done intentionally to gain tactical advantage, in which case waiver would be extended to all related material. n11.1

A disclosure does not operate as a waiver if n11.2

- The disclosure is inadvertent;
- The holder of the privilege or protection took reasonable steps to prevent disclosure; and
- The holder promptly took reasonable steps to rectify the error, including (if applicable) following *Fed. R. Civ. P. 26(b)(5)(B)*.

[4] Monitoring the Examiner's Use of Documents

When defending a deposition, counsel should pay close attention to the examiner's use of documents. Although attorneys are generally used to dealing with documents, many lay witnesses are unaware of or not used to the traps that

may be set using documents. Moreover, many witnesses are more inclined to agree with a statement that appears in writing, and are often reluctant to disavow or disagree with written statements. As a result, the following important rules in dealing with documents should be followed:

- **Read the Document Before Answering Questions About It.** When the examiner refers to a document, remind the witness to read it before answering any question about it. Even if the examiner claims that there is no need to read the document, insist that the client read it before testifying. Do not allow a witness to commit to anything in a document that he or she has not read, or to substitute the document for the witness's own recollection of the events.

- **Insure Questions Are Clear and Understood.** In addition to insuring that the witness reads the document, make certain that the examiner's document-related questions are clear. For instance, if the examiner presents a document prepared by the witness and asks whether a statement in the document is true, it is often helpful to ask the examiner to indicate whether the question asks for the witness's understanding at the time the document was prepared or at the time of the deposition. If the examiner expects both responses, the question should be separated into two questions. If the examiner asks questions about a series of documents, be sure that the examiner makes clear what question is being asked with respect to each document.

- **Limit Paraphrasing.** Do not allow a witness to be cajoled into paraphrasing the text of a document. While questioning about a document is permissible to place its language in context or to learn the basis for statements made in a document, counsel should object to questions that ask the witness to paraphrase a document. Similarly, counsel should warn against the witness discussing the meaning of a portion of a document except in the context of the entire document.

- **Limit Inquiry to What the Witness Knows.** Courts are likely to sustain an objection to a question that asks what a document means when the witness did not write it and can only speculate as to its meaning. In such a situation, an objection reminds the witness of the limits of his knowledge and the dangers of speculating.

- **Prepare the Witness For Problem Documents.** Even if it conflicts with the witness's recollection, the witness may feel she should accept the content of a document as true. Caution the witness against accepting the truth of a proposition merely because it is written in a document. A deponent should be prepared not to accept a document's content without first testing the proposition against his memory of events.

[5] Monitoring the Witness's Testimonial Performance

Another important task for defending counsel at a deposition is to closely monitor the witness's performance as a witness. In addition to listening to the substance of the witness's testimony, counsel should insure that the witness remains alert and calm.

If the witness shows signs of tiring or strain, ask for a break. Be especially aware of the need to take breaks later in the day when the witness may be losing concentration. Serious mistakes often occur at the end of a day of deposition when the witness is tired. Even though a witness may prefer to continue a deposition into the evening rather than spend another day giving testimony, this should be discouraged.

Occasionally, both the examiner and the witness will become tired. Although it may be tempting to conclude the deposition in one day in the hope that the witness can remain alert longer than the examiner, such situations can be dangerous. On the other hand, forcing the examiner to ask all his questions in one day will eliminate the chance that the examiner will accumulate a fresh supply of questions. Therefore, at the end of the day, before deciding whether to request an adjournment, carefully evaluate the witness's ability to continue against the examiner's ability to conjure up more questions overnight. Also consider whether the examiner will wrap up more quickly if the deposition is extended a short time.

Sometimes important questions are asked with little warning at the end of the direct examination when the examiner tries to tie up loose ends. The somewhat disconnected nature of this final questioning catches many witnesses off guard. For this reason, consider taking a break near the close of the direct examination to remind the witness of topics that may arise during the examiner's clean-up questioning.

This is especially important where the examiner has missed crucial follow-up questions or failed to ask any questions about relevant topics.

Defending counsel should monitor the witness's temper and attitude during the course of a deposition. If the examiner is reaching an area of sensitive questions that may agitate the witness, it usually helps to take a break and review with the witness the points made about those questions during preparation sessions. If the witness's anger interferes with his ability to give accurate testimony, ask for as many breaks as necessary to calm the witness.

[6] Monitoring Opposing Counsel

In addition to monitoring the witness, deposition defense requires monitoring of opposing counsel. This includes reading verbal and non-verbal signals, paying close attention to the examiner's questioning techniques, learning what areas the examiner focuses on, and protecting the witness from undue harassment. The first three areas require close listening and observation skills, while the latter requires exercising discretion and backbone.

If the examiner is conducting the deposition in bad faith or in an annoying, embarrassing, or oppressive manner, defending counsel may move to terminate the deposition under Rule 30(d)(3). n12 This can be accomplished either by calling the judge or magistrate judge and orally presenting the motion, or by unilaterally terminating the deposition and immediately filing a motion for a protective order. In the latter case especially, counsel must be certain his decision is correct. If the decision to terminate is not validated, counsel and his client will likely be sanctioned under Rule 37.

Although the cases do not provide much guidance as to what conduct will support a motion to terminate, courts have recognized that this remedy is available. n13 Often, however, a stern warning to the examiner will avoid the need to terminate a deposition. Moreover, standing up to the examiner's rough tactics will provide the witness with additional confidence.

[7] Conducting Cross-Examination of Witness

After direct examination of the witness is concluded, counsel must consider whether to conduct cross-examination. Because there is no need to take discovery of your own witness, and because further discovery may only help the other parties to the litigation, cross-examination should be viewed as the exception.

Despite the general rule against cross-examination of one's own deposition witness, there are a few circumstances where cross-examination is appropriate. First, if the effect of a witness's harmful testimony can be alleviated by bringing out additional facts, cross-examination may be the best vehicle. Even though there is no obligation to reveal the ameliorating facts at the deposition, there may be a tactical reason to provide the facts immediately. By placing such facts into the transcript, for example, you may improve the prospects for a favorable settlement. Similarly, bringing out ameliorating facts may fend off a summary judgment motion.

If cross-examination is necessary, counsel should take a short break following direct examination. During the interval between the direct examination and cross-examination, discuss cross-examination questions with the witness and listen carefully to the answers. Because leading questions are not permitted on cross-examination, the witness's answers must be stated in a way that will not damage the case. Therefore, preparation of the cross-examination is important. Finally, cross-examination should be limited so that the examiner cannot reopen the direct examination on grounds that a new

area of questioning has been raised.

[8] Correcting Errors in Testimony

[8.--1] Correcting Errors During Deposition

Testimonial errors should not go uncorrected at a deposition, unless the errors are harmless or insignificant. A factual inaccuracy in deposition testimony, even an apparently insignificant one, may later be used to undermine the witness's credibility. Thus, before ignoring factual inaccuracies, carefully weigh the likelihood that they can be used later against the witness. *Counsel should err on the side of correcting inaccuracies*.

On the other hand, accurate but confusing testimony should only be corrected if it can be misused by the opposing party. Even though there is no affirmative obligation to correct deposition testimony that is merely confusing, it is often wiser to make the correction at the deposition if there is a danger that the deposition testimony will be used against the witness later or the confusion will add to your client's detriment.

Generally, a factual error should be corrected at the *first opportunity*. Rather than waiting to correct the error in cross-examination, consult with the witness as early as possible to determine how to correct erroneous testimony. If a possibly important error is likely to be compounded during responses to subsequent questioning, ask to speak with the witness so that the witness can make the correction before the damage or inaccuracy grows. If the error is less important or is not likely to be repeated, wait until the next break in the deposition to consult with the witness. In either event, when correcting an answer, the witness should make the clarification in his own words.

[8.--2] Correcting Testimony After Deposition

In addition to correcting errors at the deposition itself, Rule 30 entitles witnesses to review and correct their deposition transcript. Every witness should carefully read the transcript of their deposition and correct any errors that may appear. Review of thetranscript must be requested before the conclusion of the deposition. n14 While execution of the transcript may be waived, there is little advantage in doing so. Execution of the transcript gives the witness and counsel another chance to review the testimony. Despite a widespread notion that review and correction of the transcript is limited to correcting typographical errors, Rule 30(e) provides that the witness may make changes "in form or substance."

When making changes in the transcript, follow the procedures set out in Rule 30(e). The witness must state the specific reason for each change that is made. Although there is no limit to the number or extent of changes that are permitted, if the changes are extensive, the court may order that the examiner be given a further opportunity to depose the witness. n15 In extreme cases, where the deposition is so changed as to become meaningless, the court may decline to permit the changes. n16

Since both the changed and the original version of the testimony, and the explanation for the changes, are admissible, n17 an adverse party will likely try to exploit at trial any extensive changes in a deposition transcript by suggesting that the witness has "rewritten" the testimony. Accordingly, if the transcript is substantially accurate and the testimony is only stylistically deficient, it should not be changed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryRelevanceEvidencePrivilegesAttorney-Client PrivilegeGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Plaisted v. Geisinger Med. Ctr., 210 F.R.D. 527, 535 (M.D. Pa. 2002)* .

(n2)Footnote 2. *See United States v. Philip Morris Inc., 212 F.R.D. 418, 420 (D.D.C. 2002)* .

(n3)Footnote 1. *Fed. R. Civ. P. 30(d)(2)*. The Advisory Committee's Note to the 1993 revision of Rule 30 explained that "[d]epositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond."

(n4)Footnote 1. *Fed. R. Civ. P. 30* Advisory Committee's note (1993).

(n5)Footnote 4. *Fed. R. Civ. P. 30(d)(2)*.

(n6)Footnote 5. Rule 32(d)(3) provides in pertinent part:

> (A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.
>
> (B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(n7)Footnote 6. Although counsel may choose to make no objection to questions that the witness is handling successfully, counsel should make any objection to the form of a question that may be made at trial, since failure to make this objection probably results in a waiver. At trial, courts will generally prohibit an objection to the form of a question that was not made at the deposition. As the Sixth Circuit noted in *Bahamas Agricultural Indus. Ltd. v. Riley Stoker Corp., 526 F.2d 1174 (6th Cir. 1975)* , objections that could have been obviated or removed if made at the time of the taking of the deposition are waived if not made then. The court reasoned that to allow defending counsel to wait until trial before objecting would limit the usefulness of the deposition.

(n8)Footnote 7. Rather than an objection as to "form," however, this calls for an objection on the grounds of a compound question.

(n9)Footnote 8. Again, rather than an objection as to "form," a more clearly stated objection would state that the question assumes facts not in disclosure. This objection further provides the witness with some guidance while adhering to the requirement to succinctly state one's objection.

(n10)Footnote 9. In *In re Folding Carton Antitrust Litig., 83 F.R.D. 132 (N.D. Ill. 1979)* , the court sustained defending counsel's instruction not to answer questions concerning the interpretation of documents that the witnesses did not prepare and had not seen prior to the deposition. The court held that many of the questions were improper because they required "a study and comparison of documents and the performance of mathematical calculations." This kind of instruction is risky, however, since the rules strictly limit the grounds for an instruction not to answer. In most cases, the appropriate response is to lodge an objection and allow the witness to answer.

(n11)Footnote 10. In *Deep South Oil Co. v. Metropolitan Ins. Co., 25 F.R.D. 81 (S.D.N.Y. 1959)* , the court held that counsel could not ask the witness a series of questions to which the witness did not know the answer and then direct the witness to formulate answers by examining books and records. The court rejected such tactics as an effort to turn a deposition into an interrogatory or inspection procedure. Again, however, after the 1993 amendments to the Federal Rules, the admissible uses of an instruction not to answer are much more limited, and it is unlikely most courts would uphold an instruction under these circumstances.

(n12)Footnote 10.1. *See Quantachrome Corp. v. Micromeritics Instrument Corp., 189 F.R.D. 697, 700 (S.D. Fla. 1999)* .

(n13)Footnote 11. This tactic may be especially fruitful in jurisdictions that limit depositions to a certain number of hours.

(n14)Footnote 11.1. *Fed. R. Evid. 502(a).*

(n15)Footnote 11.2. *Fed. R. Evid. 502(b).*

(n16)Footnote 12. *Fed. R. Civ. P. 30(d)(3)(A)*

(n17)Footnote 13. *See, e.g., Batchelor v. Sears, Roebuck & Co., 574 F. Supp. 1480 (E.D. Mich. 1983)* ; *Broadbent v. Moore-McCormack Lines, Inc., 5 F.R.D. 220 (E.D. Pa. 1946)* .

(n18)Footnote 14. *Fed. R. Civ. P. 30(e)(1)*; *see also Hambleton Bros. Lumber Co. v. Balkin Enters., 397 F.3d 1217, 1224-1226 (9th Cir. 2005)* ; *see also Agrizap, Inc. v. Woodstream Corp., 232 F.R.D. 491, 494 (E.D. Pa. 2006)* .

(n19)Footnote 15. In *Sanford v. CBS, Inc., 594 F. Supp. 713 (N.D. Ill. 1984)* , singer Michael Jackson made extensive changes to the transcript of his deposition but did not explain them. The changes were so extensive that the plaintiff was afforded an opportunity to cross-examine Jackson as to why the changes were made and how his memory improved. The court ordered Jackson to bear the cost of this additional discovery, including plaintiff's attorney's fees.

> *See also Lugtig v. Thomas, 89 F.R.D. 639 (N.D. Ill. 1981)* ; *Erstad v. Curtis Bay Towing Co., 28 F.R.D. 583 (D. Md. 1961)* ; *Colin v. Thompson, 16 F.R.D. 194 (W.D. Mo. 1954)* . *Cf. Allen & Co. v. Occidental Petroleum Corp., 49 F.R.D. 337 (S.D.N.Y. 1970)* (changes in the transcript were not so extensive as to warrant further cross-examination).

(n20)Footnote 16. *In Barlow v. Esselte Pendaflex Corp., 111 F.R.D. 404 (M.D.N.C. 1986)* , *aff'd without opinion, 838 F.2d 1209 (4th Cir. 1988)* , the court held that plaintiff's "cutting, pasting, and mutilation" of the transcript of her deposition amounted to sabotage of the deposition process. The court sanctioned plaintiff for her conduct, deeming her to have signed or waived the signing of the transcript as it originally stood and finding the transcript an accurate representation of her deposition testimony.

(n21)Footnote 17. *Lugtig v. Thomas, 89 F.R.D. 639 (N.D. Ill. 1981)* .

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CHAPTER 18 Defense of Depositions *

2-18 Federal Litigation Guide § 18.04

§ 18.04 Defending Non-Party Witness Depositions

[1] Preparing for Non-Party Depositions

The defense of a non-party deposition brings challenges that do not typically arise when defending a witness that is, or is employed by, your client. The lack of an attorney-client relationship removes the protection of the attorney-client privilege, and limits opportunities to prepare the non-party witness. In fact, many hostile, and some neutral, non-party witnesses will refuse to meet prior to the deposition.

The first task upon receipt of the notice of a non-party deposition is to determine whether the witness will speak to you before the deposition. This will usually depend on whether the deponent is friendly, neutral, or hostile.

If the non-party witness is subject to the trial court's subpoena powers, cross-examination may not be necessary, unless the witness refuses to talk to you outside the deposition. However, if the witness is outside the court's subpoena power and will not agree to appear at trial, cross-examination at the deposition may be the only opportunity to confront the witness.

In addition to learning about the witness's attitude and possible availability at trial, if possible, counsel should learn as much as possible about the background of the witness and the substance of potential testimony. In doing this, look to all available sources, including your client, any relevant documents, and the pleadings in the case to identify the factual issues about which the witness may give testimony.

Counsel should determine whether the non-party witness is represented by an attorney. If the witness is represented, any preparation concerns should be addressed to the witness's lawyer. That lawyer will likely prepare the witness for the deposition. In this way, the preparation sessions will be privileged, avoiding the risk that the witness's preparation for the deposition will be discoverable.

[2] Preparing for the Deposition of the Friendly Non-Party Witness

In the case of a friendly non-party witness, preparation should occur in much the same way that a party witness's preparation occurs. Communications with the witness are not privileged, however. Although any discussions with the non-party deponent will be discoverable, the risk of disclosure is usually outweighed by the desire to prepare the deponent. To the extent possible, however, avoid revealing case strategy or information that could be harmful to your client if repeated at the deposition.

When a friendly non-party deponent is not represented by counsel, be especially cautious about providing excessive factual information. Provide the non-party deponent with an overview of your theory of the case, but do noteducate the witness in any areas on which the examiner is unlikely to ask questions and on which you will not rely on the witness's testimony. If the witness will not provide affirmative testimony on a subject, there is usually no need to provide information that could be discovered. Counsel also should avoid educating the witness about any negative facts.

The friendly witness should be prepared to testify effectively about any matter on which his testimony is needed. Because the principal objective is to prevent the examiner from undermining the deponent's potential usefulness, prepare the witness to deal with any possible weaknesses in the testimony. To the extent there are such weaknesses, try to review facts that may help strengthen that testimony. Similarly, if the friendly non-party witness is expected to give any harmful testimony to your case, focus on ways that the witness might minimize the negative testimony.

[3] Preparing for the Deposition of the Neutral Non-Party Witness

While some neutral non-party witnesses will agree to meet prior to their depositions, others will refuse to do so. If you have an opportunity to meet with the neutral non-party deponent, review the deposition procedure in an even-handed way to avoid offending the witness's desire to remain neutral. Give only limited instruction on how to answer deposition questions. Of course, if the witness requests further advice, provide it. Most importantly, carefully review with the witness all matters on which you may require the witness's testimony. Use the meeting to learn as much as possible about what the neutral non-party witness will say so that you can prepare an effective cross-examination.

When preparing for the deposition of the neutral non-party witness who has refused to meet, counsel must try to anticipate cross-examination topics. Sometimes information is available from sources other than the witness to determine those areas on which the witness's testimony may be useful. For example, employees of counsel's own client may be able to identify the non-party person's role and thus relevant areas of inquiry. If the deponent has a particular piece of information that is central to the litigation, try to learn as much as possible about it prior to the deposition so that cross-examination will be effective.

[4] Preparing for the Deposition of the Hostile Non-Party Witness

Preparation for the deposition of the hostile non-party witness usually will involve a large degree of guess-work. Since there is no opportunity to meet with the witness prior to the deposition, undertake a careful review of the pleadings and documents in the case, and review information gathered in interviews with your client and other witnesses, to help prepare for the witness's testimony.

In many cases, cross-examination of the hostile non-party deponent will be similar to trial examination. The deposition may be the only opportunity to cross-examine the witness since presumably, if the witness were going to be available at trial, the examiner would avoid exposing the witness to a deposition. Counsel must, therefore, be prepared to conduct a vigorous cross-examination to minimize any damaging testimony given during the direct examination. Counsel must try to anticipate each of the areas on which the witness must be cross-examined. This can be done by reviewing all available sources to determine the nature of the negative testimony. Before the deposition, prepare specific questions that may highlight weaknesses in the witness's testimony.

[5] Raising Objections at the Deposition of a Non-Party

[5.--1] Objecting to Leading Questions

Leading questions at the deposition of a non-party are generally objectionable because the defendant is the examiner's own witness. Courts are likely to sustain such an objection at the deposition of a non-party who is friendly or neutral toward the examiner's client. n1 Although the examiner may, as a result, be prompted to build a record showing that the

witness is hostile, objecting to leading questions will allow a court to rule on the issue. As at trial, leading questions are permitted on preliminary or uncontested matters.

[5.--2] Avoiding Excessive Objections

Just as with the deposition of your client, the extent to which you use objections at a non-party deposition may depend on whether the testimony is going well or badly from your perspective. On the other hand, if the examiner is obtaining harmless information, refrain from interfering with the questioning. If the examiner is eliciting damaging testimony, however, objections may help to slow down the examination and encourage the witness to give more qualified testimony.

When defending the deposition of a non-party witness, counsel should be especially careful to avoid appearing obstructionist to the witness, particularly if the witness is genuinely neutral. Just as a lawyer trying a case before a jury avoids making objections that would appear to be stifling testimony,counsel must avoid angering the non-party witness with excessive objections. This does not mean that necessary objections should be avoided. However, it may help to explain to a friendly or neutral witness in advance that your objections are made for purposes of the record and not to prevent the witness from answering the question. It also helps to insure that the witness does not misinterpret objections as an attack on the witness's testimony or credibility. If the witness misinterprets objections as either obstructionist or belittling, the witness may be motivated to help the examiner. Of course, if the witness is hostile, this will not be an important concern.

[5.--3] Objecting to the Non-Party Witness's Answers

During the deposition of a non-party witness, objections can be made to the witness's answers, as well as to the question. For instance, if the deponent's testimony goes beyond the question asked, the proper rejoinder is to state a motion to strike on the record. Even though the examiner may then ask a question to which the answer is more responsive, the objection will encourage the witness to be more careful when answering subsequent questions. In addition, if the witness is represented by an attorney, objecting to the answers may encourage the witness's lawyer to direct the witness to give more careful testimony.

[5.--4] Avoiding Instruction Not to Answer

Only counsel representing a witness has standing to direct the witness not to answer a question. n2 In the event the witness chooses to answer an improper question, such as one concerning the witness's conversations with the witness's lawyer, the sole remedy is to make an objection for the record on which the court may later rule. Any attempt to direct the witness not to answer the question is simply improper and will be viewed by the court as obstructionist conduct.

[6] Cross-Examining the Non-Party Deponent

Decisions concerning the cross-examination of a non-party deposition witness turn largely on an assessment of the deponent's availability at trial and the quality of the testimony on direct examination. While it sometimes pays to conduct an extensive cross-examination of a non-party witness, other times call for very little cross-examination.

These decisions are perhaps easiest when the deponent is a friendly witness who will be available at trial. When defending such a witness, if the witness has agreed to appear at trial counsel need not conduct cross-examination at the deposition. This will allow better preparation before any cross-examination is conducted. To a great extent, the factors that will influence whether and how to cross-examine such a deponent are similar to those applicable to deciding whether to cross-examine your own witness at a deposition. As already noted, avoid cross-examination at a deposition unless it is necessary to preserve the witness's credibility or to avoid a summary judgment.

If a neutral or hostile non-party witness who is unavailable for trial gives uneventful testimony, little or no

cross-examination may be needed. More detailed cross-examination is necessary only when helpful evidence may be obtained. For example, if documents indicate that the deponent's testimony will be helpful on a particular point, cross-examination can be used to elicit the anticipated testimony.

In contrast, if the direct examination of a neutral or hostile non-party witness has been damaging, consider conducting a more extensive cross-examination. When conducting a cross-examination of the neutral or hostile non-party deponent who will appear at trial, proceed as if taking the direct examination of an adverse witness. That is, view the deposition as an opportunity to discover any information that may be helpful in minimizing the impact of the witness's harmful testimony. Try to uncover material that will show that the previous testimony is unreliable or simply wrong. Because the witness will appear at trial, it is unlikely the negative information obtained on cross-examination will simply be read at trial without the opportunity for further questioning.

It is not uncommon to confront unfavorable deposition testimony from a non-party deponent who will not appear at trial. Indeed, the deposition of a hostile non-party deponent is usually taken to facilitate the presentation of the unavailable deponent's negative testimony at the trial. Presumably, if the deponent were available at trial, the deposition would not be taken, at least not by the opposing party. When confronted with such testimony, narrow cross-examination can weaken or qualify the witness's testimony, much as at trial. When trying to undermine the effect of negative testimony, try to avoid eliciting additional harmful testimony or giving the witness an opportunity to repeat the previously given testimony.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryRelevanceCivil ProcedurePretrial MattersSubpoenasEvidenceTestimonyGeneral OverviewEvidenceTestimonyExaminationLeading Questions

FOOTNOTES:
(n1)Footnote 1. An objection on the ground that a question is leading should be made at the deposition. In *Oberlin v. Marlin Am. Corp., 596 F.2d 1322 (7th Cir. 1979)* , the court held that the defendant's objections to plaintiff's counsel's leading cross-examination questions were waived because they were not made at the deposition. Interestingly, the objections were not permitted even though the examiner was taking the deposition of his own client.

(n2)Footnote 2. In *Shapiro v. Freeman, 38 F.R.D. 308 (S.D.N.Y. 1965)* , defending counsel consistently directed a non-party witness not to answer the examiner's questions. In response to these improper directions and other abuses, and especially in view of a prior court order, the court appointed a special master to preside over depositions in the case and directed that the special master's fees be paid by plaintiff's counsel.

* This chapter was rewritten in 1999 by Peter Kearns, Esq., San Francisco, California.

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CHAPTER 18 Defense of Depositions *

2-18 Federal Litigation Guide § 18.05

§ 18.05 Defending Adverse Party Depositions

Although relatively uncommon, there are circumstances when the deponent may be the examiner's witness. Usually, such a deposition is taken when the examiner wants to preserve testimony because the deponent may be unavailable at trial. Occasionally, a deposition may be taken when examining counselbelieves the negative impression that the witness will make on the trier of fact outweighs the benefit of presenting the witness's live testimony at trial. This type of deposition could also conceivably be taken to support a motion for preliminary relief.

When defending an adverse party deposition, make vigorous use of objections to insure that the questioning is conducted properly. Because the examiner has presumably had an opportunity to rehearse with the client prior to the deposition, a court may be especially willing to sustain objections to leading questions. Moreover, some of the reasons that may prompt you to make few objections in other circumstances have little application when the examiner's client is deposed. For instance, you generally need not be concerned about irritating an already adverse party.

Preparation for the witness's cross-examination should proceed as if you had noticed the deposition in the first instance. In fact, if you believe that your cross-examination may go beyond the scope of the direct examination, cross-notice a contemporaneous deposition of the witness. This will insure against opposing counsel objecting to cross-examination beyond the scope of the direct examination.

Since the circumstances under which such depositions are generally conducted preclude any future opportunity to examine the witness, cross-examination should cover each issue on which the witness may have knowledge. When the examiner's client is deposed, the danger of eliciting additional unfavorable testimony on cross-examination is relatively slight. Presumably, the examiner's direct examination elicited most or all of the harmful testimony that the witness could provide. Similarly, the examiner probably has elicited specific harmful testimony that must then be rebutted. Thus, cross-examination should be more expensive.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryRelevanceEvidenceTestimonyExaminationGeneral OverviewEvidenceTestimonyExaminationDirect ExaminationEvidenceTestimonyExaminationLeading Questions

* This chapter was rewritten in 1999 by Peter Kearns, Esq., San Francisco, California.

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CHAPTER 19 Requests to Admit

2-19 Federal Litigation Guide 19.syn

§ 19.syn Synopsis to Chapter 19: Requests to Admit

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§ 19.02 Requests Must Concern Matters Relating to Fact

§ 19.03 Use Is Limited to Pending Action

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§§ 19.10 through 19.19 [Reserved]

§ 19.20 Making Requests Unambiguous, Simple, and Direct

§ 19.21 Setting Forth Each Request for Admission Separately

§ 19.22 Including Definitions of Key Terms

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§ 19.24 Encompassing Factual Matters in Request

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§ 19.41 Drafting Responses to Requests to Admit

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§ 19.43 Admitting or Denying With Qualification

§ 19.44 Denying Fully

§ 19.45 Stating Lack of Information or Knowledge
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[5] Objecting Because Requests Are Unduly Burdensome
[6] Objecting Because Facts Sought to Be Admitted Are Not Ascertainable Merely by Examination of Request
[7] Objecting Because Document Was Not Attached to Request

§ 19.47 Avoiding Improper Basis for Objection to Request
[1] Improper Objection: Request Entails Genuine Issue for Trial
[2] Improper Objection: Burden of Proof Is on Requesting Party
[3] Improper Objection: Matters Are Within Knowledge of Requesting Party
[4] Improper Objection: Request Concerns Opinions of Fact or Application of Law to Fact
[5] Improper Objection: Lack of Personal Knowledge
[6] Improper Objection: Depositions Will Duplicate Admission Requests

§ 19.48 Signing and Certifying Response

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§§ 19.51 through 19.59 [Reserved]

§ 19.60 Seeking Court Order Permitting Withdrawal or Amendment of Admission, or Permitting Late Response
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§ 19.61 Importance of Timing of Request for Court's Ruling
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§ 19.62 Review Based on Abuse of Discretion Standard

§ 19.63 CHECKLIST: Moving for Withdrawal and Amendment of Admission or Relief From Untimely Response

§§ 19.64 through 19.99 [Reserved]

§ 19.100 Request for Admission
[1] FORM
Request for Admission
[2] Use of Form
[3] Subject Matter of Requests
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[5] Signature Required
[6] Rule 26(f) Meeting May Be Required Prior to Formal Discovery
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[3] Grounds for Withdrawal or Amendment of Admissions
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CHAPTER 19 Requests to Admit

2-19 Federal Litigation Guide Scope

Scope

SCOPE

Requests to admit can be a very valuable tool. Early in the discovery process, they can be used to limit the amount of necessary discovery. Late in the discovery process, they can sharply limit the need for trial witnesses.

As the discovery process is about to start, attempt to identify every important document as to which authentication will be necessary, and every important fact about which you know of no reasonable disagreement. To the extent that admissions of authenticity and facts are procured, no further discovery will be necessary. Even an unexpected denial is useful as a warning flag that a fact you believed to be beyond controversy may be subject to challenge. Forcing an admission combined with an explanation can also be informative, and allow you to sharpen the discovery that follows.

Requests to admit are often tricky to draft. Attempt to avoid the inclusion of two or more facts in a single request; while the responding party is supposed to treat both facts in the response, that requirement is easily evaded and hard to enforce. It is far better to separate the facts of which admission is sought, to procure a clear response and make evasion difficult.

As the discovery process is concluding, attempt to isolate the formal allegations of the adverse pleading, whether assertion or denial, that do not appear to have evidentiary support, and make those the subject of a request for admission that will limit your trial burdens. Be careful, however, to weigh the effect on a jury of the presentation of the sterile admission rather than the evidence. You may wish to use a witness or a document to demonstrate the falsity of an adversary's assertion or denial if the jury may be influenced by that manner of presentation, and an efficient trial judge may limit you to the formal admission.

This chapter discusses requests to admit. It outlines key legal, strategic, and tactical issues concerning use of requests to admit and the responses to those requests, including the use and effect of admissions, the contents of admissions and responses, the timing and service of admissions and responses, and the amendment or withdrawal of admissions.

The chapter also provides procedural checklists for use in requesting and responding to requests for admission. The chapter also includes a form of request for admission, a form of response to request for admission, and a form of motion for leave to withdraw or amend admission.

For expanded coverage of requests for admission, ***see*** MOORE'S Federal Practice, Ch. 36, ***Requests for Admission*** (Matthew Bender 3d ed.).

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CHAPTER 19 Requests to Admit
A. Understanding Requests to Admit

2-19 Federal Litigation Guide § 19.01

§ 19.01 Objective to Establish Undisputed Facts

Requests to admit are written requests seeking admission of facts about which there is no real dispute. n1 They are helpful to expedite and streamline the course of the litigation. n2 For example, a motion for summary judgment may be granted based on admissions. n2.1

Requests to admit may be directed to any party to the action, including co-parties and adverse parties. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsContent & FormCivil ProcedureDiscoveryMethodsAdmissionsEffectCivil ProcedureDiscoveryMethodsAdmissionsObjectionsCivil ProcedureDiscoveryMethodsAdmissionsResponses

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 36.*

(n2)Footnote 2. *American Auto. Ass'n v. AAA Legal Clinic, 930 F.2d 1117, 1121 (5th Cir. 1991)* ; *Henry v. Champlain Enters., 212 F.R.D. 73, 77 (N.D.N.Y. 2003)* (citing **Moore's Federal Practice**).

(n3)Footnote 2.1. *See Directv, Inc. v. Price, 403 F. Supp. 2d 537, 540 (M.D. La. 2005)* .

(n4)Footnote 3. *Fed. R. Civ. P. 36(a)*; *see Fed. R. Civ. P. 26(b).*

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CHAPTER 19 Requests to Admit
A. Understanding Requests to Admit

2-19 Federal Litigation Guide § 19.02

§ 19.02 Requests Must Concern Matters Relating to Fact

Requests to admit may call for the admission of any of the following: n1

- Statements of fact
- Opinions of fact
- The application of law to facts
- The genuineness of documents

Requests to admit a legal conclusion are improper. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsContent & FormCivil ProcedureDiscoveryMethodsAdmissionsResponses

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 36(a).*

(n2)Footnote 2. *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., 130 F.R.D. 92, 95-96 (N.D. Ind. 1990) .*

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CHAPTER 19 Requests to Admit
A. Understanding Requests to Admit

2-19 Federal Litigation Guide § 19.03

§ 19.03 Use Is Limited to Pending Action

An admission made under Rule 36 can only be used in the pending action. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsEffectCivil ProcedureDiscoveryMethodsAdmissionsWithdrawals

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 36(b)*; *see Kohler v. Leslie Hindman Inc., 80 F.3d 1181, 1185 (7th Cir. 1996)* ; *In re Leon Pizante, 186 B.R. 484, 489-490 (9th Cir. 1995)* .

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CHAPTER 19 Requests to Admit
A. Understanding Requests to Admit

2-19 Federal Litigation Guide § 19.04

§ 19.04 Requests May Concern Any Matters Within General Scope of Discovery

Requests to admit may concern any matter or subject to which other discovery techniques may be directed; that is, any non-privileged matter relevant to theclaims or defenses of any of the parties. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsEffectCivil ProcedureDiscoveryMethodsAdmissionsObjectionsCivil ProcedureDiscoveryPrivileged MattersGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 36(a)*; *see Fed. R. Civ. P. 26(b)*; *see also § 19.46[4]* (objecting to request to admit on basis of privilge).

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CHAPTER 19 Requests to Admit
A. Understanding Requests to Admit

2-19 Federal Litigation Guide § 19.05

§ 19.05 Responding Party May Admit, Deny, Object, or Declare Inability to Respond

The response to a request for admission may include an admission, denial, objection, or statement of lack of information or knowledge, or any combination of these responses with or without qualifications. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsObjectionsCivil ProcedureDiscoveryMethodsAdmissionsResponses

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 36(b)*; *see §§ 19.41-19.46* (responding to notice to admit).

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CHAPTER 19 Requests to Admit
A. Understanding Requests to Admit

2-19 Federal Litigation Guide § 19.06

§ 19.06 Admission Only Binds Party to Whom Request Directed

An admission binds only the specific party to whom the request is directed. n1 The requesting party is not bound by a resulting admission. Even if the requesting party offers admitted facts into evidence, it is also free to offer more favorable or contradictory evidence. n2

Admissions resulting from a failure to answer do not bind co-parties of the non-responding party. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsResponsesCivil ProcedureDiscoveryMethodsAdmissionsWithdrawals

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 36(b)*; *see Riberglass, Inc. v. Techni-Glass Indus., Inc., 811 F.2d 565, 566-567 (11th Cir. 1987)* .

(n2)Footnote 2. *Fed. R. Civ. P. 36(b)*; *see Brook Village North Assocs. v. General Elec. Co., 686 F.2d 66, 75 (1st Cir. 1982)* .

(n3)Footnote 3. *Becerra v. Asher, 921 F. Supp. 1538, 1544 (S.D. Tex. 1996)* ; *Riberglass, Inc. v. Techni-Glass Indus., Inc., 811 F.2d 565, 566 (11th Cir. 1987)* .

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CHAPTER 19 Requests to Admit
A. Understanding Requests to Admit

2-19 Federal Litigation Guide § 19.07

§ 19.07 Admitted Matter Is Conclusively Established Against Responding Party

Matters admitted in accordance with Rule 36, whether explicitly admitted or admitted by default, are conclusively established for purposes of the pending action, unless the court, on motion, permits the withdrawal or amendment of the admission. n1

Any matter conclusively established is treated as a judicial admission, not an evidentiary admission. An admission under Rule 36 is comparable to an admission in a pleading or a stipulation drafted by counsel for use at trial, as opposed to an evidentiary admission of a party for use at trial. n2

A matter that is deemed admitted requires no further proof. n3 Once a matter is deemed admitted, it cannot be rebutted by contrary testimony or ignored by the court, even if the party against whom it is directed offers more credible evidence. n4

Note, however, that the *requesting party* is not bound by the admission. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsEffectCivil ProcedureDiscoveryMethodsAdmissionsResponsesCivil ProcedureDiscoveryMethodsAdmissionsWithdrawals

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 36(b)*; *see Local Union No. 38, Sheet Metal Workers' Int'l Ass'n v. Tripodi, 913 F. Supp. 290, 294 (S.D.N.Y. 1996)* ; *Attick v. United States, 904 F. Supp. 77, 79 (D. Conn. 1995)* ; *see also §§ 19.60-19.62* (seeking withdrawal or amendment of admission).

(n2)Footnote 2. *See Fed. R. Civ. P. 36(b)* advisory committee's note (1970); *In re Corland Corp. 967 F.2d 1069, 1074 (5th Cir. 1992)* .

(n3)Footnote 3. *See Weva Oil Corp. v. Belco Petroleum Corp., 68 F.R.D. 663, 667 (N.D. W. Va. (1975)* .

(n4)Footnote 4. *See* 999 v. *C.I.T. Corp., 776 F.2d 866, 869 (9th Cir. 1985)* .

(n5)Footnote 5. *See § 19.06*.

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CHAPTER 19 Requests to Admit
A. Understanding Requests to Admit

2-19 Federal Litigation Guide § 19.08

§ 19.08 Lack of Response or Insufficient Response May Be Treated as Admission

A response is timely if it is submitted within 30 days of service of the request for admission, or within any other time to which parties have agreed or that has been allowed by the court. n1

If a timely written response is not made, the matter about which the admission is requested is deemed admitted. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsEffectCivil ProcedureDiscoveryMethodsAdmissionsResponses

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 36(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 36(a)*; *Donovan v. Carls Drug Co., 703 F.2d 650, 651-652 (2d Cir. 1983)* ; *Wright v. Paul Revere Life Ins. Co., 291 F. Supp. 2d 1104, 1111 (C.D. Cal. 2003)* .

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CHAPTER 19 Requests to Admit
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2-19 Federal Litigation Guide § 19.09

§ 19.09 Court Has Discretion to Permit Withdrawal of Admission

Courts have discretion to permit withdrawal of admissions when the presentation of the merits will be aided and no prejudice to the party obtaining the admission will result. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsEffectCivil ProcedureDiscoveryMethodsAdmissionsResponsesCivil ProcedureDiscoveryMethodsAdmissionsWithdrawals

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 36(b)*; *see Local Union No. 38, Sheet Metal Workers' Int'l Ass'n v. Tripodi, 913 F. Supp. 290, 293-294 (S.D.N.Y. 1996)* ; *see also § 19.60* (court's permission to permit withdrawl based on two-part test).

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CHAPTER 19 Requests to Admit
A. Understanding Requests to Admit

2-19 Federal Litigation Guide § 19.10

§ 19.10 Requesting Party May Obtain Order to Determine Sufficiency of Response

A party who has requested admissions may move to determine the sufficiency of the answers or the objections. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsEffectCivil ProcedureDiscoveryMethodsAdmissionsObjectionsCivil ProcedureDiscoveryMethodsAdmissionsResponses

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 36(a).*

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CHAPTER 19 Requests to Admit
A. Understanding Requests to Admit

2-19 Federal Litigation Guide §§ 19.10 through 19.19

[Reserved]

§§ 19.10[Reserved]

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CHAPTER 19 Requests to Admit
B. Drafting and Serving Requests for Admission

2-19 Federal Litigation Guide § 19.20

§ 19.20 Making Requests Unambiguous, Simple, and Direct

Requests to admit must be unambiguous, simple, and direct. n1

A request to admit should be posed in the form of a statement, not a question, should not be argumentive, and should avoid subjective, pejorative, legal, or conclusory terms. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsEffect

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 36(a) ; see United Coal Cos. v. Powell Constr. Co., 839 F.2d 958, 967-968 (3d Cir. 1988)* ; *Henry v. Champlain Enters., 212 F.R.D. 73, 77 (N.D.N.Y. 2003)* (citing **Moore's Federal Practice**).

(n2)Footnote 2. *See Herrera v. Scully, 143 F.R.D. 545, 549 (S.D.N.Y. 1992)* .

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CHAPTER 19 Requests to Admit
B. Drafting and Serving Requests for Admission

2-19 Federal Litigation Guide § 19.21

§ 19.21 Setting Forth Each Request for Admission Separately

Each matter for which an admission is requested must be set forth separately, and be directed to a single fact or issue. It is inappropriate to include multiple requests in one statement. Instead, the requesting party should limit individual requests to single, discrete facts. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsEffect

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 36(a).*

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CHAPTER 19 Requests to Admit
B. Drafting and Serving Requests for Admission

2-19 Federal Litigation Guide § 19.22

§ 19.22 Including Definitions of Key Terms

To help clarify the meaning and scope of a request, and to enhance its readability, a request for admission may begin with definitions of key terms.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsEffect

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CHAPTER 19 Requests to Admit
B. Drafting and Serving Requests for Admission

2-19 Federal Litigation Guide § 19.23

§ 19.23 Determining Whether Number of Requests Has Been Limited by Local Rule or Court Order

The number of requests to admit may be limited by local rule or court order. Even if there is no applicable numeric limit, litigants must avoid serving requests to admit that are unnecessarily burdensome or duplicative. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsEffectCivil ProcedureDiscoveryUndue Burdens

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(b)(2).*

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CHAPTER 19 Requests to Admit
B. Drafting and Serving Requests for Admission

2-19 Federal Litigation Guide § 19.24

§ 19.24 Encompassing Factual Matters in Request

Requests to admit may relate to statements or opinions of fact, and may encompass all of the fact issues in the subject action. n1 A request may relate to opinions of fact, including facts that would otherwise be the subject of expert testimony. n2

A request to admit may encompass a genuine issue for trial. The responding party may not, on that ground alone, object to the request. n3 Requests to admit and the resulting admissions may relate to the ultimate facts of a case, and be dispositive of the case based on those facts. Admissions, even those accruing on a party's default in responding, may be sufficient independent grounds for summary judgment. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsEffectCivil ProcedureDiscoveryMethodsAdmissionsObjections

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 36(a)*; *see Pleasant Hill Bank v. United States, 60 F.R.D. 1, 4 n.1 (W.D. Mo. 1973)* .

(n2)Footnote 2. *See, e.g., Lumpkin v. Meskill, 64 F.R.D. 673, 679 (D. Conn. 1974)* .

(n3)Footnote 3. *Fed. R. Civ. P. 36(a)*; *Chemical Eng'g Corp. v. Essef Indus., Inc., 795 F.2d 1565, 1575 (Fed. Cir. 1986)* ; *see § 19.47[1].*

(n4)Footnote 4. *Anchorage Assoc. v. Virgin Islands Bd. of Tax Review, 922 F.2d 168, 176 (3d Cir. 1990)* ; *Dukes v. South Carolina Ins. Co., 770 F.2d 545, 548-549 (5th Cir. 1985)* .

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CHAPTER 19 Requests to Admit
B. Drafting and Serving Requests for Admission

2-19 Federal Litigation Guide § 19.25

§ 19.25 Applying Law to Facts in Request

Requests to admit may relate to the application of law to fact. This includes the legal effect of certain facts, the inapplicability of certain legal principles to facts, or the causal relationship among facts. In addition, a party may be requested to admit what its obligations are as a matter of law. n1

Pure opinions of law are not contemplated by the rule. Requests to admit may not seek legal conclusions or legal theories. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsEffect

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 36(a)*; *Langer v. Monarch Life Ins. Co., 966 F.2d 786, 802 (3d Cir. 1992)* .

(n2)Footnote 2. *See Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., 130 F.R.D. 92, 95-96 (N.D. Ind. 1990)* ; *EEOC v. Otto, 75 F.R.D. 624, 626 n.1 (D. Md. 1976)* .

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CHAPTER 19 Requests to Admit
B. Drafting and Serving Requests for Admission

2-19 Federal Litigation Guide § 19.26

§ 19.26 Seeking Admission of Genuineness of Documents in Request

Requests to admit may seek admission of the genuineness of documents. Such requests can help parties determine which documents that are to be introduced at trial will present foundational problems. Copies of the subject documents must be served with the request, unless the copies have already been furnished or made available for inspection and copying, or are already in possession of the responding party. n1 It is also permissible to request that a party admit or deny the accuracy of quoted textual material from a particular document relevant to the case, and the request may not be ignored on the ground that it seeks an interpretation of the text. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsEffect

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 36(a)*; *see Berry v. Federated Mut. Ins. Co. 110 F.R.D. 441, 443 (N.D. Ind. 1986)* .

(n2)Footnote 2. *See Booth Oil Site Admin. Group v. Safety-Kleen Corp., 194 F.R.D. 76, 80 (W.D.N.Y. 2000)* .

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CHAPTER 19 Requests to Admit
B. Drafting and Serving Requests for Admission

2-19 Federal Litigation Guide § 19.27

§ 19.27 Signing and Certifying Request

The request to admit must be signed by the attorney for the requesting party. If therequesting party is unrepresented, the request should be signed by the party. n1

Along with the signature, the attorney or the pro se party must designate his or her address, e-mail address, and telephone number. n2

The signature of the attorney or party constitutes a certification under Rule 26(g) that the request is made in good faith. Attorneys and parties who make certifications that violate the rule are subject to mandatory sanctions. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsContent & FormCivil ProcedureDiscoveryMethodsAdmissionsEffectLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 36(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(g)(1).*

(n3)Footnote 3. *Fed. R. Civ. P. 26(g)(1)-(3).*

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CHAPTER 19 Requests to Admit
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2-19 Federal Litigation Guide § 19.28

§ 19.28 Serving Requests to Admit

[1] General Rule: No Service of Requests Before Rule 26(f) Conference

Requests to admit may be served as determined by:

- Time limits prescribed by federal statutes and local rules n1
- Agreement of the parties n2
- Order of the court n3

In most districts, the parties' Rule 26(f) preliminary discovery conference is the event triggering the opening of formal discovery, including requests for admission. Rule 26(d) disallows parties from seeking discovery before the conference, absent a court order or stipulation between the parties. n4

Requests for admission must be made in a timely manner and are a discovery device for purposes of the discovery deadlines established in a scheduling order. n4.1

[2] Service Must Be on All Parties

The signed requests to admit must be served on the party from whom the admission is requested, and copies of the requests must be served on all other parties in the case in accordance with Rule 5(a). n5 Service may be made by delivery, by mail, or by electronic or other means consented to in writing under Rule 5(b)(2)(F). n6 Service by mail is complete on mailing. n7 Service by electronic means is complete on transmission, and service by other consented means under Rule 5(b)(2)(F) is complete when the person making service delivers the copy to the agency designated to make delivery. n8 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. n9

If there is no known address for the party being served, service may be made to the court clerk. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsContent & FormCivil ProcedureDiscoveryMethodsAdmissionsEffectCivil ProcedureDiscoveryMethodsStipulationsGovernmentsCourtsClerks of Court

FOOTNOTES:

(n1)Footnote 1. *See Fed. R. Civ. P. 26, 36.*

(n2)Footnote 2. *Fed. R. Civ. P. 26(f), 36(a).*

(n3)Footnote 3. *Fed. R. Civ. P. 36(a).*

(n4)Footnote 4. *See Fed. R. Civ. P. 26(d)(1), (f).*

(n5)Footnote 4.1. *Joseph L. v. Connecticut Dep't of Children & Families, 225 F.R.D. 400, 403 (D. Conn. 2005) .*

(n6)Footnote 5. *Fed. R. Civ. P. 5(a), 36(a).*

(n7)Footnote 6. *Fed. R. Civ. P. 5(b)(2).*

(n8)Footnote 7. *Fed. R. Civ. P. 5(c); Attick v. United States, 904 F. Supp. 77, 79 (D. Conn. 1995) .*

(n9)Footnote 8. *Fed. R. Civ. P. 5(b)(2)(E), (F).*

(n10)Footnote 9. *Fed. R. Civ. P. 5(b)(2)(E).*

(n11)Footnote 10. *Fed. R. Civ. P. 5(b)(2)(D).*

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2-19 Federal Litigation Guide § 19.29

§ 19.29 CHECKLIST: Drafting and Serving Requests to Admit

The following checklist may be used as a general guideline for drafting requests to admit:

☐ **Make request unambiguous, simple, and direct.** Requests to admit should be precisely calculated to elicit admission useful to requesting party. n1

☐ **Set forth each request for admission separately.** Limit individual requests to single, discrete facts, to ensure that no objection will result, and to reduce the likelihood of confused or evasive answers. n2

☐ **Verify that requests solicit only useful and permissible information.** Requests to admit may be directed to any non-privileged matter relevant to the claims or defenses of any of the parties, and may concern any of the following: n3

- ☐ Statements or opinions of facts, including the ultimate facts of the case. n4
- ☐ Application of law to facts. n5
- ☐ Question of genuineness of documents. n6

☐ **Determine whether requests to admit are limited.** The number of requests for admissions allowable may be limited by local rule or court order. n7

☐ **Have request signed by proper party, and include address of party.** The request for admission must be signed by the attorney for the requesting party, or if the requesting party is not represented by counsel, by the party; the signing party must also designate his or her address, e-mail address, and telephone number. n8

☐ **Attach documents if request concerns genuineness of documents.** Copies ofdocuments must be served with the request, unless copies have already been furnished or made available for inspection and copying, or are already in possession of the responding party. n9

☐ **Verify that request does not place excessive burden on responding party.** A protective order may be sought by the responding party if the request is excessively burdensome. n10

☐ **Ascertain that requests do not offer possible grounds for objection.** The following are bases for objecting to requests:

- ☐ Requested matter goes beyond permissible scope of discovery. n11
- ☐ Requested matter is protected by privilege. n12
- ☐ Request is unduly burdensome because it is convoluted, vague, ambiguous, or otherwise requires extensive analysis or explanation. n13
- ☐ Facts sought to be admitted by requests are not ascertainable merely by examination of the request (for example, request incorporates material by reference). n14
- ☐ Document that is subject of request has not been attached to the request, and has not otherwise been furnished or made available for inspection and copying. n15

☐ **Determine whether service of requests to admit must await discovery conference or other established time.** Service generally must await the parties' Rule 26(f) discovery conference, absent a court order or stipulation between the parties. n16

☐ **Serve request for admission on appropriate parties:**

- ☐ **Serve original on party from whom admission is requested.** The original signed request for admission must be served on the party from whom the admission is requested. n17
- ☐ **Serve copies served on all other parties who have appeared in the action.** Copies of the request must be served to all other parties who have appeared in the pending action. n18
- ☐ **Adhere to all requirements for proper service.** Proper service may be made by delivery, by mail, or by electronic or other means consented to in writing under Rule 5(b)(2)(D). n19

Service by mail is complete on mailing. n20 Service by electronic means is complete on transmission, and service by other consented means under Rule 5(b)(2)(D) is complete when the person making service delivers the copy to the agency designated to make delivery. n20.1 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. n21 If there is no known address for the party being served, service may be made to the court clerk. n22

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsContent & FormCivil ProcedureDiscoveryMethodsAdmissionsEffectCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryUndue Burdens

FOOTNOTES:
(n1)Footnote 1. *See § 19.20.*

(n2)Footnote 2. *See § 19.21.*

(n3)Footnote 3. *Fed. R. Civ. P. 26(b), 36(a).*

(n4)Footnote 4. *See § 19.24.*

(n5)Footnote 5. *See § 19.25.*

(n6)Footnote 6. *See § 19.26.*

(n7)Footnote 7. *Fed. R. Civ. P. 26(b)(2); see § 19.23.*

(n8)Footnote 8. *Fed. R. Civ. P. 26(g)(1), 36(a); see § 19.27.*

(n9)Footnote 9. *Fed. R. Civ. P. 36(a); see § 19.26.*

(n10)Footnote 10. *Fed. R. Civ. P. 26(c).*

(n11)Footnote 11. *Fed. R. Civ. P. 26(b), 36(a); see § 19.46[3].*

(n12)Footnote 12. *See § 19.46[4].*

(n13)Footnote 13. *See § 19.46[5].*

(n14)Footnote 14. *See § 19.46[6].*

(n15)Footnote 15. *Fed. R. Civ. P. 36(a); see § 19.46[7].*

(n16)Footnote 16. *Fed. R. Civ. P. 26(d)(1), (f), 36(a).*

(n17)Footnote 17. *Fed. R. Civ. P. 5(a), 36(a); see § 19.28[1].*

(n18)Footnote 18. *Fed. R. Civ. P. 5(a), 36(a); see § 19.28[2].*

(n19)Footnote 19. *Fed. R. Civ. P. 5(b)(2).*

(n20)Footnote 20. *Fed. R. Civ. P. 5(b)(2)(C).*

(n21)Footnote 20.1. *Fed. R. Civ. P. 5(b)(2)(F).*

(n22)Footnote 21. *Fed. R. Civ. P. 5(b)(2)(E).*

(n23)Footnote 22. *Fed. R. Civ. P. 5(b)(2)(D).*

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CHAPTER 19 Requests to Admit
B. Drafting and Serving Requests for Admission

2-19 Federal Litigation Guide §§ 19.30 through 19.39

[Reserved]

§§ 19.30[Reserved]

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CHAPTER 19 Requests to Admit
C. Responding to Requests for Admission

2-19 Federal Litigation Guide § 19.40

§ 19.40 Written Response Typically Required Within 30 Days, Absent Court Order or Stipulation

If no stipulation or court order provides for specific response time, the responding party must serve a written response to the requests to admit on the requesting party within 30 days of service of the request. n1

If the request to admit was served to the clerk, electronically, or by mail, or by other agreed-upon means, an additional three days are added to the time to respond. If the parties stipulate to extend the time to respond, they may not extend the time beyond the date set for trial or a motion hearing, or the discovery cutoff date, without court approval. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsResponsesCivil ProcedureDiscoveryMethodsStipulations

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 36(a)*; *see Fed. R. Civ. P. 29* (discovery stipulations).

(n2)Footnote 2. *Fed. R. Civ. P. 6(d)*, *29*.

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CHAPTER 19 Requests to Admit
C. Responding to Requests for Admission

2-19 Federal Litigation Guide § 19.41

§ 19.41 Drafting Responses to Requests to Admit

The response to a request for admission must be in writing. n1

The response must meet the substance of the requested admission. A party cannot object to the **entire** request to admit on the basis of an objection to **part** of the request. n2

The response may consist of any of the following, or a combination of any of the following, which must be explicitly set forth: n3

- Admission [*see § 19.42*]
- Admission or denial with qualification [*see § 19.43*]
- Full denial [*see § 19.44*]
- Statement of lack of information or knowledge, and statement of reasons why responding party cannot admit or deny [*see § 19.45*]
- Objections to form or substance of request [*see § 19.46*]
- Request for extension of time to respond [*see Fed. R. Civ. P. 36(a)*]
- Request for protective order [*see Fed. R. Civ. P. 26(c)*]
- No response, which is deemed to be an admission [*see § 19.42*]

A response to a request for admission stating that the answers may be found in "previously produced business records" is improper. n3.1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsResponsesCivil ProcedureDiscoveryProtective Orders

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 36(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 36(a)*; *Jackson Buff Corp. v. Marcelle, 20 F.R.D. 139, 140 (E.D.N.Y. 1957)* ; *see also Fed. R. Civ. P. 26(g)(2), 37.*

(n3)Footnote 3. *Fed. R. Civ. P. 36(a).*

(n4)Footnote 3.1. *In re Heritage Bond Litig., 220 F.R.D. 624, 626 (C.D. Cal. 2004)* .

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CHAPTER 19 Requests to Admit
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2-19 Federal Litigation Guide § 19.42

§ 19.42 Admitting Without Qualification

If the responding party chooses to admit the request without qualification, a simple unambiguous, explicit, concise, and specific admission is sufficient. The responding party need not specify any evidence or authority underlying the admission, or give the names of witnesses he or she will call. n1

An admission without qualification also results if a request is not responded to within 30 days, or within any other time agreed to by parties or established by the court. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsEffect

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 36(a)*; *Van Horne v. Hines, 31 F. Supp. 346, 348 (D.D.C. 1940)* .

(n2)Footnote 2. *Fed. R. Civ. P. 36(a)*.

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CHAPTER 19 Requests to Admit
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2-19 Federal Litigation Guide § 19.43

§ 19.43 Admitting or Denying With Qualification

The responding party may admit or deny with qualification. A qualified admission can be used if an admission is ostensibly true, but the responding party cannot in good faith admit it without some necessary contextual explanation to remedy any improper inferences. If an admission is qualified, or the party denies only part of a requested matter, it must state specifically what part of the request is true, and explain or deny only the remainder. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsEffect

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 36(a)*; *Henry v. Champlain Enters., 212 F.R.D. 73, 77 (N.D.N.Y. 2003)* (citing **Moore's Federal Practice**).

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CHAPTER 19 Requests to Admit
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2-19 Federal Litigation Guide § 19.44

§ 19.44 Denying Fully

A responding party may make full denials as to admissions it knows to be untrue. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsEffect

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 36(a).*

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CHAPTER 19 Requests to Admit
C. Responding to Requests for Admission

2-19 Federal Litigation Guide § 19.45

§ 19.45 Stating Lack of Information or Knowledge

[1] Providing Specific Response

A responding party who cannot truthfully admit or deny a request for admission must serve a written answer on the requesting party. The answer should include the following: n1

- A specification of reasons why it is not possible to admit or deny
- A statement that the responding party has made a reasonable inquiry in its attempt to respond to the request [*see* [2], *below*]
- A statement that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny

[2] Meeting Obligation of Reasonable Inquiry

The responding party may not simply respond that it lacks information or knowledge regarding the matter in question as an excuse for not admitting or qualifying further, without stating in good faith that it has made a reasonable inquiry and that the information known or readily obtainable is insufficient to enable it to admit or deny. n1.1

Reasonable inquiry includes investigation and inquiry of any of the responding party's officers, administrators, agents, employees, servants, enlisted, or other personnel who conceivably and realistically may have information that may lead to or furnish the necessary and appropriate response, as well as reviewing relevant documents and regulations. n2

If information is held by an individual or entity with which the responding party maintains a relationship that enables it to readily obtain required information, the party is expected to seek out the information. n3

If relevant information is readily available or available through reasonable inquiry, a response based on lack of personal knowledge may be deemed inadequate. A party cannot object by the mere assertion that it would have to contact third persons to prepare responses. n4

If the responding party has failed to make a reasonable inquiry, the court, on motion of the requesting party, may order

that the matter be admitted or require an amended answer. n5

[3] Claiming Lack of Access to Documents

With respect to requests to admit concerning the genuineness of documents, a factual assertion by the responding party that it does not have, or have access to, the documents appears to be sufficient. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsEffectCivil ProcedureDiscoveryMethodsAdmissionsResponses

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 36(a)*; *see Han v. Food and Nutrition Serv., 580 F. Supp. 1564, 1566 (D.N.J. 1984)* .

(n2)Footnote 1.1. *See Concerned Citizens v. Belle Haven Club, 223 F.R.D. 39, 44 (D. Conn. 2004)* (citing **Moore's Federal Practice**).

(n3)Footnote 2. *See Asea, Inc. v. Southern Pac. Transp. Co., 669 F.2d 1242, 1247 (9th Cir. 1981)* .

(n4)Footnote 3. *A & V Fishing, Inc. v. Home Ins. Co., 145 F.R.D. 285, 288 (D. Mass. 1993)* .

(n5)Footnote 4. *Van Wagenen v. CONRAIL, 170 F.R.D. 86, 88 (N.D.N.Y. 1997)* ; *Hesselbine v. Wedel, 44 F.R.D. 431, 433 (W.D. Okla. 1968)* .

(n6)Footnote 5. *Fed. R. Civ. P. 36(a).*

(n7)Footnote 6. *See Dallis v. Aetna Life Ins. Co., 100 F.R.D. 765, 767 (N.D. Ga. 1984)* .

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CHAPTER 19 Requests to Admit
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2-19 Federal Litigation Guide § 19.46

§ 19.46 Objecting to Form or Substance of Request

[1] Establishing Basis of Objection With Specificity

Whether an objection is based on form or substance, the responding party must specify the reasons for the objection. n1

If a responding party objects to a particular *portion* of the request, the response should identify that portion and the objection to it, and the responding party should unambiguously answer the portion of the request to which the objection does not apply. Courts will generally sustain objections to the invalid requests, and direct the responding party to respond to the valid requests. n2

[2] Avoiding Waiver of Objection by Responding

If the responding party responds to the request without objecting to it, any objection is waived. Nonetheless, the court on motion may still permit withdrawal or amendment of an admission. n3

[3] Basing Objection on Issues of Scope

A responding party may validly object if the requested matter goes beyond the scope of discovery. n4

Possible objections in include:

- The request concerns a matter that is irrelevant to the subject matter of the litigation n5
- The request seeks information regarding trial strategy; for example, a request seeking identification of evidence the opposing party plans to present n6

[4] Basing Objection on Privilege

An objection to a request to admit may be based on the responding party'sclaim that the information sought involves privileged matters, such as matters within the attorney-client privilege, the privilege against self-incrimination, or the government privilege. An objection based on privilege must specify the claimed privilege, and how the request violates that privilege. n7

If a criminal matter is pending against the responding party based on the same facts as the civil case, the responding party may be able to object on the basis thatresponding to the request would infringe on the party's right against self-incrimination. Even though Rule 36 states clearly that an admission obtained under the rule is intended to be used only in the pending action, and that the admission may not be used against the responding party in any other proceeding, the Rule does not provide the responding party with adequate protection if a criminal matter is simultaneously pending against the responding party based on the same facts. n8

[5] Objecting Because Requests Are Unduly Burdensome

Undue burden may provide a ground for objection. Requests that are prolix, convoluted, vague, ambiguous, or otherwise require extensive analysis or explanation are usually objectionable. n9

The number of requests that may be served in any given case will depend on the circumstances of that case, subject to the trial judge's discretion.

[6] Objecting Because Facts Sought to Be Admitted Are Not Ascertainable Merely by Examination of Request

An objection to the format of a request to admit may be sustained if the facts sought to be admitted are not ascertainable merely by examination of the request. For example, a request concerning matters that are incorporated by reference is usually not permitted, except in exceptional circumstances. n10

[7] Objecting Because Document Was Not Attached to Request

The responding party may object to a request that seeks to establish the genuineness of a document if the document in question is not attached to the request, or if the document has not otherwise been furnished or made available for inspection and copying by the responding party. n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsEffectCivil ProcedureDiscoveryMethodsAdmissionsResponsesCivil ProcedureDiscoveryMethodsAdmissionsWithdrawals

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 36(a)*; *see, e.g., SEC v. Micro-Moisture Controls, 21 F.R.D. 164, 166-167 (S.D.N.Y. 1957)* .

(n2)Footnote 2. *Fed. R. Civ. P. 36(a)*; *see English v. Cowell, 117 F.R.D. 132, 135 (C.D. Ill. 1986)* .

(n3)Footnote 3. *Fed. R. Civ. P. 36(b)*; *Pleasant Hill Bank v. United States, 60 F.R.D. 1, 4 (W.D. Mo. 1973)* ; *see §§ 19.60-19.62* (seeking leave of court to withdraw or amend admission).

(n4)Footnote 4. *See Fed. R. Civ. P. 26(b)(1)*.

(n5)Footnote 5. *See Fed. R. Civ. P. 26(b)(1)*.

(n6)Footnote 6. *Howell v. Maytag, 168 F.R.D. 502, 504 (M.D. Pa. 1996)* .

(n7)Footnote 7. *Fed. R. Civ. P. 36(a)*; *see United States v. 266 Tonawanda Trail, 95 F.3d 422, 428 n. 10 (6th Cir.*

1996) (citing **Moore's Federal Practice**).

(n8)Footnote 8. *Fed. R. Civ. P. 36(a)*; *SEC v. Cayman Islands Reinsurance Corp., 551 F. Supp. 1056, 1059 (S.D.N.Y. 1982)* ; *Fed. Deposit Ins. Corp. v. Logsdon, 18 F.R.D. 57, 58 (W.D. Ky. 1955)* .

(n9)Footnote 9. *Fed. R. Civ. P. 36(a)*; *Herrera v. Scully, 143 F.R.D. 545, 550 (S.D.N.Y. 1992)* .

(n10)Footnote 10. *Fed. R. Civ. P. 36(a)*; *see United States v. Watchmakers of Switzerland Info. Ctr., Inc., 25 F.R.D. 197, 200 (S.D.N.Y. 1959)* .

(n11)Footnote 11. *Fed. R. Civ. P. 36(a)*.

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CHAPTER 19 Requests to Admit
C. Responding to Requests for Admission

2-19 Federal Litigation Guide § 19.47

§ 19.47 Avoiding Improper Basis for Objection to Request

[1] Improper Objection: Request Entails Genuine Issue for Trial

A party may not object on the basis that the requested matter constitutes a genuine issue for trial, or that the request goes to a disputed matter that presents a genuine issue for trial. n1

Instead, subject to the provisions of Rule 37(c), the responding party may deny the matter, or set forth reasons why the party cannot admit or deny it. n2

[2] Improper Objection: Burden of Proof Is on Requesting Party

A party may not object to a request for admission on the basis that the request is improper because the requesting party bears the burden of proof on the matter requested. n3

[3] Improper Objection: Matters Are Within Knowledge of Requesting Party

A party may not object on the basis that the requested matters consist of facts within the knowledge of the requesting party. n4 The purpose of Rule 36 is to identify or to eliminate facts as matters in controversy, not to discover facts. n5

[4] Improper Objection: Request Concerns Opinions of Fact or Application of Law to Fact

A party may not object on the basis that the request asks for an opinion of fact or the application of law to fact, because these are legitimate subjects of inquiry under Rule 36. n6

[5] Improper Objection: Lack of Personal Knowledge

A responding party may not object to a request on the basis that the party lacks personal knowledge, if the information is obtainable on reasonable inquiry. n7

[6] Improper Objection: Depositions Will Duplicate Admission Requests

A responding party may not object to a request on the ground that depositions already scheduled will duplicate the

admission requests, or that the same questions raised in the request were previously asked and answered at a deposition. n8 One of the key uses of requests to admit is to avoid discovery of unessential or uncontested facts. If a party has admitted a matter to be true, however, and the opponent nonetheless conducts additional discovery on that identical matter, the responding party may seeka protective order pursuant to Rule 26(c). n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsEffectCivil ProcedureDiscoveryMethodsAdmissionsObjectionsCivil ProcedureDiscoveryMethodsAdmissionsResponses

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 36(a)*; *Chemical Eng'g Corp. v. Essef Indus., Inc., 795 F.2d 1565, 1575 (Fed. Cir. 1986)* ; *In re M & L Bus. Mach. Co., 184 B.R. 366, 368 (D. Colo. 1995)* ; *see § 19.25*.

(n2)Footnote 2. *Fed. R. Civ. P. 36(a), 37(c)*.

(n3)Footnote 3. *See House v. Giant of Maryland LLC, 232 F.R.D. 257, 260 (E.D. Va. 2005)* .

(n4)Footnote 4. *See Webb v. Westinghouse Elec. Co., 81 F.R.D. 431, 436 (E.D. Pa. 1978)* ; *see also Al-Jundi v. Rockefeller, 91 F.R.D. 590, 594 (W.D.N.Y. 1981)* .

(n5)Footnote 5. *Fed. R. Civ. P. 36(a)*; *O'Neill v. Medad, 166 F.R.D. 19, 21 (E.D. Mich. 1996)* ; *Wigler v. Electronic Data Sys. Corp., 108 F.R.D. 204, 205 (D. Md. 1985)* .

(n6)Footnote 6. *Fed. R. Civ. P. 36(a)*.

(n7)Footnote 7. *Herrera v. Scully, 143 F.R.D. 545, 548 (S.D.N.Y. 1992)* .

(n8)Footnote 8. *See United States v. Kasuboski, 834 F. 2d 1345, 1349 (7th Cir. 1988)* .

(n9)Footnote 9. *Fed. R. Civ. P. 26(c)*; *Al-Jundi v. Rockefeller, 91 F.R.D. 590, 594 (W.D.N.Y. 1981)* .

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CHAPTER 19 Requests to Admit
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2-19 Federal Litigation Guide § 19.48

§ 19.48 Signing and Certifying Response

Counsel for the responding party must sign the response. If the responding party is unrepresented, the response must be signed by the responding party. Along with the signature, the attorney or the pro se party must designate his or her address, e-mail address, and telephone number. The response need not be verified. n1

The signature of the attorney or party constitutes a certification pursuant to Rule 26(g). Attorneys and parties who make certifications that violate the rule are subject to mandatory sanctions. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsResponsesLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(g)(1), 36(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(g)(3).*

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CHAPTER 19 Requests to Admit
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2-19 Federal Litigation Guide § 19.49

§ 19.49 Serving Responses to Requests to Admit

The responding party must serve the original response on the requesting party, and serve copies of the response on all other parties in the case in accordance with Rule 5(a). Service may be made by delivery, by mail, by electronic or other means under Rule 5(b)(2)(D), or to the clerk of the court if there is no known address. n1 Service by mail is complete on mailing. n2 Service by electronic means is complete on transmission, and service by other consented means under Rule 5(b)(2)(D) is complete when the person making service delivers the copy to the agency designated to make delivery. n3 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. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsResponses

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 5(b).*

(n2)Footnote 2. *Fed. R. Civ. P. 5(b)(2)(C).*

(n3)Footnote 3. *Fed. R. Civ. P. 5(b)(2)(F).*

(n4)Footnote 4. *Fed. R. Civ. P. 5(b)(2)(E).*

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CHAPTER 19 Requests to Admit
C. Responding to Requests for Admission

2-19 Federal Litigation Guide § 19.50

§ 19.50 CHECKLIST: Drafting, Serving, and Filing Responses to Requests to Admit

The following checklist may be used as a general guideline for drafting a response to a request for admission:

☐ **Determine time in which response must be submitted:**

☐ **30-day deadline:** Response generally must be made within 30 days of service of the request. n1

☐ **Different period stipulated by parties or ordered by court:** Court order, or written stipulation of parties, may lengthen or shorten the 30-day period. n2 If the parties stipulate to extend the time to respond, they may not extend the time beyond the date set for trial or a motion hearing, or the discovery cutoff date, without court approval. n3

☐ **Three-day addition for some delivery methods.** If the request for admission was originally sent electronically by mail, or by other agreed-upon means to the responding party, an additional three days are added to the time to respond. Three days are also added to the resonse time when the clerk is served. n4

☐ **Set forth response or objection to request.** Response may include any of the following, and in any combination, and must fairly meet the substance of the requested admission.

☐ **Admission or qualified admission as response.** If admission is with qualification, it must specify its qualification or denial of the remainder. n5

☐ **Full denial.** n6

☐ **Lack of information or knowledge after reasonable inquiry.** Responding party must state that

reasonable inquiry has been made to acquire the requisite information or knowledge. n7

☐ **Objection to requests for admission.** The responding party may state specific objections to the request or a specific part of the request (in which case the remainder of the request must be answered), on the following bases: n8

☐ **Request is not within scope of subject matter of action.** In general, the acceptable scope are any matters with the scope of Rule 26(b)(1). n9

☐ **Responding party is protected by privilege.** This may include the privilege against self incrimination or another privilege. n10

☐ **Request is unduly burdensome on responding party.** In addition, the responding party may bring a motion for a protective order. n11

☐ **Facts sought to be admitted are not ascertainable merely by examining request.** Incorrect form would include requests that do not state all relevant matters to be admitted, but rather incorporate some matters by reference. n12

☐ **Document was not included with request concerning genuineness of document.** Copies of subject documents must be served with request, unless they have been or are otherwise furnished or made available for copying. n13

☐ **Have response signed by proper party.** The response must be signed by attorney of the responding party, or if the litigant is acting pro se, the responding party, and it must include the address, e-mail address, and telephone numberof the person signing. n14

☐ **Serve original response on party who requested admission.** The signed response to the request for admission must be served on the party requesting the admission. n15

☐ **Serve copies of response on all other parties who have appeared in pending action.** Copies of the request must be served to all other parties in the case. n16

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsContent & FormCivil ProcedureDiscoveryMethodsAdmissionsObjectionsCivil ProcedureDiscoveryMethodsAdmissionsResponsesCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryProtective Orders

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 36(a)*; *see § 19.40*.

(n2)Footnote 2. *Fed. R. Civ. P. 36(a)*; *see § 19.40*.

(n3)Footnote 3. *Fed. R. Civ. P. 29.*

(n4)Footnote 4. *Fed. R. Civ. P. 6(d).*

(n5)Footnote 5. *See §§ 19.42-19.43.*

(n6)Footnote 6. *See § 19.44.*

(n7)Footnote 7. *See § 19.45.*

(n8)Footnote 8. *Fed. R. Civ. P. 36(a)*; *see § 19.46.*

(n9)Footnote 9. *Fed. R. Civ. P. 26(b)(1)*, *36(a)*; *see § 19.46[3].*

(n10)Footnote 10. *See § 19.46[4].*

(n11)Footnote 11. *See § 19.46[5].*

(n12)Footnote 12. *See § 19.46[6].*

(n13)Footnote 13. *Fed. R. Civ. P. 36(a)*; *see § 19.46[7].*

(n14)Footnote 14. *Fed. R. Civ. P. 26(g)*, *36(a).*

(n15)Footnote 15. *Fed. R. Civ. P. 5(a)*, *36(a).*

(n16)Footnote 16. *Fed. R. Civ. P. 5(a)*, *36(a).*

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CHAPTER 19 Requests to Admit
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2-19 Federal Litigation Guide §§ 19.51 through 19.59

[Reserved]

§§ 19.51[Reserved]

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CHAPTER 19 Requests to Admit
D. Seeking Withdrawal, Amendment, or Late Response

2-19 Federal Litigation Guide § 19.60

§ 19.60 Seeking Court Order Permitting Withdrawal or Amendment of Admission, or Permitting Late Response

[1] Court's Permission Based on Two-Part Test

Courts occasionally permit withdrawal or amendment of responses, or the submission of a late response. n1 Such relief must be sought by motion, and is subject to the provisions of Rule 16 governing amendment of a pretrial order. n2

Courts apply a two-part test in determining whether to grant or deny a request for amendment, withdrawal, or late response: n3

- The presentation of the merits must be subserved by allowing the amendment, withdrawal, or late response
- The party who served the request for admission must not be prejudiced in its presentation of the case if the amendment, withdrawal, or late response is permitted n3.1

[2] Different Burdens on Moving and Non-Moving Parties

The party moving for relief has the burden of establishing that allowing the amendment, withdrawal, or late response will subserve the merits of the case. n4

The party who obtained the admission has the burden of showing that it will be prejudiced if the amendment or withdrawal is allowed. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsObjectionsCivil ProcedureDiscoveryMethodsAdmissionsResponsesCivil ProcedureDiscoveryMethodsAdmissionsWithdrawals

FOOTNOTES:
(n1)Footnote 1. *See, e.g., Rolscreen v. Pella Prods. of St. Louis, Inc., 64 F.3d 1202, 1209-1210 (8th Cir. 1995)* ; *Hadley v. United States, 45 F.3d 1345, 1349 (9th Cir. 1995)* ; *Chrysler Credit Corp.v. Whitney Nat'l Bank, 824 F.*

Supp. 587, 595 (E.D. La. 1993) ; *Red Lake Band of Chippewa Indians v. United States, 861 F. Supp. 841, 843 (D. Minn. 1990)* .

(n2)Footnote 2. *See Fed. R. Civ. P. 16, 36(b)*; *Donovan v. Carls Drug Co., 703 F.2d 650, 651-652 (2d Cir. 1983)* .

(n3)Footnote 3. *Fed. R. Civ. P. 36(b)*; *American Auto. Ass'n v. AAA Legal Clinic, 930 F.2d 1117, 1119 (5th Cir. 1991)* .

(n4)Footnote 3.1. *See Banos v. City of Chicago, 398 F.3d 889, 892 (7th Cir. 2005)* .

(n5)Footnote 4. *Weeks Stevedoring Co. v. Raymond Int'l Bldrs., Inc., No. 88 Civ. 3865 (MJL), 1995 U.S. Dist. LEXIS 19266, at *8, 9 (S.D.N.Y. Dec. 28, 1995)* .

(n6)Footnote 5. *Hadley v. United States, 45 F.3d 1345, 1348 (9th Cir. 1995)* .

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CHAPTER 19 Requests to Admit
D. Seeking Withdrawal, Amendment, or Late Response

2-19 Federal Litigation Guide § 19.61

§ 19.61 Importance of Timing of Request for Court's Ruling

[1] File Motion as Early as Possible

The proper procedure to amend or withdraw an admission, or to request additional time for a late response, is to file a motion as quickly as possible after determining thataction is required. This is true even if the requested matters have been deemed admitted because of a failure to respond to the requests in a timely fashion. n1

Rule 36(b) contemplates prejudice arising from the difficulty a party may face in proving its case because of the sudden need to obtain evidence required to prove the matter that had been admitted. n2 The party opposing the motion has the burden of showing that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits. n3 The moving party need not prove excusable neglect. n4

[2] Consider Likelihood of Prejudice for Withdrawals During Trial

Courts are more likely to find prejudice from the withdrawal of an admission when the motion for withdrawal of the admission is made in the middle of trial. n5 Once trial has begun, the judge may not permit withdrawal or amendment of a Rule 36 admission, unless failure to do so would cause manifest injustice. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsObjectionsCivil ProcedureDiscoveryMethodsAdmissionsResponsesCivil ProcedureDiscoveryMethodsAdmissionsWithdrawals

FOOTNOTES:
(n1)Footnote 1. *United States v. Kasuboski, 834 F.2d 1345, 1350 (7th Cir. 1987)* .

(n2)Footnote 2. *See Gutting v. Falstaff Brewing Corp., 710 F.2d 1309, 1313-1314 (8th Cir. 1983)* ; *Brook Village North Assocs. v. General Elec. Co., 686 F.2d 66, 70 (1st Cir. 1982)* .

(n3)Footnote 3. *Hadley v. United States, 45 F.3d 1345, 1348 (9th Cir. 1995)* .

(n4)Footnote 4. *Fed. R. Civ. P. 36(b)*; *Jones v. Employers Ins. of Wausau, 96 F.R.D. 227, 230 (N.D. Ga. 1982)* (citing **Moore's Federal Practice**).

(n5)Footnote 5. *Hadley v. United States, 45 F.3d 1345, 1349 (9th Cir. 1995)* .

(n6)Footnote 6. *Fed. R. Civ. P. 36(b)*; *American Auto. Ass'n v. AAA Legal Clinic, 930 F.2d 1117, 1120 (5th Cir. 1991)* .

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CHAPTER 19 Requests to Admit
D. Seeking Withdrawal, Amendment, or Late Response

2-19 Federal Litigation Guide § 19.62

§ 19.62 Review Based on Abuse of Discretion Standard

Any review of the district court's determination of whether to allow an amendment or a withdrawal is based on an abuse of discretion standard. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsObjectionsCivil ProcedureDiscoveryMethodsAdmissionsResponsesCivil ProcedureDiscoveryMethodsAdmissionsWithdrawalsCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

FOOTNOTES:
(n1)Footnote 1. *See American Auto. Ass'n v. AAA Legal Clinic, 930 F.2d 1117, 1119 (5th Cir. 1991)* ; *Atakpa v. Perimeter Ob-Gyn Assocs., 912 F. Supp. 1566, 1581 (N.D. Ga. 1994)* .

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CHAPTER 19 Requests to Admit
D. Seeking Withdrawal, Amendment, or Late Response

2-19 Federal Litigation Guide § 19.63

§ 19.63 CHECKLIST: Moving for Withdrawal and Amendment of Admission or Relief From Untimely Response

☐ **Determine whether court's two-part test would be satisfied.** The court must apply a two-part test in determining whether to grant or deny a request for amendment, withdrawal, or late response: n1

- ☐ The presentation of the merits must be subserved by allowing the amendment, withdrawal, or late response.
- ☐ The party who obtained the admission must not be prejudiced in its presentation of the case if the amendment, withdrawal, or late response is permitted.

☐ **Consider burdens of proof.** Different burdens of proof fall on the parties as follows: n2

- ☐ The party moving for amendment, withdrawal, or late response has burden of establishing that allowing the amendment, withdrawal, or late response will subserve the merits of the case.
- ☐ The non-moving party has burden of showing that it will be prejudiced if the amendment or withdrawal is allowed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsObjectionsCivil ProcedureDiscoveryMethodsAdmissionsResponsesCivil ProcedureDiscoveryMethodsAdmissionsWithdrawalsCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 36(b)*; *American Auto. Ass'n v. AAA Legal Clinic, 930 F.2d 1117, 1119 (5th Cir. 1991)*

; *Upchurch v. USTNET, Inc., 160 F.R.D. 131, 132 (D. Ore. 1995)* ; *see § 19.60[1].*

(n2)Footnote 2. *See § 19.60[2].*

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CHAPTER 19 Requests to Admit
D. Seeking Withdrawal, Amendment, or Late Response

2-19 Federal Litigation Guide §§ 19.64 through 19.99

[Reserved]

§§ 19.64[Reserved]

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CHAPTER 19 Requests to Admit
E. Forms

2-19 Federal Litigation Guide § 19.100

§ 19.100 Request for Admission

[1] FORM

Request for Admission

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

Request for Admission

[*Party designation and name of requesting party*] requests [*party designation and name of party from whom admissions are sought*] within 30 days after service of this request to admit, for the purpose of this action only and subject to all pertinent objections to admissibility that may be interposed at the trial, the truth of the following matters for purposes of this action.

Under the provisions of *Federal Rules of Civil Procedure, Rule 36*, you are required to respond to the Request for Admission, in writing, within 30 days of the service of this request. Your response must be signed as required by *Federal Rules of Civil Procedure, Rule 26(g)*. If you fail to respond to the Request for Admission within 30 days of service, every matter set forth in this request may be deemed admitted and conclusively established against you for purposes of this action.

REQUEST No. 1: [*State matter on which admission is requested*].

REQUEST No. 2: [*State matter on which admission is requested*].

REQUEST No. 3: [*State matter on which admission is requested*].

[*Date*]

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for [*name of party*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

TO: [*Name of counsel for party from whom admissions are sought*], Attorney for [*name of party from whom admissions are sought*]
[*Address of counsel*]

[2] Use of Form

This is a form of request for admission for use by a party seeking admitted facts from an opposing party.

[3] Subject Matter of Requests

A party may serve a written request for the admission of any matters within the scope of Rule 26(b) that relates to the following: n1

- Statements or opinions of fact
- The application of law to fact
- The genuineness of any documents described in the request

[4] Each Matter Must Be Described Separately

Each matter of which an admission is requested must be separately set forth. n2

[5] Signature Required

Requests to admit must be signed by the propounding party's attorney, and must state the signer's address, e-mail address, and telephone number. n3

[6] Rule 26(f) Meeting May Be Required Prior to Formal Discovery

Under the Federal Rules, formal discovery must await the parties' initial discovery planning meeting, as required by Rule 26(d) and (f). n4

[7] Service and Filing

The signed request for admission must be served on the party from whom the admission is requested and copies of the request must be served on all other parties in the case in accordance with Rule 5(a). Service may be made on a party by mail to his or her last known address, provided that service requirements of Rule 5(b) are met. Service is complete on mailing. Copies of documents must be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Without leave of court or written stipulation, requests for admission may not be served before the time specified in Rule 26(d). n5

Discovery requests and responses shall not be filed unless they are used in the proceedings or the court orders filing. n6

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 36(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 36(a)*; *see § 19.21.*

(n3)Footnote 3. *Fed. R. Civ. P. 26(g)(1).*

(n4)Footnote 4. *Fed. R. Civ. P. 26(d)(1)*, *36(a).*

(n5)Footnote 5. *Fed. R. Civ. P. 5(a)*, *36(a).*

(n6)Footnote 6. *See Fed. R. Civ. P. 5(d).*

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CHAPTER 19 Requests to Admit
E. Forms

2-19 Federal Litigation Guide § 19.101

§ 19.101 Response to Request for Admission

[1] FORM

Response to Request for Admission

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

Answers and Objections to Request for Admission

Party designation and name of responding party], answers and objects to the request for admission served on him (or her) by [*party designation and name of requesting party*] on[*date*] as follows:

REQUEST No. 1: [*Reproduce request*]

ANSWER to Request No. 1: [*Admission, denial, or statement of inability to admit or deny, including assertion of reasonable inquiry and partial response if possible*]

REQUEST No. 2: [*Reproduce request*]

OBJECTION to Request No. 2: [*Reasons for objection*]

[*Date*]

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for [*name of party*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local*

district court rules]

TO: [*Name of counsel for requesting party*], Attorney for [*name of party*]
[*Address of counsel for requesting party*]

[2] Use of Form

This is a form of response to a request for admission. The response includes samples for answers and objections and must be modified to suit each request and response.

[3] Responses Required to Avoid Admission

A matter stated in a request for admission is admitted unless, within 30 days after service of the request, or within such shorter or longer times as the court may allow, the party to whom the request is directed serves on the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. n1

[4] Denials and Objections Must Be Specific

If objection is made, the reasons for the objection must be stated. The answer must specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial must fairly meet the substance of the requested admission. When good faith requires that a party qualify his or her answer or deny only a part of the matter of which an admission is requested, he or she must specify so much of it as is true and qualify or deny the remainder. n2

[5] Lack of Knowledge Must Be Supported by Reasonable Inquiry

An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he or she states that he or she has made reasonable inquiry and that the information known or readily obtainable by him or her is insufficient to enable him or her to admit or deny. n3

[6] Genuine Trial Issue Must Be Addressed

A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request. He or she may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why he or she cannot admit or deny it. n4

[7] Service and Filing

The responding party must serve the original response on the requesting party or attorney for the represented party and serve copies on all other parties in the case in accordance with Rule 5. Service may be made by delivery, by mail, by electronic or other means under Rule 5(b)(2)(D), or to the clerk of the court if there is no known address. n4.1 Service by mail is complete on mailing. n5 Service by electronic means is complete on transmission, and service by other consented means under Rule 5(b)(2)(D) is complete when the person making service delivers the copy to the agency designated to make delivery. n5.1 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. n5.2

Discovery requests and responses shall not be filed unless they are used in theproceedings or the court orders filing. n6

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 36(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 36(a)*; *see § 19.41[1]*.

(n3)Footnote 3. *Fed. R. Civ. P. 36(a)*; *see § 19.45*.

(n4)Footnote 4. *Fed. R. Civ. P. 36(a)*; *see Fed. R. Civ. P. 37(c)(2)*; *see also § 19.47[1]*.

(n5)Footnote 4.1. *Fed. R. Civ. P. 5(b)*.

(n6)Footnote 5. *Fed. R. Civ. P. 5(b)(2)(C)*.

(n7)Footnote 5.1. *Fed. R. Civ. P. 5(b)(2)(F)*.

(n8)Footnote 5.2. *Fed. R. Civ. P. 5(b)(2)(E)*.

(n9)Footnote 6. *See Fed. R. Civ. P. 5(d)*.

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CHAPTER 19 Requests to Admit
E. Forms

2-19 Federal Litigation Guide § 19.102

§ 19.102 Notice of Motion for Leave to Withdraw or Amend Admission

[1] FORM

Notice of Motion for Leave to Withdraw or Amend Admission

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

NOTICE IS HEREBY GIVEN that on [*date*] at [*time of day (specify a.m. or p.m.)*], or as soon thereafter as counsel may be heard, [*party designation and name of responding party*] will move this Court, at the United States Courthouse located at [*address of Court*], Courtroom [*courtroom number*], for an order:

(a) pursuant to *Federal Rules of Civil Procedure, Rule 36(b)*, to [withdraw *or* amend] [his/her] admissions to Requests No. [*numbers*] given by [him/her] on [*date*] in response to the Request for Admission served by [*party designation and name of requesting party*] on [*date*], on the ground that [*state basis of motion*]; and

(b) granting [*moving party*] such other incidental relief as may be appropriate.

This motion is based on this Notice of Motion, the accompanying Affidavit (*or appropriate affidavit substitute*) of [*name of signatory*] sworn to (*or dated*) [*date*], the accompanying Memorandum of Law [*if required*] dated [*date*], and on all of the pleadings and papers on file in this action.

[*Date*]

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for [*name and designation of party*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

TO: [*Name of opposing counsel*], Attorney for [*name of party*]

[2] Use of Form

This is a form of notice of motion for use by a party who responded to a request for admission to obtain an order to withdraw or amend certain admissions made in the response.

[3] Grounds for Withdrawal or Amendment of Admissions

A court may permit withdrawal or amendment of an admission on motion by the party who responded to a request for admission. The court may grant the motion, subject to *Fed. R. Civ. P. 16* (amendment of pretrial order) if both of the following requirements are present: n1

- The presentation of the merits of the action will be subserved by the withdrawal or amendment
- The party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits

[4] Timing of Motion

A motion to withdraw or amend an admission must be filed as quickly as possible after determining that motion is required. This is true even if the requested matters have been deemed admitted because of a failure to respond to the request in a timely fashion. n2

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 36(b).*

(n2)Footnote 2. *See § 19.61.*

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CHAPTER 20 Inspection of Land and Other Tangibles *

2-20 Federal Litigation Guide 20.syn

§ 20.syn Synopsis to Chapter 20: Inspection of Land and Other Tangibles *

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§ 20.02 Use Limited to Pending Action

§ 20.03 Use Generally Limited to Pretrial Discovery

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§ 20.06 Comparing Rule 34 Discovery With Subpoena to Nonparty Under Rule 45

§ 20.07 Ensuring Timely Request
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[2] Mandatory Disclosure Provisions Generally Affect Timing
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§ 20.08 Ensuring Request Seeks Discoverable Matter
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§ 20.12 Certifying Requests

§ 20.13 Serving Appropriate Parties

§ 20.14 CHECKLIST: Drafting Rule 34 Document Request

§§ 20.15 through 20.19 [Reserved]

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§ 20.22 Moving for a Protective Order

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[1] Form
Request for Inspection of Property
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CHAPTER 20 Inspection of Land and Other Tangibles *

2-20 Federal Litigation Guide Scope

Scope

SCOPE

This chapter focuses on inspection of tangible things and entry upon designated land or other property pursuant to *Fed. R. Civ. P. 34*. Any party may serve on any other party a request to inspect and copy, test, or sample tangible things which are in the possession, custody or control of the party upon whom the request is served; or to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property. The chapter deals with the substantive and procedural matters that are unique to the inspection of land and tangible things under Rule 34. The inspection of tangible things and land in the possession of nonparties is governed by Rule 45 and discussed in Ch. 13, *Production of Documents*.

The chapter outlines the key legal, strategic, and tactical issues concerning inspection requests, including the procedural and substantive requirements for requests. Local rules must be consulted before proceeding under Rule 34, as district courts may impose procedural requirements and limitations in addition to those found in the Federal Rules of Civil Procedure.

The chapter includes a sample request for documents, and discusses procedural requirements and use of the form.

For related coverage, see Ch. 13, *Production of Documents*, Ch. 14, *Document Responses*, and Ch. 15, *Management of Documents*.

For expanded coverage of inspections of land, *see* Moore's Federal Practice, Ch. 34, *Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes* (Matthew Bender 3d ed.).

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CHAPTER 20 Inspection of Land and Other Tangibles *
A. Using Rule 34 Requests to Inspect Tangible Things, Land, and Other Property

2-20 Federal Litigation Guide § 20.01

§ 20.01 Scope of Discovery Under Rule 34

Fed. R. Civ. P. 34 authorizes and provides a procedure for the inspection of documents and tangible things in the possession custody, or control of a party, as well as the inspection of land possessed or controlled by a party. n1

This chapter focuses on discovery of tangible things and inspection of land and other property. n2 Rule 34 authorizes not only inspection and copying, but also testing or sampling of tangible things, and permits such procedures as the testing of allegedly defective machinery or equipment and the sampling or analysis of chemicals. n3 Rule 34 also permits entry upon designated land or other property in the possession or control of a party for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation on it. n4

Rule 34 is most commonly employed to request production of documents. For that reason, most of the substantive, procedural and tactical issues that are likely to arise under Rule 34 are discussed in the chapter relating to the discovery of documents in general; see Ch. 13, *Production of Documents*. A person not a party to the action may be compelled to submit to an inspection as provided in Rule 45. The procedure for requesting inspection from nonparties under Rule 45 is discussed in Ch. 13, *Production of Documents*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 34(a)(1).*

(n2)Footnote 2. *See Fed. R. Civ. P. 34.*

(n3)Footnote 3. *See Fed. R. Civ. P. 34(a)(1).*

(n4)Footnote 4. *See Fed. R. Civ. P. 34(a)(2).*

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CHAPTER 20 Inspection of Land and Other Tangibles *
A. Using Rule 34 Requests to Inspect Tangible Things, Land, and Other Property

2-20 Federal Litigation Guide § 20.02

§ 20.02 Use Limited to Pending Action

Rule 34 discovery is only available *after* an action is commenced. n1

Perpetuation proceedings pursuant to *Fed. R. Civ. P. 27* may be used to obtain production or inspection *before* the initiation of a formal action. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(b)(1).*

(n2)Footnote 2. *See Fed. R. Civ. P. 27(a).*

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CHAPTER 20 Inspection of Land and Other Tangibles *
A. Using Rule 34 Requests to Inspect Tangible Things, Land, and Other Property

2-20 Federal Litigation Guide § 20.03

§ 20.03 Use Generally Limited to Pretrial Discovery

Rule 34 is intended to be used principally as a pretrial discovery device. n1

Whether Rule 34 may be used at trial is generally made moot by the Rule's 30-dayresponse time, the easy availability of a Rule 45 subpoena, and the existence of court-ordered discovery deadlines. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

FOOTNOTES:
(n1)Footnote 1. *See Goldy v. Beal, 91 F.R.D. 451, 456 (M.D. Pa. 1981)* .

(n2)Footnote 2. *See Fed. R. Civ. P. 16(b), (c).*

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CHAPTER 20 Inspection of Land and Other Tangibles *
A. Using Rule 34 Requests to Inspect Tangible Things, Land, and Other Property

2-20 Federal Litigation Guide § 20.04

§ 20.04 Use Limited to Parties

A Rule 34 discovery demand may be served by any party on any other party. n1

A plaintiff or defendant may serve a request for inspection on a third-party defendant, and vice versa. Co-plaintiffs and co-defendants may serve Rule 34 requests on each other. n2

Inspection requests against nonparties are governed by Rule 45. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 34(a).*

(n2)Footnote 2. *See Biben v. Card, 119 F.R.D. 421, 424-425 (W.D. Mo. 1987) .*

(n3)Footnote 3. *See Fed. R. Civ. P. 34(c), 45(d).*

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CHAPTER 20 Inspection of Land and Other Tangibles *
A. Using Rule 34 Requests to Inspect Tangible Things, Land, and Other Property

2-20 Federal Litigation Guide § 20.05

§ 20.05 No Limit on Number of Requests for Production and Inspection

The Federal Rules of Civil Procedure place no limits on the number of requests permitted under Rule 34. Local rules must be consulted for local limitations. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

FOOTNOTES:
(n1)Footnote 1. *See e.g.*, M.D. Ga.. L.R. 34 (limited to 10 requests "[e]xcept with written permission of the court first obtained").

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CHAPTER 20 Inspection of Land and Other Tangibles *
A. Using Rule 34 Requests to Inspect Tangible Things, Land, and Other Property

2-20 Federal Litigation Guide § 20.06

§ 20.06 Comparing Rule 34 Discovery With Subpoena to Nonparty Under Rule 45

Rule 34 governs the pretrial production and inspection of documents, electronically stored informations and "things" from a party and the entry on a party's premises. n1 Rule 45 is the corresponding provision used when a party desires to obtain such materials in the possession of a nonparty in advance of trial. n2

The procedure for requesting inspection from nonparties under Rule 45 is discussed in Ch. 13, *Production of Documents*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 34(a).*

(n2)Footnote 2. *See Fed. R. Civ. P. 34(c)*; *see also Contardo v. Merrill Lynch, Pierce, Fenner & Smith, 119 F.R.D. 622, 624 (D. Mass. 1988)* .

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CHAPTER 20 Inspection of Land and Other Tangibles *
A. Using Rule 34 Requests to Inspect Tangible Things, Land, and Other Property

2-20 Federal Litigation Guide § 20.07

§ 20.07 Ensuring Timely Request

[1] Restrictions on Timing of Discovery

Rule 34 requests may be served as determined by:

- Time limits prescribed by federal statutes and local rules. n1
- Agreement of the parties. n2
- Order of the court. n3

In most cases, the parties' Rule 26(f) preliminary discovery conference is the event triggering the opening of formal discovery, including Rule 34 requests for inspection. Rule 26(d) disallows parties from seeking discovery before the conference, unless there is a contrary order or agreement of the parties. n4

[2] Mandatory Disclosure Provisions Generally Affect Timing

Except in certain categories of cases, Rule 26(a) requires parties to exchange specified types of information at specified times throughout the litigation, absent court order or stipulation. n5

A court may strike as untimely a Rule 34 request that seeks the same information required by the mandatory disclosure requirements of Rule 26(a) if the Rule 34 request is served before the Rule 26(a) disclosures are due. This general prohibition does not prevent otherwise timely discovery under Rule 34 of independently discoverable things not generated for purposes of mandatory disclosure. n6

For further discussion of how mandatory disclosure provisions may affect timing of inspection demands, see Ch. 13, *Production of Documents*.

[3] Request May Be Untimely If Served After Discovery Cutoff Date

When the court enters a Rule 16(b) scheduling order setting the time for completion of discovery, a party must seek permission from the court to serve Rule 34 requests that seek inspection after the cutoffdate. This rule applies whether

service of the request is accomplished before or after the cutoff date. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedurePretrial MattersConferencesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 26, 34.*

(n2)Footnote 2. *Fed. R. Civ. P. 26(f), 34(b)(2)(A).*

(n3)Footnote 3. *Fed. R. Civ. P. 34(b)(2)(A).*

(n4)Footnote 4. *See Fed. R. Civ. P. 26(d), (f).*

(n5)Footnote 5. *See Fed. R. Civ. P. 26(a).*

(n6)Footnote 6. *See Fed. R. Civ. P. 26(a)(1)-(3).*

(n7)Footnote 7. *See Fed. R. Civ. P. 16(b).*

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CHAPTER 20 Inspection of Land and Other Tangibles *
A. Using Rule 34 Requests to Inspect Tangible Things, Land, and Other Property

2-20 Federal Litigation Guide § 20.08

§ 20.08 Ensuring Request Seeks Discoverable Matter

[1] General Rule: Rule 34 May Be Used to Inspect Tangible Things or Land

Any party may serve on any other party a request to inspect and copy, test, or sample tangible things which are in the possession, custody or control of the party upon whom the request is served; or to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose ofinspection and measuring, surveying, photographing, testing, or sampling the property. n1

The production of tangible things and the inspection of land or other property is not limited by:

- The admissibility of the evidence at trial. n2
- The requesting party's prior knowledge of or access to the matters sought. n3

Note, however, that Rule 34 discovery is subject to Rule 26(b), which allows a court to limit discovery that it finds cumulative or duplicative, burdensome or expensive, or directed at information that the discovering party already has within its control. n4

[2] Limitations to General Rule

[2.--1] Discoverable Matter Must Be Relevant

Discovery under Rule 34 is limited to information that is relevant to the claim or defense of any party. n5 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 trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. n6

[2.--2] Unnecessary or Burdensome Requests May Be Barred

The court may limit Rule 34 requests if: n7

- The request is unreasonably cumulative or duplicative.

- The requesting party has had ample opportunity by discovery to obtain the information.
- The burden or expense of the request outweighs its likely benefit.

[2.--3] Discoverable Matter May Be Protected by Work Product Doctrine

The work product doctrine protects tangible things used in preparation for trial that reveal an attorney's legal theories, strategy, evaluation of strengths and weaknesses, and mental impressions. n8

[2.--4] Discoverable Matter May Be Protected by Privilege

Discovery under Rule 34 is limited to information that is not privileged. Discovery of privileged information is not permitted even if the information is relevant to the subject matter of the action. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryRelevanceCivil ProcedureDiscoveryUndue Burdens

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 34(a)(1), (a)(2).*

(n2)Footnote 2. *See Seattle Times Co. v. Rhinehart, 467 U.S. 20, 29-30, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984) .*

(n3)Footnote 3. *See* Italia di *Navigazione, S.p.A. v. M.V. Hermes I, 564 F. Supp. 492, 495 (S.D.N.Y.) , aff'd on other grounds, 724 F.2d 21 (2d Cir. 1983)* (citing **Moore's**); *see also Burton Mechanical Contractors, Inc. v. Foreman, 148 F.R.D. 230, 236 (N.D. Ind. 1992) .*

(n4)Footnote 4. *Fed. R. Civ. P. 26(b)(2).*

(n5)Footnote 5. *See Fed. R. Civ. P. 26(b)(1).*

(n6)Footnote 6. *Fed. R. Civ. P. 26(b)(1).*

(n7)Footnote 7. *See Fed. R. Civ. P. 26(2)(b); Schwab v. Wyndham Int'l, Inc., 225 F.R.D. 538, 539 (N.D. Tex. 2005) .*

(n8)Footnote 8. *Fed. R. Civ. P. 26(b)(3), (4); Hickman v. Taylor, 329 U.S. 495, 511-512, 67 S. Ct. 385, 91 L. Ed. 451 (1947) .*

(n9)Footnote 9. *See Fed. R. Civ. P. 26(b)(1).*

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CHAPTER 20 Inspection of Land and Other Tangibles *
A. Using Rule 34 Requests to Inspect Tangible Things, Land, and Other Property

2-20 Federal Litigation Guide § 20.09

§ 20.09 Inspecting "Tangible Things"

[1] Defining "Tangible Things"

Courts generally accord "tangible things" a broad, common sense meaning that includes practically everything that is not a document, land, or other form of property covered under Rule 34. n1

Examples of things held subject to an order for production include:

- Dead body. n2
- Fingerprints. n3
- Vaccine samples. n4

[2] "Tangible Things" Includes Computer Software and Hardware

In addition to supplying raw electronic data, a party may also be ordered to produce the software and supporting materials the requesting party needs to make the computer data readable on its own equipment, including operating systems, applications, computer-generated models, and other sets of instructions found in computer memory. n5

Discovery of the computer software needed to process raw electronic data can become especially important when the responding party has made its own unique modificationsto standard software programs. n6

Production of computer hardware may be necessary if the hardware is at issue in the case or is essential to the manipulation of the data. n7

Counsel may wish to consider requesting actual entry into the opposing party's computer system. An expert in information retrieval may be able to find documents that the opposing party "deleted" but which remain accessible. Actual entry into the computer system of another party to obtain data orinformation may be permissible when there is no less intrusive manner available to obtain the information sought, and when measures can be taken to prevent the discovering party from accessing confidential or privileged information and harming the discovered party's computer and data bases. Any order for such discovery should define parameters of time and scope, and place sufficient access

restrictions to protect the party from whom discovery is requested.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

FOOTNOTES:
(n1)Footnote 1. *See, e.g., Zalatuka v. Metropolitan Life Ins. Co., 108 F.2d 405, 405-406 (7th Cir. 1939)* .

(n2)Footnote 2. *See, e.g., Zalatuka v. Metropolitan Life Ins. Co., 108 F.2d 405, 405-406 (7th Cir. 1939)* (proceedings stayed while body exhumed).

(n3)Footnote 3. *See Alford v. Northeast Ins. Co., 102 F.R.D. 99, 101 (N.D. Fla. 1984)* (fingerprints found relevant (citing **Moore's**)).

(n4)Footnote 4. *See Williams v. American Cyanamid, 164 F.R.D. 608, 611 (D.N.J. 1995)* (permitting testing of polio vaccine for HIV-1 virus in action when child allegedly contracted AIDS from polio vaccine).

(n5)Footnote 5. *See Williams v. E.I. du Pont de Nemours & Co., 119 F.R.D. 648, 651 (W.D. Ky. 1987)* (ordering production of computer disc with "codebooks," user's manual, and all documents used in encoding data on disc).

(n6)Footnote 6. *See Armstrong v. Bush, 139 F.R.D. 547, 553-554 (D.D.C. 1991)* .

(n7)Footnote 7. *See Haseotes v. Abacab Int'l Computers, Inc., 120 F.R.D. 12, 15 (D. Mass. 1988)* .

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CHAPTER 20 Inspection of Land and Other Tangibles *
A. Using Rule 34 Requests to Inspect Tangible Things, Land, and Other Property

2-20 Federal Litigation Guide § 20.10

§ 20.10 Inspecting Land and Other Property

[1] Gaining Entry on Premises

Rule 34 authorizes a request to a party to permit entry upon designated land "or other property" for the purpose of inspecting, measuring, surveying, photographing, testing, or sampling the property or any object or operation located on the property. n1

The Rule has been used to obtain entry to the following:

- Manufacturing facilities. n2
- Schools. n3
- State mental health facilities. n4
- Ships. n5

The property must be within the possession or control of a party to the litigation in order for access to be obtained under Rule 34. n6

[2] Limitations on Use for Entry of Property

The scope of a request to enter on property is limited only by the broad scope of examination permitted by Rule 26(b). n7

As is the case with the inspection of documents, a court may set conditions governing the entry onto property and any related acts to safeguard against unnecessary disruptions and to protect against unwarranted disclosures. n8

It may be permissible for a court to order the inspecting party to pay compensation if any damage occurs during the course of the inspection or testing. n9

[3] Testing of Property and Other Permissible Acts

Rule 34(a)(2) allows a party to perform various acts in connection with entry onto property, including observation, testing, and photographing. n10

When appropriate, access should be allowed to any consultants and experts a party needs to adequately perform the inspection and related acts. n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 34(a).*

(n2)Footnote 2. *See, e.g., Cuno Inc. v. Pall Corp., 116 F.R.D. 279, 280-281 (E.D.N.Y. 1987)* ; *Eirhart v. Libbey-Owens-Ford Co., 93 F.R.D. 370, 371-372 (N.D. Ill. 1981)* .

(n3)Footnote 3. *See, e.g., City of Kingsport v. SCM Corp., 352 F. Supp. 287, 288 (E.D. Tenn. 1972)* .

(n4)Footnote 4. *See, e.g., N.O. v. Callahan, 110 F.R.D. 637, 640 (D. Mass. 1986)* ; *New York State Ass'n for Retarded Children v. Carey, 706 F.2d 956, 960-961 (2d Cir.)* , *cert. denied, 464 U.S. 915 (1983)* .

(n5)Footnote 5. *See, e.g., Mulligan v. Eastern S.S. Lines, Inc., 6 F.R.D. 601, 606 (S.D.N.Y. 1946)* .

(n6)Footnote 6. Rule 45 may be utilized to obtain access when the property is in the control of a nonparty; see Ch. 13, *Production of Documents* for further discussion.

(n7)Footnote 7. *Fed. R. Civ. P. 34(a)(2)*; *see Cuno Inc. v. Pall Corp., 116 F.R.D. 279, 281 (E.D.N.Y. 1987)* (party need not show "need" for inspection, as scope is governed by "relevance" as set forth in *Fed. R. Civ. P. 26(b)*).

(n8)Footnote 8. *N.O. v. Callahan, 110 F.R.D. 637, 640-641 (D. Mass. 1986)* ; *National Dairy Prods. Corp. v. L.D. Schreiber & Co., 61 F.R.D. 581, 583 (E.D. Wis. 1973)* .

(n9)Footnote 9. *Martin v. Reynolds Metals Corp., 297 F.2d 49, 57 (9th Cir. 1961)* (order permitting inspection of cattle and taking urine samples required compensation for any damage done).

(n10)Footnote 10. *See New York State Ass'n for Retarded Children v. Carey, 706 F.2d 956, 960 (2d Cir.)* , *cert. denied, 464 U.S. 915 (1983)* ; *see also N.O. v. Callahan, 110 F.R.D. 637, 640 (D. Mass. 1986)* ; *United States v. Bunker Hill Co., 417 F. Supp. 332, 333 (D. Idaho 1976)* ; *Morales v. Turman, 59 F.R.D. 157, 159 (E.D. Tex. 1972)* .

(n11)Footnote 11. *New York State Ass'n for Retarded Children v. Carey, 706 F.2d 956, 960 (2d Cir.)* , *cert. denied, 464 U.S. 915 (1983)* ; *see also Eirhart v. Libbey-Owens-Ford Co., 93 F.R.D. 370, 372 (N.D. Ill. 1981)* .

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CHAPTER 20 Inspection of Land and Other Tangibles *
A. Using Rule 34 Requests to Inspect Tangible Things, Land, and Other Property

2-20 Federal Litigation Guide § 20.11

§ 20.11 Making Requests Specific

[1] Making Requests in Writing

Rule 34 requests must be in writing. n1 A court may refuse to compel production if it finds the formalities of Rule 34 are not satisfied. n2

[2] Complying With Required Formalities

[2.--1] Identifying Requested Items Individually or By Category

The request must contain the items to be inspected or produced, identified either by individual item or by category. n3

It is good practice to number sequentially each particular request.

[2.--2] Describing Requested Items With Reasonable Particularity

Each item in the request must be described with reasonable particularity. The test is whether a reasonable person would know what property is to be inspected pursuant to the request. n4

Reasonable particularity varies according to the facts and circumstances of each case. n5

[2.--3] Description Satisfying Rule 26(a)(1)(B) Also Should Satisfy Rule 34 Requirements

A "description by category and location" satisfying a party's obligations under Rule 26(a)(1)(A)(ii) (mandatory disclosures regarding documents and things relevant to claims or defenses of the parties) should also satisfy the Rule 34(b) requirement to set forth by category the documents to be inspected with reasonable particularity. n6

Consequently, if a party has furnished a description of documents and things pursuant to Rule 26(a)(1)(A)(ii), the opposing party should be able to use that description in a Rule 34(b) inspection request.

[2.--4] Specifying Time for Inspection at Least 30 Days After Service of Request

The requesting party chooses the time for inspection. The time chosen must be reasonable, and should be at least 30 days after service of the request, extended by three days for service to the clerk if there is no known address, or service by mail or by electronic or other agreed-upon means of delivery. n7

The date chosen for production of the documents should be after the date the response is due, so that the requesting party will know whether the responding party plans to produce the items.

[2.--5] Party May Seek Change in Requested Time

If a party wants more or less time to make a request or to allow for the inspection, the party must do one of the following:

- Obtain an agreement in writing from the opposing party, except that stipulations extending the time for responses may be made only with approval of the court if they would interfere with any time set for completion of discovery, hearing a motion, or for trial. n8

- Obtain a court order. n9

[2.--6] Specifying Reasonable Place and Manner for Inspection

The place and manner of inspection must be reasonable. n10 The place of inspection also is subject to control by the court. n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 34(a)* (requiring service of process).

(n2)Footnote 2. *See Roberts v. Americable Int'l, Inc., 883 F. Supp. 499, 501 n.2 (E.D. Cal. 1995)* ; *see also Schwartz v. Marketing Publishing Co., 153 F.R.D. 16, 20-21 (D. Conn. 1994)* (motion to compel denied as to documents requested in letter).

(n3)Footnote 3. *Fed. R. Civ. P. 34(b).*

(n4)Footnote 4. *Fed. R. Civ. P. 34(b)*; *In re Folding Carton Antitrust Litig., 76 F.R.D. 420, 424 (N.D. Ill. 1977)* (requests comported with reasonable particularity requirement (citing **Moore's**)); *Mallinckrodt Chem. Works v. Goldman, Sachs & Co., 58 F.R.D. 348, 354 (S.D.N.Y. 1973)* (citing **Moore's**); *Camco, Inc. v. Baker Oil Tools, Inc., 45 F.R.D. 384, 386-387 (S.D. Tex. 1968)* (basing test on person of "ordinary intelligence").

(n5)Footnote 5. *Robbins v. Camden City Bd. of Educ., 105 F.R.D. 49, 60 (D.N.J. 1985)* (request for all documents that "refer or relate to" plaintiff was too broad and ambiguous to satisfy particularity standard because all documents in defendant's possession could relate to plaintiff in some way); *Westhemeco Ltd. v. New Hampshire Ins. Co., 82 F.R.D. 702, 709 (S.D.N.Y. 1979)* (plaintiff failed to request documents with reasonable particularity); *In re Folding Carton Antitrust Litig., 76 F.R.D. 420, 424 (N.D. Ill. 1977)* (requests comported with reasonable particularity requirement).

(n6)Footnote 6. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 230, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)* ; *see also Fed. R. Civ. P. 26(a)(1)* advisory committee's note (1993).

(n7)Footnote 7. *Fed. R. Civ. P. 6(d), 34(b).*

(n8)Footnote 8. *Fed. R. Civ. P. 34(b)(2)(A); see Fed. R. Civ. P. 29(b).*

(n9)Footnote 9. *Fed. R. Civ. P. 34(b)(2)(A); Fed. R. Civ. P. 26(c)(1)(B).*

(n10)Footnote 10. *Fed. R. Civ. P. 34(b)(1)(B).*

(n11)Footnote 11. *See Fed. R. Civ. P. 26(c)(1)(B), 34(b).*

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2-20 Federal Litigation Guide § 20.12

§ 20.12 Certifying Requests

If the requesting party is represented by counsel, the requests must be signed by at least one attorney of record. The attorney must include his or her address, e-mail address, and telephone number. n1 An unrepresented party must certify the requests personally and state his or her address, e-mail address, and telephone number. n2

If the request lacks proper certification, no action need be taken with respect to it by the other parties, and the court will strike the request, unless it is promptly signed after the omission is called to the requestor's attention. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(g)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(g)(1).*

(n3)Footnote 3. *Fed. R. Civ. P. 26(g)(2).*

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CHAPTER 20 Inspection of Land and Other Tangibles *
A. Using Rule 34 Requests to Inspect Tangible Things, Land, and Other Property

2-20 Federal Litigation Guide § 20.13

§ 20.13 Serving Appropriate Parties

A Rule 34 request must be served on the party to whom it is directed and on all other parties in the action, unless the court directs otherwise. Service usually is made by delivery or by mail to each party's attorney of record. n1 Service may also be made byelectronic or other means consented to in writing, or to the clerk of the court if there is no known address. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProcedureCounselGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 5(a), (b), 34(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 5(b)(2)(E), (F).*

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2-20 Federal Litigation Guide § 20.14

§ 20.14 CHECKLIST: Drafting Rule 34 Document Request

The following checklist may be used as a general guideline for drafting inspection requests under Rule 34:

☐ **Determine party status.** Determine whether the person or entity to whom the request is to be directed is a party to the action

☐ **Determine when requests will be served.** Determine when requests will be served, considering:

- ☐ **Conference requirements.** Ascertain that parties have conferred as required by Rule 26(f), unless a stipulation or court order provides otherwise.
- ☐ **Local rules.** Review local rules for any exceptions to general rule for service of papers.
- ☐ **Shortening time.** Consider whether a motion for shortening time for service of responses and objections is appropriate.

☐ **Draft requests.** Draft each request keeping in mind the following issues:

- ☐ **Useful information.** Is the request precisely calculated to elicit information useful to the proponent?
- ☐ **Mandatory disclosures requirement.** Ensure that request does not seek the same information required by Rule 26 before the time those disclosures are due.
- ☐ **Organization by individual item or by category.** Is the request organized either

by individual item or by category?

☐ **Description with reasonable particularity.** Are the requested documents described with reasonable particularity?

☐ **Designation of time for inspection or production.** Does the request designate a reasonable time for inspection for inspection or copying?

☐ **Date of inspection compared to date of response.** Is the date of inspection set at least 30 days after the request is served?

☐ **Date of inspection compared to date for completion of discovery.** Ensure that the request does not seek production or inspection after the discovery cutoff date.

☐ **Designation of reasonable place, and manner for inspection.** Does the request designate a reasonable place and manner for inspection?

☐ **Number requests sequentially.** Number each request sequentially, as required by applicable local rules.

☐ **Review possible grounds for objections.** Review list of possible grounds for objections, and frame requests, as appropriate, to minimize potential objections.

☐ **Certifying request.** If requesting party is represented by counsel, have at least one attorney of record sign request, and include an address, e-mail address, and telephone number

☐ **Service of requests.** Serve requests within appropriate time frame.

☐ **Certificate of service.** Attach certificate of service, if required by local rules.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMethodsStipulationsGovernmentsCourtsRule Application & Interpretation

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2-20 Federal Litigation Guide §§ 20.15 through 20.19

[Reserved]

§§ 20.15[Reserved]

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CHAPTER 20 Inspection of Land and Other Tangibles *
B. Responding to Inspection Request

2-20 Federal Litigation Guide § 20.20

§ 20.20 Time For Response to Inspection Request Set by Rule 34(b)

A party served with an inspection request under Rule 34 generally has 30 days to file a written response. n1

The court has the discretion to shorten or lengthen the 30-day time period for a response to an inspection request, and the parties may agree in writing to a shorter or longer time, subject to Rule 29. n2 Rule 29 requires court approval of any stipulation extending the time to respond to a Rule 34 request if the extension would interfere with a discovery cut-off date, a motion hearing, or trial. n3

If a shorter time has not been ordered by the court or agreed to between the parties but the requesting party has nevertheless specified a time for production that is less than the time allowed by the Rule for a response, the party may not move to compel discovery under Rule 37(a) until the time allowed by Rule 34 has expired. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 34(b)(2)(A).*

(n2)Footnote 2. *Fed. R. Civ. P. 34(b)(2)(A); Smith v. Conway Org., Inc., 154 F.R.D. 73, 76 (S.D.N.Y. 1994)* (agreement to extend time to respond to document request must be in writing to be enforceable).

(n3)Footnote 3. *Fed. R. Civ. P. 29.*

(n4)Footnote 4. *See GFI Computer Indus., Inc. v. Fry, 476 F.2d 1, 3-4 (5th Cir. 1973)* (plaintiff had requested production in less than allotted time and had filed motion under Rule 37 before expiration of that time).

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CHAPTER 20 Inspection of Land and Other Tangibles *
B. Responding to Inspection Request

2-20 Federal Litigation Guide § 20.21

§ 20.21 Form of Response

[1] Responding Party Must Produce, Allow Inspection, or State Objection

There are three basic appropriate responses to a request for production: n1

- An objection to the scope, time, method, and manner of the requested production.
- An answer agreeing to the requested scope, time, place, and manner of production.
- A response offering a good faith, reasonable alternative production that is definite in scope, time, place or manner.

Local rules in numerous courts mandate the format for such responses; specifically that each request be set forth with its particular response provided just below. n2

If the responding party fails to make a timely objection, or fails to comply with the provisions of the Rule regarding the manner of making objections, the party may be held to have waived its objections. n3

[2] Reasons For Objections Must Be Given

If a party responding to a Rule 34 request objects to a particular item or category of the request, the reason for the objection must be stated. If the party objects to the production of an item or category in part rather than in its entirety, the objection must specify the part to which the objection pertains. n4

An objection to a Rule 34 request must clearly set forth the specifics of the objection and how that objection relates to the documents being demanded. n5

[3] Waiver of Privilege Objections

When claiming a privilege or trial preparation protection to a Rule 34 request, a party must make the claim expressly, and must describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the

privilege or protection. n6 The failure to make a timely and proper privilege objection may be found to be a waiver of the objection. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

FOOTNOTES:
(n1)Footnote 1. *Jayne H. Lee, Inc. v. Flagstaff Indus. Corp., 173 F.R.D. 651, 656 (D. Md. 1997)* .

(n2)Footnote 2. *See, e.g.*, E.D. Mich. L.R. 26.1; D. Del. L.R. 26.1.

(n3)Footnote 3. *Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1473 (9th Cir.)* , *cert. dismissed sub nom. China Everbright Trading Co. v. Timber Falling Consultants, Inc., 506 U.S. 948 (1992)* ; *Marx v. Kelly, Hart & Hallman, 929 F.2d 8, 12 (1st Cir. 1991)* ; *Peat, Marwick, Mitchell & Co. v. West, 748 F.2d 540, 541-542 (10th Cir. 1984)* , *cert. dismissed*, *469 U.S. 1199 (1985)* .

(n4)Footnote 4. *Fed. R. Civ. P. 34(b)(2)(C).*

(n5)Footnote 5. Some courts have local rules requiring that the specific objections be provided. *See, e.g.*, D.R.I. L.R. 13(b)(3) (objection must be "in a paper separate from the answers or response and shall recite in detail the grounds thereof"); N.D. W.Va. L.R. 3.05 (any ground not set forth is deemed waived).

(n6)Footnote 6. *Fed. R. Civ. P. 26(b)(5)*; *First Sav. Bank, F.S.B. v. First Bank Sys., Inc., 902 F. Supp. 1356, 1360 (D. Kan. 1995)* .

(n7)Footnote 7. *See Peat, Marwick, Mitchell & Co. v. West, 748 F.2d 540, 541-542 (10th Cir. 1984)* , *cert. dismissed*, *469 U.S. 1199 (1985)* .

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CHAPTER 20 Inspection of Land and Other Tangibles *
B. Responding to Inspection Request

2-20 Federal Litigation Guide § 20.22

§ 20.22 Moving for a Protective Order

A party from whom Rule 34 discovery is sought may move for a protective order. n1 However, a responding party will more typically elect instead simply to interpose an objection, which will place the burden on the requesting party to make a motion to compel production or inspection under Rule 37(a). n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryProtective Orders

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(c).*

(n2)Footnote 2. *See § 20.21.*

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CHAPTER 20 Inspection of Land and Other Tangibles *
B. Responding to Inspection Request

2-20 Federal Litigation Guide § 20.23

§ 20.23 Moving for an Order to Compel Inspection

If the party from whom production is sought objects to a request or fails to respond,the requesting party may move for an order to compel under Rule 37(a). n1

If the requesting party deems the response to be insufficient in any way, the initiative rests with that party to move for an order compelling production. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMotions to Compel

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 37(a).*

(n2)Footnote 2. *Clinchfield R.R. Co. v. Lynch, 700 F.2d 126, 132 & n.10 (4th Cir. 1983)* (requesting party had merely accepted response that documents requested were not available and therefore could not be produced (citing **Moore's**)).

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CHAPTER 20 Inspection of Land and Other Tangibles *
B. Responding to Inspection Request

2-20 Federal Litigation Guide §§ 20.24 through 20.99

[Reserved]

§§ 20.24 through[Reserved]

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CHAPTER 20 Inspection of Land and Other Tangibles *
C. Forms

2-20 Federal Litigation Guide § 20.100

§ 20.100 Request for Inspection of Property

[1] Form

Request for Inspection of Property

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

Request for Inspection

[*Party designation and name of requesting party*] requests, pursuant to *Federal Rule of Civil Procedure, Rule 34*, that [*party designation and name of responding party*]:

Produce and permit [*party designation and name of requesting party*] to inspect and [*specify, e.g., photograph*] the following: [*list objects or property to be inspected*].

[*Party designation and name of requesting party*] requests that the production described above be made on [*date*] at [*time of day (specify a.m. or p.m.)*]. Inspection will be made by [*specify manner of inspection*].

[*Date*]

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for [*name and designation of party*]

[*Attorney's or firm's address, telephone number, e-mail address, and any other identifying information required by local district court rules*]

[2] Use of Form

This is a form of request for inspection of property or things for use by a party to request inspection from an adverse party.

[3] Contents of Request

A request for inspection of property must contain the following:

- A description of the property to be inspected, identified either by individual item or by category, and described with particularity. n1

- The time for inspection must be reasonable and should be at least 30 days after service of the request, extended by three days for service to the clerk if there is no known address or service by mail or by electronic or otheragreed upon means of delivery. n2

- The place and manner of inspection, which must be reasonable, and is subject to control by the court. n3

[4] Signature Required

Rule 34 requests must be signed by the requesting party's attorney, and include an address, e-mail address, and telephone number. n4

[5] Rule 26(f) Meeting Generally Required Prior to Commencement of Discovery

Under the Federal Rules, Rule 34 requests generally may not be served before the parties have had their initial discovery planning meeting, as required by Rule 26(d) and (f). n5

[6] Request Must Not Conflict With Mandatory Disclosure Obligations

A court may strike as untimely a Rule 34 request that seeks the same information required by Rule 26 before the time those disclosures are due. This general prohibition does not prevent otherwise timely discovery under Rule 34 of independently discoverable documents or things not generated for purposes of mandatory disclosure. n6

[7] Effect of Discovery Cutoff Date

When the court enters a scheduling order under Rule 16(b) setting the time for completion of discovery, a party must seek permission from the court to serve Rule 34 requests that seek production orinspection after the cutoff date. This rule applies whether service is accomplished before or after the cutoff date. n7

[8] Service

A Rule 34 request must be served on the party to whom it is directed and on all other parties in the action, unless the court directs otherwise. Service usually is made by personal delivery or by mail to each party's attorney of record. n8 Service may also be made by electronic or other means consented to in writing. n8.1

[9] Filing Generally Not Permitted

Discovery requests and responses shall not be filed unless they are used in the proceedings or the court orders filing. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 34(b)(1)(A).*

(n2)Footnote 2. *Fed. R. Civ. P. 6(d), 34(b)(2)(A).*

(n3)Footnote 3. *Fed. R. Civ. P. 34(b).*

(n4)Footnote 4. *Fed. R. Civ. P. 26(g)(1).*

(n5)Footnote 5. *Fed. R. Civ. P. 26(d)(1), 34(b).*

(n6)Footnote 6. *See Fed. R. Civ. P. 26(a)(1)-(3).*

(n7)Footnote 7. *See Fed. R. Civ. P. 16(b).*

(n8)Footnote 8. *Fed. R. Civ. P. 5(a), (b), 34(a).*

(n9)Footnote 8.1. *Fed. R. Civ. P. 5(b)(2)(E), (F).*

(n10)Footnote 9. *See Fed. R. Civ. P. 5(d).*

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CHAPTER 21 Physical and Mental Examinations *

2-21 Federal Litigation Guide 21.syn

§ 21.syn Synopsis to Chapter 21: Physical and Mental Examinations *

§ 21.01 Party May Request Mental or Physical Examination Under Rule 35

§ 21.02 Timing of Request

§ 21.03 Persons Who May Be Subject to Examination

§ 21.04 Stipulated Examinations

§ 21.05 CHECKLIST: Determining Whether to Seek a Physical or Mental Examination

§ 21.06 Participating in Motion Practice for Examination Order
[1] Matters That Must Be Addressed in Moving Papers
[2] Conferring With Other Affected Parties Before Filing Motion

§ 21.07 Providing Facts About Proposed Examination in Motion

§ 21.08 Showing That Physical or Mental Condition Is "In Controversy"
[1] Moving Party Has Burden
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[3] Claim Solely for Past Injury Does Not Put Condition at Issue
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§ 21.09 Establishing "Good Cause" Requirement
[1] Moving Party Must Show Necessity
[2] Prior Examination May Affect Determination
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§ 21.10 Selecting "Suitably Licensed or Certified" Examiner
[1] Proposed Examiner Must Be Qualified
[2] Choice Usually Honored by Court

§ 21.11 Selecting Examination Method
[1] Court May Require Showing of Valid and Reliable Examination Method

[2] Court May Require Showing That Examination Is Not Painful or Dangerous

§ 21.12 Regulation of Examination Procedure
[1] Conditions on Examination
[2] Protective Order
[3] Barring Third Persons From Attending Examination
[4] Allowing Presence of Stenographer and Transcription of Examination

§ 21.13 Sanctions for Failure to Comply With Examination Order
[1] Various Sanctions Possible
[2] Dismissal of Noncooperative Personal Injury Plaintiff
[3] Contempt Citation Not Imposed

§ 21.14 CHECKLIST: Opposing a Request or Motion for Physical or Mental Examination

§ 21.15 Seeking Examiner's Report
[1] Examined Party's Entitlement to Report
[2] Report Must Be Provided in Timely Fashion
[3] Noticed Motion Procedure Available to Compel Delivery of Report
[4] Examinee's Entitlement to Like Reports of Other Examinations of Same Condition
[5] Exclusion of Examiner's Testimony for Failure to Make Report
[6] Waiving Privileges
[7] Discovery of Report by Other Methods

§§ 21.16 through 21.99 [Reserved]

§ 21.100 Notice of Motion Requesting Physical or Mental Examination
[2] Use of Form
[3] Grounds for Physical or Mental Examination
[4] Showing Required in Moving Papers

§ 21.101 Affidavit in Support of Physical or Mental Examination
[2] Use of Form
[3] Supporting Documents

§ 21.102 Order Granting Motion for Physical or Mental Examination
[2] Use of Form
[3] Order Based on Motion and Notice
[4] Contents of Order
[5] LOCAL PRACTICE: Agreement or Settlement of Terms of Proposed Order

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CHAPTER 21 Physical and Mental Examinations *

2-21 Federal Litigation Guide Scope

Scope

SCOPE

This chapter covers the examination of parties, or persons in the custody or under the control of a party, when the physical or mental condition of the person is in controversy. The chapter discusses motion practice for orders of examination under Rule 35. It also discusses stipulations for physical and mental examination. The chapter discusses when the physical or mental condition of a person is in controversy, as well as the requirement for "good cause" under Rule 35.

The chapter sets forth regulations of physical and mental examinations, sanctions for failure to comply with examination orders, and opposing motions for examination.

The chapter also discusses the report prepared as a result of the examination. Under Rule 35(b), the examined person may request a copy of the examiner's report, but doing so waives whatever privileges may apply to the person's own medical records and consultations. If no such privilege applies, medical records and opinions are subject to discovery in the same way and to the same extent as other facts, and the "demand and waiver" provisions of Rule 35(b) are essentially irrelevant. Failure to supply the examiner's report may result in the exclusion of the examiner's testimony at trial. Otherwise, either party may introduce and rely on that report.

The chapter also provides a sample notice of motion for an examination, a supporting affidavit, and a sample examination order. Comments to the forms set forth procedural requirements and use of the forms.

For expanded coverage of physical and mental examinations, *see* Moore's Federal Practice, Ch. 35, *Physical and Mental Examinations of Persons* (Matthew Bender 3d ed.).

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CHAPTER 21 Physical and Mental Examinations *

2-21 Federal Litigation Guide § 21.01

§ 21.01 Party May Request Mental or Physical Examination Under Rule 35

Rule 35 provides that whenever the mental or physical condition of a party or of a person in a party's custody or legal control is in controversy, the court, on a motion for good cause shown, may order the party to submit to a physical or mental examination, or to produce the person in the party's control for examination. n1

Although orders for examination are sought most often in personal injury actions, they are potentially available in any type of civil action in which mental or physical condition is at issue. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsMental & Physical Examinations

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 35(a).*

(n2)Footnote 2. *See Schlagenhauf v. Holder, , 13 L.Ed. 2d 152 (1964) see also* In re Letter Rogatory from the *Nedenes Dist. Court, Nor., 216 F.R.D. 277, 279 (S.D.N.Y. 2003)* (blood test permissible in paternity action).

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CHAPTER 21 Physical and Mental Examinations *

2-21 Federal Litigation Guide § 21.02

§ 21.02 Timing of Request

Except when authorized under the Federal Rules of Civil Procedure, or by order or agreement of the parties, a party may not seek discovery under Rule 35 before the parties have conducted the discovery conference required under Rule 26(f). n1

Parties may be able to use the testimony perpetuation mechanisms of Rule 27 to conduct a Rule 35 examination before a court action has been filed or while an appeal is pending, but such discovery is available on a restricted basis, subject to court approval. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsPerpetuation of Testimony

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(d), (f), 30(a)(2)(A)(iii).*

(n2)Footnote 2. *See Fed. R. Civ. P. 27(a), (b); Martin v. Reynolds Metals Corp., 297 F.2d 49, 56 (9th Cir. 1961)* (authorizing use of Rule 34 and Rule 35 discovery in prelitigation perpetuation).

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CHAPTER 21 Physical and Mental Examinations *

2-21 Federal Litigation Guide § 21.03

§ 21.03 Persons Who May Be Subject to Examination

Under Rule 35, the court may order the following persons to submit to an examination provided that physical or mental condition is at issue: n1

- Parties.
- Persons in the custody of or under the legal control of a party.

The purpose of the "person in the custody or under the legal control of a party" language is to make it clear that the court may order a parent or guardian suing for personal injuries on behalf of a minor to produce the minor for examination. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsMental & Physical Examinations

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 35(a)(1).*

(n2)Footnote 2. *See Schempp v. Reniker, 809 F.2d 541, 542-543 (8th Cir. 1987) .*

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CHAPTER 21 Physical and Mental Examinations *

2-21 Federal Litigation Guide § 21.04

§ 21.04 Stipulated Examinations

When it is clear that a party's physical or mental condition is relevant to the case, the parties commonly agree to have anexamination conducted by agreement or stipulation instead of seeking a court order under Rule 35. n1

Examination by agreement is usually preferable to seeking a court order under Rule 35, because:

- It offers the advantage of flexibility in terms of scheduling and setting limits on the scope of the examination.

- The examined party is still entitled to a copy of the examiner's report under Rule 35(b)(3), but the parties may set forth their own arrangement.

If the parties do not agree to an examination, the party seeking the examination must proceed by noticed motion. n2 A party seeking to compel an examination under Rule 35 must proceed by a motion filed within the time period permitted for discovery. The examining party must follow the general rules applicable to timing and format of motions. In addition, the motion must be specific as to the time, place, manner, conditions, and scope of the examination, and the person or persons by whom the examination is to be made. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsStipulations

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 35(b)* advisory committee's note (1970); *see also Fed. R. Civ. P. 29.*

(n2)Footnote 2. *Fed. R. Civ. P. 35(a).*

(n3)Footnote 3. *See § 21.06.*

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CHAPTER 21 Physical and Mental Examinations *

2-21 Federal Litigation Guide § 21.05

§ 21.05 CHECKLIST: Determining Whether to Seek a Physical or Mental Examination

Before seeking a court ordered physical or mental examination under Rule 35, counselshould determine whether the benefits outweigh the disadvantages. This checklist may be used as a guide in making that determination.

☐ **Consider other means of discovery.** Determine whether the information sought can be obtained by other means of discovery, such as production of documents under Rule 34. Such discovery does not carry the obligation to produce an examiner's report that is required under a Rule 35 examination. n1

☐ **Determine whether claims are overstated.** Consult with your own experts to determine whether the claims of the opposing party seem overstated. If they do not, seeking an examination may lead to a report that will be prejudicial to your client. n2

☐ **Evaluate likely outcome of examination.** Consult with your experts on whether the examination is likely to produce information that will benefit your case. Bear in mind, however, that if the examined party demands a copy of the report, he or she may have to furnish reports not otherwise available to the examining party. n3

☐ **Consider other investigative techniques.** Especially in personal injury cases involving alleged injuries or symptoms that cannot be conclusively determined by physical examinations (e.g., back injuries; perceived pain), other investigative techniques, such as surveillance and interviews with neighbors and co-workers, may produce more useful results than a traditional physical examination.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsMental & Physical Examinations

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 35(b)*; *see Fed. R. Civ. P. 34*.

(n2)Footnote 2. *Fed. R. Civ. P. 35(b).*

(n3)Footnote 3. *Fed. R. Civ. P. 35(b).*

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CHAPTER 21 Physical and Mental Examinations *

2-21 Federal Litigation Guide § 21.06

§ 21.06 Participating in Motion Practice for Examination Order

[1] Matters That Must Be Addressed in Moving Papers

A party who wishes to obtain Rule 35 discovery through a court order must proceed by noticed motion. The moving party must:

- Provide specific facts about the proposed examination as required by Rule 35(a). n1
- Show that the medical condition of the proposed examinee is in controversy. n2
- Show good cause that the examination proceed. n3

[2] Conferring With Other Affected Parties Before Filing Motion

Local district court rules typically require parties to attempt informal resolution of discovery disputes prior to filing a motion. Local rules must be consulted.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsMental & Physical Examinations

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 35(a).*

(n2)Footnote 2. *Schlagenhauf v. Holder, 379 U.S. 104, 118-119, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964) .*

(n3)Footnote 3. *Schlagenhauf v. Holder, 379 U.S. 104, 118-119, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964) .*

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CHAPTER 21 Physical and Mental Examinations *

2-21 Federal Litigation Guide § 21.07

§ 21.07 Providing Facts About Proposed Examination in Motion

In the moving papers, the movant must provide specific information as to each of the following aspects of the examination: n1

- Time.
- Place.
- Manner.
- Conditions.
- Scope.
- Person or persons that will conduct examination.

If the moving papers do not make these specifications, the court will not order an examination. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsMental & Physical Examinations

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 35(a).*

(n2)Footnote 2. *See Fed. R. Civ. P. 35(a)*; *see also Schlagenhauf v. Holder, 379 U.S. 104, 119, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964)* .

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CHAPTER 21 Physical and Mental Examinations *

2-21 Federal Litigation Guide § 21.08

§ 21.08 Showing That Physical or Mental Condition Is "In Controversy"

[1] Moving Party Has Burden

The moving party has the burden of showing that the prospective examinee's mental or physical condition is genuinely in controversy. n1

A showing of mere relevance to the case is insufficient to obtain an order of examination. n2

[2] Using Pleadings to Demonstrate That Condition Is in Controversy

In a personal injury case, when the complaint alleges an ongoing physical or psychiatric injury, the movant often can show that the plaintiff's condition is in controversy by referring directly in the moving papers to the plaintiff's claims. n3

[3] Claim Solely for Past Injury Does Not Put Condition at Issue

Claims that are solely for past physical or emotional suffering do not put the claimant's medical condition "in controversy" for purposes of Rule 35 discovery. n4

[4] Making Requisite Showing in Discrimination and Emotional Distress Cases

Employment discrimination and sexual harassment cases typically include allegations that the plaintiff suffered as part of the damages emotional pain, suffering, and mental distress. General allegations of mental anguish are insufficient to put the plaintiff's mental condition in controversy. n5 A plaintiff in an employment discrimination action does not necessarily place his or her mental condition in controversy with a claim for emotional distress when there is no claim for unusually severe distress and no specific psychiatric malady is alleged, particularly when the plaintiff does not intend to offer expert testimony in support of the emotional distress claim. n6

However, a defendant should be able to overcome this obstacle, by placing the mental anguish claim into specific controversy, perhaps through the use of a doctor's affidavit. For example, if the defendant's doctor-consultant is able to say that mental anguish is not customarily associated with the incident involved, or may be short-lived, the defendant should be entitled to have a psychiatric examination.

Note that the following generally are sufficient to put the examinee's condition at issue:

- An allegation of a psychiatric disorder or an ongoing mental or emotional injury. n7

- A separate tort claim for emotional distress. n8

- Retention by the plaintiff of an expert witness specifically to testify regarding the extent of the plaintiff's emotional injuries. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsMental & Physical Examinations

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 35(a)*; *Schlagenhauf v. Holder, 379 U.S. 104, 119, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964)* ; *Bennett v. White Lab., Inc., 841 F. Supp. 1155, 1158 (M.D. Fla. 1993)* ; *Davis v. City of Ellensburg, 651 F. Supp. 1248, 1258 (E.D. Wash. 1987)* .

(n2)Footnote 2. *O'Quinn v. New York Univ. Med. Ctr., 163 F.R.D. 226, 227-228 (S.D.N.Y. 1995)* ; *Bennett v. White Lab., Inc., 841 F. Supp. 1155, 1158 (M.D. Fla. 1993)* .

(n3)Footnote 3. *Schlagenhauf v. Holder, 379 U.S. 104, 119, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964)* .

(n4)Footnote 4. *See Winters v. Travia, 495 F.2d 839, 840-841 (2d Cir. 1974)* .

(n5)Footnote 5. *Ricks v. Abbott Labs., 198 F.R.D. 647, 649-650 (D. Md. 2001)* .

(n6)Footnote 6. *See Bowen v. Parking Auth. of Camden, 214 F.R.D. 188, 194 (D.N.J. 2003)* .

(n7)Footnote 7. *Cauley v. Ingram Micro, Inc., 216 F.R.D. 245, 247 (W.D.N.Y. 2003)* ; *Ali v. Wang Lab., 162 F.R.D. 165, 168 (M.D. Fla. 1995)* ; *Ragge v. MCA/Universal Studios, 165 F.R.D. 605, 608 (C.D. Cal. 1995)* ; *Bridges v. Eastman Kodak Co., 850 F. Supp. 216, 222 (S.D.N.Y. 1994)* (psychiatric disorder); *Duncan v. Upjohn Co., 155 F.R.D. 23, 24-25 (D. Conn. 1994)* ; *Jansen v. Packaging Corp., 158 F.R.D. 409, 410 (N.D. Ill. 1994)* .

(n8)Footnote 8. *Lahr v. Fulbright & Jaworski, 164 F.R.D. 204, 209-210 (N.D. Tex. 1996)* ; *Smith v. J.I. Case Corp., 163 F.R.D. 229, 230-231 (E.D. Pa. 1995)* ; *Bridges v. Eastman Kodak Co., 850 F. Supp. 216, 222 (S.D.N.Y. 1994)* .

(n9)Footnote 9. *Tomlin v. Holecek, 150 F.R.D. 628, 630 (D. Minn. 1993)* .

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CHAPTER 21 Physical and Mental Examinations *

2-21 Federal Litigation Guide § 21.09

§ 21.09 Establishing "Good Cause" Requirement

[1] Moving Party Must Show Necessity

The moving party under Rule 35 must show "good cause" for ordering the examination. n1

Whether good cause is established depends on both relevance and need. n2

[2] Prior Examination May Affect Determination

Good cause for ordering an examination may be lacking if the party's mental or physical condition can be established by referring to a prior examination or other documentary evidence. n3

If the claimant has alleged an ongoing injury or illness, a prior examination probably will not provide an adequate basis for evaluating the party's condition, even if the prior examination yielded voluminous records. n4

The court may also order the examination if the proposed examiners will perform tests not undertaken in the prior examinations. n5

[3] Court May Deny Examination Even If Good Cause Present

Even if good cause is shown, it is still within the court's discretion to determine whether to order an examination. n6 The court will order the examination if it finds that the moving party's right to a fair trial outweighs the party to be examined's right to avoid personal invasion. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsMental & Physical Examinations

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 35(a)*; *see also Storms v. Lowe's Home Centers, Inc., 211 F.R.D. 296, 298 (W.D. Va. 2002)* .

(n2)Footnote 2. *Simpson v. University of Colo., 220 F.R.D. 354, 362 (D. Colo. 2004)* ; *Smith v. J.I. Case Corp., 163 F.R.D. 229, 231 (E.D. Pa. 1995)* .

(n3)Footnote 3. *DeCrescenzo v. Maersk Container Serv. Co., 741 F.2d 17, 21 (2d Cir. 1984)* ; *Plaisted v. Geisinger Med. Ctr., 210 F.R.D. 539, 542 (M.D. Pa. 2002)* (citing **Moore's Federal Practice**); *Moore v. Calavar Corp., 142 F.R.D. 134, 135-136 (W.D. La. 1992)* ; *Stanislawski v. Upper River Servs., 134 F.R.D. 260, 262 (D. Minn. 1991)* .

(n4)Footnote 4. *Duncan v. Upjohn Co., 155 F.R.D. 23, 25 (D. Conn. 1994)* ; *Ziemann v. Burlington County Bridge Comm'n, 155 F.R.D. 497, 501-502 (D.N.J. 1994)* ; *Galieti v. State Farm Mut. Auto. Ins. Co., 154 F.R.D. 262, 263 (D. Colo. 1994)* .

(n5)Footnote 5. *Olcott v. LaFiandra, 793 F. Supp. 487, 492 (D. Vt. 1992)* .

(n6)Footnote 6. *Plaisted v. Geisinger Med. Ctr., 210 F.R.D. 539, 542 (M.D. Pa. 2002)* .

(n7)Footnote 7. *Shirsat v. Mutual Pharmaceutical Co., Inc., 169 F.R.D. 68, 72 (E.D. Pa. 1996)* ; *Sauer v. Burlington Northern R.R. Co., 169 F.R.D. 120, 124 (D. Minn. 1996)* ; *Curtis v. Express, Inc., 868 F. Supp. 467, 468 (N.D.N.Y. 1994)* .

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CHAPTER 21 Physical and Mental Examinations *

2-21 Federal Litigation Guide § 21.10

§ 21.10 Selecting "Suitably Licensed or Certified" Examiner

[1] Proposed Examiner Must Be Qualified

The court may order Rule 35 discovery only if the proposed examiner is "suitably licensed or certified." n1

Qualified examiners include physicians, psychologists, vocational rehabilitation experts, and other certified or licensed professionals. n2

[2] Choice Usually Honored by Court

Courts usually honor the examining party's choice of an examiner. n3

If the parties cannot agree on an examiner, the court may designate one. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsMental & Physical Examinations

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 35(a).*

(n2)Footnote 2. *See Hill ex rel. Hill v. McNairy County Bd. of Educ., 229 F.R.D. 563, 568 (W.D. Tenn. 2004)* ; *see also Olcott v. LaFiandra, 793 F. Supp. 487, 492 (D. Vt. 1992)* .

(n3)Footnote 3. *Great West Life Assurance Co. v. Levithan, 153 F.R.D. 74, 76 (E.D. Pa. 1994)* ; *Powell v. United States, 149 F.R.D. 122, 123-124 (E.D. Va. 1993)* ; *Olcott v. LaFiandra, 793 F. Supp. 487, 492 (D. Vt. 1992)* ; *Looney v. National R.R. Passenger Corp., 142 F.R.D. 264, 265 (D. Mass. 1992)* .

(n4)Footnote 4. *Jansen v. Packaging Corp., 158 F.R.D. 409, 410-411 (N.D. Ill. 1994)* .

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CHAPTER 21 Physical and Mental Examinations *

2-21 Federal Litigation Guide § 21.11

§ 21.11 Selecting Examination Method

[1] Court May Require Showing of Valid and Reliable Examination Method

In exercising discretion with regard to requested examinations, courts may consider the scientific validity and reliability of the requested examination method. n1

[2] Court May Require Showing That Examination Is Not Painful or Dangerous

The court may refuse to order the examination if it would be painful or dangerous to the party to be examined. n2

If an examination is painful or risky, the court will require a substantial showing of its necessity. n3

Some courts have utilized a "burden-shifting" approach to analyze potentially dangerous examinations. Under this approach, the party to be examined must first show that the proposed test is prima facie dangerous. Once this burden is satisfied, the burden shifts to the party seeking the examination to demonstrate the need for the examination and its safety. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsMental & Physical Examinations

FOOTNOTES:
(n1)Footnote 1. *See, e.g., Usher v. Lakewood Engineering & Mfg. Co., 158 F.R.D. 411, 413 (N.D. Ill. 1994)* .

(n2)Footnote 2. *Hernandez v. Gulf Oil Corp., 21 Fed. R. Serv. 2d 1378, 1379 (E.D. Pa. 1976)* (pain and stress of proposed bone scan outweighed necessity of examination).

(n3)Footnote 3. *See, e.g.*, Waite v. Noble Drilling Corp., 1996 U.S. Dist. LEXIS 469 (E.D. La. Jan. 11, 1996) ; *see also Stinchcomb v. United States, 132 F.R.D. 29, 30 (E.D. Pa. 1990)* .

(n4)Footnote 4. *Pena v. Troup, 163 F.R.D. 352, 353 (D. Colo. 1995)* .

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CHAPTER 21 Physical and Mental Examinations *

2-21 Federal Litigation Guide § 21.12

§ 21.12 Regulation of Examination Procedure

[1] Conditions on Examination

Courts may set terms and conditions on Rule 35 examinations. n1

[2] Protective Order

For good cause shown, the court may issue a protective order to shield the prospective examinee from "annoyance, embarrassment, oppression, or undue burden or expense." n2

[3] Barring Third Persons From Attending Examination

Because the presence of the opposing attorney may inhibit the examiner and also create the possibility that the attorney will become a trial witness, counsel for the party to be examined is usually prohibited from attending the examination. n3

Absent evidence that the proposed examiner intends to use medically unsound or dangerous techniques, the courts usually prevent opposing counsel's expert from attending the examination. n4

[4] Allowing Presence of Stenographer and Transcription of Examination

To prevent undue intrusion on the examination process and for reasons of fairness (there is usually no transcript of the examination by the treating physician), the courts usually do not permit the party to be examined to have the examination transcribed either electronically or by a court stenographer. n5

However, if there is no other effective means of preserving the examined person'sversion of what happened in the examination, such as when the examined person speaks no English, the court may permit a stenographer to be present on the condition that the stenographer does not interfere with the examination. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil

ProcedureDiscoveryMethodsMental & Physical Examinations

FOOTNOTES:

(n1)Footnote 1. *In re American President Lines, Ltd., 929 F.2d 226, 228 (6th Cir. 1991)* ; *DeCrescenzo v. Maersk Container Serv. Co., 741 F.2d 17, 21 (2d Cir. 1984)* ; *Nicholas v. Wyndham Int'l, Inc., 218 F.R.D. 122, 124 (D.V.I. 2003)* .

(n2)Footnote 2. *Fed. R. Civ. P. 26(c)(1)*; *see, e.g., Usher v. Lakewood Eng'g & Mfg. Co., 158 F.R.D. 411, 412-414 (N.D. Ill. 1994)* ; *see also Swift v. Swift, 64 F.R.D. 440, 443 (E.D.N.Y. 1974)* .

(n3)Footnote 3. *Cabana v. Forcier, 200 F.R.D. 9, 12 (D. Mass. 2001)* ; *EEOC v. Grief Bros. Corp., 218 F.R.D. 59, 64 (W.D.N.Y. 2003)* ; *but see Marsch v. Rensselaer County, 218 F.R.D. 367, 371 (N.D.N.Y. 2003)* (plaintiff with criminal charges pending against him permitted to have his counsel present at mental examination to protect against self-incrimination).

(n4)Footnote 4. *See Underwood v. Fitzgerald, 229 F.R.D. 548, 549 (M.D. Tenn. 2005)* ; *see also Ragge v. MCA/Universal Studios, 165 F.R.D. 605, 609-610 (C.D. Cal. 1995)* .

(n5)Footnote 5. *Tirado v. Erosa, 158 F.R.D. 294, 299 (S.D.N.Y. 1994)* ; *Tomlin v. Holecek, 150 F.R.D. 628, 631-634 (D. Minn. 1993)* .

(n6)Footnote 6. *See Di Bari v. Incaica Cia Armadora, S.A., 126 F.R.D. 12, 14 (E.D.N.Y. 1989)* .

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CHAPTER 21 Physical and Mental Examinations *

2-21 Federal Litigation Guide § 21.13

§ 21.13 Sanctions for Failure to Comply With Examination Order

[1] Various Sanctions Possible

Possible sanctions for failure to comply with an examination order include the following: n1

- Refusing to allow the disobedient party to support or oppose designated claims or defenses or introduce designated matters into evidence.
- Striking pleadings or parts of pleadings.
- Staying the action until the order is obeyed.
- Dismissing the action or parts of the action.

[2] Dismissal of Noncooperative Personal Injury Plaintiff

In a personal injury action, the sanction most likely to be employed by the court against a plaintiff who unjustifiably refuses to comply with an order to submit to an examination by the defendant's examiner is dismissal. n2

[3] Contempt Citation Not Imposed

The court may not impose a contempt citation for disobeying an order to submit to a physical or mental examination. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMisconductCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 37(b)(2)(A).*

(n2)Footnote 2. *Schempp v. Reniker, 809 F.2d 541, 542-543 (8th Cir. 1987)* ; *Sloane v. Thompson, 128 F.R.D. 13, 15 (D. Mass. 1989)* .

(n3)Footnote 3. *Fed. R. Civ. P. 37(b)(2)(A)(vii)*; *Fed. R. Civ. P. 37(b)* advisory committee's note (1970).

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CHAPTER 21 Physical and Mental Examinations *

2-21 Federal Litigation Guide § 21.14

§ 21.14 CHECKLIST: Opposing a Request or Motion for Physical or Mental Examination

Before opposing a request or motion for a physical or mental examination, counsel for the party to be examined should determine if there is anything to be gained by such resistance. Negotiation or simple preparation of the client might yield more fruitful results. The following checklist may aid in that determination:

☐ **Attempt negotiation.** In many cases, especially personal injury cases, there will be no question that the opposing party is entitled to the examination. An agreement will allow for more flexibility than a court-ordered examination, and counsel will still be entitled to review the examiner's report

☐ **Focus on scope of examination.** If it is clear that the opposition is entitled to an examination, focus your efforts on ensuring that the scope of the examination is properly limited. n1

If the motion does not properly specify the time, place, manner, conditions, and scope of the examination, the motion should be denied.

☐ **Ensure that there is no room for examiner discretion.** Take advantage of the court's power to set terms and conditions on the examination and make sure that the examiner has no power to expand the scope of the examination either by conducting tests not specified in the agreement or order or by going into areas not specified in the agreement or order.

☐ **Consider seeking a protective order.** If the proposed examination involves invasive or painful procedures, seek a protective order. n2 Even if the court does not deny the examination outright, it can still ensure that all possible precautions are taken.

☐ **Prepare the client on history.** Assuming an agreement is reached or the examination ordered, advise the client that the examiner will probably take a history. Prepare the client so that unnecessary information is not disclosed.

☐ **Prepare the client for trick questions.** Advise the client that the examiner may ask trick questions

(e.g., "When did you start working around the house again?"). Make sure the client understands that there is no obligation to respond to such questions.

☐ **Debrief the client.** Interview the client immediately following the examination. This provides a means of rooting out any discrepancies in the examiner's report.

☐ **Decide whether to ask for a copy of the examiner's report.** Although counsel is entitled to a copy of the opposition's examination report, n3 remember that requesting the report obligates counsel to furnish the opposition with its own experts' reports on the same condition. n4 If these reports contain information that you do not wish to disclose, counsel may wish to forego asking for the opposition's examination report. Note that Rule 35 does not preclude discovery of the opposition's examination report under other discovery rules. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryProtective Orders

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 35(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(c).*

(n3)Footnote 3. *Fed. R. Civ. P. 35(b).*

(n4)Footnote 4. *Fed. R. Civ. P. 35(b)(4).*

(n5)Footnote 5. *Fed. R. Civ. P. 35(b)(6).*

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CHAPTER 21 Physical and Mental Examinations *

2-21 Federal Litigation Guide § 21.15

§ 21.15 Seeking Examiner's Report

[1] Examined Party's Entitlement to Report

When an examination is ordered following a noticed motion under Rule 35(a), the examined party or the party against whom the order was made is entitled to request a copy of the report of the examiner and copies of all earlier examinations of the same condition. n1

The obligation to furnish reports on request also applies to examinations by agreement of the parties, unless the agreement expressly provides otherwise. n2

[2] Report Must Be Provided in Timely Fashion

The examined party, on making the request, is entitled to receive a copy of the report in sufficient time to use it in trial preparation. n3

[3] Noticed Motion Procedure Available to Compel Delivery of Report

Following noncompliance with a request, the party requesting the report may compel delivery by moving for a court order. If the examiner fails or refuses to make the report, the court may exclude the examiner's testimony if offered at trial. n4

[4] Examinee's Entitlement to Like Reports of Other Examinations of Same Condition

Once the examining party furnishes the examination report on request of the examined party, the examining party becomes entitled to receive from the examined party copies of reports of all previous and subsequent examinations dealing with the same physical or mental condition. n5 The obligation to exchange reports is triggered only by the examined party's request for a report; there is no obligation to exchange reports unless the examined party makes the initial request. n6

[5] Exclusion of Examiner's Testimony for Failure to Make Report

Failure to produce a requested report empowers the court to exclude the examiner's testimony at trial. n7

[6] Waiving Privileges

By requesting and obtaining a report of the examination or by taking the deposition of the examiner, the examined party waives any privilege regarding the testimony of any other person who examined or may examine the party with respect to the same condition. n8

[7] Discovery of Report by Other Methods

Rule 35 does not bar discovery of an examiner's report or the deposition of the examiner under other discovery rules. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsMental & Physical ExaminationsEvidenceDocumentary EvidenceWritingsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 35(b)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 35(b)(6)*; *Salvatore v. American Cyanamid Co, 94 F.R.D. 156, 158 (D.R.I. 1982) .*

(n3)Footnote 3. *Shapiro v. Win-Sum Ski Corp., 95 F.R.D. 38, 38-39 (W.D.N.Y. 1982) .*

(n4)Footnote 4. *Fed. R. Civ. P. 35(b)(5).*

(n5)Footnote 5. *Fed. R. Civ. P. 35(b)(3).*

(n6)Footnote 6. *Fed. R. Civ. P. 35(b)(1).*

(n7)Footnote 7. *Fed. R. Civ. P. 35(b)(5).*

(n8)Footnote 8. *Fed. R. Civ. P. 35(b)(4).*

(n9)Footnote 9. *Fed. R. Civ. P. 35(b)(6).*

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CHAPTER 21 Physical and Mental Examinations *

2-21 Federal Litigation Guide §§ 21.16 through 21.99

[Reserved]

§§ 21.16 [Reserved]

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CHAPTER 21 Physical and Mental Examinations *

2-21 Federal Litigation Guide § 21.100

§ 21.100 Notice of Motion Requesting Physical or Mental Examination

Notice of Motion Requesting Physical or Mental Examination

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

NOTICE IS HEREBY GIVEN that on [*date*] at [*time of day (specify a.m. or p.m.)*], or as soon thereafter as counsel may be heard, [*party designation and name of moving party*] will move this Court, at the United States Courthouse located at [*address of Court*], Courtroom [*courtroom number*], for an order:

(a) pursuant to *Federal Rules of Civil Procedure, Rule 35(a)*, that [*party designation and name of examinee*] submit to a [physical *or* mental] examination by a suitably licensed or certified examiner to be appointed by this court, at such time as the court may direct, on the ground that [*state basis of motion*]; and

(b) granting [*moving party*] such other incidental relief as may be appropriate.

This motion is based on this Notice of Motion, the Affidavit (*or appropriate affidavit substitute; see*) of [*name of signatory*] sworn to (*or dated*) [*date*], the accompanying Memorandum of Law [*if required; see*] dated [*date*], and on all of the pleadings and papers on file in this action.

[*Date*]

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for [*name and designation of party*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

TO: [*Name of opposing counsel*], Attorney for [*name of party*]

[2] Use of Form

This is a form of notice of motion for use by a party to obtain a physical or mental examination of another party.

[3] Grounds for Physical or Mental Examination

When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner. n1

[4] Showing Required in Moving Papers

A party who moves for a physical or mental examination under Rule 35 discovery must: n2

- Provide specific facts about the proposed examination as required by Rule 35(a), including time, place, manner, conditions, scope, and identity of examiner.
- Show that the medical condition of the proposed examinee is in controversy.
- Show good cause that the examination proceed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsMental & Physical Examinations

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 35(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 35(a).*

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CHAPTER 21 Physical and Mental Examinations *

2-21 Federal Litigation Guide § 21.101

§ 21.101 Affidavit in Support of Physical or Mental Examination

Affidavit in Support of Physical or Mental Examination

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

[*Name of affiant*], being duly sworn, deposes and says:

1. I am a doctor of medicine duly licensed to practice medicine in the State of [*name of state*], and have so practiced for [*number*] years; that I have been on the staff of [*name of hospital*] for [*number*] years, and am currently [*specify position or specialty*].

2. I have been retained as a medical expert by [*name of moving party's attorney*] with respect to [*set forth scope of expertise*] on behalf of [*party designation and name of moving party*].

3. [*State necessity for examination, using additional numbered paragraphs if necessary*].

4. I am competent to examine [*party designation and name of examinee*] with respect to [*describe scope of examination*], as follows: [*state conditions of examination*].

5. I am available to examine [*party designation and name of examinee*] for the purposes of this action, within the scope described in Paragraph 5, on or about [*time and date*] at [*place*], or at any other suitable time and place ordered by the court.

I declare under penalty of perjury [*if executed outside the United States or its territories, insert:* under the laws of the United States of America] that the foregoing is true and correct.

Executed on [*date*].

[*Signature of affiant*]

[*Jurat*]

[2] Use of Form

This is a form of affidavit by a physician for use in support of a motion for an order for a physical or mental examination. n1

[3] Supporting Documents

Local district court rules must be consulted for regulations concerning supporting documents and form of documents (*e.g.*, Affidavits and Memoranda of Law).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsMental & Physical Examinations

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 35(a).*

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CHAPTER 21 Physical and Mental Examinations *

2-21 Federal Litigation Guide § 21.102

§ 21.102 Order Granting Motion for Physical or Mental Examination

Order Granting Motion for Physical or Mental Examination

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

This cause came on to be heard on motion of [*party designation and name of moving party*] for an order requiring [*party designation and name of party to be examined*] to submit to a physical examination. It appearing to the court that the [physical *or* mental] condition of the [Plaintiff/Defendant] is in controversy in this action,

IT IS ORDERED:

1. That [*party designation and name of examinee*] submit to [*describe type of examination*] by Dr. [*name*] in [his/her] office on [*date*] at [*time of day (specify a.m. or p.m.)*]. The examination will include the following: [*describe nature and scope of examination*].

2. That [*party designation and name of examinee*] submit to [*describe any specific procedures, e.g., an x-ray examination*].

3. That [*party designation and name of examinee*] at the time of the examination answer all proper questions and inquiries submitted to [him/her] by Dr. [*name*], including [*describe specific types of questions, e.g., prior injuries*], for the purpose of making a proper diagnosis of [his/her] condition.

4. That the personal physician of [*party designation and name of examinee*] may be present at the examination if [*party designation and name of examinee*] so desires.

5. That [*party designation and name of moving party*] bear the costs of the examination.

[*Signature of District Judge*]

[*Typed or printed name of District Judge*]

United States District Judge for the

[*specify district*] District of [*state in which district located*]

[2] Use of Form

This is a form of order for a physical or mental examination of an opposing party. The order should be prepared by the moving party, for the judge's signature.

[3] Order Based on Motion and Notice

An order granting a motion for a physical or mental examination under Rule 35 may be made only on motion for good cause shown and on notice to the person to be examined and to all parties. n1

[4] Contents of Order

An order granting a motion for a physical or mental examination under Rule 35 must specify the following: n2

- The time of the examination.
- The place of the examination.
- The manner of the examination.
- The conditions of the examination.
- The scope of the examination.
- The person or persons by whom it is to be made.

[5] LOCAL PRACTICE: Agreement or Settlement of Terms of Proposed Order

When a proposed order is requested by the court, the prevailing party should attempt to come to an agreement with the opposing party as to the terms of the order. If such agreement has been reached, it should be noted on the agreedform of order by adding the endorsement "Approved as to form" and a signature block for opposing counsel.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsMental & Physical Examinations

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 35(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 35(a).*

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CHAPTER 22 Enforcement of Discovery

2-22 Federal Litigation Guide 22.syn

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[4] Expense-Shifting Sanctions
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[1] FORM
Notice of Motion to Compel Compliance With Discovery Request
[2] Use of Form
[3] Grounds for Motion to Compel
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[5] Certification of Attempt to Resolve Without Court Action

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[1] FORM
Notice of Motion for Sanctions for Failure to Comply With Court Order
[2] Use of Form
[3] Types of Sanctions Available
[4] Timing of Motion
[5] Certification of Attempt to Resolve Without Court Action

§ 22.203 Notice of Motion for Sanctions for Failure to Make Mandatory Disclosures
[1] FORM
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[2] Use of Form
[3] Types of Sanctions Available
[4] Certification of Attempt to Resolve Without Court Action

§ 22.204 Notice of Motion for Sanctions for Unreasonable Failure to Admit
[1] FORM
Notice of Motion for Sanctions for Unreasonable Failure to Admit
[2] Use of Form
[3] When Sanction Is Available
[4] Date and Time of Hearing
[5] Certification of Attempt to Resolve Without Court Action

§ 22.205 Notice of Motion for Sanctions for Failure to Appear or Respond
[1] FORM
Notice of Motion for Sanctions for Failure to Appear or Respond
[2] Use of Form
[3] Grounds for Motion
[4] Types of Sanctions Available
[5] Certification of Attempt to Resolve Without Court Action

§ 22.206 Notice of Motion for Sanctions for Failure to Participate in Discovery Plan
[1] FORM
Notice of Motion for Sanctions for Failure to Participate in Discovery Plan
[2] Use of Form
[3] Certification of Attempt to Resolve Without Court Action

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CHAPTER 22 Enforcement of Discovery

2-22 Federal Litigation Guide Scope

Scope

SCOPE

This chapter discusses enforcement of discovery obligations and imposition of sanctions for various types of breaches of discovery and disclosure obligations.

It examines the procedural and substantive prerequisites for motions to compel. It also addresses substantive and procedural issues concerning sanctions based on a party's failure to make the disclosures required by Rule 26(a); violation of a discovery order; failure to admit matters addressed in a request for admission; failure to respond to a notice of deposition, to interrogatories, or to a request for production of documents or for inspection; and failure to participate in good faith in developing a discovery plan. Finally, the chapter examines sanctions based on spoliation of evidence and improper certification under Rule 26(g).

The chapter contains checklists and sample forms.

For expanded coverage of enforcement of discovery, ***see*** Moore's Federal Practice, Ch. 37, ***Failure to Make Disclosure or Cooperate in Discovery: Sanctions*** (Matthew Bender 3d ed.).

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CHAPTER 22 Enforcement of Discovery
A. Obtaining Order to Compel Discovery or Mandatory Disclosure

2-22 Federal Litigation Guide § 22.01

§ 22.01 Determining If Grounds for Order to Compel Exist

[1] Failure to Make Required Mandatory Disclosures

[1.--1] Requirements of Rule 26(a)

Except in categories of exempt cases, Rule 26(a) imposes on parties a certain set of disclosure obligations, which can be divided into three categories: n1

- **Initial disclosures:** including information regarding (1) individuals likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment; (2) documents, electronically stored informations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment; (3) claims and calculations of damages; and (4) insurance coverage

- **Disclosures related to expert testimony:** including information regarding the background and qualifications of expert witnesses, as well as the content of and bases for the opinions such witnesses will be offering

- **Final pretrial disclosures:** including identification of trial witnesses and exhibits, and designation of deposition testimony that will be used at trial.

Parties must make these disclosures at the times specified in Rule 26(a), unless a stipulation or court order relieves them of all or part of these obligations. n2

[1.--2] Relief Available on Party's Failure to Comply With Rule 26(a)

If a party fails to make mandatory disclosures required under Rule 26(a) any other party may: n3

- Move to compel mandatory disclosure

- Move for recovery of costs and attorney's fees incurred in connection with the motion to compel

[1.--3] Motion to Compel Compared With Preclusion Sanction

A motion to compel would most likely be filed when the information to be disclosed might be helpful to the party seeking the disclosure, but not to the party required to make it.

When the information sought is more likely to be helpful to the party with the duty to disclose, the more effective enforcement mechanism is found in the court's power under Rule 37(c)(1) to preclude use of the information that was not disclosed. n4

[2] Failure to Comply With Discovery Requests

A motion to compel may be filed not only when a person fails entirely to provide any response to a discovery request, or responds only by objecting and without providing the requested information, but also when a response is provided, but it is at least partially evasive or incomplete. The following types of discovery breaches may precipitate a motion to compel: n5

- A deponent fails to answer an oral or written question propounded pursuant to Rule 30 or 31. n6
- A corporation or other entity fails to designate a person to testify in accordance with Rule 30(b)(6) or 31(a)(4). n7
- A party fails to answer an interrogatory served in accordance with Rule 33. n8
- A party fails to produce documents or to permit an inspection requested pursuant to Rule 34. n9

[3] Failure to Answer Deposition Questions

[3.--1] Motion for Court Order to Compel Answer

If a party or a witness during an oral deposition refuses to answer a question, and if counsel for the examining party has tried in good faith toresolve the matter without judicial intervention, then the examining party has the following options: n10

- Suspending the examination and moving immediately for a court order to compel an answer
- Completing the examination about other matters and then moving for a court order to compel an answer

[3.--2] Considering Completion of Remainder of Deposition

When a deponent refuses to answer a question, the deposing party must consider whether to complete the remainder of the deposition. Often it is better to complete the remainder of the deposition, for the following reasons:

- The deponent has an opportunity to reconsider his or her position, and may later provide the answers
- The information later provided may lead the attorney conducting the deposition to conclude that there is no substantial need for answers to those unanswered questions
- A court looks more favorably on a motion to compel when it is focused on a few questions, than on a motion for an open ended order to compel responses to questions not yet posed in subject areas not yet reached

[3.--3] Situations in Which Deponent May Decline to Answer

Under the Federal Rules of Civil Procedure, a party may instruct a deponent not to answer a question only when necessary to do one of the following: n11

- Preserve a privilege
- Enforce a court ordered limitation as to the scope of the matters about which evidence may be taken during discovery
- Present a motion for a protective order on the ground that the examination is being conducted in bad faith, or in a manner that unreasonably annoys, embarrasses, or oppresses either the deponent or a party

[3.--4] Use of Motion to Compel in Connection With Written Deposition

A motion to compel also may be used, after exhaustion of good faith efforts to secure responses by conferring with opposing counsel, to require answers to written questions that are posed to a party or to a nonparty witness through a deposition upon written questions. n12

[4] Failure to Designate Deponent

If a business entity or governmental agency served with a deposition fails to designate a deponent in accordance with Rule 30(b)(6) or 31(a), the discovering party may bring a motion to compel. n13

[5] Failure to Answer Interrogatories

[5.--1] Sanctions for Complete Failure to Respond

Absent a court order or a written stipulation extending the time to respond, a party must serve answers or objections to interrogatories within 30 days of being served with the questions. n14

A complete failure to serve answers or objections to interrogatories within the prescribed, ordered, or stipulated time may result in the imposition of sanctions under Rule 37(d). n15

[5.--2] Motion to Compel When Incomplete Response Provided

Because a party who serves objections or what purport to be answers has not completely failed to respond, a motion for sanctions under Rule 37(d) is inappropriate.

Instead, if the party on whom the interrogatories were served responds by serving objections to some or all of the interrogatories, or serves answers that the propounding party considers evasive or incomplete, and if the propounding party has tried unsuccessfully to negotiate a resolution of the dispute, that party may bring a motion for an order compelling answers. The validity of objections or the adequacy of the responses will be tested by such a motion. n16

[6] Failure to Produce or to Permit Inspection

[6.--1] Sanctions for Complete Failure to Respond

Absent a court order or a written stipulation extending the period for responding, a party served with a request for production or inspection must serve responses or objections within 30 days after service of the request. n17

A complete failure to serve responses or objections within the prescribed, ordered, or stipulated time may result in the imposition of sanctions under Rule 37(d). n18

[6.--2] Motion to Compel When Incomplete Response Provided

Because a party who serves a response has not completely failed to respond, a motion for sanctions is inappropriate.

Instead, if the party on whom the request was served responds by serving objections to some or all of the requests, or responds in a manner that the propounding party considers evasive or incomplete, and if the propounding party has tried unsuccessfully to negotiate a resolution of the dispute, that party may bring a motion to compel discovery. The validity of objections or the adequacy of the responses will be tested by such a motion. n19

[6.--3] Compare: Failure by Nonparty to Respond to Subpoena

When a *nonparty* fails to produce documents responsive to a Rule 45 subpoena, aparty may bring a motion to compel production. However, Rule 37(a) is inapplicable to such a motion, and the costs and fees provision under Rule 37(a) is not available.

Such a failure may, however, result in contempt sanctions under Rule 45(e). n20

[7] Distinguishing Inadequate Response From Complete Failure to Respond

[7.--1] Inadequate Response Prompts Motion to Compel

If a disclosure, answer, or response is given, but the discovering party deems it to be incomplete, that party may move to compel an adequate response. n21

A complete failure to respond to a discovery demand is different from an evasive or inadequate response and should prompt a motion for sanctions under Rule 37(d).

[7.--2] Interpreting Discovery Request to Determine Adequacy of Response

Interrogatories and requests for production should not be read or interpreted in an artificially restrictive or hyper-technical manner to avoid disclosure of information fairly covered by the discovery request. Doing so exposes the responding party, its counsel, or both, to sanctions. n22

[8] Clarifying Discovery Requests Without Formal Motion

[8.--1] Desirability of Informal Discussion Between Parties

Parties should attempt to informally resolve disputes concerning the scope of discovery requests. Consultation between the attorneys will often result in punctual delivery of clearly discoverable information pursuant to an appropriately framed discovery probe.

A party served with an interrogatory or document request that it considers ambiguous or unclear should contact the propounding attorney for clarification, rather than simply objecting. Similarly, a party served with an interrogatory or document request that it considers overly broad, partially irrelevant, or unduly burdensome, should contact the propounding attorney in an attempt to reach an agreement reducing the scope of the probe.

[8.--2] Understanding Between Parties Should Be Reflected in Writing

Any agreement clarifying a discovery request should be reduced to writing. Also, if there is a meaningful chance that the response to aninterrogatory might be used at trial, the clarification should be set forth in a revised interrogatory.

[8.--3] Action on Rejection of Informal Request

If an informal request for clarification is rejected, the responding party should note that fact in its responses, set forth in good faith its understanding of the unclear terms, and then, on the basis of that understanding, provide answers.

Similarly, if an informal request to narrow the scope of a document request is rejected, the responding party should note that fact, identify the scope of a request that it would consider appropriate, and then provide the documents responsive to that narrowed request.

[9] No Response Leads to Immediate Sanctions

In contrast to an inadequate response, if there is a complete failure by a party to appear at his or her own deposition, or to respond to interrogatories or requests for production, in that no answers, objections, or responses of any kind are served, and no motion for a protective order is filed, then the moving party has immediate access to a wider range of sanctions, provided that party has attempted in good faith to secure a response through negotiations. There is no requirement that the moving party must have first secured a court order directing its opponent to provide the discovery in question. n23

[10] Failing to Supplement Disclosure Material or Discovery Responses

A party that without substantial justification fails to supplement disclosure material or discovery responses is not, unless the failure is harmless, permitted to use as evidence at trial, at a hearing, or on a motion, any witness or information that has not been supplemented. n24

In addition to this sanction, the court may, on noticed motion, compel supplementation or impose other appropriate sanctions including: n25

- An award of attorney's fees caused by the failure to supplement
- Informing the jury of the failure to supplement

[11] Electronically Stored Information

Absent exceptional circumstances, a court may not impose sanctions under the Federal Rules of Civil Procedure 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. n26

Rule 37(e) focuses on a distinctive feature of computer operations, the routine alteration and deletion of information that attends ordinary use. Many steps essential to computer operation may alter or destroy information, for reasons that have nothingto do with how that information might relate to litigation. As a result, the ordinary operation of computer systems creates a risk that a party may lose potentially discoverable information without culpable conduct on its part. Under Rule 37(e), absent exceptional circumstances, sanctions may not be imposed for loss of electronically stored information resulting from the routine, good-faith operation of an electronic information system. n27

The protection provided under Rule 37(e) applies only to sanctions under the Federal Rules, and it does not affect other sources of authority to impose sanctions or rules of professional responsibility.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to CompelLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 26(a).*

(n2)Footnote 2. *See Fed. R. Civ. P. 26(a).*

(n3)Footnote 3. *Fed. R. Civ. P. 37(a)(3)(A).*

(n4)Footnote 4. *Fed. R. Civ. P. 37(c)(1)*; *see also Fed. R. Civ. P. 37(a)* Committee Note (1993); *see also § 22.40.*

(n5)Footnote 5. *Fed. R. Civ. P. 37(a)(3)(B).*

(n6)Footnote 6. *See* [3], *below.*

(n7)Footnote 7. *See* [4], *below.*

(n8)Footnote 8. *See* [5], *below.*

(n9)Footnote 9. *See* [6], *below.*

(n10)Footnote 10. *Fed. R. Civ. P. 37(a)(3)(C).*

(n11)Footnote 11. *Fed. R. Civ. P. 30(c)(2), (d)(2), (3).*

(n12)Footnote 12. *Fed. R. Civ. P. 37(a)(3)(B).*

(n13)Footnote 13. *Fed. R. Civ. P. 37(a)(3)(B)(ii).*

(n14)Footnote 14. *Fed. R. Civ. P. 33(b)(2)*; *see also Fed. R. Civ. P. 6(d)* (extending time to respond by three days when interrogatories are served electronically, by mail, by other agreed-upon means or to the court clerk).

(n15)Footnote 15. *See Fed. R. Civ. P. 37(d)*; *see also § 22.80.*

(n16)Footnote 16. *Fed. R. Civ. P. 37(a)(3)(B).*

(n17)Footnote 17. *Fed. R. Civ. P. 34(b)*; *see also Fed. R. Civ. P. 6(d)* (extending time to respond by three days when request is served electronically, by mail, by other agreed-upon means or to the court clerk).

(n18)Footnote 18. *See Fed. R. Civ. P. 37(d).*

(n19)Footnote 19. *Fed. R. Civ. P. 37(a)(3)(B).*

(n20)Footnote 20. *See Fed. R. Civ. P. 45(e).*

(n21)Footnote 21. *See Fed. R. Civ. P. 37(a)(3), (4).*

(n22)Footnote 22. *Fed. R. Civ. P. 37(a)(3)* Committee Note (1993).

(n23)Footnote 23. *Fed. R. Civ. P. 37(d).*

(n24)Footnote 24. *Fed. R. Civ. P. 37(c)(1).*

(n25)Footnote 25. *Fed. R. Civ. P. 37(c)(1)*.

(n26)Footnote 26. *Fed. R. Civ. P. 37(e)*.

(n27)Footnote 27. *Fed. R. Civ. P. 37(f)* Committee Note (2006).

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CHAPTER 22 Enforcement of Discovery
A. Obtaining Order to Compel Discovery or Mandatory Disclosure

2-22 Federal Litigation Guide § 22.02

§ 22.02 Bringing Motion for Order to Compel

[1] Determining Who May Make Motion

[1.--1] Failure to Make Mandatory 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. n1

[1.--2] Failure to Comply With Discovery Request

If the discovery failure consists of one of the following, only the party seeking discovery has standing to move to compel compliance: n2

- A deponent fails to answer a question
- A corporation or other entity fails to make a required designation
- A party fails to answer an interrogatory
- A party fails to respond that a requested inspection will be permitted or fails to permit that inspection

[2] Making Motion Promptly

[2.--1] Parties Must Have Time to Confer

The Federal Rules of Civil Procedure impose no outside limit on the time within which a motion to compel additional disclosures or discovery must be made. However, such limits may be imposed by local rules, standing orders, or orders entered in individual cases. n3

At a minimum, parties seeking discovery must be given sufficient time after a discovery response is due to meet and confer with parties from whom discovery has been sought. Motions to compel or for sanctions are generally prohibited unless the moving party has first attempted to secure the information it needs through informal negotiations. n4

[2.--2] Parties Must Have Time to Supplement Discovery

Parties have a continuing duty to supplement both their mandatory disclosures, and their responses to formal discovery requests. n5 A motion to compel brought too soon might negate the beneficial effects of the supplementation rule.

[2.--3] Inaction May Constitute Waiver

The best practice is to act promptly to try to resolve discovery or disclosure problems shortly after they surface, first through direct negotiations with opposing counsel, and then, if negotiations fail, by filing a motion. The right to bring a motion to compel may be waived through inaction, especially if the motion is not filed until the trial has concluded. n6

The consequences of failing to bring a timely motion to compel discovery can be very severe. For example, in affirming a district court's denial of a motion for a new trial or relief from judgment based on alleged prejudice by inaccurate responses to interrogatories, the First Circuit explained that seeking reversal after an unfavorable verdict is not the appropriate remedy for parties who uncover discovery violations. n7

Similarly, the Second Circuit upheld a district court's dismissal for lack of prosecution after noting that the plaintiff, when confronted by the defendant's failure to cooperate in discovery, should have apprised the district court, which could have made an appropriate order compelling discovery. n8

[2.--4] Court Has Discretion in Determining Timeliness

Even motions to compel that are filed before or shortly after the discovery cutoff date are not necessarily timely. Courts have considerable discretion in deciding whether motions to compel have been timely filed. n9

Courts may consider many factors, and all pertinent case specific circumstances, including any or all of the following:

- The length of the delay in bringing the motion n10
- Whether the delay in filing the motion is likely to cause prejudice to or impose an undue hardship on any other party n11
- Whether the delay was caused by matters over which the moving party had no control, or about which it was justifiably ignorant n12
- Whether the delay was tactically inspired, the product of negligence, or was occasioned by good-faith efforts to secure the information through negotiations, other discovery tools, or from other sources n13
- Whether permitting the motion would interfere with the pretrial schedule n14

[3] Providing Reasonable Notice of Motion

[3.--1] Reasonable Notice Must Be Given

The party applying for an order to compel discovery or mandatory disclosure must give reasonable notice to the other parties, and to all other persons who would be affected by the order. n15

[3.--2] Typically, Motion Is Formally Noticed

Notice

must comport with the requirements of due process. The notice must be designed to communicate the pertinent information, and must afford the noticed party or persons a meaningful opportunity to be heard. n16

Absent a contrary local rule, standing order, or case-specific directive from the assigned judge, an application to the court for an order compelling disclosures or discovery must be by motion, and notice of the hearing must be served at least five days before the date set for that hearing. n17

[3.--3] Immediate Intervention May Be Appropriate

It is not uncommon for district courts by local rule, or for individual judges by standing order or case-specific directive, to permit parties to seek court assistance with respect to discovery disputes by means other than a regularly noticed motion. Sometimes, immediate intervention can save the litigants considerable expense and time, as when the deposition or document production is underway in a remote location, and failure to resolve the dispute might well force the parties to reconvene the discovery event at another time. n18

Some judges permit discovery disputes to be handled by letters to the judge directly or to the magistrate if one is assigned.

[4] Certifying Good-Faith Attempt at Resolution

[4.--1] Certification Mandatory

A motion to compel must include a certification that the movant has in good faith conferred or attempted to confer with the party from whom disclosure or discovery is being sought in an effort to secure the information without court action. n19

[4.--2] Requirement Strictly Construed

The meet and confer requirement may be strictly construed. Local rules may mandate denial of the motion to compel, or an award of attorney's fees, if counsel have failed to confer for the purpose of attempting to resolve the disputed issues. n20 Many courts vigorously enforce these kinds of rules. n21

[4.--3] Extent of Effort to Meet and Confer

Neither the text of the Federal Rules of Civil Procedure nor the Committee Notes purport to define the type of effort that must be undertaken to comply with the requirement that counsel confer in an attempt to negotiate a resolution of a disclosure or discovery dispute before filing a motion to compel. However, cases have held that sending a letter is insufficient. n22 This view requires a live exchange of ideas and opinions.

A Ninth Circuit district court ruled that the "certification of good faith attempt at resolution" requirement has two components. First is the actual certification, which must specifically convey to the court the following information:

- The names of the parties who conferred or attempted to confer
- The manner by which they communicated
- The date and time of that communication
- Specific discovery disputes discussed

- The results of the discussion or an explanation as to why meaningful discussions were not had

Second is the performance of the good faith attempt to confer. "Good faith" under the rule encompasses honesty in one's purpose to meaningfully discuss the discovery dispute, freedom from intention to defraud or abuse the discovery process, and faithfulness to one's obligation to secure information without court action. A party is required to have had or attempted to have had an actual meeting or conference to discuss each contested discovery dispute. This requires a personal, two-way communication, either in person or by telephone. n23

[4.--4] Additional Requirements Under Local District Court Rules

Local district court rules typically require counsel to confer before approaching the court concerning a discovery dispute.

[5] Identifying Inadequacies of Response

A motion to compel discovery or disclosure should both identify specifically the portions of the responses that are inadequate, and explain, at least briefly, what is missing or what kind of information would be necessary to make the responses adequate. n24

[6] Determining Which Court Has Jurisdiction

[6.--1] Filing in Court Where Action Is Pending to Compel Party

If a motion to compel discovery or disclosure is directed toward a party, the motion must be filed with the court where the action is pending. n25

If a deposition of a corporate party is taken in another district through an officer, director, managing agent, or some other individual designated by the corporate party, the forum court has the power to order the deponent to answer questions. n26

[6.--2] Filing in Court Where Discovery Is Taken to Compel Nonparty

If a motion to compel discovery is directed toward a nonparty, the motion must be filed in the court in the district where the discovery is sought. n27

Unlike most orders denying discovery, which generally are deemed interlocutory and nonappealable, the denial of a motion seeking discovery from a nonparty in a district other than the forum district may be immediately appealed because it otherwise would remain unreviewable. n28

[7] Court May Grant or Deny Motion in Whole or in Part

In ruling on a motion to compel discovery or mandatory disclosure, the court may: n29

- Grant the motion in whole
- Deny the motion in whole
- Grant the motion in part and deny the motion in part

[8] Court May Enter Protective Order or Impose Other Restrictions

[8.--1] On Request of Party

A party faced with a motion to compel discovery or mandatory disclosure who objects to the motion on the ground that it would cause annoyance, embarrassment, oppression, or undue burden or expense, may file a cross motion for a protective order. n30

[8.--2] On Own Initiative

Courts may enter protective orders on their own initiative, without a motion first being brought by the objecting party. If a motion to compel discovery or mandatory disclosure is denied in whole or in part, the court may enter any protective order authorized by Rule 26(c). n31

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to CompelLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 37(a)(3)(A).*

(n2)Footnote 2. *Fed. R. Civ. P. 37(a)(3)(B).*

(n3)Footnote 3. *See, e.g.*, N.D. Cal. L.R. 26-5 (motions to compel discovery may not be filed later than 10 days after discovery cut-off).

(n4)Footnote 4. *Fed. R. Civ. P. 37(a)(1), (a)(5)(A).*

(n5)Footnote 5. *Fed. R. Civ. P. 26(e).*

(n6)Footnote 6. *Mercy v. County of Suffolk, 748 F.2d 52, 55-56 (2d Cir. 1984)* ; *Butler v. Pettigrew, 409 F.2d 1205, 1207 (7th Cir. 1969)* .

(n7)Footnote 7. *United States Fidelity & Guar. Co. v. Baker Material Handling Corp., 62 F.3d 24, 29 (1st Cir. 1995)* .

(n8)Footnote 8. *Ali v. A & G Co., 542 F.2d 595 (2d Cir. 1976)* .

(n9)Footnote 9. *See Public Loan Co. v. FDIC, 803 F.2d 82, 86 (3d Cir. 1986)* ; *Draper v. Coombs, 792 F.2d 915, 924 (9th Cir. 1986)* .

(n10)Footnote 10. *See Byrnes v. Jetnet Corp., 111 F.R.D. 68, 70-71 (M.D.N.C. 1986)* .

(n11)Footnote 11. *See Kendrick v. Heckler, 778 F.2d 253, 258 (5th Cir. 1985)* .

(n12)Footnote 12. *See Petroleum Ins. Agency, Inc. v. Hartford Accident & Indem. Co., 106 F.R.D. 59, 63 (D. Mass. 1985)* .

(n13)Footnote 13. *See Kendrick v. Heckler, 778 F.2d 253, 258 (5th Cir. 1985)* ; *Riley v. United Air Lines, Inc., 32 F.R.D. 230, 232-233 (S.D.N.Y. 1962)* .

(n14)Footnote 14. *See Kendrick v. Heckler, 778 F.2d 253, 258 (5th Cir. 1985)* .

(n15)Footnote 15. *Fed. R. Civ. P. 37(a).*

(n16)Footnote 16. *Holcomb v. Allis Chalmers Corp., 774 F.2d 398, 401 (10th Cir. 1985)* .

(n17)Footnote 17. *Fed. R. Civ. P. 6(c)(1)*; *see Fed. R. Civ. P. 7(b)(1)* (motion requirement).

(n18)Footnote 18. *See Braziller v. Lind, 32 F.R.D. 367, 368 (S.D.N.Y. 1963)* .

(n19)Footnote 19. *Fed. R. Civ. P. 37(a)(2).*

(n20)Footnote 20. *See, e.g.*, N.D. Cal. L.R. 37-1(b).

(n21)Footnote 21. *See, e.g., Haselhorst v. Wal-Mart Stores, Inc., 163 F.R.D. 10, 11 (D. Kan. 1995)* (plaintiff's motion to compel denied because its counsel failed to make reasonable effort to confer before bringing motion).

(n22)Footnote 22. *Soto v. City of Concord, 162 F.R.D. 603, 622-623 (N.D. Cal. 1995)* (letter does not satisfy duty to confer); *Ballou v. Univ. of Kansas Med. Ctr., 159 F.R.D. 558, 559-560 (D. Kan. 1994)* (one letter does not satisfy duty to confer, but a telephone call might).

(n23)Footnote 23. *Shuffle Master, Inc. v. Progressive Games, Inc., 170 F.R.D. 166, 170-173 (D. Nev. 1996)* .

(n24)Footnote 24. *James N. Pappas & Sons, Inc. v. McDonald's Corp., 21 Fed. R. Serv. 2d 773 (D.D.C. 1976)* .

(n25)Footnote 25. *Fed. R. Civ. P. 37(a)(2).*

(n26)Footnote 26. *See Independent Prods. Corp. v. Loew's, Inc., 27 F.R.D. 426, 428-429 (S.D.N.Y. 1961)* ; *see also Belfer v. Pence, 435 F.2d 121, 122 (9th Cir. 1970)* ; *Fed. R. Civ. P. 30(b)(6)* (designation requirement).

(n27)Footnote 27. *Fed. R. Civ. P. 37(a)(2).*

(n28)Footnote 28. *In re Rubin, 679 F.2d 29, 30 (5th Cir. 1982)* .

(n29)Footnote 29. *Fed. R. Civ. P. 37(a)(5).*

(n30)Footnote 30. *Johnson v. Wayne Manor Apartments, 152 F.R.D. 56, 57 (E.D. Pa. 1993)* ; *Shapiro v. Freeman, 38 F.R.D. 308, 309 (S.D.N.Y. 1965)* ; *see also Fed. R. Civ. P. 26(c).*

(n31)Footnote 31. *Fed. R. Civ. P. 37(a)(5)(B), (C)*; *see also Fed. R. Civ. P. 26(c).*

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CHAPTER 22 Enforcement of Discovery
A. Obtaining Order to Compel Discovery or Mandatory Disclosure

2-22 Federal Litigation Guide § 22.03

§ 22.03 Considering Factors Weighed by Court in Compelling Mandatory Disclosures

Although the standards for ruling on motions to compel Rule 26(a) mandatory disclosures may not materially differ from the standards for ruling on motions to compel other types of discovery, cases construing parties' obligations under the discovery rules may not be reliable guides for determining how courts will rule on motions to comply with specific, mandatory disclosure obligations articulated in Rule 26(a). The only reliable guidance will be found in cases construing the specifically pertinent subdivisions of Rule 26(a).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to Compel

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CHAPTER 22 Enforcement of Discovery
A. Obtaining Order to Compel Discovery or Mandatory Disclosure

2-22 Federal Litigation Guide § 22.04

§ 22.04 Considering Factors Weighed by Court in Compelling Discovery

[1] Court Order Required to Obtain All Relevant Evidence

The traditional discovery rule has been substantially narrowed in that parties may only obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of parties to the action. n1 The parties are now required to show good cause for an order allowing discovery of any matter relevant to the subject matter involved in the action. n2 Such relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

[2] Weighing Relevance

Under the relevance standard, information is potentially discoverable if it is both of the following: n3

- It is not privileged
- It is relevant to the claim or defense of any party

[3] Weighing Proportionality

Under the proportionality requirements, a motion to compel should be denied if the party opposing the discovery persuades the court that any of the following are true: n4

- The discovery sought is unreasonably cumulative or duplicative
- The discovery sought is obtainable from some other source that is more convenient, less burdensome, or less expensive
- The party seeking the discovery has had ample opportunity by discovery in the action to obtain the information sought
- The burden or expense of the proposed discovery outweighs its likely benefit n5

[4] Considering Good Faith

Under the good faith requirements, a motion to compel should be denied if the party opposing the discovery persuades the court that either of the following are true: n6

- The discovery sought is not warranted by existing law or a good-faith argument to change existing law, or for establishing new law

- The discovery has been sought for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation

[5] Privilege and Work Product Protection

A motion to compel discovery generally will be denied if the materials sought are privileged or protected by the work-product doctrine, irrespective of whether the materials may be otherwise discoverable. n7

A party resisting discovery on the ground that the material sought is privileged or constitutes work product bears the burden of proving that the asserted privilege or protection attaches. n8

In some circumstances, courts will conduct in camera inspections of materials in order to rule on motions to compel that are opposed on grounds of privilege or work product. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(b)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(b)(1).*

(n3)Footnote 3. *See Fed. R. Civ. P. 26(b)(1).*

(n4)Footnote 4. *Fed. R. Civ. P. 26(b)(2).*

(n5)Footnote 5. *See also Fed. R. Civ. P. 26(g)(1)(B)(iii)* (also articulating burden and expense element).

(n6)Footnote 6. *Fed. R. Civ. P. 26(g)(1)(B).*

(n7)Footnote 7. *See Fed. R. Civ. P. 26(b)(1)* (privilege); (b)(3) (work-product doctrine); *see also* [2], *above.*

(n8)Footnote 8. *See e.g., In re Horowitz, 482 F.2d 72, 82 (2d Cir.) , cert. denied, 414 U.S. 867 (1973)* ; *see also Resolution Trust Corp. v. Dabney, 73 F.3d 262, 266 (10th Cir. 1995)* ; *Davis v. Fendler, 650 F.2d 1154, 1160 (9th Cir. 1981)* .

(n9)Footnote 9. *See, e.g., United States v. Zolin, 491 U.S. 554, 572, 109 S. Ct. 2619, 105 L. Ed. 2d. 469 (1989)* (party seeking in-camera inspection must make threshold showing of appropriateness).

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CHAPTER 22 Enforcement of Discovery
A. Obtaining Order to Compel Discovery or Mandatory Disclosure

2-22 Federal Litigation Guide § 22.05

§ 22.05 Obtaining Expense Shifting Sanctions on Motion to Compel

[1] Presumption Favoring Sanctions

A rebuttable presumption favors imposing expense shifting sanctions on the party against whom a motion to compel disclosures or discovery is resolved. n1

If the motion to compel is granted in part and denied in part, the court may apportion expense shifting sanctions among the parties "in a just manner". n2

[2] Determining Person Against Whom Sanctions May Be Imposed

[2.--1] Imposing Sanctions Against Party, Attorney, or Both

Expense shifting sanctions may be imposed against any party or attorney who is responsible for taking the position that the court rejected when it ruled on a motion to compel. Expense shifting sanctions may be imposed on both counsel and client. n3

If fault is to be apportioned between attorney and client, the character of the apportionment is committed to the sound discretion of the trial court. n4

[2.--2] Apportioning Sanctions When Motion Is Granted in Part and Denied in Part

If a motion to compel discovery or disclosure is granted in part and denied in part, the court, after affording every affected party or person an opportunity to be heard, may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner. n5

If a motion for an order to compel is granted in part and denied in part, and there is a determination that many of the discovery objections were substantially justified, courts frequently refuse to award expense shifting sanctions to either party. n6

[2.--3] Split in Authority as to Imposition of Expense Shifting Sanctions Against Nonparty Deponent

There is a split in authority as to whether expense shifting sanctions may be imposed against a nonparty deponent, properly subpoenaed for deposition. One court has held that two nonparty deponents who were properly subpoenaed to give testimony and produce documents, and who served objections to the subpoena on the date set for deposition, but who failed to appear for the deposition, were liable for expense shifting sanctions. n7

A different court has reached a contrary conclusion. In ruling that a nonparty deponent was not liable for expense shifting sanctions arising out of a failure to appear at a scheduled deposition, the court held that Rule 37 applies only to parties, and that the only authority for imposing sanctions on a nonparty for failure to comply with a subpoena is found in Rule 45, which authorizes an order of contempt. n8

[3] Providing Sanctioned Party With Opportunity to Be Heard

Before imposing expense shifting sanctions on a party who unsuccessfully made or opposed a motion to compel discovery or mandatory disclosures, a court must afford the persons or parties to be sanctioned an opportunity to be heard. n9

Courts may comply with this requirement either by holding an oral hearing on adequate notice, or by considering written submissions from the affected parties. n10

[4] Limiting Sanctions to Expenses Incurred in Connection With Motion

[4.--1] Expenses Must Relate to Successful Motion

The unsuccessful party on a motion to compel may be ordered to pay sanctions to the successful party. These sanctions consist of the reasonable expenses incurred by the successful party in making or opposing the motion, including attorney's fees. n11

[4.--2] Attorney's Fees Incurred in Preparing Request May Be Included

Attorney's fees incurred in preparing a request for expense shifting sanctions are recoverable. n12

The costs of defending on appeal an award of expense shifting sanctions may be added to the original sanction award. n13

[4.--3] Attorney's Fees Not Available to Pro Se Party

A pro se party may not obtain an award for attorney's fees in conjunction with a motion to compel. However, that party may be awarded the reasonable expenses incurred in bringing or defending the motion. n14

[5] Determining Reasonableness of Sanction--Use of Lodestar Formula

Most courts use the "lodestar" formula to compute attorney's fees as part of expense shifting sanctions.

Under this basic formula, the number of hours spent by the attorneys is multiplied by the hourly rate normally charged for similar work by attorneys of like skill in the area, and the party seeking reimbursement bears the burden of proving the hours spent and the prevailing rates charged. n15

The lodestar figure may be increased or reduced as a result of consideration of a number of different factors, including the complexity of the issues involved, and the perceived skill and efficiency of counsel. n16

[6] Award in Connection With Motion for Protective Order

Expense shifting sanctions may also be awarded in connection with a motion for a protective order. n17

Thus, a court may impose expense shifting sanctions on a party or nonparty who, without substantial justification, unsuccessfully moved for or opposed a motion for a protective order. n18

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to CompelLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 37(a)(5)(A), (a)(5)(B)*; *Fed. R. Civ. P. 37* Committee Note (1970).

(n2)Footnote 2. *Fed. R. Civ. P. 37(a)(5)(C).*

(n3)Footnote 3. *Fed. R. Civ. P. 37(a)(5)(A), (a)(5)(B).*

(n4)Footnote 4. *DeVaney v. Continental Am. Ins. Co., 989 F.2d 1154, 1161-1162 (11th Cir. 1993)* .

(n5)Footnote 5. *Fed. R. Civ. P. 37(a)(5)(C).*

(n6)Footnote 6. *See, e.g., Smith v. The Conway Org., 154 F.R.D. 73, 78 (S.D.N.Y. 1994)* ; *Caruso v. Coleman Co., 157 F.R.D. 344, 350 (E.D. Pa. 1994)* ; *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 138 F.R.D. 530, 538-539 (C.D. Ill. 1991)* ; *Cal Dive Int'l, Inc. v. M/V Tzimin, 127 F.R.D. 213, 218 (S.D. Ala. 1989)* .

(n7)Footnote 7. *Aetna Cas. & Sur. Co. v. Rodco Autobody, 130 F.R.D. 2, 4 (D. Mass. 1990)* .

(n8)Footnote 8. *Cruz v. Meachum, 159 F.R.D. 366, 368 (D. Conn. 1994)* .

(n9)Footnote 9. *Fed. R. Civ. P. 37(a)(5)(A), (a)(5)(B).*

(n10)Footnote 10. *See Fed. R. Civ. P. 37(a)(4)* Committee Note (1993).

(n11)Footnote 11. *Fed. R. Civ. P. 37(a)(5)(A), (a)(5)(B)*; *see Cruz v. Meachum, 159 F.R.D. 366, 368 (D. Conn. 1994)* ; *Foxley Cattle Co. v. Grain Dealers Mut. Ins. Co., 142 F.R.D. 677, 681 (S.D. Iowa 1992)* .

(n12)Footnote 12. *Sure Safe Indus. Inc. v. C & R Pier Mfg., 152 F.R.D. 625, 626 (S.D. Cal. 1993)* .

(n13)Footnote 13. *Rickels v. City of South Bend, 33 F.3d 785, 787 (7th Cir. 1994)* .

(n14)Footnote 14. *Walker v. Tri-Tech Planning Consultants, Inc., 149 F.R.D. 22, 23 (E.D.N.Y. 1993)* .

(n15)Footnote 15. *Bowne of New York City, Inc. v. AmBase Corp., 161 F.R.D. 258, 266 (S.D.N.Y. 1995)* .

(n16)Footnote 16. *Bowne of New York City, Inc. v. AmBase Corp., 161 F.R.D. 258, 267 (S.D.N.Y. 1995)* ; *E.E.O.C. v. Accurate Mechanical Contractors, Inc., 863 F. Supp. 828, 834-835 (E.D. Wis. 1994)* ; *Gordon v. Castle Oldsmobile and Honda, Inc., 157 F.R.D. 438, 439 (E.D. Ill. 1994)* ; *Brown v. State of Iowa, 152 F.R.D. 168, 174-175 (S.D. Iowa 1993) Am. Hangar, Inc. v. Basic Line, Inc., 105 F.R.D. 173, 178 (D. Mass. 1985)* ;.

(n17)Footnote 17. *Fed. R. Civ. P. 26(c)*; *see also Fed. R. Civ. P. 37(a)(4).*

(n18)Footnote 18. *Rickels v. City of South Bend, Indiana, 33 F.3d 785, 786 (7th Cir. 1994)* ; *In re Akros*

Installations, Inc. v. Great Nat'l Bank, 834 F.2d 1526, 1530 (9th Cir. 1987) .

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CHAPTER 22 Enforcement of Discovery
A. Obtaining Order to Compel Discovery or Mandatory Disclosure

2-22 Federal Litigation Guide § 22.06

§ 22.06 Opposing Expense Shifting Sanctions on Motion to Compel

[1] Rebutting Presumption

The presumption in favor of expense shifting sanctions may be overcome in any of several ways: n1

- If the moving party prevails, the opposing party may rebut the presumption by demonstrating that the motion was filed without the movant's first making a good-faith effort to obtain the disclosure or discovery without court action

- If the moving party prevails, the opposing party may rebut the presumption by demonstrating that its nondisclosure, response, or objection was substantially justified

- If the party opposing the motion prevails, the moving party may rebut the presumption by demonstrating that the making of the motion was substantially justified

- Regardless of who prevails, the party losing the motion may rebut the presumption by demonstrating that other circumstances make an award of expenses unjust

[2] Rebutting Presumption If Unsuccessful Position Was Substantially Justified--Objective Standard

A party meets the substantial justification standard by demonstrating that the dispute about the matter was "genuine," meaning that reasonable lawyers could disagree about the appropriateness of the disputed position. n2

The substantial justification standard is objective, meaning that the source of the norms for determining whether the standard has been satisfied is the court's view about the range of behavior that a hypothetical reasonable lawyer would engage in if confronted with the circumstances presented in the particular case. A prevailing party may secure an expense sanction award without proving that the losing party acted in bad faith, and proof by the losing party that it acted in subjective good faith is not sufficient to defeat a request for sanctions. n3

[3] Overcoming Presumption If Other Circumstances Make Sanctions Unjust

[3.--1] Unjustifiable Conduct by Prevailing Party

There are few reported cases discussing which kinds of other circumstances would make an award of expenses unjust. The drafters suggest that one such circumstance might arise when "the prevailing party also acted unjustifiably". n4

[3.--2] Both Parties Entitled to Sanctions Award

Sanctions may also be unjust when they would be awarded to both parties, and amount to a "wash." One court refused to award sanctions when both parties had filed motions to compel, and both were only partially successful, opining that such an award would have been unjust and not furthering the purpose of minimizing court resources in solving discovery disputes. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to CompelEvidenceInferences & PresumptionsPresumptionsRebuttal of PresumptionsLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 37(a)(5)(A), (a)(5)(B).*

(n2)Footnote 2. *See Fed. R. Civ. P. 37(a)(4)* Committee Note (1970); *see also Pierce v. Underwood, 487 U.S. 552, 565, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988)* (establishing meaning of *substantial justification* within context of Equal Access to Justice Act).

(n3)Footnote 3. *DeVaney v. Continental Am. Ins. Co., 989 F.2d 1154, 1162 (11th Cir. 1993)* ; *Bowne of New York City, Inc. v. AmBase Corp., 161 F.R.D. 258, 262-263 (S.D.N.Y. 1995)* ; *Eureka Fin. Corp. v. Hartford Accident & Indem. Co., 136 F.R.D. 179, 186 (E.D. Cal. 1991)* .

(n4)Footnote 4. *Fed. R. Civ. P. 37(a)(4)* Committee Note (1970).

(n5)Footnote 5. *Tri-Star Pictures, Inc. v. Unger, 171 F.R.D. 94, 103 (S.D.N.Y. 1997)* .

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CHAPTER 22 Enforcement of Discovery
A. Obtaining Order to Compel Discovery or Mandatory Disclosure

2-22 Federal Litigation Guide § 22.07

§ 22.07 "Abuse of Discretion" Standard of Review

Trial courts are vested with substantial discretion in determining whether the losing party on a motion to compel took a position that was substantially justified. Appellate courts apply a deferential "abuse of discretion" standard when reviewing trial court rulings with respect to expense shifting sanctions. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to CompelCivil ProcedureAppealsStandards of ReviewAbuse of DiscretionLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Petrucelli v. Bohringer and Ratzinger, 46 F.3d 1298, 1310-1311 (3d Cir. 1995)* ; *Bill Call Ford, Inc. v. Ford Motor Co., 48 F.3d 201, 209 (6th Cir. 1995)* ; United States v. One 1987 BMW 325, *985 F.2d 655, 657 (1st Cir. 1993)* ; *AHP Subsidiary Holding Co. v. Stuart Hale Co., 1 F.3d 611, 620 (7th Cir. 1993)* ; *Haworth, Inc. v. Herman Miller, Inc., 162 F.R.D. 289, 297 (W.D. Mich. 1995)* .

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CHAPTER 22 Enforcement of Discovery
A. Obtaining Order to Compel Discovery or Mandatory Disclosure

2-22 Federal Litigation Guide § 22.08

§ 22.08 CHECKLISTS: Motion to Compel

[1] CHECKLIST: Bringing Motion to Compel

☐ **Determine if grounds for motion to compel disclosure exist.** If a party fails to make mandatory disclosures, motion may be brought. n1 Consider:

- ☐ Whether the case is exempt under Rule 26(a)(1)(B). n2
- ☐ Nature of information sought and whether preclusion of that material is more advantageous.
- ☐ Costs of motion against value of information.
- ☐ Delay caused by motion.

☐ **Determine if grounds for motion to compel discovery exist.** If a party fails to respond to discovery request or to supplement discovery responses, motion may be brought. n3 Consider:

- ☐ Costs of motion against value of information.
- ☐ Delay caused by motion.

☐ **Prepare motion, and serve papers.** Include following allegations:

- ☐ Court has jurisdiction. n4

☐ Moving party has right to bring motion. n5

☐ Moving party made good-faith effort at resolution of issues. n6

☐ Information is discoverable. n7 or material should have been disclosed. n8

☐ Motion is timely. n9

☐ Reasonable notice was given. n10

[2] CHECKLIST: Opposing Motion to Compel

☐ **Determine if grounds to oppose motion to compel exist**. n11 Consider:

☐ Whether case is exempt from Rule 26(a) requirements, so motion to compel disclosure is inappropriate. n12

☐ Nature of information sought and whether costs of opposing motion are less than value of information.

☐ Court does not have jurisdiction. n13

☐ Moving party does not have right to bring motion. n14

☐ Moving party failed to made good faith effort at resolution of issues. n15

☐ Information is privileged or otherwise protected from discovery. n16 or material did not have to be disclosed. n17

☐ Motion is untimely. n18

☐ Reasonable notice was not given. n19

☐ Prepare and serve response papers.

☐ Determine whether to seek protective order. n20

[3] CHECKLIST: Seeking Imposition of Sanctions

☐ **When motion to compel is granted, request sanctions** against party opposing motion. n21

Document:

☐ Costs incurred in bringing motion.

☐ Attorney's fees.

☐ **When motion to compel is denied, request sanctions** against party bringing motion. n22 Document:

☐ Costs incurred in opposing motion.

☐ Attorney's fees.

[4] CHECKLIST: Opposing Imposition of Sanctions

☐ **When position on motion to compel was unsuccessful, oppose imposition of expense shifting sanctions.** n23 Argue:

☐ Unsuccessful position was substantially justified.

☐ Other circumstances make imposition of sanctions unjust.

☐ Prevailing party did not make good faith attempt at resolution of issues.

☐ Amount requested is excessive.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 37(a)(3)(A)*; *see § 22.01[1].*

(n2)Footnote 2. *See § 22.01[1][b].*

(n3)Footnote 3. *Fed. R. Civ. P. 37(a)(3)(B)*; *see § 22.01[2]-[6].*

(n4)Footnote 4. *Fed. R. Civ. P. 37(a)(2)*; *see § 22.02[8].*

(n5)Footnote 5. *Fed. R. Civ. P. 37(a)(3)*; *see § 22.02[1].*

(n6)Footnote 6. *Fed. R. Civ. P. 37(a)(1)*; *see § 22.02[5].*

(n7)Footnote 7. *See Fed. R. Civ. P. 26(b)(1).*

(n8)Footnote 8. *See Fed. R. Civ. P. 26(a)*; *see also § 22.03.*

(n9)Footnote 9. *See § 22.02[3].*

(n10)Footnote 10. *See § 22.02[4].*

(n11)Footnote 11. *Fed. R. Civ. P. 37(a).*

(n12)Footnote 12. *See § 22.01[1][b].*

(n13)Footnote 13. *Fed. R. Civ. P. 37(a)(2)*; *see § 22.02[8].*

(n14)Footnote 14. *Fed. R. Civ. P. 37(a)(3)*; *see § 22.02[1].*

(n15)Footnote 15. *Fed. R. Civ. P. 37(a)(1)*; *see § 22.02[5].*

(n16)Footnote 16. *See Fed. R. Civ. P. 26(b)(1).*

(n17)Footnote 17. *See Fed. R. Civ. P. 26(a)*; *see also § 22.03.*

(n18)Footnote 18. *See § 22.02[3].*

(n19)Footnote 19. *See § 22.02[4].*

(n20)Footnote 20. *Fed. R. Civ. P. 37(a)(5)(B), (C)*; *see Fed. R. Civ. P. 26(c).*

(n21)Footnote 21. *See Fed. R. Civ. P. 37(a)(5)(A), (C).*

(n22)Footnote 22. *See Fed. R. Civ. P. 37(a)(5)(B), (C).*

(n23)Footnote 23. *See Fed. R. Civ. P. 37(a)(5)(A), (a)(5)(C).*

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CHAPTER 22 Enforcement of Discovery
A. Obtaining Order to Compel Discovery or Mandatory Disclosure

2-22 Federal Litigation Guide §§ 22.09 through 22.19

[Reserved]

§§ 22.09[Reserved]

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2-22 Federal Litigation Guide § 22.20

§ 22.20 Determining If Grounds for Rule 37(b) Sanctions Exist

[1] Order or Direction Must Be Violated

Rule 37(b) requires two prerequisites before sanctions may be imposed: n1

- A court order or direction must be in effect
- That order or direction must be violated

[2] Violation Is Determined by Court

Whether a party has violated a particular discovery order is determined by the court that issued the order. That judge is in the best position to determine both what that order means, including how far it reaches, and whether a party's conduct is in violation of the order. n2

[3] Specified Violation by Specified Person Required

Rule 37(b) sanctions are available:

- If a deponent fails to be sworn or answer a question after being directed to do so by the court n3
- If a party (or an officer, director, or managing agent of a person designated under Rule 30(b)(6) or Rule 31(a) to testify on behalf of a party) fails to obey an order to provide or permit discovery n4
- If a party fails to obey an order under Rule 26(f) n5

[4] Applicable Orders

[4.--1] Order Must Be Directed at Specific Party for Specific Act

The court order or direction must be directed at the party against whom the sanctions are sought to be imposed. For example, the Second Circuit has held that sanctions could not be imposed on one defendant when the order compelling

discoverywas directed only to its codefendant. n6

[4.--2] Order Must Give Adequate Notice of Duties Imposed

Regardless of the form of the discovery order alleged to have been violated, it must adequately identify the duties it imposes. n7

If the terms of a discovery order are too vague or general to give fair notice of its obligations, it cannot support sanctions. n8

[4.--3] Source of Authority for Order Is Immaterial

Sanctions are permitted for a violation of an order compelling discovery irrespective of whether the order compelling discovery was issued pursuant to Rule 37(a). As long as there was a duly entered order compelling discovery, and it was violated, sanctions are appropriate. n9

When entering orders to compel discovery, courts can draw on a number of different sources of authority, including:

- The court's inherent authority n10
- Rule 16 (pretrial orders) n11
- Rule 26(b)-(g) (general discovery orders) n12
- Rule 35 (orders for physical or mental examinations) n13
- Rule 36 (orders directing compliance with requests for admission) n14
- Rule 37(a) (orders compelling disclosure or discovery) n15
- *28 U.S.C. § 1927* (imposing personal liability on attorneys who unreasonably and vexatiously multiply proceedings)

[4.--4] Order Need Not Be Formal

Informal, minute orders may be sufficient to support sanctions, provided that they are clear. n16

[4.--5] Order Need Not Be Written

The discovery order predicating an award of sanctions under Rule 37(b) need not be written. n17

An oral order will satisfy the prior order requirement, provided that both the following circumstances exist: n18

- The party to whom the oral order was directed was given adequate opportunity to persuade the trial court that the discovery in question should not be compelled
- The oral order gave the party who failed to comply sufficiently clear notice of what the order required that party to do

A deponent may be found in contempt if he or she fails to be sworn or to answer a question, after being "directed" to do so by the court. n19

[4.--6] Subpoena Is Not Order

An order awarding sanctions for disobeying a discovery order must be predicated on a violation of a prior court order compelling discovery. n20

A subpoena, which can be obtained as a matter of course from the court clerk and is not issued by judicial officer in resolution of a discovery dispute, is not considered a prior order. The target of a subpoena has no opportunity before its issuance to contest the propriety of the discovery the subpoena purports to compel. Thus, failure to obey a subpoena, without more, does not constitute a violation of a court order for purposes of Rule 37(b). n21

[5] Defending Propriety of Order Is Not Necessary

[5.--1] Trial Court Will Not Reexamine Order

If sanctions are sought for failure to obey an earlier discovery order, the proprietyof the underlying discovery order generally will not considered. n22

Unless the party against whom sanctions are sought had no opportunity to contest the underlying order, trial courts are unlikely to be interested in revisiting the wisdom of their discovery orders. The issues in the sanctions proceeding at the trial court level usually will be limited to whether there was a violation of the discovery order, and if so, which particular sanction is appropriate.

[5.--2] Appellate Court May Reexamine Order in Limited Cases

Under very limited circumstances a party may challenge the propriety of the underlying discovery order at the appellate level. For example, one court reversed a dismissal sanction after finding that the discovery order on which the sanction was based was unreasonable because compliance with it was physically impossible. The plaintiff was ordered to comply with all outstanding discovery requests by the end of that business day, and she, her attorney, and the courthouse were located in three different cities. n23

[6] Differences Between 37(a) and 37(b)

Note

the following differences between motions to compel under Rule 37(a) and sanctions under Rule 37(b): n24

- **Applicability.** Rule 37(a) applies to disclosure and discovery disputes; Rule 37(b) applies only to discovery
- **Court order as prerequisite to sanctions.** Rule 37(a) permits sanctions even if no court order has been entered, but Rule 37(b) authorizes sanctions only if a court has first entered an order compelling the discovery in question, and a party has disobeyed that order
- **Meet and confer requirement.** Rule 37(a) has a meet and confer requirement, while Rule 37(b) does not
- **Potential sanctions.** Rule 37(a) sanctions are limited to expenses incurred in connection with the motion to compel, but Rule 37(b) sanctions are not so limited, and indeed may include such severe sanctions as striking pleadings

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to CompelLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 37(b)*; *see* United States v. One 1987 BMW 325, *985 F.2d 655, 660-661 (1st Cir. 1993)* .

(n2)Footnote 2. *United States v. National Med. Enters., Inc., 792 F.2d 906, 911 (9th Cir. 1986)* .

(n3)Footnote 3. *Fed. R. Civ. P. 37(b)(1)*.

(n4)Footnote 4. *See Fed. R. Civ. P. 37(b)(2)(A)*.

(n5)Footnote 5. *Fed. R. Civ. P. 37(b)(2)(A)*; *see Fed. R. Civ. P. 26(f)* (preliminary discovery planning meeting).

(n6)Footnote 6. *Daval Steel Prods. v. M/V Fakredine, 951 F.2d 1357, 1364 (2d Cir. 1991)* .

(n7)Footnote 7. *Daval Steel Prods. v. M/V Fakredine, 951 F.2d 1357, 1363 (2d Cir. 1991)* .

(n8)Footnote 8. *Hathcock v. Navistar Int'l Transp. Corp., 53 F.3d 36, 40-41 (4th Cir. 1995)* ; *R. W. Int'l Corp. v. Welch Foods, Inc., 937 F.2d 11, 16 (1st Cir. 1991)* ; *Salahuddin v. Harris, 782 F.2d 1127, 1131-1132 (2d Cir. 1986)* .

(n9)Footnote 9. *See Fed. R. Civ. P. 37(b)(2)*; *see also Fed. R. Civ. P. 37(b)* Committee Note (1970).

(n10)Footnote 10. *See Chambers v. NASCO, Inc., 501 U.S. 32, 43-49, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)* , *reh'g denied*, *501 U.S. 1269 (1991)* .

(n11)Footnote 11. *See Fed. R. Civ. P. 16*; *see also* Ch. 27, *The Pre-Trial Conference*.

(n12)Footnote 12. *See Fed. R. Civ. P. 26(b)-(g)*.

(n13)Footnote 13. *See Fed. R. Civ. P. 35*; *see also* Ch. 21, *Physical and Mental Examinations*.

(n14)Footnote 14. *See Fed. R. Civ. P. 36*; *see also* Ch. 19, *Requests to Admit*.

(n15)Footnote 15. *See Fed. R. Civ. P. 37(a)*.

(n16)Footnote 16. *See Brandt v. Vulcan, Inc., 30 F.3d 752, 756 n.7 (7th Cir. 1994)* ; *Properties Int'l, Ltd. v. Turner, 706 F.2d 308, 310 (11th Cir. 1983)* ; *Penthouse International, Ltd. v. Playboy Enterprises, Inc., 663 F.2d 371, 387-390 (2d Cir. 1981)* .

(n17)Footnote 17. *See Fed. R. Civ. P. 37(b)(1), (2)*.

(n18)Footnote 18. *Nike Inc. v. Wolverine World Wide, Inc., 43 F.3d 644, 648 (Fed. Cir. 1994)* ; *Halas v. Consumer Servs., Inc., 16 F.3d 161, 165 (7th Cir. 1994)* ; *Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1542 n.7 (11th Cir.)* , *cert. denied*, *510 U.S. 863 (1993)* ; *Avionic Co. v. General Dynamics Corp., 957 F.2d 555, 558 (8th Cir. 1992)* ; *Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1415, 1991-1 Trade Cas. (CCH) P69395 (9th Cir.)* , *cert. denied*, *502 U.S. 994 (1991)* ; *Penthouse International, Ltd. v. Playboy Enterprises, Inc., 663 F.2d 371, 387-390 (2d Cir. 1981)* .

(n19)Footnote 19. *See Fed. R. Civ. P. 37(b)(1)*.

(n20)Footnote 20. *See Fed. R. Civ. P. 37(b)(1), (b)(2).*

(n21)Footnote 21. *See Daval Steel Prods. v. M/V Fakredine, 951 F.2d 1357, 1364 (2d Cir. 1991)* ; *Wm. T. Thompson Co. v. General Nutrition Corp., 671 F.2d 100, 102 (3d Cir. 1982)* ; *Fremont Energy Corp. v. Seattle Post Intelligencer, 688 F.2d 1285, 1286-1287 (9th Cir. 1982)* .

(n22)Footnote 22. *See Fed. R. Civ. P. 37(b).*

(n23)Footnote 23. *Diehl v. H.J. Heinz Co., 901 F.2d 73, 73-75 (7th Cir. 1990)* .

(n24)Footnote 24. *See Fed. R. Civ. P. 37(a), 37(b).*

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CHAPTER 22 Enforcement of Discovery
B. Obtaining Sanctions for Failure to Comply with Order Compelling Discovery or Mandatory Disclosure

2-22 Federal Litigation Guide § 22.21

§ 22.21 Bringing Motion for Sanctions for Failure to Comply With Order

[1] Filing Motion Within Reasonable Time After Alleged Violation of Order

Rule 37(b) does not establish any specific time limits within which a motion for sanctions must be filed. n1

Nevertheless, Rule 37(b) motions must be filed within a reasonable time after the alleged violation of the underlying discovery order occurred, was discovered, or should have been discovered through reasonable diligence. The amount of time that is reasonable varies with the circumstances, but long delays will significantly reduce the likelihood that the motion will be granted. n2

[2] Providing Party With Adequate Time to Prepare for Hearing--Five Days' Notice Typically Required

Due process requires that a delinquent party be provided with notice of the possibility that sanctions will be imposed and with an opportunity to present evidence or arguments against their imposition. n3

Absent a contrary local rule, standing order, or case specific directive from the assigned judge, a motion for sanctions predicated upon a party's failure to comply with a discovery order must be by motion, and notice of the hearing must be served at least five days before the date set for that hearing. n4

If it is not feasible for the party accused of the violation to prepare an adequate defense to the motion within five days, the due process clause might require more notice, given the circumstances and the nature of the alleged disobedience. n5

[3] Providing Adequate Description of Alleged Disobedience

A motion for sanctions must describe the alleged disobedience of the order with enough specificity to enable the accused party to understand the charges, so that he or she is given a fair opportunity to develop a defense. The motion must comport with the requirements of due process; it must be real, reasonable, and afford some opportunity to be heard. n6

Absent a clear, contrary indication in the moving papers, any motion for sanctions based on an alleged violation of a discovery order places both the party and the party's counsel on notice that the court might assess sanctions against

either or both, unless they provide the court with substantial justification for their conduct. n7

[4] Providing Causal Connection Between Expenses and Alleged Disobedience

If the motion for sanctions seeks an award of expenses, including attorney's fees, itshould describe the causal connection between the expenses and the alleged disobedience of the underlying court order, and it should set forth with particularity the nature of the services rendered, the amount of attorney time spent, and the rates at which the time was billed to the client. n8

[5] Certifying Good Faith Attempt at Resolution

The Federal Rules of Civil Procedure do not require a "meet and confer" with opposing counsel before filing a motion for sanctions under Rule 37(b). n9

Local rules in many district courts, however, impose a duty to confer with opposing counsel before approaching the court. Failure to comply with such local rules may result in denial of a motion for sanctions.

[6] Determining Which Court Has Jurisdiction

[6.--1] Sanctions Against Nonparty Deponent

If sanctions are sought against a nonparty deponent for failure to comply with a discovery order, the motion must be brought pursuant to Rule 37(b)(1), in which case only the court that issued the discovery order has jurisdiction over the motion. n10

If the court that issued the discovery order against the nonparty is not the court where the action is pending, the only sanction that the court may impose pursuant to Rule 37(b)(1) is contempt. n11

[6.--2] Sanctions Against Party

If sanctions are sought against a party for failure to comply with a discovery order, or an order entered under Rule 26(f), the motion may be brought in the court where the action is pending. n12

In such case, the court is not limited to a finding of contempt, but may fashion an appropriate sanctions order, including sanctions that directly affect the parties' substantive rights, and disposition of the action on the merits. n13

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to CompelLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 37(b).*

(n2)Footnote 2. *Brandt v. Vulcan, Inc., 30 F.3d 752, 756 (7th Cir. 1994)* ; *Zimmerman v. Bishop Estate, 25 F.3d 784, 790 (9th Cir.)* , *cert. denied*, *513 U.S. 1043 (1994)* .

(n3)Footnote 3. *Satcorp Int'l Group v. China Nat'l Silk Import & Export Corp., 101 F.3d 3, 6 (2d Cir. 1996)* ; *Hathcock v. Navistar Int'l Transp. Corp., 53 F.3d 36, 41-42 (4th Cir. 1995)* .

(n4)Footnote 4. *Fed. R. Civ. P. 6(c)(1), 7(b)(1).*

(n5)Footnote 5. *See, e.g., Hathcock v. Navistar Int'l Transp. Corp., 53 F.3d 36, 41-42 (4th Cir. 1995)* .

(n6)Footnote 6. *See Hathcock v. Navistar Int'l Transp. Corp., 53 F.3d 36, 41-42 (4th Cir. 1995)* .

(n7)Footnote 7. *DeVaney v. Continental Am. Ins. Co., 989 F.2d 1154, 1160 (11th Cir. 1993)* .

(n8)Footnote 8. *Henry v. Gill Indus., Inc., 983 F.2d 943, 946 (9th Cir. 1993)* ; *see also Fed. R. Civ. P. 37(b)(2).*

(n9)Footnote 9. *See Fed. R. Civ. P. 37(b).*

(n10)Footnote 10. *See Fed. R. Civ. P. 37(b)(1).*

(n11)Footnote 11. *See Fed. R. Civ. P. 37(b)(1).*

(n12)Footnote 12. *See Fed. R. Civ. P. 37(b)(2).*

(n13)Footnote 13. *See Fed. R. Civ. P. 37(b)(2)(A)(i)-(vii).*

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2-22 Federal Litigation Guide § 22.22

§ 22.22 Considering Factors Weighed by Court in Imposing Rule 37(b) Sanctions

[1] Identifying Specified Purpose Furthered by Sanctions

Sanctions are intended to serve the following purposes: n1

- They ensure that a party will not benefit from its own failure to comply with discovery requests
- They are specific deterrents and seek to ensure compliance with discovery orders
- They serve as general deterrents, both in the instant case and in other cases

[2] Applying Discretion of Trial Court

[2.--1] Court Has Broad Discretion

The decision whether to impose sanctions, and the particular type of sanction to by imposed, are left to the trial court's broad discretion. n2

[2.--2] Range of Discretion Varies Depending on Severity of Sanction

The range of trial court discretion varies wtih the severity of the selected sanction. The more severe the sanction imposed, the narrower the range of discretion because the most severe sanctions require the highest degree of fault. n3

Similarly, the scope of a trial court's discretion regarding the procedures it has followed in determining the sanctions request decreases with the magnitude of the sanction selected. The due process considerations that are triggered by the imposition of severe sanctions are greater than those presented by the imposition of lesser sanctions. n4

[3] Imposing Sanctions Against Pro Se Litigants

Courts are less demanding of pro se litigants than of parties who are represented by counsel. n5

However, pro se litigants are expected to obey court orders, and are not immunefrom sanctions for failing to comply

with discovery orders, especially if the court concludes that the disobedience was deliberate, or the litigant was warned in advance that sanctions would ensue if the litigant was warned in advance that sanctions would ensue if the litigant did not comply. Indeed, appellate courts have upheld even the most severe sanctions against pro se litigants, including dismissal of the action. n6

[4] Party Should Warn Court of Inability to Comply With Order

It is not clear whether courts may impose lesser sanctions against a party whose disobedience to a discovery order clearly was attributable to a genuine inability to comply.

To protect itself from sanctions, and to prevent other parties from needlessly incurring expenses seeking to enforce discovery orders, a party that is unable to comply with a discovery order should promptly bring that fact to the attention of the court and of the other parties. Failure to promptly report this kind of circumstance, or to seek a protective order, might justifiably lead to imposition of at least an expense shifting sanction.

[5] Inability to Comply Precludes Imposition of Severe Sanctions

If a party's disobedience of a discovery order was due to its inability to comply, and the inability was not fostered by its own conduct or by circumstances within its control, severe sanctions, such as dismissal, are not authorized. n7

Courts are unlikely to accept a party's mere assertion that it was unable to comply with a discovery order, and may require the production of meaningful evidence tending to support the encessary finding of inability. n8

[6] Sanctions Reaching Merits Must Affect Only Claim Related to Noncompliance.

If, as a result of a party's violation of a discovery order, the trial court imposes a sanction that affects that party's ability to litigate the merits of the action, that sanction may only affect the claims, difenses, or isues to which the discovery would have been pertinent. n9

[7] Severe Sanctions Require Bad Faith, Willfulness, or Substantial Fault

[7.--1] Requisite Showing for Dismissal for Default Sanction

The Supreme Court has held that Rule 37 "should not be construed to authorize dismissal of [a] complaint because of [a party's] noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of [the noncomplying party]." n10

This language has been widely construed to require a showing of bad faith, willfulness, or substantial fault before a dismissal or default sanction may be properly imposed. n11

Several factors may be useful in evaluating a district court's exercise of discretion to dismiss an action under Rule 37. These include: n12

- The willfulness of the non-compliant party or the reason for noncompliance
- The efficacy of lesser sanctions
- The duration of the period of noncompliance
- Whether the non-compliant party had been warned of the consequences of noncompliance

[7.--2] Valid Objection May Preclude Severe Sanctions

Severe sanctions may be rejected if the party resisting discovery had a valid objection to the discovery sought. n13

[7.--3] Circuits Divided as to Whether Dismissal or Default Sanctions Must Be Preceded by Warning

Several circuits have held that in most circumstances, district courts should give advance warning before resorting to dismissal or default sanctions for a party's failure to comply with a discovery order. n14

It is almost certain that all appellate courts will require advance warning if the party sanctioned is proceeding pro se. n15

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesSelf-RepresentationSanctionsCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to CompelLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 642-643 (1976) (per curiam)* .

(n2)Footnote 2. *Chilcutt v. United States, 4 F.3d 1313, 1320 (5th Cir. 1993)* ; *Pesaplastic, C.A. v. Cincinnati Milacron Co., 799 F.2d 1510, 1519 (11th Cir. 1986)* ; *Tamari v. Bache & Co. (Lebanon) S.A.L., 729 F.2d 469, 472 (7th Cir. 1984)* .

(n3)Footnote 3. *Lediju v. New York City Dept. of Sanitation, 173 F.R.D. 105, 112 (S.D.N.Y. 1997)* .

(n4)Footnote 4. *See Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 n.14, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980)* .

(n5)Footnote 5. *Salahuddin v. Harris, 782 F.2d 1127, 1132-1133* (2d Cir. 1986) (reversing dismissal of pro se plaintiff's case).

(n6)Footnote 6. *Agiwal v. Mid Island Mortgage Corp., 555 F.3d 298, 302 (2d Cir. 2009)* .

(n7)Footnote 7. *Societe Internationale Pour Participantions Industrielles et Commerciales v. Rogers, 357 U.S. 197, 210-212, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958)* (reversing dismissal when compliance with order mandating disclosure of bank records woudl be violation of Swiss laws).

(n8)Footnote 8. *Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1543 (11th Cir.)* , *cert. denied*, *510 U. S. 863 (1993)* .

(n9)Footnote 9. *Avionic Co. v. General Dynamics Corp., 957 F.2d 555, 559 (8th Cir. 1992)* ; *Daval Steel Prods. v. M/V Fakredine, 951 F.2d 1357, 1366 (2d Cir. 1991)* ; *United States v. National Med. Enter., Inc., 792 F.2d 906, 910-911 (9th Cir. 1986)* .

(n10)Footnote 10. *National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 640, 96 S. Ct. 2778, 49 L. Ed. 2d 747 (1976)* .

(n11)Footnote 11. *See, e.g., Valentine v. Museum of Modern Art, 29 F.3d 47, 49-50 (2d Cir. 1994)* ; *In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 791-792 (3d Cir. 1994)* , *cert. denied sub nom. General Elec. Co. v. Ingram, 513*

U.S. 1190 (1995) ; *Wouters v. Martin County, Fla., 9 F.3d 924, 934 (11th Cir. 1993)* , *cert. denied*, *513 U.S. 812 (1994)* ; *Philips Med. Sys. Int'l, B.V. v. Bruetman, 982 F.2d 211, 214 (7th Cir. 1992)* .

(n12)Footnote 12. *See Agiwal v. Mid Island Mortgage Corp., 555 F.3d 298, 302 (2d Cir. 2009)* .

(n13)Footnote 13. *Fonseca v. Regan, 734 F.2d 944, 947-949 (2d Cir. 1984)* , *cert. denied*, *469 U.S. 882 (1984)* .

(n14)Footnote 14. *Simmons v. Abruzzo, 49 F.3d 83, 88 (2d Cir. 1995)* ; Accord *Hathcock v. Navistar Int'l Transp. Corp., 53 F.3d 36, 40-41 (4th Cir. 1995)* ; *Bass v. Jostens, Inc., 71 F.3d 237, 241-242 (6th Cir. 1995)* ; *Adriana Int'l Corp. v. Thoeren, 913 F.2d 1406, 1413 (9th Cir. 1990)* .

(n15)Footnote 15. *See, e.g., Valentine v. Museum of Modern Art, 29 F.3d 47, 50 (2d Cir. 1994)* .

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2-22 Federal Litigation Guide § 22.23

§ 22.23 Considering Possible Sanctions Under Rule 37(b)

[1] Overview of Possible Sanctions

If a party has failed to comply with a discovery order, the court in which the actionis pending "may make such orders in regard to the failure as are just." n1 Although not an exhaustive list, some of the sanctions that are specifically authorized include: n2

- An order that the matters with respect to which the order was made, or any other designated facts, shall be taken to be established for the purposes of the action in accordance with the claims of the party obtaining the order n3

- An order refusing to allow the disobedient party to support or oppose designated claims or defenses or prohibiting that party from introducing designated matters in evidence n4

- An order striking pleadings or parts of pleadings n5

- An order staying further proceedings until the order is obeyed n6

- An order dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party n7

- In lieu of, or in addition to any of the other enumerated sanctions, an order treating the disobedience of the discovery order as a contempt of court, except when the violation is failure to submit to a physical or mental examination: n8

- When a party has failed to comply with an order requiring that party to produce another for physical or mental examination, those orders as are enumerated in Rule 37(b)(2)(A)-(C), unless the party failing to comply demonstrates inability to produce that person for examination n9

In lieu of, or in addition to, any of the enumerated sanctions, the court must require the disobedient party, or the attorney advising that party, or both, to pay the reasonable expenses, including attorney's fees, caused by the violation,

unless the court finds that the failure was substantially justified, or that other circumstances make an award of expenses unjust. n10

[2] Sanctions Deeming Facts Established

If a party violates a discovery order, the trial court may order that specified facts or other matters related to the violated discovery order shall be taken as established for the purposes of the action in accordance with the claim of the party obtaining the order. n11

[3] Sanctions Prohibiting Support or Opposition to Claims or Introduction of Evidence

If a party violates a discovery order, the trial court may enter an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, or prohibiting that party from introducing designated matters into evidence. n12

Due process considerations require that there be a sufficient nexus between the discovery order that was disobeyed and the matter that the disobedient party is prohibited from introducing into evidence. n13

[4] Sanctions Striking Pleadings

If a party violates a discovery order, the trial court may enter an order striking pleadings or parts of pleadings. n14

[5] Sanctions Staying Further Proceedings

If a party violates a discovery order, the court may stay further proceedings until the order is obeyed. n15

[6] Sanctions Dismissing Action or Entering Default Judgment

If a plaintiff violates a discovery order, the court may dismiss the case, in whole or in part, with prejudice, and if a defendant violates a discovery order, the court may enter a default judgment against the defendant. n16

In view of the severity of a dismissal or default sanction, appellate courts generally require trial judges to consider specific factors in determining whether the sanction is an appropriate response to the party's disobedient conduct. The following factors may be considered in determining whether to impose a dismissal or default sanction: n16.1

- Whether the violation or violations were the product of willfulness, bad faith, or some other substantial fault
- Whether the violations caused other parties to suffer prejudice, and if so, the severity, and whether it was remediable through some other action
- Whether the violation caused delay in the proceedings, and if so, to what extent
- Whether the disobedient party had been warned earlier that violations could or would result in this kind of drastic sanction
- Whether the disobedience was an isolated event or was part of a pattern of misbehavior
- Whether less severe sanctions had been imposed earlier on the disobedient party without sufficient effect

- Whether the trial judge who imposed the severe sanction first considered alternative, less severe measures but concluded, for articulated reasons, why no less drastic sanction would achieve the legitimate ends of the sanctions rules

[7] Sanctions Finding Contempt of Court

[7.--1] Contempt of Court

If a party violates a discovery order, other than an order to submit to a physical or mental examination, the court may enter an order treating the violation as a contempt of court. A contempt sanction is available in addition to, or in lieu of, the following sanctions: n17

- An order deeming facts established n18
- An order of preclusion n19
- An order striking pleadings n20
- An order staying proceedings n21
- An order dismissing the action or rendering a judgment by default. n22

[7.--2] Procedural Prerequisites to Contempt

A court may not impose a contempt sanction without first satisfying the procedural requirements required by due process. A contempt proceeding of any kind must be preceded by clear notice of the alleged disobedience, as well as an adequate opportunity to present a defense to the allegations. The specific procedural requirements will depend on various factors, such as: n23

- The nature of the allegedly contumacious conduct
- Whether that conduct occurred in the presence of the judge
- Whether the sanction consists of a civil contempt or a criminal contempt

[7.--3] Effect of Local District Court Rules on Contempt Proceedings

Local district court rules may set forth specific procedural requirements to be followed with regard to civil contempt.

[7.--4] Potential Contemnor Should Notify Court of Inability to Comply

A party anticipating that it will not be able to comply with a discovery order should explain the circumstances to opposing counsel before the deadline, and request from the court a modification of the original order. If opposing counsel is uncooperative, the party to whom the order is directed should then file a formal motion for reconsideration or modification of the original discovery order, or for a protective order. n24

The least prudent course of action would be to remain silent until after the deadline, and only then to attempt to defend the disobedience.

[7.--5] Criminal Contempt

Criminal contempt may not be imposed as a sanction for disobeying a discovery order unless the disobedience was willful or in bad faith. n25

A party facing a criminal contempt sanction has additional procedural rights and protections. For example:

- That party is entitled to be warned not only that sanctions might be imposed, but also that the sanction could be criminal contempt n26
- That party is entitled to the assistance of counsel in the contempt proceedings, and may have a right to trial by jury on the charges n27
- The facts necessary to support the conviction must be proven beyond a reasonable doubt n28

[8] Sanctions for Failure to Produce Person for Examination

If a party has failed to comply with an order pursuant to Rule 35(a) requiring that party to produce another person for a physical or mental examination, the court may impose any of the following sanctions, unless the disobedient party shows that he or she was unable to produce the person for the examination: n29

- An order deeming facts established n30
- An order of preclusion n31
- An order striking pleadings n32
- An order staying proceedings n33
- An order dismissing the action or rendering a judgment by default. n34 The contempt sanction is unavailable under Rule 37. n35

In this context, alleged inability to produce another for physical or mental examination means that the party must have been "unable in good faith" to comply with the underlying order. n36

[9] Sanctions Imposing Reasonable Expenses

[9.--1] Compensatory Monetary Sanctions Are Mandatory

If a party disobeys a discovery order, the district court may require the disobedient party, or the attorney advising that party, or both, to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified, or that other circumstances make an award of expenses unjust. n37

The court may impose the compensatory monetary sanction instead of, or in addition to, any other sanctions. n38

[9.--2] Bad Faith Not Required

Negligent failure to comply with a discovery order may provide a basis for monetary sanctions; bad faith is not required. n39

[9.--3] Overcoming Presumption If Failure Was Substantially Justified

The disobedient party bears the burden of proving that its failure was substantially justified, or that it would be unjust

for some other reason to impose compensatory monetary sanctions. This is appropriate because the court already will have found that the resisting party has violated the discovery order. n40

District courts have considerable discretion in determining whether a party was substantially justified in disobeying a discovery order. n41

[9.--4] Overcoming Presumption If Other Circumstances Make Sanctions Unjust

The district court may also elect not to impose compensatory monetary sanctions if "other circumstances make an award of expenses unjust". n42 Such "other circumstances" are most likely to arise when a litigant is proceeding pro se, and is not held to the same standards as represented parties, or when the disobedient party is impecunious. In the latter circumstance, a court that is reluctant in good conscience to impose a monetary sanction might instead impose another type of sanction, especially when the disobedience is willful, repeated, or particularly egregious, and it would threaten the administration of justice not to respond.

[9.--5] Determining Person Against Whom Sanctions May Be Imposed

Compensatory monetary sanctions may be imposed on the disobedient party, on the attorney advising the party, or on both the party and the attorney. n43

[9.--6] Limiting Sanctions to Reasonable Expenses Caused by Failure

Compensatory monetary sanctions are limited to the "reasonable expenses, including attorney's fees, caused by the failure" to obey the discovery order. n44 Compensatory monetary sanctions awarded for failure to obey a discovery order may compensate for a broader range of losses than monetary sanctions in connection with a motion to compel discovery, which are limited to the reasonable expenses incurred in making or opposing the motion. n45

[10] Sanctions Imposing Such Other Sanctions as Are Just

If a party fails to obey a discovery order, the court may make "issue further just orders". n46 The specific sanctions set forth in Rule 37(b)(2)(A) are illustrative, rather than exclusive. n47

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to CompelLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 37(b)(2).*

(n2)Footnote 2. *Fed. R. Civ. P. 37(b)(2).*

(n3)Footnote 3. *See* [2], *below*.

(n4)Footnote 4. *See* [3], *below*.

(n5)Footnote 5. *See* [4], *below*.

(n6)Footnote 6. *See* [5], *below*.

(n7)Footnote 7. *See* [6], *below*.

(n8)Footnote 8. *See* [7], *below*.

(n9)Footnote 9. *See* [8], *below*.

(n10)Footnote 10. *Fed. R. Civ. P. 37(b)(2)*; *see* [9], *below*.

(n11)Footnote 11. *Fed. R. Civ. P. 37(b)(2)(A)(i)*.

(n12)Footnote 12. *Fed. R. Civ. P. 37(b)(2)(A)(ii)*.

(n13)Footnote 13. *Jankins v. TDC Management Corp., Inc., 21 F.3d 436, 444 (D.C. Cir. 1994)* ; *Daval Steel Prods. v. M/V Fakredine, 951 F.2d 1357, 1362-1363, 1366 (2d Cir. 1991)* ; *United States for use of Wiltec Guam v. Kahaluu Constr. Co., 857 F.2d 600, 603 & n.5 (9th Cir. 1988)* ; *E.E.O.C. v. Kenosha Unified Sch. Dist. No. 1, 620 F.2d 1220, 1226 (7th Cir. 1980)* .

(n14)Footnote 14. *Fed. R. Civ. P. 37(b)(2)(A)(iii)*.

(n15)Footnote 15. *Fed. R. Civ. P. 37(b)(2)(A)(iv)*.

(n16)Footnote 16. *Fed. R. Civ. P. 37(b)(2)(A)(v), (vi)*; *see generally*, *Bass v. Jostens, Inc., 71 F.3d 237, 243 (6th Cir. 1995)* ; *see also Rose v. Franchetti, 979 F.2d 81, 86-87 (7th Cir. 1992)* .

(n17)Footnote 16.1. *Agiwal v. Mid Island Mortg. Corp., 555 F.3d 298, 302-303 (2d Cir. 2009)* .

(n18)Footnote 17. *Fed. R. Civ. P. 37(b)(2)(A)(vii)*.

(n19)Footnote 18. *See* [2], *above*.

(n20)Footnote 19. *See* [3], *above*.

(n21)Footnote 20. *See* [4], *above*.

(n22)Footnote 21. *See* [5], *above*.

(n23)Footnote 22. *See* [6], *above*.

(n24)Footnote 23. *See, e.g.*, *Schoenberg v. Shapolsky Publishers, Inc., 971 F.2d 926, 935 (2d Cir. 1992)* ; *see also Citronelle-Mobile Gathering, Inc., v. Watkins, 943 F.2d 1297, 1304 (11th Cir. 1991)* .

(n25)Footnote 24. *See Fed. R. Civ. P. 26(c)*.

(n26)Footnote 25. *Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1479 (9th Cir. 1992)* ; *Pesaplastic, C.A. v. Cincinnati Milacron Co., 799 F.2d 1510, 1519-1521 (11th Cir. 1986)* .

(n27)Footnote 26. *Schoenberg v. Shapolsky Publishers, Inc., 971 F.2d 926, 934-935 (2d Cir. 1992)* ; *Lamar Fin. Corp. v. Adams, 918 F.2d 564, 567 (5th Cir. 1990)* .

(n28)Footnote 27. *Muniz v. Hoffman, 422 U.S. 454, 474-476, 95 S. Ct. 2178, 45 L. Ed. 2d 319 (1975)* .

(n29)Footnote 28. *In re Kave, 760 F.2d 343, 351 (1st Cir. 1985)* .

(n30)Footnote 29. *Fed. R. Civ. P. 37(b)(2)(B)*; *see Fed. R. Civ. P. 35(a)* (examinations).

(n31)Footnote 30. *See* [2], *above*.

(n32)Footnote 31. *See* [3], *above*.

(n33)Footnote 32. *See* [4], *above*.

(n34)Footnote 33. *See* [5], *above*.

(n35)Footnote 34. *See* [6], *above*.

(n36)Footnote 35. *See Fed. R. Civ. P. 37(b)(2)(B)*, .

(n37)Footnote 36. *Fed. R. Civ. P. 37(b)* Committee Note (1970).

(n38)Footnote 37. *Fed. R. Civ. P. 37(b)(2)*; *see, e.g., Penthouse International, Ltd. v. Playboy Enterprises, Inc., 663 F.2d 371, 392 (2d Cir. 1981)* ; *see also Eastway Gen. Hosp. v. Eastway Women's Clinic, Inc., 737 F.2d 503, 503 (5th Cir. 1984)* ; *United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365, 1371 (9th Cir. 1980)* .

(n39)Footnote 38. *Fed. R. Civ. P. 37(b)(2)(C)*.

(n40)Footnote 39. *Tamari v. Bache & Co. (Lebanon) S.A.L. 729 F.2d 469, 473-474 (7th Cir. 1984)* ; *Marquis v. Chrysler Corp., 577 F.2d 624, 642 (9th Cir. 1978)* .

(n41)Footnote 40. *See Fed. R. Civ. P. 37(b)(2)* Committee Note (1970).

(n42)Footnote 41. *Fonar Corp. v. Magnetic Resonance Plus, Inc., 162 F.R.D. 276, 279 (S.D.N.Y. 1995)* , *aff'd, 128 F.3d 99 (2d Cir. 1997)* .

(n43)Footnote 42. *Fed. R. Civ. P. 37(b)(2)(C)*.

(n44)Footnote 43. *Fed. R. Civ. P. 37(b)(2)(C)*; *see, e.g., Roadway Express, Inc. v. Piper, 447 U.S. 752, 763-764, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980)* .

(n45)Footnote 44. *Fed. R. Civ. P. 37(b)(2)(C)*.

(n46)Footnote 45. *See Fed. R. Civ. P. 37(a)(5)(A)*, *(a)(5)(B)*.

(n47)Footnote 46. *Fed. R. Civ. P. 37(b)(2)*.

(n48)Footnote 47. *See Fed. R. Civ. P. 37(b)(2)(A)*.

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CHAPTER 22 Enforcement of Discovery
B. Obtaining Sanctions for Failure to Comply with Order Compelling Discovery or Mandatory Disclosure

2-22 Federal Litigation Guide § 22.24

§ 22.24 "Abuse of Discretion" Standard of Review

[1] Clear Error of Judgment Must Be Shown

Appellate courts apply a deferential "abuse of discretion" standard when reviewing a trial court's sanctions ruling. Under this test, the trial court's decision will be disturbed only if the reviewing court has a definite and firm conviction, after weighing all the relevant factors, that the court below committed a clear error of judgment in the conclusion it reached. n1

[2] Amount of Monetary Sanction

Appellate courts will not lightly displace a district court's judgment regarding the appropriate amount of a compensatory monetary sanction for a party's disobedience of a discovery order, but a sanction that appears clearly excessive will be reversed. n2

[3] Articulation of Basis by District Court Required

District courts must articulate clearly the bases for the amount of the sanction. A district judge's failure to adhere to this requirement likely will result in a remand. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to CompelCivil ProcedureAppealsStandards of ReviewAbuse of DiscretionLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Friends of Animals, Inc. v. United States Surgical Corp., 131 F.3d 332, 334 (2d Cir. 1997)* (citing **Moore's**); *Moore v. Armour Pharmaceutical Co., 927 F.2d 1194, 1197 (11th Cir. 1991)* ; *Brune v. IRS, 861 F.2d 1284, 1288 (D.C. Cir. 1988)* .

(n2)Footnote 2. *See Fonar Corp. v. Magnetic Resonance Plus, Inc., 162 F.R.D. 276, 279 (S.D.N.Y. 1995)* , *aff'd, 128 F.3d 99 (2d Cir. 1997)* .

(n3)Footnote 3. *Martin v. Brown, 63 F.3d 1252, 1263-1264 (3rd Cir. 1995)* .

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2-22 Federal Litigation Guide § 22.25

§ 22.25 CHECKLISTS: Moving for Rule 37(b) Sanctions

[1] CHECKLIST: Bringing Motion for Rule 37(b) Sanctions

☐ **Determine if grounds for motion for sanctions exist.** If a person fails to obey court order for discovery, motion for sanctions may be brought. n1 Consider:

- ☐ If disobedient person is nonparty deponent, contempt is only available sanction. n2
- ☐ If disobedient person is party (or party designee), additional sanctions are available. n3

☐ **Prepare motion, and serve papers.** Include following allegations:

- ☐ Court has jurisdiction. n4
- ☐ Valid order was violated by person against whom sanctions are sought. n5
- ☐ Moving party made good faith effort at resolution of issues. n6
- ☐ Motion is timely. n7
- ☐ Adequate description of disobedience and sanction sought was given. n8
- ☐ Reasonable notice was given. n9
- ☐ Papers and procedures followed comply with local rules. n10

☐ **When monetary sanctions are requested**, n11 Document:

- ☐ Costs incurred by party's failure to obey order.
- ☐ Attorney's fees.

[2] CHECKLIST: Opposing Motion for Rule 37(b) Sanctions

☐ **Determine if grounds to oppose motion for sanctions exist**. n12 Consider:

- ☐ Court does not have jurisdiction. n13
- ☐ Order was not valid or was not directed at person to be sanctioned. n14
- ☐ Moving party failed to made good faith effort at resolution of issues. n15
- ☐ Motion is untimely. n16
- ☐ Inadequate description of disobedience and sanction was given. n17
- ☐ Reasonable notice was not given. n18
- ☐ Sanction requested is inappropriate. n19
- ☐ Papers and procedures followed did not comply with local rules. n20

☐ **Prepare and serve response papers.**

☐ **When monetary sanctions are sought**, n21 argue:

- ☐ Failure to obey order was substantially justified.
- ☐ Other circumstances make imposition of sanctions unjust.
- ☐ Moving party did not make good faith attempt at resolution of issues.
- ☐ Amount requested is excessive.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to CompelCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral OverviewLegal EthicsSanctionsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 37(b)(1),(2)*; *see § 22.21*.

(n2)Footnote 2. *See § 22.23[7]*.

(n3)Footnote 3. *See § 22.23*.

(n4)Footnote 4. *Fed. R. Civ. P. 37(b)(1)*, *(b)(2)* ; *see § 22.21[8]*.

(n5)Footnote 5. *Fed. R. Civ. P. 37(b)*; *see §§ 22.20*, *22.21*.

(n6)Footnote 6. *See § 22.21[5]*.

(n7)Footnote 7. *See § 22.21[1]*.

(n8)Footnote 8. *See § 22.21[3]*.

(n9)Footnote 9. *See § 22.21[2]*.

(n10)Footnote 10. *See § 22.21[6]*, *[7]*.

(n11)Footnote 11. *Fed. R. Civ. P. 37(b)(2)*; *see § 22.23[9]*.

(n12)Footnote 12. *Fed. R. Civ. P. 37(b)*.

(n13)Footnote 13. *Fed. R. Civ. P. 37(b)*; *see § 22.21[8]*.

(n14)Footnote 14. *Fed. R. Civ. P. 37(b)*; *see § 22.20*.

(n15)Footnote 15. *See § 22.21[5]*.

(n16)Footnote 16. *See § 22.21[1]*.

(n17)Footnote 17. *See § 22.21[3]*.

(n18)Footnote 18. *See § 22.21[2]*.

(n19)Footnote 19. *See § 22.23*.

(n20)Footnote 20. *See § 22.21[6]*, *[7]*.

(n21)Footnote 21. *Fed. R. Civ. P. 37(b)(2)*; *see § 22.23[9]*.

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CHAPTER 22 Enforcement of Discovery
B. Obtaining Sanctions for Failure to Comply with Order Compelling Discovery or Mandatory Disclosure

2-22 Federal Litigation Guide §§ 22.26 through 22.39

[Reserved]

§§ 22.26[Reserved]

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CHAPTER 22 Enforcement of Discovery
C. Sanctions for Failure to Disclose

2-22 Federal Litigation Guide § 22.40

§ 22.40 Determining If Grounds for Preclusion Exist

[1] Failure to Comply With Disclosure Requirements

If a party, without substantial justification, fails to disclose information required by Rule 26(a) or 26(e), that party may not use testimony from that witness or the undisclosed information as evidence at trial, at a hearing, or in connection with a motion, unless the failure to disclose was harmless. n1

In lieu of a preclusion sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. n2

[2] Disclosure Required by Rule 26(a)

Rule 26(a) imposes three sets of automatic disclosure obligations on parties: n3

- Initial disclosures, which include information regarding (1) individuals likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment; (2) documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment; (3) claims and calculations of damages; and (4) insurance coverage

- Disclosures related to expert testimony, including information regarding the background and qualifications of expert witnesses, as well as the content of and bases for the opinions such witnesses will be offering

- Final pretrial disclosures, which include identifying trial witnesses and exhibits, and designating deposition testimony that will be used at trial

District courts may opt out from requiring any or all of these types of disclosure.

[3] Supplementation of Disclosure Required by Rule 26(e)(1)

A party who has made a disclosure under Rule 26(a) is under a duty to supplement at appropriate intervals that disclosure to include information later acquired: n4

- If ordered by the court

- If that party learns that in some material respect the information so disclosedis incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties

[4] Proffering of Undisclosed Evidence Triggers Sanction

If the party does not seek to use the undisclosed evidence at trial or in connection with a motion, there is no occasion to invoke the preclusion sanction, although other sanctions might be available, even if it is unclear that the undisclosed evidence would be helpful to the opposing parties. n5

[5] Sanction Designed to Be Automatic

The drafters described the evidence preclusion sanction for a party's failure to make mandatory, voluntary disclosures as "self-executing" and "automatic," indicating an intent not only that evidence preclusion sanctions are to be imposed without need for a motion, but also that there is to be no occasion for an exercise of discretion by the trial judge. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to CompelLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 37(c)(1)*; *see also Black v. Columbus Pub. Sch., 124 F. Supp. 2d 550, 561 (S.D. Ohio 2000)*.

(n2)Footnote 2. *Fed. R. Civ. P. 37(c)(1)*.

(n3)Footnote 3. *Fed. R. Civ. P. 26(a)*.

(n4)Footnote 4. *See Fed. R. Civ. P. 26(e)(1)*.

(n5)Footnote 5. *See Resolution Trust Corp. v. Hidden Ponds Phase IV Dev. Assocs., 873 F. Supp. 799, 807 (E.D.N.Y. 1995)* .

(n6)Footnote 6. *Fed. R. Civ. P. 37(c)* Committee Note (1993).

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CHAPTER 22 Enforcement of Discovery
C. Sanctions for Failure to Disclose

2-22 Federal Litigation Guide § 22.41

§ 22.41 Obtaining Evidence Preclusion Sanction

[1] Prerequisites

Before evidence will be precluded:

- The party seeking to invoke the sanction must first prove that the opposing party violated Rule 26(a) or 26(e) by failing to disclose the evidence in question;

- The party to be sanctioned must have an opportunity to demonstrate that its failure to disclose was substantially justified or harmless, factors involving considerable discretion by the district court. n1

[2] Bringing Failure to Court's Attention

Be prepared to object if the opposing party attempts to proffer the nondisclosed witness or information at a hearing or on a motion. Be prepared to prove that such proffer is in violation of Rule 37(c)(1), and request additional time if necessary. If objection is not made at the hearing, be prepared to follow a formal motion procedure.

[3] Showing Culpable Conduct and Prejudice Before Important Evidence Is Precluded

An evidence preclusion sanction may be tantamount to dismissal with prejudice, or entry of a default judgment. Accordingly, many judges are reluctant to exclude evidence that is important to the merits of the case without a showing of substantial and largely irremedial prejudice, as well as bad faith, willfulness, or some other substantial fault. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedurePretrial JudgmentsDefaultGeneral OverviewLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 37(c)(1).*

(n2)Footnote 2. *Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 904-905 (3d Cir. 1977)* ; *McNerney v. Archer Daniels Midland Co., 164 F.R.D. 584, 587 (W.D.N.Y. 1995)* .

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CHAPTER 22 Enforcement of Discovery
C. Sanctions for Failure to Disclose

2-22 Federal Litigation Guide § 22.42

§ 22.42 Obtaining Other Sanctions for Failure to Comply With Disclosure Requirements

In addition to or in lieu of an evidence preclusion sanction, the court may impose other appropriate sanctions if a party, without substantial justification, violates its disclosure obligations pursuant to Rule 26(a) or Rule 26(e), and fails to show that the violation was harmless. These sanctions include: n1

- An order requiring the payment of reasonable expenses, including attorney's fees, caused by the failure to make the mandatory disclosure n2

- An order that the matters as to which the disclosure was not made, or any other designated facts, shall be taken to be established for the purposes of the action in accordance with the claims of the party seeking disclosure n3

- An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters into evidence n4

- An order striking pleadings or parts of pleadings, staying further proceedings until the disclosure is made, dismissing the action or proceeding or any part of the action or proceeding, or entering a default judgment against the party who violated the disclosure rules n5

- A statement to the jury informing it of the failure to make the mandatory disclosure

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedurePretrial JudgmentsGeneral OverviewLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 37(c)(1).*

(n2)Footnote 2. *Arthur v. Atkinson Freight Lines Corp., 164 F.R.D. 19, 21-22 (S.D.N.Y. 1995)* ; *Bonin v. Chadron*

Community Hosp., 163 F.R.D. 565, 566 (D. Neb. 1995) .

(n3)Footnote 3. *See § 22.23[2].*

(n4)Footnote 4. *See § 22.23[3].*

(n5)Footnote 5. *See §§ 22.23[4]-[6].*

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CHAPTER 22 Enforcement of Discovery
C. Sanctions for Failure to Disclose

2-22 Federal Litigation Guide § 22.43

§ 22.43 Opposing Sanctions on Ground That Failure to Disclose Was Substantially Justified

[1] No Sanction If Failure to Disclose Was Substantially Justified

Sanctions may not be imposed if a party's failure to disclose information requiredby Rule 26(a) or 26(e)(1) was substantially justified. n1

[2] Genuine Discovery Dispute May Substantially Justify Failure

A party's position in failing to make disclosure may be substantially justified if it appears that it is based on a genuine discovery dispute. n2

A dispute may be deemed genuine if reasonable attorneys, applying the relevant legal norms to the evidence, could disagree about how the dispute should be resolved. If a rational legal mind could conclude, without the excessive strain that only self-serving motives would tolerate, that the legally imposed duty did not require production of the evidence, the dispute should be deemed genuine, the party's position would be substantially justified, and no sanction would be imposed. n3

[3] Reasonable Predisclosure Investigation May Substantially Justify Failure

A party's predisclosure investigation may be considered by the court in determining whether that party's failure to comply with Rule 26(a) or Rule 26(e)(1) was substantially justified. n4

[4] Pro Se Party's Ignorance of Requirement May Substantially Justify Failure

When the party failing to comply with disclosure requirements is proceeding pro se, that party's lack of knowledge, before the failure, of the disclosure requirements may indicate the failure was substantially justified. n5

[5] Unforeseen Relevance May Substantially Justify Failure

A party may be substantially justified in not disclosing evidence if that party could not have been expected to foresee its relevance. For example, a party may not be barred from calling an undisclosed witness or from using an undisclosed document if the need for the witness' testimony or for the evidence is based upon developments during trial that could

not reasonably have been anticipated, such as a change in testimony. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 37(c)(1).*

(n2)Footnote 2. *See Fed. R. Civ. P. 37(a)(4)* Committee Note (1970).

(n3)Footnote 3. *See Hinton v. Patnaude, 162 F.R.D. 435, 439-440 (N.D.N.Y. 1995)* ; *Nguyen v. IBP, Inc., 162 F.R.D. 675, 680 (D. Kan. 1995)* .

(n4)Footnote 4. *See Fed. R. Civ. P. 26(a)(1)*; *see also Fed. R. Civ. P. 26(a)* Committee Note (1993).

(n5)Footnote 5. *Fed. R. Civ. P. 37(c)* Committee Note (1993).

(n6)Footnote 6. *Fed. R. Civ. P. 26(a)* Committee Note (1993).

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CHAPTER 22 Enforcement of Discovery
C. Sanctions for Failure to Disclose

2-22 Federal Litigation Guide § 22.44

§ 22.44 Opposing Sanctions on Ground That Failure to Disclose Was Harmless

Sanctions may not be imposed if a party's failure to disclose information required by Rule 26(a) or Rule 26(e)(1) was harmless. n1 Two examples of harmless failures to disclose are: n2

- The inadvertent omission from a Rule 26(a)(1) disclosure of the name of a potential witness known to all parties

- The failure to list as a trial witness in a disclosure mandated by Rule 26(a)(3) a person so listed by another party

The burden of establishing harmlessness is on the party who failed to make the required disclosure; "harmless" involves an honest mistake on the part of the party who failed to make the disclosure coupled with sufficient knowledge on the party requesting discovery. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 37(c)(1).*

(n2)Footnote 2. *See Fed. R. Civ. P. 37(c)* Committee Note (1993).

(n3)Footnote 3. *Russell v. Bronson Heating & Cooling, 345 F. Supp. 2d 761, 778 (E.D. Mich. 2004)* .

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CHAPTER 22 Enforcement of Discovery
C. Sanctions for Failure to Disclose

2-22 Federal Litigation Guide § 22.45

§ 22.45 CHECKLISTS: Moving for Rule 37(c)(1) Sanctions

[1] CHECKLIST: Seeking Sanctions for Failure to Make Mandatory Disclosures

☐ **Determine if grounds for preclusion exist.** If a party who failed to disclose information required by Rule 26(a) or 26(e)(1) proffers that evidence, preclusion sanction is available. n1

☐ **Raise issue with court.** n2

☐ **If necessary, prepare motion, and serve papers.**

☐ **Request monetary sanctions.** n3 Document:

- ☐ Costs incurred by party's failure to properly disclose evidence.
- ☐ Attorney's fees.

■ **FORM:** For a sample notice of motion for sanctions for failure to make mandatory disclosures.

[2] CHECKLIST: Opposing Sanctions for Failure to Make Mandatory Disclosures

☐ **Determine if grounds to oppose preclusion exist**. n4 Consider:

- ☐ Undisclosed material was not proffered as evidence.
- ☐ Failure to disclose was substantially justified. n5

☐ Failure to disclose was harmless. n6

☐ Sanction requested is inappropriate.

☐ Papers and procedures followed did not comply with local rules.

☐ **Prepare and serve response papers**.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 37(c)*; *see § 22.40*.

(n2)Footnote 2. *Fed. R. Civ. P. 37(c)*; *see § 22.41*.

(n3)Footnote 3. *Fed. R. Civ. P. 37(c)(1)*.

(n4)Footnote 4. *Fed. R. Civ. P. 37(c)(1)*.

(n5)Footnote 5. *See § 22.43*.

(n6)Footnote 6. *See § 22.44*.

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CHAPTER 22 Enforcement of Discovery
C. Sanctions for Failure to Disclose

2-22 Federal Litigation Guide §§ 22.46 through 22.59

[Reserved]

§§ 22.46[Reserved]

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CHAPTER 22 Enforcement of Discovery
D. Obtaining Sanctions for Unreasonable Failure to Admit

2-22 Federal Litigation Guide § 22.60

§ 22.60 Determining If Grounds for Order for Expense Shifting Sanctions Exist

[1] Requirements for Rule 37(c)(2) Sanctions

If a party fails to admit the genuineness of any document or the truth of any matter as requested pursuant to Rule 36, and if the requesting party then proves the genuineness of the document or the truth of the matter, the requesting party may seek an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. n1

[2] Four Exceptions to Mandatory Sanction Rule

If the requisite showing discussed in [1], *above*, is made, the court must impose expense shifting sanctions unless one of four exceptions is applicable. These exceptions are addressed in § 22.62.

[3] Requests for Admission

[3.--1] Scope

A request for admission asks the other party to admit to the truth of specified matters or the genuineness of specified documents. Requests for admission may encompass matters that relate to statements or opinions of fact, or of the application of law to fact. n2

[3.--2] Potential Responses

A party who does nothing in response to a properly framed request for admission is deemed to have admitted the matter. n3 A party who elects to respond to the request for admission may: n4

- Object to the request and set forth the basis for the objection
- Admit the matter
- Deny the matter

- State that the matter cannot be admitted or denied, setting forth in detail why this is the case

If the responding party provides answers or objections that the propounding party finds to be insufficient, the propounding party may file a motion during the pretrialperiod requesting the court to determine the sufficiency of those answers or objections. n5

[4] When to Use Rule 37(c)

If a party responding to a request for admission provides a response consisting of a straightforward, but clearly unjustified denial, or a statement, proper in form but ultimately wanting in substance, that the responding party cannot either admit or deny the request at that stage of the proceedings, Rule 36 leaves a propounding party effectively without a remedy.

In these situations Rule 37(c) is intended to provide post-trial relief in the form of a requirement that the party improperly refusing the admission pay the expenses of the other side in making the necessary proof at trial. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsAdmissionsObjectionsCivil ProcedureDiscoveryMethodsAdmissionsResponsesCivil ProcedureDiscoveryMisconductLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 37(c)(2)*; *see SEC v. Happ, 295 F. Supp. 2d 189, 192-194 (D. Mass. 2003)* .

(n2)Footnote 2. *Fed. R. Civ. P. 36(a)*.

(n3)Footnote 3. *Fed. R. Civ. P. 36(a)*.

(n4)Footnote 4. *Fed. R. Civ. P. 36(a)*.

(n5)Footnote 5. *See Fed. R. Civ. P. 36(a)*.

(n6)Footnote 6. *Fed. R. Civ. P. 37(c)* Committee Note (1970).

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CHAPTER 22 Enforcement of Discovery
D. Obtaining Sanctions for Unreasonable Failure to Admit

2-22 Federal Litigation Guide § 22.61

§ 22.61 Moving for Sanctions Under Rule 37(c)(2)

[1] Determining Person Against Whom Sanctions May Be Imposed

Expense shifting sanctions for unreasonably denying or unreasonably refusing either to admit or deny a legitimate request for admission may be imposed only on parties, and not on counsel. n1

A court that concludes that an attorney played a culpable role in a party's improper response to a request for admissions must look to another other source of authority to impose sanctions against the attorney. Other sources might include:

- Other provisions of Rule 37
- Rule 26(g), which authorizes sanctions for discovery certifications made in violation of Rule 26(g) n2
- Rule 11(c), which permits sanctions for violations of the obligation to conduct a reasonable inquiry into the law and facts n3
- *28 U.S.C. § 1927*, which authorizes sanctions against an attorney who "multiplies the proceedings in any case unreasonably and vexatiously" n4
- A district court's inherent authority n5

[2] Making Timely Motion

The Federal Rules of Civil Procedure do not specify any time frame within which a motion seeking expense shifting sanctions for a party's unreasonable failure to admit must be filed.

However, Rule 37(c)(2) is intended to provide post-trial relief, and it would be inappropriate for counsel to seek expense shifting sanctions before completion of the trial. As a practical matter, it is necessary to complete a proceeding before a court would be able to conclude that the moving party had "proven" the truth of the matter for which an admission was requested, because a court must consider all rebuttal evidence before it may determine what has been proven.

[3] Certifying Good Faith Attempt at Resolution

There is no requirement to meet and confer with opposing counsel before filing a motion for sanctions under Rule 37(c). n6 However, by local rule, a district may have adopted such a requirement.

[4] Complying With Local Procedural Rules

Local district court rules typically contain special requirements governing the preparation of papers supporting and opposing discovery motions, as well as service of these papers.

[5] Complying With Local Filing Rules

Local rules in many districts specify what discovery material should be filed with a discovery motion.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureSanctionsBaseless FilingsGeneral OverviewLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Johnson Int'l Co. v. Jackson Nat'l Life Ins. Co., 19 F.3d 431, 438 n.8 (8th Cir. 1994)* (citing **Moore's**).

(n2)Footnote 2. *See Fed. R. Civ. P. 26(g).*

(n3)Footnote 3. *See Fed. R. Civ. P. 11(c).*

(n4)Footnote 4. *28 U.S.C. § 1927.*

(n5)Footnote 5. *Natural Gas Pipeline Co. v. Energy Gathering, Inc., 2 F.3d 1397, 1410-1411 (5th Cir. 1993)* , *cert. denied, 510 U.S. 1073 (1994)* .

(n6)Footnote 6. *See Fed. R. Civ. P. 37(b).*

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CHAPTER 22 Enforcement of Discovery
D. Obtaining Sanctions for Unreasonable Failure to Admit

2-22 Federal Litigation Guide § 22.62

§ 22.62 Overcoming Presumption Favoring Sanctions

[1] Presumption Favoring Sanctions

A party responding to a motion for sanctions under Rule 37(c)(2) should consider the applicability of the four exceptions within the rule.

Expense shifting sanctions for unreasonably denying or unreasonably refusing either to admit or deny a legitimate request for admission are mandatory, unless the court finds that one of the following exceptions exist: n1

- The request was held objectionable pursuant to Rule 36(a) n2
- The admission sought was of no substantial importance n3
- The party failing to admit had reasonable ground to believe that the party might prevail on the matter n4
- There was other good reason for the failure to admit n5

[2] Overcoming Presumption If Request Was Objectionable Under Rule 36(a)

Expense shifting sanctions for unreasonably denying or unreasonably refusing either to admit or deny a legitimate request for admission may be denied if the court finds that the request was held objectionable pursuant to Rule 36(a). n6 Apparently, this exception is available only if all of the following conditions exist: n7

- The party who failed to make the admission interposed a timely objection
- The propounding party filed a pretrial motion to determine the sufficiency of the objection
- The trial court ruled that the objection was well founded

[3] Overcoming Presumption If Admission Sought Was of No Substantial Importance

[3.--1] Basis for Rejecting Sanctions

Expense shifting sanctions for unreasonably denying or unreasonably refusing either to admit or deny a legitimate request for admission may be denied if the court finds that the admission sought was of no substantial importance. n8

[3.--2] Evaluation on Case-by-Case Basis

Courts decide whether a particular admission sought was of substantial importance on a case-by-case basis, taking into account all surrounding circumstances. Courts consider whether the propounding party was required by the pertinent law to prove the fact that was the subject of the requested admission in order to prevail on a claim or defense. If the fact was not essential, directly or indirectly, to the party's success, it may not be of substantial importance. n9

[4] Overcoming Presumption If Responding Party Had Reasonable Ground to Believe It Might Prevail

[4.--1] Reasonable Ground for Belief

Expense shifting sanctions for unreasonably denying or unreasonably refusing either to admit or deny a legitimate request for admission may be denied if the party failing to admit had reasonable ground to believe that it might prevail on the matter. n10 The test for determining whether this exception applies is not whether a party prevailed at trial, but whether that party acted reasonably in believing that it might prevail. n11

[4.--2] Examples of Reasonable Grounds for Belief

The test of reasonableness is objective, and courts will reject a party's attempt to invoke the exception if there clearly was too little evidentiary support to permit a rational jury to resolve the matter in favor of the party that failed to make the requested admission. This exception has been invoked successfully in the following circumstances:

- Cases involving substantially conflicting evidence n12
- Good faith arguments about how to resolve important and unsettled questions of law, or of the application of law to fact n13
- Complicated technical issues, particularly when there is no agreement among the experts n14

[4.--3] Reliance on Expert Opinion

Reliance on an expert opinion does not automatically provide a reasonable ground for a party to believe that he or she will prevail on the matter. Courts will not permit a party to escape sanctions by purporting to rely on an expert opinion that is patently implausible or lacks any arguably reliable support. However, a court may look favorably on a party who acknowledges its lack of expertise, and who consults in good faith experts in the relevant field.

[5] Overcoming Presumption If Responding Party Had Other Good Reason for Failure to Admit

Expense shifting sanctions for unreasonably denying or unreasonably refusing either to admit or deny a legitimate request for admission may be denied if the courtfinds that there was other good reason for the failure to admit. n15

This exception is rarely invoked. It may be applicable, however, when the propounding party serves a request for admission that addresses complicated technical or statistical matters that would be the subject of expert analysis, about which the responding party could not have developed a reliable position about the truth of the matters asserted on the basis of readily available information, but would have been required to undertake extraordinary efforts to gather and analyze information it did not have. n16

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMisconductEvidenceInferences & PresumptionsGeneral OverviewLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 37(c)(2).*

(n2)Footnote 2. *See* [2], *below*.

(n3)Footnote 3. *See* [3], *below*.

(n4)Footnote 4. *See* [4], *below*.

(n5)Footnote 5. *See* [5], *below*.

(n6)Footnote 6. *Fed. R. Civ. P. 37(c)(2)(A).*

(n7)Footnote 7. *Fed. R. Civ. P. 37(c)* Committee Note (1970).

(n8)Footnote 8. *Fed. R. Civ. P. 37(c)(2)(B).*

(n9)Footnote 9. *See Washington State Dep't of Transp. v. Washington Natural Gas Co., 59 F.3d 793, 806 (9th Cir. 1995) .*

(n10)Footnote 10. *Fed. R. Civ. P. 37(c)(2)(C).*

(n11)Footnote 11. *Fed. R. Civ. P. 37(c)* Committee Note (1970).

(n12)Footnote 12. *See, e.g., Board of Directors v. Anden Group, 136 F.R.D. 100, 107 (E.D. Va. 1991) .*

(n13)Footnote 13. *See, e.g., Comeaux v. Brown & Williamson Tobacco Co., 915 F.2d 1264, 1275 (9th Cir. 1990) .*

(n14)Footnote 14. *Washington State Dep't of Transp. v. Washington Natural Gas Co., 59 F.3d 793, 806 (9th Cir. 1995) .*

(n15)Footnote 15. *Fed. R. Civ. P. 37(c)(2)(D).*

(n16)Footnote 16. *See Fed. R. Civ. P. 37(c)* Committee Note (1970).

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CHAPTER 22 Enforcement of Discovery
D. Obtaining Sanctions for Unreasonable Failure to Admit

2-22 Federal Litigation Guide § 22.63

§ 22.63 "Abuse of Discretion" Standard of Review

Appellate courts apply an "abuse of discretion" standard when reviewing rulings by district courts on motions for sanctions for unreasonably denying or unreasonably refusing either to admit or deny a legitimate request for admission. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureAppealsStandards of ReviewAbuse of DiscretionLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *SEC v. Happ, 392 F.3d 12, 33-34 (1st Cir. 2004)* .

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2-22 Federal Litigation Guide § 22.64

§ 22.64 CHECKLISTS: Moving For Rule 37(c)(2) Sanctions

[1] CHECKLIST: Moving for Sanctions for Unreasonable Failure to Admit

☐ **Determine if grounds for motion for sanctions exist.** If a party fails to admit the genuineness of any matter to which requesting party later proves, sanctions are available. n1

☐ **Prepare motion, and serve papers.**

☐ **Prepare documentation for amount of sanctions are requested.** Document the following: n2

- ☐ Costs incurred in making proof.
- ☐ Attorney's fees.

[2] CHECKLIST: Opposing Motion for Sanctions for Unreasonable Failure to Admit

☐ **Determine if grounds to oppose motion for sanctions exist**. n3 Consider:

- ☐ Unadmitted matter was not proved.
- ☐ Motion is premature.
- ☐ Request was objectionable pursuant to Rule 36(a). n4
- ☐ Admission was of no substantial importance. n5

☐ There was reasonable ground to believe party would prevail on matter. n6

☐ There was other good reason for failure to admit. n7

☐ Sanction requested is excessive.

☐ Papers and procedures followed did not comply with local rules.

☐ Prepare and serve response papers.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 37(c)(2)*; *see § 22.60*.

(n2)Footnote 2. *Fed. R. Civ. P. 37(c)(2)*.

(n3)Footnote 3. *Fed. R. Civ. P. 37(c)(2)*; *see § 22.60*.

(n4)Footnote 4. *See § 22.62[2]*.

(n5)Footnote 5. *See § 22.62[3]*.

(n6)Footnote 6. *See § 22.62[4]*.

(n7)Footnote 7. *See § 22.62[5]*.

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CHAPTER 22 Enforcement of Discovery
D. Obtaining Sanctions for Unreasonable Failure to Admit

2-22 Federal Litigation Guide §§ 22.65 through 22.79

[Reserved]

§§ 22.65[Reserved]

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2-22 Federal Litigation Guide § 22.80

§ 22.80 Determining If Grounds for Rule 37(d) Sanctions Exist

[1] Complete Failure to Respond to Discovery Request Required

A party (or an officer, director, or managing agent of a party or a person designated pursuant to Rule 30(b)(6) or 31(a) to testify on behalf of a party) may be sanctioned for failing to do any of the following: n1

- To appear before the officer who is to take a deposition n2
- To serve answers or objections to interrogatories submitted pursuant to Rule 33 n3
- To serve a written response to a request for production or inspection submitted pursuant to Rule 34 n4

The court may impose any of a wide range of potentially severe sanctions directly, without first issuing an order to compel discovery, or requiring that an order be disobeyed. n5

[2] Failure to Appear for Deposition

[2.--1] Determining If There Was Failure to Appear

A party may be sanctioned if that party fails to appear for its deposition, after being served with a proper notice of deposition. n6 There is a split in authority as to whether sanctions may also be imposed when a party appears at the deposition, but either refuses to answer any questions, or without excuse, provides woefully inadequate responses to questions that should have been anticipated. Some courts insist that this provision must be strictly construed, and will impose sanctions only if a party fails to attend its own deposition, but not if a party appears at its noticed deposition and either refuses to answer specific questions, n7 or answers questions but then improperly adjourns the deposition. n8

Other courts, however, are unlikely to insist on a literal construction of this provision, and believe that sanctions may be imposed if a party appears at the deposition, but refuses to answer questions, or provides inadequate responses. Courts are most likely not to insist on a literal construction in cases involving institutional parties which have been noticed for deposition pursuant to Rule 30(b)(6).

[2.--2] Determining If There Was Failure to Appear by Corporate Deponent

A deponent that is a business entity may be sanctioned if the officer, director, or managing agent or other person designated by the entity to be deposed on it its behalf fails to appear. n9

If the designee appears at the deposition, but does not have information regarding the matters described in the deposition notice, sanctions are usually appropriate. A corporation or association appears vicariously through its designated agent, and if that agent is not knowledgeable about relevant facts, then the appearance is, for all practical purposes, no appearance at all. n10

[3] Failure to Respond to Discovery Request

[3.--1] Sanctions Imposed If No Response to Interrogatories or Request for Production

A party may be sanctioned if that party fails to serve answers or objections to interrogatories, n11 or a written response to a request for production or inspection. n12

[3.--2] Inadequate Response Does Not Warrant Rule 37(d) Sanctions

There is a split in authority as to whether Rule 37(d) sanctions may be imposed when a party has responded to interrogatories or a request for inspection, but the response is so inadequate that it is tantamount to a complete failure to respond. Some courts believe that sanctions are available only if a party has failed completely to serve a timely response to interrogatories or a request for inspection. n13 According to these authorities, if a party serves a response that contains answers that are incomplete, evasive, or false, the aggrieved party may file a motion to compel, n14 but any sanctions will be limited to expense shifting sanctions. n15

Some courts have determined that Rule 37(d) encompasses evasive or misleading responses. n16

[3.--3] Loss of Electronically Stored Information

Absent exceptional circumstances, a court may not impose sanctions under the Federal Rules of Civil Procedure 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. n17

Rule 37(e) focuses on a distinctive feature of computer operations, the routine alteration and deletion of information that attends ordinary use. Many steps essential to computer operation may alter or destroy information, for reasons that have nothing to do with how that information might relate to litigation. As a result, the ordinary operation of computer systems creates a risk that a party may lose potentially discoverable information without culpable conduct on its part. Under Rule 37(e), absent exceptional circumstances, sanctions may not be imposed for loss of electronically stored information resulting from the routine, good-faith operation of an electronic information system. n18

The protection provided under Rule 37(e) applies only to sanctions under the Federal Rules, and it does not affect other sources of authority to impose sanctions or rules of professional responsibility.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesSelf-RepresentationSanctionsCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMisconductLegal EthicsSanctionsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 37(d).*

(n2)Footnote 2. *See* [2], *below*.

(n3)Footnote 3. *See* [3], *below*.

(n4)Footnote 4. *See* [3], *below*.

(n5)Footnote 5. *Minnesota Mining & Mfg. Co. v. Eco Chem, Inc., 757 F.2d 1256, 1260-1261 (Fed. Cir. 1985)* (citing **Moore's**).

(n6)Footnote 6. *Fed. R. Civ. P. 37(d)*; *see, e.g., Hyde & Drath v. Baker, 24 F.3d 1162, 1167 (9th Cir. 1994)* ; *Bobal v. Rensselaer Polytechnic Inst., 916 F.2d 759, 763-766 (2d Cir. 1990)* , *cert. denied*, *499 U.S. 943 (1991)* .

(n7)Footnote 7. *Estrada v. Rowland, 69 F.3d 405, 406 (9th Cir. 1995)* (pro se plaintiff who attended deposition but refused to testify until he received signed commitment that he would be given transcript did not fail to appear); *Aziz v. Wright, 34 F.3d 587, 589 (8th Cir. 1994)* , *cert. denied*, *513 U.S. 1090 (1995)* (sanctions denied when pro se plaintiff attended deposition but refused to permit videotaped deposition as long as he remained in handcuffs); *R.W. Int'l Corp. v. Welch Foods, Inc., 937 F.2d 11, 15 & n.2 (1st Cir. 1991)* (reversing dismissal for failure to appear at deposition as improper (citing **Moore's**)); *Salahuddin v. Harris, 782 F.2d 1127, 1131-1132 (2d Cir. 1986)* (reversing Rule 37(d) dismissal sanction); *Stevens v. Greyhound Lines, Inc., 710 F.2d 1224, 1228 (7th Cir. 1983)* (reversing Rule 37(d) dismissal sanction that was based on failure to appear and deliver subpoenaed materials at deposition).

(n8)Footnote 8. *Salahuddin v. Harris, 782 F.2d 1127, 1131-1132 (2d Cir. 1986)* (reversing dismissal of pro se plaintiff's complaint when he adjourned deposition after answering questions for more than two hours).

(n9)Footnote 9. *Fed. R. Civ. P. 37(d)*; *see Fed. R. Civ. P. 30(b)(6), 31(a)* .

(n10)Footnote 10. *See Resolution Trust Corp., v. Southern Union Co., 985 F.2d 196, 197-198 (5th Cir. 1993)* ; *Republic of the Philippines v. Marcos, 888 F.2d 954, 956-957 (2d Cir. 1989)* ; *Buycks-Roberson v. Citibank Fed. Sav. Bank, 162 F.R.D. 338, 342-343 (N.D. Ill. 1995)* .

(n11)Footnote 11. *Fed. R. Civ. P. 37(d)*; *United States v. Aldeco, 917 F.2d 689, 690 (2d Cir. 1990)* (reversing default judgment based on single failure to timely answer interrogatories); *Coane v. Ferrara Pan Candy Co., 898 F.2d 1030, 1031-1032 (5th Cir. 1990)* (affirming award of attorney's fees for failing to answer interrogatories and for producing incorrect version of document); *Minnesota Mining & Mfg. Co. v. Eco Chem, Inc., 757 F.2d 1256, 1261 (Fed. Cir. 1985)* (affirming default as within court's discretion when defendant's failure to respond to interrogatories was part of ongoing pattern of dilatory tactics).

(n12)Footnote 12. *Fed. R. Civ. P. 37(d)*; *Henry v. Gill Indus., Inc., 983 F.2d 943, 947 (9th Cir. 1993)* (affirming dismissal against plaintiff who produced tax return after dismissal, and failed to produce either legiblecopy or original of key document repeatedly requested by defendant); *Marx v. Kelly, Hart & Hallman, P.C., 929 F.2d 8, 11 (1st Cir. 1991)* (plaintiff may be sanctioned for ignoring defendant's production request); *Badalamenti v. Dunham's, Inc., 896 F.2d 1359, 1362 (Fed. Cir.)* , *cert. denied*, *498 U.S. 851 (1990)* (reversing $100,000 sanction award against plaintiff which served objection as written response); *Charter House Ins. Brokers v. New Hampshire Ins. Co., 667 F.2d 600, 604-605 (7th Cir. 1981)* (affirming dismissal when plaintiff took no action whatsoever in response to either of defendant's requests for production).

(n13)Footnote 13. *Minnesota Mining & Mfg. Co. v. Eco Chem, Inc., 757 F.2d 1256, 1260-1261 (Fed. Cir. 1985)* ; *Fjelstad v. American Honda Motor Co., 762 F.2d 1334, 1339-1340 (9th Cir. 1985)* ; *Laclede Gas Co. v. G.W. Warnecke Corp., 604 F.2d 561, 565 (8th Cir. 1979)* ; *Maritime Ventures Int'l v. Caribbean Trading & Fidelity, Ltd.,*

689 F. Supp. 1340, 1358 (S.D.N.Y. 1988) .

(n14)Footnote 14. *See Fed. R. Civ. P. 37(b)*; *Fjelstad v. American Honda Motor Co., 762 F.2d 1334, 1339-1340 (9th Cir. 1985)* ; *Fox v. Studebaker-Worthington, Inc., 516 F.2d 989, 995 (8th Cir. 1975)* .

(n15)Footnote 15. *Fed. R. Civ. P. 37(a).*

(n16)Footnote 16. *Hathcock v. Navistar Int'l Transp. Corp., 53 F.3d 36, 40 (4th Cir. 1995)* ; *Coane v. Ferrara Pan Candy Co., 898 F.2d 1030, 1031 n.1 (5th Cir. 1990)* ; *E.E.O.C. v. Sears, Roebuck & Co., 114 F.R.D. 615, 626 (N.D. Ill. 1987)* .

(n17)Footnote 17. *Fed. R. Civ. P. 37(e).*

(n18)Footnote 18. *Fed. R. Civ. P. 37(f)* Committee Note.

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CHAPTER 22 Enforcement of Discovery
E. Obtaining Sanctions for Failure to Appear at Deposition, or to Respond to Discovery Requests

2-22 Federal Litigation Guide § 22.81

§ 22.81 Bringing Motion for Rule 37(d) Sanctions

[1] Determining Person Against Whom Sanctions May Be Imposed

[1.--1] Sanctions Against Party

If a party (or its agent or designee) does not appear for a properly noticed deposition, does not answer or object to interrogatories properly served, or does not make a written response to a proper request for production or inspection, the court may impose a range of sanctions against the party. n1

In lieu of any sanction order, or in addition thereto, the court may order the party failing to act to pay the reasonable expenses, including attorney's fees, caused by the unjustified violation. n2

[1.--2] Sanctions Against Attorney

In lieu of any sanction order, or in addition thereto, the court may order the attorney advising the party violating its discovery obligation to pay the reasonable expenses, including attorney's fees, caused by the violation. n3 Expense shifting sanctions may be imposed against an attorney even if the attorney did not act in bad faith. n4

Courts may look to other sources of authority to impose more severe sanctions against an attorney. Other possible sources include:

- Rule 26(g), which authorizes sanctions for improper discovery certifications n5
- *28 U.S.C. § 1927*, which authorizes sanctions against an attorney who "multiplies the proceedings in any case unreasonably and vexatiously"
- A district court's inherent authority n6

[2] Determining Which Court Has Jurisdiction

A motion for sanctions based on a party's failure to appear for deposition, or failureto serve answers or objections to interrogatories or a written response to a request for inspection, must be brought in the court where the action is

pending. n7

The forum court is the appropriate jurisdiction to hear the motion, even if the failure physically occurred in a different jurisdiction. Rule 37(d) sanctions may be imposed only against a party or a party's attorney, and the court in which an action is pending must retain the power to discipline misconduct by parties who are using that court to litigate their disputes. n8

[3] Determining When to Move for Rule 37(d) Sanctions

Rule 37(d) does not establish a specific time limit within which a motion for sanctions based on a party's failure to appear for deposition, or failure to serve answers or objections to interrogatories or a written response to a request for inspection must be filed. n9

The nature of the sanctions sought may affect the timing of the motion. For example, if the sanctions sought would affect litigation of the merits of the action, the motion obviously must be filed before those merits are reached. If the moving party seeks an order deeming a fact established, n10 prohibiting another party from supporting or denying a claim or defense, n11 or striking pleadings, n12 the motion must be filed before the hearing or trial of those matters.

It is best to seek relief promptly after the discovery failure and the parties' unsuccessful efforts to resolve the matter. At that time, the parties' memories will be freshest, documentary evidence is least likely to have been lost or destroyed, and intervention by the court may limit any negative ripple effects of the discovery failure.

[4] Certifying Good Faith Attempt to Obtain Response

A motion for sanctions based on a party's failure to serve answers or objections to interrogatories, or a written response to a request for inspection, must include a certification that the moving party has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain a response without court action. n13

Local rules in many district courts contain special requirements concerning the duty to attempt informal resolution before approaching the court.

[5] Complying With Local Procedural and Filing Rules

Local rules in many districts contain special requirements governing the preparation of papers supporting and opposing discovery motions, service of those papers, as well as the specific discovery material which must be filed with the motion. Those rules should be consulted.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMisconductLegal EthicsProfessional ConductGeneral OverviewLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 37(d).*

(n2)Footnote 2. *See Fed. R. Civ. P. 37(d).*

(n3)Footnote 3. *See Fed. R. Civ. P. 37(d).*

(n4)Footnote 4. *Hyde & Drath v. Baker, 24 F.3d 1162, 1171 (9th Cir. 1994)* .

(n5)Footnote 5. *Fed. R. Civ. P. 26(g).*

(n6)Footnote 6. *Natural Gas Pipeline Co. v. Energy Gathering, Inc., 2 F.3d 1397, 1410-1411 (5th Cir. 1993)* , *cert. denied, 510 U.S. 1073 (1994)* .

(n7)Footnote 7. *Fed. R. Civ. P. 37(d).*

(n8)Footnote 8. *See generally Fed. R. Civ. P. 37(d).*

(n9)Footnote 9. *See Fed. R. Civ. P. 37(d).*

(n10)Footnote 10. *See § 22.82[5].*

(n11)Footnote 11. *See § 22.82[6].*

(n12)Footnote 12. *See § 22.82[7].*

(n13)Footnote 13. *Fed. R. Civ. P. 37(d).*

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CHAPTER 22 Enforcement of Discovery
E. Obtaining Sanctions for Failure to Appear at Deposition, or to Respond to Discovery Requests

2-22 Federal Litigation Guide § 22.82

§ 22.82 Considering Possible Sanctions Under Rule 37(d)

[1] Court May Make Such Orders as Are Just

If a party fails to appear for deposition, or to serve answers or objections to interrogatories or a written response to a request for inspection, the court may make such orders in regard to the failure as are just. n1

[2] Trial Court Has Broad Discretion

District courts have broad discretion in determining whether to impose Rule 37(d) nonmonetary sanctions, even after finding that a party, without substantial justification, failed to appear for deposition, or to serve answers or objections to interrogatories or a written response to a request for inspection. n2

Similarly, once the district court decides that non-monetary sanctions are appropriate, the court has broad discretion in determining the type of sanction to be imposed. n3

[3] Opportunity to Be Heard Must Be Provided

Before sanctions may be imposed, the party to be sanctioned must have had an opportunity to be heard. This may be by oral hearing, although itmay be based on written submissions. n4

[4] Sanctions Imposing Reasonable Expenses

The court may require the party failing to appear for deposition, or to serve answers or objections to interrogatories or a written response to a request for inspection, or the attorney advising that party, or both, to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that either: n5

- The failure was substantially justified
- Other circumstances make an award of expenses unjust

[5] Sanctions Deeming Facts Established

If a party fails to appear for deposition, or to serve answers or objections to interrogatories or a written response to a request for inspection, the court may order that specified facts or other matters related to the discovery failure will be deemed established in accordance with the claim of the party seeking the discovery. n6

[6] Sanctions Prohibiting Support or Opposition to Claims or Introduction of Evidence

If a party fails to appear for deposition, or to serve answers or objections to interrogatories or a written response to a request for inspection, the court may enter an order refusing to allow the failing party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters into evidence. n7

If the court imposes a sanction that would affect a party's ability to present evidence or otherwise litigate fully the merits of a claim or defense, the sanction should be limited to the claims or defenses to which the discovery would have been pertinent. n8

[7] Sanctions Striking Pleadings or Staying Further Proceedings

If a party fails to appear for deposition, or to serve answers or objections to interrogatories or a written response to a request for inspection, the court may enter an order striking pleadings or parts of pleadings, or staying further proceedings until the discovery obligations are met. n9

[8] Sanctions Dismissing Action or Entering Default Judgment

[8.--1] Sanctions Available

If a party fails to appear for deposition, or to serve answers or objections to interrogatories or a written response to a request for inspection, the court may enter an order dismissing the action or any part of the action, or rendering a judgment by default against the noncomplying party. n10

[8.--2] Factors Considered

Appellate courts generally require trial judges to consider specific factors in determining whether the sanction is an appropriate response to the party's discovery failure, although the different circuits disagree as to the factors. Most courts consider the following:

- Whether the violation of the rule was the product of willfulness, bad faith, or other substantial fault n11
- Whether the violation was an isolated event or part of a pattern or repeated breaches of pretrial duties n12
- Whether (or to what extent) the party's discovery failure may be attributed to circumstances beyond its control n13
- Whether the discovery failure caused prejudice to the propounding party n14
- Whether the evidence that was not produced could be discovered from other sources n15
- Whether entering judgment in favor of or against a particular party might cause unfair prejudice to parties aligned with, but not pursuant to the control of, those parties n16
- Whether the court warned the party who violated the discovery rules that dismissal or default was a

possible sanction n17

- Whether a less severe measure would adequately achieve the purposes of the sanctions rules. n18

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMisconductCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 37(d)*; *see Dedvukaj v. Equilon Enters., L.L.C., 301 F. Supp. 2d 664, 668 (E.D. Mich. 2004)* .

(n2)Footnote 2. *Fed. R. Civ. P. 37(d).*

(n3)Footnote 3. *Marx v. Kelly, Hart & Hallman, P.C., 929 F.2d 8, 10 (1st Cir. 1991)* ; *Charter House Ins. Brokers v. New Hampshire Ins. Co., 667 F.2d 600, 605-606 (7th Cir. 1981)* .

(n4)Footnote 4. *Williams v. National Hous. Exch., Inc., 165 F.R.D. 405, 411-412 (S.D.N.Y. 1996)* .

(n5)Footnote 5. *Fed. R. Civ. P. 37(d).*

(n6)Footnote 6. *Fed. R. Civ. P. 37(d)*; *see Fed. R. Civ. P. 37(b)(2)(A)(i).*

(n7)Footnote 7. *Fed. R. Civ. P. 37(d)*; *see Fed. R. Civ. P. 37(b)(2)(A)(ii).*

(n8)Footnote 8. *Avionic Co. v. General Dynamics Corp., 957 F.2d 555, 558 (8th Cir. 1992)* ; *Daval Steel Prods. v. M/V Fakredine, 951 F.2d 1357, 1366 (2d Cir. 1991)* ; *United States v. National Med. Enter., Inc., 792 F.2d 906, 910 (9th Cir. 1986)* .

(n9)Footnote 9. *Fed. R. Civ. P. 37(d)*; *see Fed. R. Civ. P. 37(b)(2)(A)(iii), (iv).*

(n10)Footnote 10. *Fed. R. Civ. P. 37(d)*; *see Fed. R. Civ. P. 37(b)(2)(A)(v)*; *see also Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 919-922 (3d Cir. 1992)* ; *Panaderia La Diana, Inc. v. Salt Lake City Corp., 342 F. Supp. 2d 1013, 1030-1031 (D. Utah 2004)* .

(n11)Footnote 11. *See, e.g., Henry v. Gill Indus., Inc., 983 F.2d 943, 948-949 (9th Cir. 1993)* ; *Bobal v. Rensselaer Polytechnic Inst., 916 F.2d 759, 763-766 (2d Cir. 1990)* , *cert. denied, 499 U.S. 943 (1991)* ; *Fox v. Commissioner, 718 F.2d 251, 254-255 (7th Cir. 1983)* ; *Fox v. Studebaker-Worthington, Inc., 516 F.2d 989, 993 (8th Cir. 1975)* ; *Morris v. Snappy Car Rental, Inc., 151 F.R.D. 17, 17-19 (D.R.I. 1993)* ; *Continental Ins. Co. v. McGraw, 110 F.R.D. 679, 682-683 (D. Colo. 1986)* .

(n12)Footnote 12. *See, e.g., United States v. Aldeco, 917 F.2d 689, 690 (2d Cir. 1990)* ; *Minnesota Mining & Mfg. Co. v. Eco Chem, Inc., 757 F.2d 1256, 1261 (Fed. Cir. 1985)* .

(n13)Footnote 13. *Beil v. Lakewood Eng'g & Mfg. Co., 15 F.3d 546, 552 (6th Cir. 1994)* .

(n14)Footnote 14. *See, e.g., Archibeque v. Atchison, Topeka & Santa Fe Ry. Co., 70 F.3d 1172, 1175 (10th Cir. 1995)* ; *Hyde & Drath v. Baker, 24 F.3d 1162, 1166-1167 (9th Cir. 1994)* ; *Pope v. Lexington Ins. Co., 149 F.R.D. 586, 587-588 (E.D. Wis. 1993)* .

(n15)Footnote 15. *See, e.g., Fox v. Studebaker-Worthington, Inc., 516 F.2d 989, 992-993 (8th Cir. 1975)* ; *Panaderia La Diana, Inc. v. Salt Lake City Corp., 342 F. Supp. 2d 1013, 1030-1031 (D. Utah 2004)* ; *El-Yafi v. 360 East 72nd Owners Corp., 164 F.R.D. 12, 17-18 (S.D.N.Y. 1995)* .

(n16)Footnote 16. *See, e.g., Acme Printing Ink Co. v. Menard, Inc., 812 F. Supp. 1498, 1521 (E.D. Wis. 1992)* .

(n17)Footnote 17. *See, e.g., Bobal v. Rensselaer Polytechnic Inst., 916 F.2d 759, 763-766 (2d Cir. 1990)* (affirming dismissal against pro se plaintiff who had been warned of possibility of dismissal); *but see, Archibeque v. Atchison, Topeka & Santa Fe Ry. Co., 70 F.3d 1172, 1175 (10th Cir. 1995)* (affirming dismissal based on plaintiff's willfulness even though she had not been warned of possibility of dismissal).

(n18)Footnote 18. *See, e.g., Hyde & Drath v. Baker, 24 F.3d 1162, 1167 (9th Cir. 1994)* .

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CHAPTER 22 Enforcement of Discovery
E. Obtaining Sanctions for Failure to Appear at Deposition, or to Respond to Discovery Requests

2-22 Federal Litigation Guide § 22.83

§ 22.83 Opposing Motion for Rule 37(d) Sanctions

[1] Pending Motion for Protective Order

A party who fails to appear for deposition, or to respond to interrogatories or a request for inspection may be excused if he or she has a pending motion for a protective order seeking to block the discovery. n1

Note
that no motion for a protective order is necessary if the party from whom discovery is sought files a timely objection to the discovery. The only safe course available to a party who intends to do nothing in response to a patently objectionable discovery demand, however, is to file a motion for a protective order before the date on which a response to the discovery is due.

[2] Failure Was Substantially Justified

[2.--1] Monetary Sanction Avoidable

A litigant may avoid monetary sanctions of Rule 37(d) if the court finds that the failure was "substantially justified." n2

[2.--2] Burden Is on Party to Be Sanctioned

The burden of establishing substantial justification, and thereby negating the imposition of monetary sanctions, is on the party who failed to appear for deposition, or to serve answers or objections to interrogatories or a written response to a request for inspection. n3

[2.--3] Focus of Inquiry

The focus of the substantial justification inquiry is on the original failure to respond to the discovery request, and not on subsequent efforts by the party or the party's attorney to defend against the motion for sanctions. n4

The determination of whether there is substantial justification is case specific, making it impossible to catalog all pertinent considerations. However, it is likely that a party would meet its burden of demonstrating substantial justification if it shows that its failure to appear or respond was attributable entirely to factors beyond that party's

control, at least when the party tried in good faith to warn its opponent that it would not be able to comply within the prescribed time frames. n5

[3] Circumstances Make Sanctions Unjust

The district court may elect not to impose compensatory monetary sanctions if "other circumstances make an award of expenses unjust". n6 The burden of demonstrating other circumstances is on the party who failed to respond to the discovery request. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryProtective OrdersLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 37(d).*

(n2)Footnote 2. *Fed. R. Civ. P. 37(d).*

(n3)Footnote 3. *Telluride Management Solutions, Inc. v. Telluride Inv. Group, 55 F.3d 463, 466 (9th Cir. 1995) .*

(n4)Footnote 4. *Hyde & Drath v. Baker, 24 F.3d 1162, 1171 (9th Cir. 1994) .*

(n5)Footnote 5. *See, e.g., Speidel v. Bryan, 164 F.R.D. 241, 244 (D. Or. 1996) .*

(n6)Footnote 6. *Fed. R. Civ. P. 37(d).*

(n7)Footnote 7. *See Hyde & Drath v. Baker, 24 F.3d 1162, 1171 (9th Cir. 1994) .*

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CHAPTER 22 Enforcement of Discovery
E. Obtaining Sanctions for Failure to Appear at Deposition, or to Respond to Discovery Requests

2-22 Federal Litigation Guide § 22.84

§ 22.84 "Abuse of Discretion" Standard of Review

Appellate courts apply a deferential "abuse of discretion" standard in reviewing Rule 37(d) sanctions awards. n1

Determining the type of sanction that is most appropriately responsive to a particular Rule 37(d) violation is a fact specific inquiry that the trial court is presumptively best qualified to make. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMisconductCivil ProcedureAppealsStandards of ReviewAbuse of DiscretionLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Telluride Management Solutions, Inc. v. Telluride Inv. Group, 55 F.3d 463, 465-467 (9th Cir. 1995)* .

(n2)Footnote 2. *Oklahoma Federated Gold & Numismatics, Inc. v. Blodgett, 24 F.3d 136, 139 (10th Cir. 1994)* .

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2-22 Federal Litigation Guide § 22.85

§ 22.85 CHECKLISTS: Moving for Rule 37(d) Sanctions

[1] CHECKLIST: Bringing Motion for Rule 37(d) Sanctions

☐ **Determine if grounds for motion for sanctions exist.** If a person fails to appear at deposition or respond to a discovery request, a motion may be brought. n1

☐ **Prepare motion, and serve papers.** Include following allegations:

- ☐ Court has jurisdiction. n2
- ☐ Moving party made good faith effort at resolution of issues. n3
- ☐ Motion is timely. n4
- ☐ Adequate description of failure to comply and sanction sought was given.
- ☐ Papers and procedures followed comply with local rules.

☐ **When monetary sanctions are requested**, n5 Document:

- ☐ Costs incurred by party's failure to comply with discovery.
- ☐ Attorney's fees.

[2] CHECKLIST: Opposing Motion for Rule 37(d) Sanctions

☐ **Determine if grounds to oppose motion for sanctions exist**. n6 Consider:

- ☐ Motion for protective order was pending. n7
- ☐ Court does not have jurisdiction. n8
- ☐ Moving party failed to make good faith effort at resolution of issues. n9
- ☐ Motion is not timely. n10
- ☐ Inadequate description of failure to comply and sanction sought was given.
- ☐ Papers and procedures followed did not comply with local rules. n11
- ☐ Sanction requested is inappropriate. n12

☐ **Prepare and serve response papers**.

☐ **When monetary sanctions are sought**, n13 argue:

- ☐ Failure to comply with request was substantially justified.
- ☐ Other circumstances make imposition of sanctions unjust.
- ☐ Moving party did not make good faith attempt at resolution of issues.
- ☐ Amount requested is excessive.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMisconductLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 37(d)*; *see § 22.80*.

(n2)Footnote 2. *Fed. R. Civ. P. 37(d)*; *see § 22.81[2]*.

(n3)Footnote 3. *See § 22.81[4]*.

(n4)Footnote 4. *See § 22.81[3]*.

(n5)Footnote 5. *Fed. R. Civ. P. 37(d)*; *see § 22.82[4]*.

(n6)Footnote 6. *Fed. R. Civ. P. 37(d)*.

(n7)Footnote 7. *See § 22.83[1]*.

(n8)Footnote 8. *See § 22.81[2]*.

(n9)Footnote 9. *See § 22.81[4]*.

(n10)Footnote 10. *See § 22.81[3]*.

(n11)Footnote 11. *See § 22.81[5], [6]*.

(n12)Footnote 12. *See § 22.82*.

(n13)Footnote 13. *Fed. R. Civ. P. 37(d)*; *see § 22.82[4]*.

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CHAPTER 22 Enforcement of Discovery
E. Obtaining Sanctions for Failure to Appear at Deposition, or to Respond to Discovery Requests

2-22 Federal Litigation Guide §§ 22.86 through 22.99

[Reserved]

§§ 22.86[Reserved]

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CHAPTER 22 Enforcement of Discovery
F. Obtaining Sanctions for Failure to Participate in Discovery Plan

2-22 Federal Litigation Guide § 22.100

§ 22.100 Determining If Grounds for Sanctions Exist

[1] Failure to Participate in Development or Submission of Discovery Plan

If a party or a party's attorney fails to participate in good faith in the development and submission of a proposed discovery plan as required by Rule 26(f), the court may require the party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure. n1

[2] Scope of Duty to Participate in Development or Submission of Discovery Plan

Except in actions exempted by local rule or court order, parties must develop a proposed discovery plan in every civil action, which is expected to reflect the parties' views and proposals concerning: n2

- What changes should be made in the timing, form, or requirement for disclosures, including a statement as to when mandatory, voluntary disclosures pursuant to Rule 26(a)(1) were made or will be made
- 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
- What changes should be made in the limitations on discovery imposed pursuant to the discovery rules or by local rule, and what other limitations should be imposed
- Any other orders that should be entered by the court

Rule 26(f) may be inapplicable in cases in which the district court has opted out of its requirements.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductLegal EthicsSanctionsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 37(f)*; *see also Fed. R. Civ. P. 26(f)*.

(n2)Footnote 2. *Fed. R. Civ. P. 26(f)*.

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CHAPTER 22 Enforcement of Discovery
F. Obtaining Sanctions for Failure to Participate in Discovery Plan

2-22 Federal Litigation Guide § 22.101

§ 22.101 Obtaining Sanctions

[1] Sanctions Are Discretionary

Rule 37(f) permits, but does not mandate, sanctions. A trial court has broad discretion to decide whether to impose this sanction, even if the failure was willful or in bad faith. n1

[2] Sanctions Are Monetary

The only sanction authorized by Rule 37(f) is monetary. It is limited to the reasonable expenses, including attorney's fees, caused by the failure. n2

[3] Alternative Bases for Sanctions

A breach of a pretrial order directing the party or attorney to participate in the development of a discovery plan could expose the disobedient party or attorney to much more severe sanctions pursuant to Rule 16(f), which governs failure to obey a pretrial or scheduling order, and Rule 37(b)(2), which governs failure to comply with a discovery order. n3

[4] Bringing Failure to Court's Attention

Counsel should be prepared to raise with the court the opposing party's failure to participate in good faith in the development and submission of a proposed discovery plan. Although the court may award sanctions under Rule 37(g) on its own, nothing precludes a party from raising the issue.

[5] Providing Sanctioned Party With Opportunity to Be Heard

A judge who is considering imposing an expense shifting sanction for failing to participate in good faith in the development of a discovery plan must afford the person who would be sanctioned an opportunity to be heard. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedurePretrial

MattersConferencesPretrial OrdersCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral OverviewLegal EthicsSanctionsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See Fed. R. Civ. P. 37(f).*

(n2)Footnote 2. *Fed. R. Civ. P. 37(f).*

(n3)Footnote 3. *See Fed. R. Civ. P. 16(f), 37(b)(2); United States For Use & Benefit of Wiltec Guam, Inc. v. Kahaluu Constr. Co., 857 F.2d 600, 602-603 & n.3 (9th Cir. 1988) .*

(n4)Footnote 4. *Fed. R. Civ. P. 37(f).*

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CHAPTER 22 Enforcement of Discovery
F. Obtaining Sanctions for Failure to Participate in Discovery Plan

2-22 Federal Litigation Guide § 22.102

§ 22.102 CHECKLISTS: Moving for Rule 37(f) Sanctions

[1] CHECKLIST: Seeking Sanctions for Failure to Participate in Discovery Plan

☐ **Determine if grounds for sanction exist.** If a party fails to participate in development and submission of discovery plan, sanctions are available. n1

☐ **Raise issue of noncompliance with court.**

☐ **If necessary, prepare motion, and serve papers**.

☐ **Prepare documentation for amount of sanctions requested**. n2 Document:

- ☐ Costs incurred due to failure.
- ☐ Attorney's fees.

[2] CHECKLIST: Opposing Sanctions for Failure to Participate in Discovery Plan

☐ **Determine if grounds to oppose motion for sanctions exist**. n3 Consider:

- ☐ There was no opportunity to be heard.
- ☐ Sanction requested is excessive.
- ☐ Papers and procedures followed did not comply with local rules.

☐ **Prepare and serve response papers**.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMisconductLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 37(f).*

(n2)Footnote 2. *Fed. R. Civ. P. 37(c)(2).*

(n3)Footnote 3. *Fed. R. Civ. P. 37(f).*

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CHAPTER 22 Enforcement of Discovery
F. Obtaining Sanctions for Failure to Participate in Discovery Plan

2-22 Federal Litigation Guide §§ 22.103 through 22.109

[Reserved]

§§ 22.103[Reserved]

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CHAPTER 22 Enforcement of Discovery
G. Sanctions for Spoliation of Evidence

2-22 Federal Litigation Guide § 22.110

§ 22.110 Determining Whether Sanctions for Spoliation of Evidence Are Available

[1] Spoliation Defined

Spoliation is defined as the intentional destruction or alteration of evidence. n1

[2] Determining Which Evidence Should Be Preserved

A party is not obligated to retain every document or tangible item that is in its possession, or subject to its control, after a complaint has been filed. However, a party is obligated to preserve materials that the party knows, or reasonably should know: n2

- Might be relevant to the action
- Could lead to the discovery of admissible evidence
- Are likely to be requested during discovery
- Are the subject of a pending discovery request

The obligation to preserve evidence runs first to counsel, who has the duty to advise the client of the type of potentially relevant information and of the necessity of preventing its destruction. n3

[3] Authority for Sanctions

Sanctions for spoliation of evidence as a violation of the rules of discovery have been awarded pursuant to:

- Rule 37(b), for failure to comply with a discovery order
- Rule 37(d), for failure to respond to discovery requests
- The court's inherent authority to maintain its institutional integrity n4

[4] Considering Loss of Electronically Stored Information

Absent exceptional circumstances, a court may not impose sanctions under the Federal Rules of Civil Procedure 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. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductEvidenceRelevanceSpoliationLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Black's Law Dictionary* 1401 (6th ed. 1990).

(n2)Footnote 2. *Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 72-73 (S.D.N.Y. 1991)* ; *Wm. T. Thompson Co. v. General Nutrition Corp., 593 F. Supp. 1443, 1455 (C.D. Cal. 1984)* .

(n3)Footnote 3. *Donato v. Fitzgibbons, 172 F.R.D. 75, 79 & n. 5 (S.D.N.Y. 1997)* .

(n4)Footnote 4. *See Shepherd v. American Broad. Cos., Inc., 62 F.3d 1469, 1474, 1484 (D.C. Cir. 1995)* ; *Beil v. Lakewood Eng'g & Mfg. Co., 15 F.3d 546, 552 (6th Cir. 1994)* ; *Dillon v. Nissan Motor Co., 986 F.2d 263, 266-269 (8th Cir. 1993)* ; *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 368 (9th Cir. 1992)* .

(n5)Footnote 5. *Fed. R. Civ. P. 37(e).*

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CHAPTER 22 Enforcement of Discovery
G. Sanctions for Spoliation of Evidence

2-22 Federal Litigation Guide § 22.111

§ 22.111 Considering Factors Weighed by Court in Imposing Sanctions

[1] Severity of Sanction Dependent on Facts

Destruction of potentially relevant evidence occurs along a continuum of fault--ranging from innocence through the degrees of negligence to intentionality and the resulting penalties vary correspondingly.

The severity of the sanction imposed for spoliation of evidence will depend on:

- The significance of the evidence that was destroyed or altered n1
- The magnitude and remediability of the prejudice caused to other parties n2
- The relative culpability of the party who committed the wrong n3

[2] Severe Sanctions Appropriate in Limited Situations

Courts are likely to respond to spoliation of evidence with the ultimate sanction of dismissal or default in either of two situations: n4

- The destroyed evidence is central to the disposition of an issue, claim, or defense, on which the outcome of the entire litigation turns
- The guilty party has engaged in such wholesale destruction of primary evidence that the court cannot fashion effective issue related remedies

[3] Lesser Sanctions May Be Appropriate

If the spoliation is less egregious, courts have imposed other, less severe sanctions. These sanctions have included:

- Preclusion orders n5
- Orders deeming specified facts to be established n6

- Instructions to the jury that it may draw an inference adverse to the party responsible for the absence of the evidence n7

- Monetary awards, not necessarily limited to expenses incurred as a result of the spoliation n8

A party seeking an adverse inference instruction based on the destruction of information must establish: n9

- That the party having control over the information had an obligation to preserve it at the time it was destroyed

- That the information was destroyed with a culpable state of mind

- That the destroyed information was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductEvidenceRelevanceSpoliationLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *General Envtl. Science Corp., v. Horsfall, 141 F.R.D. 443, 450-455 (N.D. Ohio 1992)* ; *see Sylla-Sawdon v. Uniroyal Goodrich Tire Co., 47 F.3d 277, 280-281 (8th Cir.)* , *cert. denied*, *516 U.S. 822 (1995)* .

(n2)Footnote 2. *Thiele v. Oddy's Auto & Marine, Inc., 906 F. Supp. 158, 161-163 (W.D.N.Y. 1995)* .

(n3)Footnote 3. *See Beil v. Lakewood Eng'g & Mfg. Co., 15 F.3d 546, 552 (6th Cir. 1994)* .

(N4)Footnote 4. *Shepherd v. American Broad. Cos., Inc., 62 F.3d 1469, 1479-1480 (D.C. Cir. 1995)* ; *Marrocco v. General Motors Corp., 966 F.2d 220, 223-224 (7th Cir. 1992)* ; *Thiele v. Oddy's Auto & Marine, Inc., 906 F. Supp. 158, 161-163 (W.D.N.Y. 1995)* ; *General Envtl. Science Corp., v. Horsfall, 141 F.R.D. 443, 450-455 (N.D. Ohio 1992)* ; *Telectron, Inc. v. Overhead Door Corp., 116 F.R.D. 107, 126-133 (S.D. Fla. 1987)* .

(n5)Footnote 5. *See, e.g., Dillon v. Nissan Motor Co., 986 F.2d 263, 268-269 (8th Cir. 1992)* ; *see also Unigard Sec.Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 368-369 (9th Cir. 1992)* .

(n6)Footnote 6. *See, e.g., Pressey v. Patterson, 898 F.2d 1018, 1022-1024 (5th Cir. 1990)* , *reh'g denied*, *No. 88-2917, 1990 U.S. App. LEXIS 10114 (5th Cir. June 7, 1990)* .

(n7)Footnote 7. *See, e.g., Dillon v. Nissan Motor Co., 986 F.2d 263, 269 (8th Cir. 1993)* ; *Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 77 (S.D.N.Y. 1991)* .

(n8)Footnote 8. *See, e.g., Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 77-78 (S.D.N.Y. 1991)* ; *Capellupo v. FMC Corp., 126 F.R.D. 545, 553-554* (D. Minn. 1989; *National Ass'n of Radiation Survivors v. Turnage, 115 F.R.D. 543, 558-559 (N.D. Cal. 1987)* .

(n9)Footnote 9. *See Klezmer ex rel. Desyatnik v. Buynak, 227 F.R.D. 43, 48 (E.D.N.Y. 2005)* .

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2-22 Federal Litigation Guide § 22.112

§ 22.112 CHECKLISTS: Moving for Sanctions for Spoliation of Evidence

[1] CHECKLIST: Seeking Sanctions for Spoliation of Evidence

☐ **Determine if grounds for sanction exist.** If a party destroys evidence, sanctions are available. n1

☐ **Prepare motion, and serve papers**.

[2] CHECKLIST: Opposing Sanctions for Spoliation of Evidence

☐ **Determine if grounds to oppose motion for sanctions exist**. n2 Consider:

☐ Sanction requested is excessive. n3

☐ Papers and procedures followed did not comply with local rules.

☐ **Prepare and serve response papers**.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductEvidenceRelevanceSpoliationLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 37(b), (d).*

(n2)Footnote 2. *Fed. R. Civ. P. 37(b), 37(d)* ; *see § 22.110.*

(n3)Footnote 3. *See § 22.111.*

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CHAPTER 22 Enforcement of Discovery
G. Sanctions for Spoliation of Evidence

2-22 Federal Litigation Guide §§ 22.113 through 22.119

[Reserved]

§§ 22.113[Reserved]

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2-22 Federal Litigation Guide § 22.120

§ 22.120 Certifying Mandatory Disclosures

[1] Signing Disclosures

[1.--1] Represented Party

With regard to represented parties, at least one attorney of record must sign every mandatory initial disclosure made pursuant to Rule 26(a)(1) and every pretrial disclosure made pursuant to Rule 26(a)(3). n1

Each attorney signing a disclosure must sign in his or her individual name and state his or her address, e-mail address, and telephone number. n2

[1.--2] Unrepresented Party

An unrepresented party must sign each mandatory initial disclosure that he or she makes pursuant to Rule 26(a)(1) and also every pretrial disclosure he or she makes pursuant to Rule 26(a)(3). n3

The unrepresented party must also state his or her address, e-mail address, and telephone number. n4

[2] Warranties Made

The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made. n5

[3] Requirements Inapplicable If Mandatory Disclosures Not Required in District

The signature requirements for mandatory disclosures are inapplicable in districts that have opted out of the applicable Rule 26(a) disclosure requirements.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil

ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductLegal EthicsSanctionsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 26(g)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(g)(1).*

(n3)Footnote 3. *Fed. R. Civ. P. 26(g)(1).*

(n4)Footnote 4. *Fed. R. Civ. P. 26(g)(1).*

(n5)Footnote 5. *Fed. R. Civ. P. 26(g)(1)*; *see also Fed. R. Civ. P. 26(a)(1), (a)(3)* (mandatory disclosure requirements).

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CHAPTER 22 Enforcement of Discovery
H. Obtaining Sanctions for Improper Certification of Discovery Request, Response, Objection, or Disclosure

2-22 Federal Litigation Guide § 22.121

§ 22.121 Certifying Discovery Requests, Responses, or Objections

[1] Signing Discovery Requests, Responses and Objections

[1.--1] Represented Party

With regard to represented parties, every discovery request, response, or objection must be signed by at least one attorney of record. n1

Each signing attorney must sign in his or her individual name and state his or her address, e-mail address, and telephone number. n2

[1.--2] Unrepresented Party

An unrepresented party must sign each discovery request, response, or objection that he or she makes. n3

The unrepresented party must also state his or her address, e-mail address, and telephone number. n4

[2] Warranties Made

The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is: n5

- Consistent with the Federal Rules of Civil Procedure and warranted by existing law or a nonfrivolous argument for the extension, modification, or reversal of existing law, or establishing new law
- Not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation
- Not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation

[3] Duty to Read Documents

Under Rule 26(g), the signer is obligated to read the particular request, response, or objection that he or she certifies. n6

[4] Certification as to Truthfulness of Responses Not Required

Rule 26(g) does not require a signing attorney to certify the truthfulness of theclient's factual responses to a discovery request. Rather, the signature certifies that the attorney has made a reasonable effort to assure that the client has provided all the information and documents available to him or her that are responsive to the discovery demand. n7

[5] Objective Standard

The "reasonable inquiry" required under Rule 26(g) is satisfied if the investigation undertaken by the attorney and the conclusions drawn from it are reasonable under the circumstances, in accordance with an objective standard similar to that imposed by Rule 11. n8

In making the inquiry, the attorney may rely on assertions by the client and on communications with other counsel in the case as long as that reliance is appropriate under the circumstances. n9

[6] Privileged Information Remains Protected

Rule 26(g) does not require a party or an attorney to disclose privileged communications or work product in order to show that a discovery request, response, or objection is substantially justified. n10

[7] Certification Evaluated at Time It Was Made

A certification made under Rule 26(g) will be evaluated as of the time it was made. n11 Counsel should take care to supplement any discovery documents when appropriate.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(g)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(g)(1).*

(n3)Footnote 3. *Fed. R. Civ. P. 26(g)(1).*

(n4)Footnote 4. *Fed. R. Civ. P. 26(g)(1).*

(n5)Footnote 5. *Fed. R. Civ. P. 26(g)(1)(B).*

(n6)Footnote 6. *See Apex Oil Co. v. Belcher Co., 855 F.2d 1009, 1015 (2d Cir. 1988)* .

(n7)Footnote 7. *See Fed. R. Civ. P. 26(g)* Committee Note (1983); *compare Fed. R. Civ. P. 26(g) with Fed. R. Civ. P. 30(e), 33*; *see also Metropolitan Opera Ass'n v. Local 100, Hotel Employees &Rest. Employees Int'l Union, 212 F.R.D. 178, 224 (S.D.N.Y. 2003)* (district court found that counsel's repeated representations that all responsive documents had been produced were not result of reasonable inquiry).

(n8)Footnote 8. *See Fed. R. Civ. P. 26(g)* Committee Note (1983); *see Imperial Chems. Indus., PLC v. Barr Labs., 126 F.R.D. 467, 473 (S.D.N.Y. 1989)* ; *see also Fed. R. Civ. P. 11* Committee Note (1983).

(n9)Footnote 9. *See Fed. R. Civ. P. 26(g)* Committee Note (1983).

(n10)Footnote 10. *See Fed. R. Civ. P. 26(g)* Committee Note (1983).

(n11)Footnote 11. *See Fed. R. Civ. P. 26(g)* Committee Note (1983).

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2-22 Federal Litigation Guide § 22.122

§ 22.122 Striking Uncertified Request, Response, or Objection

If a request, response, or objection is not signed, it must be stricken unless it is signed promptly after the omission is called to the attention of the party making it. A party is not obligated to take any action with respect to it until it is signed. n1

Although Rule 26(g) does not specify the procedure for having an uncertified request, response, or objection stricken, a party presumably may bring a motion to strike, utilizing the customary noticed motion procedure.

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(g)(2).*

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CHAPTER 22 Enforcement of Discovery
H. Obtaining Sanctions for Improper Certification of Discovery Request, Response, Objection, or Disclosure

2-22 Federal Litigation Guide § 22.123

§ 22.123 Obtaining Sanctions for Improper Certification

[1] Who May Be Sanctioned

If without substantial justification a person makes a certification in violation of Rule 26(g), the court, on motion or on its own initiative, will impose an appropriate sanction on one or both of the following: n1

- The person who made the certification
- The party on whose behalf the disclosure, request, response, or objection is made

[2] Sanctions That May Be Requested

Sanctions that may be requested for improper certification of a discovery request, response, objection, or disclosure, in violation of Rule 26(g), may include the following:

- An order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee n2
- Preclusion, when a party has engaged in a pattern of conduct evidencing deliberate and willful disregard of the requirements of the rules and the order of a court n3
- Cancellation of a scheduled discovery event, e.g., deposition n4

[3] Motion to Obtain Sanctions

A party seeking sanctions under Rule 26(g) may proceed by motion. n5

[4] Cross-Motion to Oppose Motion to Compel

If the opposing party brings a motion to compel, counsel may file a cross-motion under Rule 26(g) if the discovery request violates Rule 26(g) (e.g., was made for an improper purpose). n6

[5] Notice and Hearing

The sanctioning process must comport with due process requirements. The kind ofnotice and hearing required depends on the facts of the case and the severity of the sanction being considered. In most cases, the court is aware of the circumstances, and only a brief hearing should be necessary. n7

[6] Making Timely Motion

The Federal Rules of Civil Procedure do not specify any time frame within which a motion seeking Rule 26(g) sanctions must be filed. The motion should be filed as soon as possible after it becomes clear that a certification was made in violation of Rule 26(g) without substantial justification. In some cases, this determination may not be possible until the action has terminated.

[7] Certifying Good Faith Attempt at Resolution

There is no requirement to meet and confer with opposing counsel before filing a motion for sanctions under Rule 26(g). n8 However, by local rule, a district may have adopted such a requirement.

[8] Complying With Local Procedural and Filing Rules

Local rules in many districts contain special requirements governing the preparation of papers supporting and opposing discovery motions, as well as service and filing of those papers.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(g)(3).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(g)(3).*

(n3)Footnote 3. *Jankins v. TDC Management Corp., Inc., 131 F.R.D. 629, 634 (D.D.C. 1989) .*

(n4)Footnote 4. *See Chambers v. NASCO, Inc., 501 U.S. 32, 38, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991) , reh'g denied, 501 U.S. 1269 (1991) .*

(n5)Footnote 5. *See, e.g., Bellinger v. Deere & Co., 881 F. Supp. 813, 819 (N.D.N.Y. 1995) .*

(n6)Footnote 6. *See, e.g., Greenberg v. Hilton Int'l Co., 870 F.2d 926, 931 (2d Cir. 1989) .*

(n7)Footnote 7. *See Fed. R. Civ. P. 26(g)* Committee Note (1983).

(n8)Footnote 8. *See Fed. R. Civ. P. 26(c).*

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2-22 Federal Litigation Guide § 22.124

§ 22.124 CHECKLISTS: Moving for Rule 26(g) Sanctions

[1] CHECKLIST: Drafting and Filing Motion for Sanctions for Improper Certification

☐ Determine whether the certified discovery request, response, objection, or disclosure was made under any of the following conditions:

☐ The document is in some way inconsistent with the Federal Rules Civil Procedure. n1

☐ The document is in some way not warranted by existing law. n2

☐ The document is in some way not warranted by a good faith argument for the extension, modification, or reversal of existing law or for establishing new law. n3

☐ The document was interposed for an improper purpose, such as the following: n4

☐ Harassment.

☐ Unnecessary delay.

☐ Needless increase in litigation costs.

☐ The document is unreasonably or unduly burdensome or expensive in light of the following considerations. n5

☐ The needs of the case.

- ☐ The discovery already completed.
- ☐ The amount in controversy.
- ☐ The importance of the issues at stake.

☐ Determine, if possible, whether the improper certification was made without substantial justification. n6

☐ Follow the applicable informal dispute resolution rules:

- ☐ Prepare and serve the moving papers.

[2] CHECKLIST: Drafting and Filing Opposition to Motion for Sanctions for Improper Certification

☐ Determine whether the grounds asserted in the moving papers are justified under Rule 26(g)(1)(B). If not, draft objections refuting the facts asserted in the moving papers. n7

☐ If there is basis in fact for the grounds asserted in the moving papers under Rule 26(g)(1)(B), then draft opposition papers explaining the substantial justification for the request, response, objection, or disclosure that is the subject of the motion. n8

☐ Determine whether the moving party has complied with local rules concerning dispute-resolution procedures. If not, the motion may be denied on this ground.

☐ Prepare and serve papers in opposition to the motion.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 26(g)(1)(B)(i).*

(n2)Footnote 2. *See Fed. R. Civ. P. 26(g)(1)(B)(i).*

(n3)Footnote 3. *See Fed. R. Civ. P. 26(g)(1)(B)(i).*

(n4)Footnote 4. *See Fed. R. Civ. P. 26(g)(1)(B)(ii).*

(n5)Footnote 5. *See Fed. R. Civ. P. 26(g)(1)(B)(iii).*

(n6)Footnote 6. *See Fed. R. Civ. P. 26(g)(3).*

(n7)Footnote 7. *See Fed. R. Civ. P. 26(g)(1)(B).*

(n8)Footnote 8. *See Fed. R. Civ. P. 26(g)(3).*

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CHAPTER 22 Enforcement of Discovery
H. Obtaining Sanctions for Improper Certification of Discovery Request, Response, Objection, or Disclosure

2-22 Federal Litigation Guide §§ 22.125 through 22.199

[Reserved]

§§ 22.125[Reserved]

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CHAPTER 22 Enforcement of Discovery
I. Forms

2-22 Federal Litigation Guide § 22.200

§ 22.200 Notice of Motion to Compel Mandatory Disclosure

[1] FORM

Notice of Motion to Compel Mandatory Disclosure

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

NOTICE IS HEREBY GIVEN that on [*date*] at [*time of day (specify a.m. or p.m.)*], or soon thereafter as counsel may be heard, [*party designation and name of moving party*] will move this Court, at the United States Courthouse located at [*address of court*], Courtroom [*courtroom number*], for:

(a) an order pursuant to *Federal Rules of Civil Procedure, Rule 26(a)* and Rule 37(a)(3)(A), requiring [*party designation and name of party against whom relief is sought*] to make the mandated disclosures as described in the Affidavit of [*name*] attached hereto on the ground that [*state basis of motion, e.g., failure to make the necessary disclosures related to expert testimony*]; and

(b) an order pursuant to *Federal Rules of Civil Procedure, Rule 37(a)(5)*, awarding to [*party designation and name of moving party*] the expenses, including attorney's fees, incurred in bringing this motion.

This motion is based on this Notice of Motion, the Affidavit (*or appropriate affidavit substitute*) of [*name of signatory*] sworn to (*or dated*) [*date*], the accompanying Memorandum of Law [*if required*] dated[*date*], and on all of the pleadings and papers on file in this action.

[*Date*]

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for [*name and designation of party*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

TO: [*Name of opposing counsel*], Attorney for [*name of party*]

[2] Use of Form

This is a form of notice of motion for use by a party who wishes to obtain an order compelling any other party to comply with its disclosure obligations under *Fed. R. Civ. P. 26(a)*. This motion is made under *Fed. R. Civ. P. 37(a)(3)(A)*.

[3] Grounds for Motion to Compel

If a party fails to make the mandatory disclosures required under *Fed. R. Civ. P. 26(a)* and local district court rules, any other party may move to compel mandatory disclosure. n1

[4] Expense-Shifting Sanctions

A rebuttable presumption favors imposing expense-shifting sanctions on the party against whom a motion to compel disclosure is resolved. n2

[5] Certification of Attempt to Resolve Without Court Action

A motion to compel must include a certification that the movant has in good faith conferred or attempted to confer with the party from whom disclosure is being sought in an effort to secure the information without court action. n3

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 37(a)(3)(A)*.

(n2)Footnote 2. *See Fed. R. Civ. P. 37(a)(5)(A), (a)(5)(B)*.

(n3)Footnote 3. *Fed. R. Civ. P. 37(a)(1)*.

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CHAPTER 22 Enforcement of Discovery
I. Forms

2-22 Federal Litigation Guide § 22.201

§ 22.201 Notice of Motion to Compel Compliance With Discovery Request

[1] FORM

Notice of Motion to Compel Compliance With Discovery Request

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

NOTICE IS HEREBY GIVEN that on [*date*] at [*time of day (specify a.m. or p.m.)*], or soon thereafter as counsel may be heard, [*party designation and name of moving party*] will move this Court, at the United States Courthouse located at [*address of court*], Courtroom [*courtroom number*], for:

(a) an order pursuant to [*specify federal rule authorizing method under which discovery was sought*] and *Federal Rules of Civil Procedure, Rule 37(a)(3)(B)*, [*specify desired relief, e.g., requiring plaintiff to answer certain questions propounded to her upon her deposition that she refused to answer, as described in the Affidavit of [name] attached hereto*], on the ground [*state basis of motion, e.g., plaintiff refused to answer these questions, all of which are material and relevant to issues herein, and answers should be required*]; and

(b) an order pursuant to *Federal Rules of Civil Procedure, Rule 37(a)(5)*, awarding to [*party designation and name of moving party*] the expenses, including attorney's fees, incurred in bringing this motion.

This motion is based on this Notice of Motion, the Affidavit (*or appropriate affidavit substitute*) of [*name of signatory*] sworn to (*or dated*) [*date*], the accompanying Memorandum of Law (*if required*) dated [*date*], and on all of the pleadings and papers on file in this action.

[*Date*]

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for [*name and designation of party*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

TO: [*Name of opposing counsel*], Attorney for [*name of party*]

[2] Use of Form

This is a notice of motion for use by a party who wishes to obtain an order compelling compliance with its valid discovery request. This motion is made under *Fed. R. Civ. P. 37(a)(3)(B)*.

[3] Grounds for Motion to Compel

A motion to compel discovery may be precipitated by any of the following: n1

- A deponent fails to answer a written or oral question propounded pursuant *Fed. R. Civ. P. 30* or *Fed. R. Civ. P. 31*
- A corporation or other entity fails to designate a person to testify in accordance with *Fed. R. Civ. P. 30(b)(6)* or *Fed. R. Civ. P. 31(a)*.
- A party fails to answer an interrogatory served in accordance with *Fed. R. Civ. P. 33*
- A party fails to produce documents or to permit an inspection requested pursuant to *Fed. R. Civ. P. 34*

A motion to compel also may be appropriate when the response provided is at least partially evasive or incomplete. n2

[4] Expense-Shifting Sanctions

A rebuttable presumption favors imposing expense-shifting sanctions on the party against whom a motion to compel disclosure is resolved. n3

[5] Certification of Attempt to Resolve Without Court Action

A motion to compel must include a certification that the movant has in good faith conferred or attempted to confer with the party from whom disclosure is being sought in an effort to secure the information without court action. n4

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 37(a)(3)(B)*.

(n2)Footnote 2. *Fed. R. Civ. P. 37(a)(4)*.

(n3)Footnote 3. *See Fed. R. Civ. P. 37(a)(5)(A), (B)*.

(n4)Footnote 4. *Fed. R. Civ. P. 37(a)(1)*.

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CHAPTER 22 Enforcement of Discovery
I. Forms

2-22 Federal Litigation Guide § 22.202

§ 22.202 Notice of Motion for Sanctions for Failure to Comply With Court Order

[1] FORM

Notice of Motion for Sanctions for Failure to Comply With Court Order

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

NOTICE IS HEREBY GIVEN that on [*date*] at [*time of day (specify a.m. or p.m.)*], or soon thereafter as counsel may be heard, [*party designation and name of moving party*] will move this Court, at the United States Courthouse located at [*address of court*], Courtroom [*courtroom number*], for:

(a) an order pursuant to Federal Rules of Civil Procedure,

[*CHOOSE ONE OF THE FOLLOWING, AS APPROPRIATE*]

Rule 37(b)(2)(A)(i), that the following facts be established as proven: [*specify*],

[*OR*]

Rule 37(b)(2)(A)(ii), that [*party designation and name of party against whom relief is sought*] be forbidden from offering any evidence at [trial *or other proceeding at which evidence is taken*] supporting the following claims: [*specify*],

[*OR*]

Rule 37(b)(2)(A)(ii), that [*party designation and name of party against whom relief is sought*] be prohibited from introducing in evidence the following matters: [*specify*],

[*OR*]

Rule 37(b)(2)(A)(iii)-(iv), that all further proceedings on behalf of [*party designation and name of party against whom relief is sought*] be stayed and that [*party designation and name of party against whom relief is sought*]'s action be

stricken from the trial calendar,

[*OR*]

Rule 37(b)(2)(A)(v), that [*party designation and name of party against whom relief is sought*]'s [complaint *or other pleading seeking affirmative relief*] be dismissed,

[*OR*]

Rule 37(b)(2)(A)(vii), that [*party designation and name of party against whom relief is sought*] be adjudged in contempt of this court,

[*CONTINUE*]

on the ground that [*party designation and name of party against whom relief is sought*] has failed to comply with this court's order of [*date*], requiring [*party designation and name of party against whom relief is sought*] to [*specify terms of order*]; and

> (b) an order pursuant to *Federal Rules of Civil Procedure, Rule 37(b)(2)*, that [*party designation and name of party against whom relief is sought*] be required to pay the expenses, including attorney's fees, incurred by [*party designation and name of moving party*] as result of [*party designation and name of party against whom relief is sought*]'s failure to comply with the order.

This motion is based on this Notice of Motion, the Affidavit (or appropriate affidavit substitute) of [*name of signatory*] sworn to (*or dated*) [*date*], the accompanying Memorandum of Law (*if required*) dated [*date*], and on all of the pleadings and papers on file in this action.

[*Date*]

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for [*name and designation of party*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

TO: [*Name of opposing counsel*], Attorney for [*name of party*]

[2] Use of Form

This is a form of notice of motion for use by a party who wishes to obtain an order for sanctions based on another party's failure to comply with a court order to provide or permit discovery. This motion is made under *Fed. R. Civ. P. 37(b)*.

[3] Types of Sanctions Available

If a party fails to comply with a discovery order, the court in which the action is pending may make such orders in

regard to the failure as are just. Some of the sanctions that are specifically authorized include: n1

- An order that the matters with respect to which the order was made, or any other designated facts, shall be taken to be established for the purposes of the action in accordance with the claims of the party obtaining the order

- An order refusing to allow the disobedient party to support or oppose designated claims or defenses or prohibiting that party from introducing designated matters in evidence

- An order striking out pleadings or parts of pleadings

- An order staying further proceedings until the order is obeyed

- An order dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party

- An order treating the disobedience of the discovery order as a contempt of court, except when the violation is failure to submit to a physical or mental examination

In lieu of, or in addition to, any of these sanctions, the court must require the disobedient party, or the attorney advising that party, or both, to pay the reasonable expenses, including attorney's fees, caused by the violation, unless the court finds that the failure was substantially justified, or that other circumstances make an award of expenses unjust. n2

[4] Timing of Motion

Fed. R. Civ. P. 37(b) does not establish specific time limits for making a motion for sanctions. In the absence of a specific local rule to the contrary, Rule 37(b) motions should be filed within a reasonable time after the alleged violation. The moving party must provide the opposing party with adequate time to prepare for a hearing on the motion. Local rules and individual judge's rules should be consulted with respect to advance notice requirements for motions and regularly scheduled motion days and times.

[5] Certification of Attempt to Resolve Without Court Action

Although *Fed. R. Civ. P. 37(b)(2)* contains no meet and confer requirement before filing a motion for sanctions, many districts have rules requiring an attempt at informal resolution before filing such a motion.

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 37(b)(2)(A).*

(n2)Footnote 2. *Fed. R. Civ. P. 37(b)(2)(C).*

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CHAPTER 22 Enforcement of Discovery
I. Forms

2-22 Federal Litigation Guide § 22.203

§ 22.203 Notice of Motion for Sanctions for Failure to Make Mandatory Disclosures

[1] FORM

Notice of Motion for Sanctions for Failure to Make Mandatory Disclosures

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

NOTICE IS HEREBY GIVEN that on [*date*] at [*time of day (specify a.m. or p.m.)*], or soon thereafter as counsel may be heard, [*party designation and name of moving party*] will move this Court, at the United States Courthouse located at [*address of court*], Courtroom [*courtroom number*], for an order:

(a) pursuant to *Federal Rules of Civil Procedure, Rule 37(c)(1)*, that [*party designation and name of party against whom relief is sought*] be forbidden from offering any evidence at [trial *or other proceeding at which evidence istaken*] any of the following witnesses or information: [*specify*], on the ground that [*party designation and name of party against whom relief is sought*] has failed to make the disclosures mandated by [*Federal Rules of Civil Procedure, Rule 26(a) or Federal Rules of Civil Procedure, Rule 26(e)(1)*] as described in the Affidavit of [*name*], attached hereto; and

(b) pursuant to *Federal Rules of Civil Procedure, Rule 37(c)(1)*, that [*party designation and name of party against whom relief is sought*] be required to pay the expenses, including attorney's fees, incurred by [*party designation and name of moving party*] as result of the failure by [*party designation and name of party against whom relief is sought*] to comply with this requirement.

This motion is based on this Notice of Motion, the Affidavit (*or appropriate affidavit substitute*) of [*name of signatory*] sworn to (*or dated*) [*date*], the accompanying Memorandum of Law [*if required*] dated [*date*], and on all of the pleadings and papers on file in this action.

[*Date*]

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for [*name and designation of party*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

TO: [*Name of opposing counsel*], Attorney for [*name of party*]

[2] Use of Form

This is a form of notice of motion for use by a party who wishes to obtain an order for sanctions based on another party's failure to disclose information required by *Fed. R. Civ. P. 26(a)* or *Fed. R. Civ. P. 26(e)(1)*. This motion is made under *Fed. R. Civ. P. 37(c)(1)*. The form seeks a preclusion sanction under *Fed. R. Civ. P. 37(b)(2)(A)(ii)* and monetary sanctions. It may be modified when other sanctions under *Fed. R. Civ. P. 37(b)(2)* are sought.

[3] Types of Sanctions Available

If a party, without substantial justification, fails to disclose information required by *Fed. R. Civ. P. 26(a)* or *Fed. R. Civ. P. 26(e)(1)*, the party may not use testimony from that witness or the undisclosed information as evidence at trial, at a hearing, or in connection with a motion, unless the failure to disclose was harmless. n1

In addition to, or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. These sanctions may include: n2

- Payment of reasonable expenses, including attorney's fees, caused by the failure
- Any of the actions authorized in *Fed. R. Civ. P. 37(b)(2)(A)(i)-(vi)*,
- Informing the jury of the failure to make the disclosure

[4] Certification of Attempt to Resolve Without Court Action

Although *Fed. R. Civ. P. 37(c)(1)* contains no meet and confer requirement before filing a motion for sanctions, many districts have local rules requiring an attempt at informal resolution before filing such a motion.

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 37(c)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 37(c)(1).*

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CHAPTER 22 Enforcement of Discovery
I. Forms

2-22 Federal Litigation Guide § 22.204

§ 22.204 Notice of Motion for Sanctions for Unreasonable Failure to Admit

[1] FORM

Notice of Motion for Sanctions for Unreasonable Failure to Admit

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

NOTICE IS HEREBY GIVEN that on [*date*] at [*time of day (specify a.m. or p.m.)*], or soon thereafter as counsel may be heard, [*party designation and name of moving party*] will move this Court, at the United States Courthouse located at [*address of court*], Courtroom [*courtroom number*], for an order:

(a) pursuant to *Federal Rules of Civil Procedure, Rule 36* and Rule 37(c)(2), that [*party designation and name of party against whom relief is sought*] be required to pay the expenses, including attorney's fees, incurred by [*party designation and name of moving party*] in proving the [genuineness of those documents *or* truth of those matters] described in the Affidavit of *name*] attached hereto on the ground that [*party designation and name of party against whom relief is sought*] unreasonably failed to admit the [genuineness of those documents *or* truth of those matters] as requested under *Federal Rules of Civil Procedure, Rule 36*; and

(b) granting [*moving party*] such other incidental relief as may be appropriate.

This motion is based on this Notice of Motion, the Affidavit (*or appropriate affidavit substitute*) of [*name of signatory*] sworn to (*or dated*) [*date*], the accompanying Memorandum of Law (*if required*) dated [*date*], and on all of the pleadings and papers on file in this action.

[*Date*]

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for [*name and designation of party*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

TO: [*Name of opposing counsel*], Attorney for [*name of party*]

[2] Use of Form

This is a form of notice of motion for use by a party who wishes to obtain an order requiring a party who failed to make an admission to pay the expenses incurred by the moving party in proving those matters. This motion is made under *Fed. R. Civ. P. 37(c)(2).*

[3] When Sanction Is Available

If a party fails to admit the genuineness of any document or the truth of any matter as requested pursuant to *Fed. R. Civ. P. 36*, and if the requesting party then proves the genuineness of the document or the truth of the matter, the requesting party may seek an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. Expense-shifting sanctions must be imposed unless the court finds one of the statutorily set forth exceptions exist. n1

[4] Date and Time of Hearing

Fed. R. Civ. P. 37(c)(2) does not set forth a time limit for filing a motion. However, such motions are typically filed after trial based on the requirement that court find that the moving party has "proven" the truth of the matter for which an admission was requested, which requires that all rebuttal evidence be considered.

[5] Certification of Attempt to Resolve Without Court Action

Although *Fed. R. Civ. P. 37(c)(2)* contains no meet and confer requirement before filing a motion for sanctions, many local rules require an attempt at informal resolution before filing such a motion.

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 37(c)(2).*

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CHAPTER 22 Enforcement of Discovery
I. Forms

2-22 Federal Litigation Guide § 22.205

§ 22.205 Notice of Motion for Sanctions for Failure to Appear or Respond

[1] FORM

Notice of Motion for Sanctions for Failure to Appear or Respond

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

NOTICE IS HEREBY GIVEN that on [*date*] at [*time of day (specify a.m. or p.m.)*], or soon thereafter as counsel may be heard, [*party designation and name of moving party*] will move this Court, at the United States Courthouse located at [*address of court*], Courtroom [*courtroom number*], for:

(a) an order pursuant to Federal Rules of Civil Procedure,

[*CHOOSE ONE OF THE FOLLOWING, AS APPROPRIATE*]

Rule 37(b)(2)(A) and Rule 37(d), that the following facts be established as proven: [*specify*],

[*OR*]

Rule 37(b)(2)(B) and Rule 37(d), that [*party designation and name of party against whom relief is sought*] be forbidden from offering any evidence at trial supporting the following defenses: [*specify*],

[*OR*]

Rule 37(b)(2)(B) and *Fed. R. Civ. P. 37(d)* that [*party designation and name of party against whom relief is sought*] be prohibited from introducing in evidence the following matters: [*specify*],

[*OR*]

Rule 37(b)(2)(C) and *Fed. R. Civ. P. 37(d)* that [*party designation and name of party against whom relief is sought*]'s [answer *or other pleading setting forth affirmative defense*] be stricken and that judgment by default in favor of [*party designation and name of moving party*] for the relief demanded in the complaint be entered,

[*CONTINUE*]

on the ground that [*party designation and name of party against whom relief is sought*] has failed to [*specify sanctionable failure, e.g., answer or object to interrogatories as described in the Affidavit of (name) attached hereto as Exhibit A, and set forth in the attached Exhibit B*]; and

> (b) an order pursuant to *Federal Rules of Civil Procedure, Rule 37(d)*, that [*party designation and name of party against whom relief is sought*] be required to pay the expenses, including attorney's fees, incurred by [*party designation and name of moving party*] as result of [*party designation and name of party against whom relief is sought*]'s failure to comply with the requested discovery.

This motion is based on this Notice of Motion, the Affidavit (*or appropriate affidavit substitute*) of [*name of signatory*] sworn to (*or dated*) [*date*], the accompanying Memorandum of Law [*if required*] dated [*date*], and on all of the pleadings and papers on file in this action.

[*Date*]

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for [*name and designation of party*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

TO: [*Name of opposing counsel*], Attorney for [*name of party*]

[2] Use of Form

This is a notice of motion for use by a party who wishes to obtain an order for sanctions based on another party's failure to appear at a deposition or respond to a request for discovery. This motion is made under *Fed. R. Civ. P. 37(d).*

[3] Grounds for Motion

A party (or an officer, director, or managing agent of a party or a person designated pursuant to *Fed. R. Civ. P. 30(b)(6)* or *Fed. R. Civ. P. 31(a)* to testify on behalf of a party) may be sanctioned for failing to do any of the following: n1

- To appear before the officer who is to take a deposition
- To serve answers or objections to interrogatories submitted pursuant to Rule 33
- To serve a written response to a request for inspection submitted pursuant to Rule 34

[4] Types of Sanctions Available

If a party fails to comply with discovery, the court may make such orders in regard to the failure as are just, and among others it may issue any order authorized under *Fed. R. Civ. P. 37(b)(2)(A)(i)-(vi)*, such as: n2

- An order that the matters with respect to which the order was made, or any other designated facts, shall be taken to be established for the purposes of the action in accordance with the claims of the party obtaining the order

- An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence

- An order striking out pleadings or parts of pleadings, or staying further proceedings until the order is obeyed

- An order dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party

In lieu of, or in addition to, any of these sanctions, the court must require the disobedient party, or the attorney advising that party, or both, to pay the reasonable expenses, including attorney's fees, caused by the violation, unless the court finds that the failure was substantially justified, or that other circumstances make an award of expenses unjust. n3

[5] Certification of Attempt to Resolve Without Court Action

A motion for sanctions based on a party's failure to respond to interrogatories, or a request for inspection, must include a certification that the moving party has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain a response without court action. n4

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 37(d).*

(n2)Footnote 2. *Fed. R. Civ. P. 37(b)(2)(A).*

(n3)Footnote 3. *Fed. R. Civ. P. 37(b)(2)(C).*

(n4)Footnote 4. *Fed. R. Civ. P. 37(d).*

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CHAPTER 22 Enforcement of Discovery
I. Forms

2-22 Federal Litigation Guide § 22.206

§ 22.206 Notice of Motion for Sanctions for Failure to Participate in Discovery Plan

[1] FORM

Notice of Motion for Sanctions for Failure to Participate in Discovery Plan

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

NOTICE IS HEREBY GIVEN that on [*date*] at [*time of day (specify a.m. or p.m.)*], or soon thereafter as counsel may be heard, [*party designation and name of moving party*] will move this Court, at the United States Courthouse located at [*address of court*], Courtroom [*courtroom number*], for an order pursuant to *Federal Rules of Civil Procedure, Rule 26(f)* and Rule 37(f), that [*party designation and name of party against whom relief is sought*] be required to pay the expenses, including attorney's fees, incurred by [*party designation and name of moving party*] as result of [*party designation and name of party against whom relief is sought*]'s failure to participate in discovery planning as described in the Affidavit of *name*] attached hereto on the ground that [*party designation and name of party against whom relief is sought*] failed to participate in good faith in the development and submission of a proposed discovery plan as required under *Federal Rules of Civil Procedure, Rule 26(f)*.

This motion is based on this Notice of Motion, the attached Affidavit (*or appropriate affidavit substitute*) of [*name of signatory*] sworn to (*or dated*) [*date*], the accompanying Memorandum of Law [*if required*] dated [*date*], and on all of the pleadings and papers on file in this action.

[*Date*]

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for [*name and designation of party*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local*

district court rules]

TO: [*Name of opposing counsel*], Attorney for [*name of party*]

[2] Use of Form

This is a form of notice of motion for use by a party who wishes to obtain an order requiring a party who failed to participate in good faith in the development and submission of a proposed discovery plan to pay the expenses incurred by the moving party as result of that failure. This motion is made under *Fed. R. Civ. P. 37(f)*. Rule 26(f) may be inapplicable in cases in which the district court has opted out of its requirements.

[3] Certification of Attempt to Resolve Without Court Action

Although *Fed. R. Civ. P. 37(f)* contains no meet and confer requirement before filing a motion for sanctions, most local rules require an attempt at informal resolution before filing such a motion.

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CHAPTER 23 Discovery of Experts

2-23 Federal Litigation Guide 23.syn

§ 23.syn Synopsis to Chapter 23: Discovery of Experts

§ 23.01 Considering the Use of Expert Witnesses
[1] Evaluating the Importance of Expert Testimony
[2] Analyzing the Impact of Rules of Evidence

§ 23.02 Selecting Expert Witnesses
[1] Timing of Expert Selection
[2] Selecting a "Consulting Expert"
[3] Selecting a "Testifying Expert"
[4] Locating Expert Witnesses

§ 23.03 Compelling Testimony From Non-retained Experts

§ 23.04 Contracting with Experts

§ 23.05 Preparing the Expert for Litigation
[1] Withstanding Cross-Examination
[2] Providing the Expert with Access to Facts
[3] Trial-Preparation Protection Pertaining to Experts

§§ 23.06 through 23.09 [Reserved]

§ 23.10 Understanding Scope of Expert Witness Disclosures
[1] Including Requisite Information in Disclosure
[2] Rebutting Expert Witness Information Disclosed Under Rule 26(a)(2)

§ 23.11 Considering Consequences of Not Disclosing Expert Information
[1] Excluding Testimony at Trial
[2] Imposing Lesser Sanctions

§ 23.12 Identifying Expert Witnesses Who May Testify
[1] Testifying Experts Must Be Disclosed
[2] "Lay Experts" Need Not Be Disclosed
[3] Consultants Need Not Be Disclosed

[4] Determining Whether to Disclose Treating Physician as Expert
[5] Including Direct, Cross, or Rebuttal Witnesses in Disclosures

§ 23.13 Preparing Expert Witness Reports
[1] Determining Whether Witnesses Must Prepare Report
[2] Including Opinions and Other Information in Expert Report
[3] Providing Detailed and Complete Report
[4] Protecting Drafts and Communications of Expert Witnesses

§ 23.14 Determining Whether Disclosure Requirement Applies to Treating Physician
[1] Scope of Testimony Determinative
[2] Report Required If Physician Retained or Specially Employed

§ 23.15 Supplementing Expert Disclosures

§ 23.16 Preparing and Certifying Expert Witness Information
[1] Making Proper Disclosures
[2] Preparing Proper Expert Witness Report

§ 23.17 Considering the Impact of the Witnesses Report on Privileged Matter

§ 23.18 CHECKLIST: Expert Witness Disclosures Under Rule 26(a)(2)

§§ 23.19. through 23.29 [Reserved]

§ 23.30 Determining Whether Expert May Be Deposed

§ 23.31 Conducting Informal Investigation of Expert Before Deposition

§ 23.32 Avoiding Ex Parte Communications With Retained Experts

§ 23.33 Deposing Experts Expected to Testify
[1] Conducting Deposition After Receipt of Expert Witness Report
[2] Considering the Applicability of the Work Product Doctrine in Expert Depositions
[3] Deposing Court-Appointed Experts

§ 23.34 Deposing Experts Specially Retained in Preparation of Trial, but Not Expected to Testify
[1] Showing of Exceptional Circumstances Required
[2] Evaluating Policy Factors

§ 23.35 Stipulating to Discovery of Experts

§ 23.36 Preparing the Expert for Deposition
[1] Reviewing Opinion Testimony
[2] Reviewing the Expert's Report Before Deposition

§ 23.37 Preparing To Take An Expert Deposition
[1] Learning the Expert's Field of Expertise
[2] Inquiring About the Expert's Qualifications
[3] Inquiring About the Expert's Retention
[4] Inquiring About Testimony in Other Cases
[5] Inquiring About Publications
[6] Inquiring About Facts and Materials Given to the Expert

[7] Inquiring About Exhibits in Support of Opinions
[8] Inquiring About Reliance on Legal Standards
[9] Inquiring About the Field of Expertise
[10] Inquiring About the Expert's Opinions

§ 23.38 Paying Expert Fees in Context of Discovery
[1] Compensating the Expert to Obtain Discovery
[2] Evaluating Experts' Fees
[3] Seeking Fees Within Reasonable Time

§§ 23.39 through 23.99 [Reserved]

§ 23.100 Expert Witness Disclosure Statement Under Rule 26(a)(2)
[1] FORM
Expert Witness Disclosure Statement Under Rule 26(a)(2)
[2] Use of Form
[3] Required Expert Witness Disclosures
[4] Contents of Expert Witness's Report
[5] Writing and Signature Requirements

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CHAPTER 23 Discovery of Experts

2-23 Federal Litigation Guide Scope

Scope

SCOPE

This chapter concerns the use and discovery of experts. It begins with a discussion of the role of the expert in modern federal litigation practice and includes suggestions for ways to find and prepare an expert for litigation.

The focus then shifts to an in-depth examination of the provisions of Rule 26(a)(2) governing disclosure of all expert witnesses retained to provide expert testimony. The chapter includes a checklist to help in the preparation of the expert report, which parties are required to exchange in advance of trial unless otherwise stipulated or ordered by the court.

Next, the chapter covers expert depositions. The discussion includes an overview of taking and defending expert depositions and concludes with a section on expert witness fees in the context of discovery.

Finally, the chapter provides a sample expert witness disclosure form with comments concerning the use of the form.

For expanded coverage of discovery of experts, *see Moore's Federal Practice, Ch. 26, General Provisions Governing Discovery; Duty of Disclosure, § 26.80.*

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CHAPTER 23 Discovery of Experts
A. Understanding the Role of Expert Witnesses in Litigation

2-23 Federal Litigation Guide § 23.01

§ 23.01 Considering the Use of Expert Witnesses

[1] Evaluating the Importance of Expert Testimony

Expert witnesses are widely used in federal litigation. Since experts can testify on the "ultimate issue," they may be the most helpful witnesses for the party presenting the expert testimony and the most damaging witnesses for the opposing party. Proper selection and pretrial preparation of expert witnesses and effective discovery of opposing expert opinion is fundamental to a successful result in federal court litigation.

The increase in the use of expert evidence has not been without its critics. Courts have seen cases bogged down by overuse of expert opinion; costs of litigation have soared as a result of the parties' heavy reliance on expert witnesses; and many litigators and judges alike have commented that experts have taken on too large a role in civil litigation.

[2] Analyzing the Impact of Rules of Evidence

Expert testimony has become a critical component of federal trials, in part, because the Federal Rules of Evidence have been expanded to allow for the flexible use of experts. For example:

- Rule 701 allows lay witnesses to offer opinions based on their perceptions if such opinions are helpful to the fact-finder n1

- Under Rule 702, the class of witnesses characterized as experts has been expanded beyond those with formal education or degrees to include persons qualified through skill or experience n2

- Rule 703 now allows experts to base their opinions on inadmissible evidence if it is the type normally and reasonably used by experts in their field n3

- Rule 705 permits the expert to state an opinion without expressing the basis for it n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsExpert Witness

DiscoveryEvidenceTestimonyExpertsGeneral OverviewEvidenceTestimonyExpertsAdmissibility

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Evid. 701.*

(n2)Footnote 2. *Fed. R. Evid. 702.*

(n3)Footnote 3. *Fed. R. Evid. 703.*

(n4)Footnote 4. *Fed. R. Evid. 705.*

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CHAPTER 23 Discovery of Experts
A. Understanding the Role of Expert Witnesses in Litigation

2-23 Federal Litigation Guide § 23.02

§ 23.02 Selecting Expert Witnesses

[1] Timing of Expert Selection

Experts can be useful at all stages of a case, including the prefiling stage. In some cases, early consultation with a person knowledgeable in the specific technical, medical, or business area involved in the controversy will help with the development of legal claims. Since not all experts selected will be used at trial, consulting with an expert early may at first seem unduly expensive. Retaining an expert as early as possible, however, can provide significant advantages when a suit is filed and an expert is needed. For example, prefiling retention avoids the possibility of losing the expert to the other side. Early retention also gives the expert a chance to learn about the case up-front, and to help in framing discovery.

Yet, retaining an expert early need not add unduly to the cost of litigation. Careful management of the expert's duties will minimize additional expenses. At most, early use of experts will simply move the costs up in time. Unless the case is likely to settle in the very early stages, this is money well spent. Moreover, it could actually reduce costs later on, since the expert will not be forced to do extra work to create theories in short order.

[2] Selecting a "Consulting Expert"

The expert hired at an early stage need not be the perfect trial witness. Some experts who may not want to testify at trial (or who may not be good at it) nevertheless have useful contributions to make to the evaluation of a case. Since the opinions of such "consulting experts" usually are not discoverable, using them early can shield the testifying expert as well. n1

A consulting expert can help formulate theories of the case using principles of science, medicine, or business. Consulting experts, as well as trial experts, can also help counsel understand and assess likely theories of opposing counsel. Each case will require an independent evaluation of the need for early expert participation.

[3] Selecting a "Testifying Expert"

A different set of considerations applies to the selection of testifying experts. Unlike consulting experts, testifying experts must be both knowledgeable on the technical issues presented, and capable of communicating with jurors in the courtroom. Testifying experts must be persuasive, confident, and capable.

In addition to substantive testifying experts, a case may also require the use of experts who do nothing but prepare demonstrative evidence for the trial: models, experiments, videos, or animations. Such demonstrative evidence experts must be prepared to testify, at least on deposition, to authenticate their work for admission into evidence.

Some experts have developed expertise solely in areas of litigation controversy--damages experts, accident reconstructionists, handwriting experts, model makers, recreation safety analysts to name just a few. These experts are unique in that their expertise relates specifically to litigation issues, and exists only partially, if at all, outside that context. Virtually all complex cases will require at least one of these experts.

[4] Locating Expert Witnesses

The appropriate expert may be found in any number of ways: from reported cases; by word of mouth from other attorneys; from bar associations; from technical literature in the field; internet searches; or from colleges or universities. There are many expert clearinghouses whose business it is to direct attorneys to qualified experts, as well as societies that attempt to screen and qualify experts for public reference.

But an independent check on the expert's experience, qualifications, and references is always imperative. Only by interviewing an expert can counsel determine if the expert's knowledge is right for the particular case.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryEvidenceTestimonyExpertsGeneral OverviewEvidenceTestimonyExpertsHelpfulness

FOOTNOTES:
(n1)Footnote 1. Under *Fed. R. Civ. P. 26(a)(2)(A)*, a party is only entitled to disclosure of persons whose expert testimony "it may use at trial." Moreover, Rule 26(b)(4)(B) allows depositions of consulting experts only upon a showing of "exceptional circumstances." Thus, the rules do not support, but also do not completely prohibit, consulting expert discovery.

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CHAPTER 23 Discovery of Experts
A. Understanding the Role of Expert Witnesses in Litigation

2-23 Federal Litigation Guide § 23.03

§ 23.03 Compelling Testimony From Non-retained Experts

An expert who has not been retained by another party in a case enjoys no immunity or privilege n1 from testifying and may be compelled to testify by subpoena. An expert can be compelled to testify to opinions that she has previously formed and that require no study of the facts or further preparation. n2 Courts will compel expert testimony, especially when a "conspiracy of silence" is detected. n3 Thus, a treating physician may be compelled to disclose expert opinion based upon an implied contractual "duty of total care" owed by the physician to the patient, which duty includes not only care and treatment but also the duty to aid the patient in litigation by rendering reports andtestifying. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryEvidenceTestimonyExpertsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Anker v. G.D. Searle & Co., 126 F.R.D. 515 (M.D.N.C. 1989)* .

(n2)Footnote 2. *Carter-Wallace, Inc. v. Otte, 474 F.2d 529 (2d Cir. 1972)* . *See also Kaufman v. Edelstein, 539 F.2d 811 (2d Cir. 1976)* (experts could be subpoenaed against their will and enjoyed no absolute or qualified privilege under the Federal Rules of Evidence). *See also Wright v. Jeep Corp., 547 F. Supp. 871 (E.D. Mich. 1982)* . Other courts have limited unwilling expert testimony. *See Buchanan v. American Motors Corp., 697 F.2d 151 (6th Cir. 1983)* .

(n3)Footnote 3. *Pegram v. Sisco, 406 F. Supp. 776 , aff'd without opinion, 547 F.2d 1172 (8th Cir. 1976)* . *See also L'Orange v. Medical Protective Co., 394 F.2d 57, 45 Ohio Op. 2d 314 (6th Cir. 1968)* (it is against public policy for an insurer to intimidate an expert in a medical malpractice claim by threatening cancellation of his malpractice policy).

(n4)Footnote 4. *Miles v. Farrell, 549 F. Supp. 82 (N.D. Ill. 1982)* .

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CHAPTER 23 Discovery of Experts
A. Understanding the Role of Expert Witnesses in Litigation

2-23 Federal Litigation Guide § 23.04

§ 23.04 Contracting with Experts

The relationship between an attorney and an expert witness is voluntary and contractual. The expert witness must fulfill the contract and perform the services with reasonable care. n1

Even though there is a contractual relationship, there is no contractual duty on the part of the expert to testify in a certain way or express certain opinions; such a contract would violate public policy. Nor does an expert owe a duty to the opposing party. The expert owes a duty only to the court and is immune from liability for claims arising out of an expert report or testimony. n2

Because of these "independent" responsibilities, a contract with an expert should explicitly address the expert's responsibilities. The agreement should also state what the expert's services will cost. Practices vary widely among experts. For example, they may charge by the hour, the day, or the job. Charges for research assistants and other technical assistants should be expressly covered.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryEvidenceTestimonyExpertsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Honeywell, Inc. v. American Standards Testing Bureau, 851 F.2d 652 (3d Cir. 1988)* (a $300,000 judgment was entered against an expert witness company for "gross negligence" where the expert who signed the report did not participate in its preparation and could not testify as to his own opinion, resulting in an adverse verdict).

(n2)Footnote 2. *Kahn v. Burman, 673 F. Supp. 210 (E.D. Mich. 1987)* .

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CHAPTER 23 Discovery of Experts
A. Understanding the Role of Expert Witnesses in Litigation

2-23 Federal Litigation Guide § 23.05

§ 23.05 Preparing the Expert for Litigation

[1] Withstanding Cross-Examination

The expert's role is to analyze the problem in sufficient detail to withstand cross-examination, *and* to reiterate that detail in a manner understandable to the lay juror or judge. If an expert will not defer to direction of counsel, or cannot because of differing opinions concerning the case theory, a new expert must be located. Of course, as a highly skilled specialist, the expert must feel free to voice contrary opinions. Vigorous discussion will narrow the issues and will facilitate explanation of the most troublesome aspects of the case to the jury. Moreover, discussions with an expert will aid in avoiding a trial theory that is destined to fail.

[2] Providing the Expert with Access to Facts

Fundamentally, the expert's opinion is based on the facts of the case. Accordingly, the expert must have access to *all* of the facts, good and bad. Such access is crucial in maintaining the expert's credibility; if important facts are withheld from an expert, cross-examination can be devastating.

Generally, the facts should not be gathered by the expert. Rather, counsel should gather the facts before requesting that the expert analyze them. One of the best ways to get an expert into a case quickly is to transmit the case documents to the expert as soon as possible after the expert is retained and a fee schedule is agreed upon.

Documents sent to the expert should be accompanied by an inventory transmittal letter. At the time of the expert's deposition this transmittal letter will help both the expert and counsel keep track of which documents were given to the expert, when they were given, and by whom. In fact, this letter can simply be attached to the expert's Rule 26(a)(2) report. Pertinent documents includes all witness depositions, photographs, test results, key physical evidence, and product information, such as labels and manuals. When testimony will be required on specific legal or statutory standards, it is also often helpful for the expert to review pertinent jury instructions on the area in question.

[3] Trial-Preparation Protection Pertaining to Experts

Effective December 1, 2010, Rules 26(b)(3)(A) and (B) protect drafts of any expert report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded. n1

Additionally, Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any expert 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 do any of the following: n2

- Relate to compensation for the expert's study or testimony
- Identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed
- Identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryEvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyExpertsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(b)(4)(B).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(b)(4)(C).*

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CHAPTER 23 Discovery of Experts
A. Understanding the Role of Expert Witnesses in Litigation

2-23 Federal Litigation Guide §§ 23.06 through 23.09

[Reserved]

§§ 23.06[Reserved]

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CHAPTER 23 Discovery of Experts
B. Making Expert Witness Disclosures

2-23 Federal Litigation Guide § 23.10

§ 23.10 Understanding Scope of Expert Witness Disclosures

[1] Including Requisite Information in Disclosure

Rule 26(a)(2)(A) requires each party to disclose the identity of any witness it may use at trial to present evidence under *Federal Rule of Evidence 702*, *703*, or *705*. Such a witness is required to provide a written export report under Rule 26(a)(2)(B) only 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." n1

Effective December 1, 2010, if a witness identified under Rule 26(a)(2)(A) is not required to provide an expert report, the party must disclose the subject matter of the expected expert testimony and a summary of the facts and opinions to which the expert is expected to testify. n2 This disclosure will support preparation for deposing the witness, and in some settings may satisfy other parties that there is no need for a deposition.

Absent a stipulation or a court order, the disclosures must be made at least 90 days before the date set for trial or for the case to be ready for trial. n3

[2] Rebutting Expert Witness Information Disclosed Under Rule 26(a)(2)

After receiving the other parties' disclosures under Rule 26(a)(2)(B), a party may determine that additional expert testimony, not yet disclosed, may be necessary to contradict or rebut the other parties' disclosed witnesses. In that case, the party must disclose rebuttal expert witness identities and reports within 30 days after the other parties' disclosures. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryEvidenceTestimonyExpertsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 26(a)(2)(A).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(a)(2)(C).*

(n3)Footnote 3. *Fed. R. Civ. P. 26(a)(2)(D).*

(n4)Footnote 4. *Fed. R. Civ. P. 26(a)(2)(D).*

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CHAPTER 23 Discovery of Experts
B. Making Expert Witness Disclosures

2-23 Federal Litigation Guide § 23.11

§ 23.11 Considering Consequences of Not Disclosing Expert Information

[1] Excluding Testimony at Trial

Failure to comply with the expert disclosure requirements of Rule 26(a)(2) may be countered by a motion to compel by any other party. n1 The failure to make disclosure without substantial justification is sanctionable and sanctions may include disqualification of the witness or the undisclosed evidence. n2 When exclusion would be tantamount to dismissal of the case (based on the party's inability to prove their case without the expert), the trial judge should not impose the exclusion sanction unless it finds that the party's failure to comply with the disclosure requirements was both unjustified and harmful. n2.1

One party's failure to comply with the expert disclosure requirements does not excuse noncompliance by another party. n3 If an expert discusses the omitted opinion in the course of the expert's deposition, that will often operate to satisfy Rule 26(e)(1) and prevent exclusion under Rule 37(c)(1), unless the court determines that the omission was intentional and without substantial justification, and the opponent was unduly prejudiced as a result. However, the mere fact that an expert's deposition is taken and the opposing party has the opportunity to inquire into opinions omitted from the expert's report--but does not in fact do so--will not cure the omission in the report. The omitted opinion will, in these circumstances, usually be excluded under Rule 37(c)(1) unless the proponent can show substantial justification or harmless error. n4

[2] Imposing Lesser Sanctions

In addition to the strong sanction of exclusion, the court has broad discretion in fashioning additional sanctions for failure to disclose experts or to provide proper expert reports under Rule 26(a)(2). The court may as an additional sanction, or in lieu of exclusion: n5

- Require payment of reasonable expenses caused by the failure to disclose (including attorney's fees)
- Designate certain facts be taken as established for the purposes of the action
- Refuse to allow the non-disclosing party to support or oppose certain claims or defenses
- Strike parts of the pleadings

- Stay further proceedings until disclosure is made
- Dismiss any part of the action
- Inform the jury of the failure to disclose

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryEvidenceTestimonyExpertsGeneral OverviewEvidenceTestimonyExpertsAdmissibility

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 37(a)(3)(A).*

(n2)Footnote 2. *Fed. R. Civ. P. 37(c)(1)*; In re Air Crash at Charlotte, N.C. on July 2, 1994, *982 F. Supp. 1086, 1088 (D.S.C. 1997)* .

(n3)Footnote 2.1. *See Sherrod v. Lingle, 223 F.3d 605, 612 (7th Cir. 2000)* .

(n4)Footnote 3. *Smith v. State Farm Fire and Cas. Co., 164 F.R.D. 49, 54 (S.D. W. Va. 1995)* .

(n5)Footnote 4. *LaMarca v. United States, 31 F. Supp. 2d 110, 123 (E.D.N.Y. 1998)* .

(n6)Footnote 5. *See Fed. R. Civ. P. 37(c)(1)*. The Committee Note suggests that the failure to disclose is admissible unless the judge acts to exclude it as evidence: "The failure to identify a witness or document in a disclosure statement would be admissible under the Federal Rules of Evidence under the same principles that allow a party's interrogatory answers to be offered against it."

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CHAPTER 23 Discovery of Experts
B. Making Expert Witness Disclosures

2-23 Federal Litigation Guide § 23.12

§ 23.12 Identifying Expert Witnesses Who May Testify

[1] Testifying Experts Must Be Disclosed

Parties must disclose the identity of experts who may be used at trial to presentevidence under *Rules 702*, *703*, or *705 of the Federal Rules of Evidence*. n1 Note that:

- Rule 702 allows experts to offer opinion evidence if it will assist the trier of fact to determine a factual issue. n2

- Rule 703 allows an expert to base an opinion on material provided before or during trial and that may not be admissible. n3

- Rule 705 allows an expert to state the reason for an offered opinion without first disclosing the facts or data relied on to form the opinion. n4

[2] "Lay Experts" Need Not Be Disclosed

A party is not required to disclose--as an expert--the identity of a lay witness who will provide opinion testimony under *Rule 701 of the Federal Rules of Evidence*. n5 Rule 701 permits a lay witness to testify in the form of opinions or inferences when the testimony is rationally based on the perception of the witness and the testimony will be helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. n6

It is sometimes difficult to distinguish between a lay witness providing Rule 701 testimony and an expert providing testimony under Rule 702, particularly if the witness might otherwise qualify as an expert in his or her field, especially in courts that have adopted a liberal view toward the admissibility of Rule 701 testimony. n7

An essential difference is that Rule 701 requires direct personal knowledge of a factual matter at issue. Only then does it allow introduction of a limited degree of opinion testimony to help convey that information and only if the court finds that it would be helpful to the jury. n8

However, "lay experts" must be disclosed as fact witnesses under Rule 26(a)(1) and (a)(3).

[3] Consultants Need Not Be Disclosed

Rule 26(a)(2) requires the disclosure only of experts who may testify at trial. Consultants who have provided expert opinions, but who the party does not intend to call as witnesses, generally need not be disclosed. n9

Note, however, that facts known or opinions held by such a consulting expert may be discoverable on a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. n10

In addition, reports of physical or mental examinations ordered by the court or agreed to by the parties must be provided if requested by the examined party. n11

[4] Determining Whether to Disclose Treating Physician as Expert

A physician who has treated a party is generally considered to be an ordinary witness, who need not be disclosed, even though a treating physician may be called on to testify based on his or her personal knowledge of the patient's examination, diagnosis, and treatment. In some cases, a treating physician may be permitted to offer an opinion as to what caused the medical condition at issue. n11.1 In contrast, a physician who is merely retained for purposes of trial, and whose opinions are based solely on knowledge acquired and developed in anticipation of litigation or for trial, is considered to be an expert witness, and is subject to expert witness disclosure requirements. n12

Several courts have held that, if a treating physician is called primarily to offer conclusions regarding causation rather than primarily to testify as to what the physician observed during treatment, the physician is an expert witness whose identity must be disclosed under Rule 26(a)(2)(A). n12.1

Although a treating physician may not be required to submit an expert witness report, the party must disclose the subject matter of the expected expert testimony and a summary of the facts and opinions to which the expert is expected to testify even when an expert report is not required. n12.2

[5] Including Direct, Cross, or Rebuttal Witnesses in Disclosures

Expert witness disclosures must include the identity, testimony, and other required information from all expert witnesses expected to testify at trial, including those that will be used to impeach or rebut evidence offered by the other parties' experts. Experts who will be offered solely as rebuttal witnesses, however, need not be identified until 30 days after the other parties' disclosures. n13

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryEvidenceTestimonyExpertsGeneral OverviewEvidenceTestimonyExpertsAdmissibilityEvidenceTestimonyExpertsCredibilityImpeachment

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(a)(2)(A).*

(n2)Footnote 2. *See Fed. R. Evid. 702.*

(n3)Footnote 3. *See Fed. R. Evid. 703.*

(n4)Footnote 4. *See Fed. R. Evid. 705.*

(n5)Footnote 5. *See MCI Telecommunications Corp. v. Wanzer, 897 F.2d 703, 706 (4th Cir. 1990)* .

(n6)Footnote 6. *Fed. R. Evid. 701.*

(n7)Footnote 7. *See Asplundh Mfg. Div. v. Benton Harbor Eng'g, 57 F.3d 1190 (3d Cir. 1995)* .

(n8)Footnote 8. *See Wilburn v. Maritrans GP, Inc., 139 F.3d 350, 355-356 (3d Cir. 1998)* .

(n9)Footnote 9. *See Fed. R. Civ. P. 26(a)(2)(A).*

(n10)Footnote 10. *Fed. R. Civ. P. 26(b)(4)(D).*

(n11)Footnote 11. *Fed. R. Civ. P. 26(b)(4)(D)*; *see also Fed. R. Civ. P. 35(b).*

(n12)Footnote 11.1. *See Brundidge v. City of Buffalo, 79 F. Supp. 2d 219, 224 (W.D.N.Y. 1999)* .

(n13)Footnote 12. *See Patel v. Gayes, 984 F.2d 214, 217 (7th Cir. 1993)* ; *Ebewo v. Martinez, 309 F. Supp. 2d 600, 608 (S.D.N.Y. 2004)* .

(n14)Footnote 12.1. *See Zarecki v. National R.R. Passenger Corp., 914 F. Supp. 1566, 1572-1573 (N.D. Ill. 1996)* ; *Widhelm v. Wal-Mart Stores, Inc., 162 F.R.D. 591, 594 (D. Neb. 1995)* .

(n15)Footnote 12.2. *Fed. R. Civ. P. 26(a)(2)(C).*

(n16)Footnote 13. *See Fed. R. Civ. P. 26(a)(2)(C).*

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CHAPTER 23 Discovery of Experts
B. Making Expert Witness Disclosures

2-23 Federal Litigation Guide § 23.13

§ 23.13 Preparing Expert Witness Reports

[1] Determining Whether Witnesses Must Prepare Report

Unless otherwise stipulated or ordered by the court, two types of witnesses mustprepare written reports: n1

- Those retained or specially employed to provide expert testimony in the case
- Those whose duties as an employee of the party regularly involve giving expert testimony

Courts often consider whether the witness has been paid a fee in determining whether the witness was retained or specially employed, but that fact alone does not make a witness an expert subject to the report requirements. n2

If an expert witness identified under Rule 26(a)(2)(A) is not required to provide an expert report, the party must disclose the subject matter of the expected expert testimony and a summary of the facts and opinions to which the expert is expected to testify. n2.1

[2] Including Opinions and Other Information in Expert Report

The expert's report must contain each of the following: n3

- A complete statement of all opinions the expert will express and their basis and reasons
- The facts or data considered by the witness in forming the opinions
- Any exhibits to be used as a summary of or in support of the witness's opinions
- The witness's qualifications, including a list of all publications written by the witness within the preceding 10 years n3.1
- The compensation to be paid for the study and testimony n3.2
- A list of any other cases in which the witness has testified as an expert at trial or by deposition within

the preceding four years

A party is not excused from producing a detailed and complete list of cases in which that party's expert has testified simply because the expert does not maintain such a list, or because such a list would be costly and difficult to compile because of the number of cases in which the expert has testified. n4 Information that is in the nature of rebuttal evidence need not be included in an expert witness's first report. It is sufficient for this information to appear in the second report filed by a party's expert in response to the other party's expert's report. n5 With respect to the required list of cases in which the witness has testified, one district court has held that the identification of cases at a minimum should include the courts or administrative agencies, the names of the parties, the case number, and whether the testimony was by deposition or at trial. n6

[3] Providing Detailed and Complete Report

An expert witness's report must include all testimony the witness is expected to present during direct examination, and the expert may not testify on a matter not disclosed in the preliminary report. An expert's testimony may be entirely precluded if the expert's report is not made available to opposing counsel within disclosure deadlines. n7

The written report requirement was designed to counter the common practice of providing information so sketchy and vague that it rarely dispensed with the need to depose the expert or was of little help in preparing for a deposition of the witness. n8

Rule 26(a)(2) effectively does away with the need for interrogatories to determine the substance of an expert's testimony because the expert report must contain a complete statement of all opinions to be expressed and the basis and reasons for the opinions, as well as the data or other information considered by the witness in forming the opinions. n9 Because the report must be served before an expert may be deposed, the report may reduce the length of the expert's deposition or may eliminate the need for one entirely. n10

[4] Protecting Drafts and Communications of Expert Witnesses

Effective December 1, 2010, Rules 26(b)(3)(A) and (B) protect drafts of any expert report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded. n11

Additionally, Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any expert 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 do any of the following: n12

- Relate to compensation for the expert's study or testimony
- Identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed
- Identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryEvidenceTestimonyExpertsGeneral OverviewEvidenceTestimonyExpertsAdmissibilityEvidenceTestimonyExpertsHelpfulness

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 26(a)(2)(B).*

(n2)Footnote 2. *Hall v. Sykes, 164 F.R.D. 46, 48 (E.D. Va. 1995)* .

(n3)Footnote 2.1. *Fed. R. Civ. P. 26(a)(2)(C).*

(n4)Footnote 3. *Fed. R. Civ. P. 26(a)(2)(B).*

(n5)Footnote 3.1. *See Rivera Pomales v. Bridgestone Firestone, Inc., 217 F.R.D. 290, 293 (D.P.R. 2003)* (district court excluded defendant's expert witness for failure to include a copy of the expert's curriculum vitae with the expert witness report).

(n6)Footnote 3.2. *See Cary Oil Co. v. MG Ref. & Mktg., Inc., 257 F. Supp. 2d 751, 756 (S.D.N.Y. 2003)* (disclosure of hourly rate on its own is insufficient).

(n7)Footnote 4. *Palmer v. Rhodes Machinery, 187 F.R.D. 653, 655-656 (N.D. Okla. 1999)* .

(n8)Footnote 5. *ABB Air Preheater, Inc. v. Regenerative Envtl. Equip. Co., Inc., 167 F.R.D. 668, 672-673 (D.N.J. 1996)* .

(n9)Footnote 6. *Nguyen v. IBP, Inc., 162 F.R.D. 675, 682 (D. Kan. 1995)* .

(n10)Footnote 7. *Walsh v. McCain Foods Ltd., 81 F.3d. 722 (7th Cir. 1996)* .

(n11)Footnote 8. *Fed. R. Civ. P. 26(a)* Committee Note (1993).

(n12)Footnote 9. *Fed. R. Civ. P. 26(a)(2).*

(n13)Footnote 10. *Fed. R. Civ. P. 26(a)* Committee Note (1993).

(n14)Footnote 11. *Fed. R. Civ. P. 26(b)(4)(B).*

(n15)Footnote 12. *Fed. R. Civ. P. 26(b)(4)(C).*

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CHAPTER 23 Discovery of Experts
B. Making Expert Witness Disclosures

2-23 Federal Litigation Guide § 23.14

§ 23.14 Determining Whether Disclosure Requirement Applies to Treating Physician

[1] Scope of Testimony Determinative

Whether a treating physician must prepare and file an expert witness report has raised some uncertainty. Generally, physicians may testify regarding their treatment and opinions with respect to the injuries or illnesses sustained as they causally relate to the incident and their opinion as to permanency without becoming subject to the more extensive expert witness requirements of Rule 26(a)(2)(B). n1

[2] Report Required If Physician Retained or Specially Employed

If a treating physician is specially retained or employed to render a medical opinion based on factors that were not learned in the course of the treatment of the patient, then such a doctor would be required to prepare an expert written report. n2

Merely paying a fee for the physician to testify at a deposition or in court does not make that physician a specially retained or employed witness. n3 However, an attorney's reference of a client to a physician for treatment raises the appearance that the physician was specially retained, and a written report may be required. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryEvidenceTestimonyExpertsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Mangla v. University of Rochester, 168 F.R.D. 137, 139 (W.D.N.Y. 1996)* .

(n2)Footnote 2. *See Mangla v. University of Rochester, 168 F.R.D. 137, 139 (W.D.N.Y. 1996)* .

(n3)Footnote 3. *Hall v. Sykes, 164 F.R.D. 46, 48 (E.D. Va. 1995)* .

(n4)Footnote 4. *Hall v. Sykes, 164 F.R.D. 46, 48-49 (E.D. Va. 1995)* .

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CHAPTER 23 Discovery of Experts
B. Making Expert Witness Disclosures

2-23 Federal Litigation Guide § 23.15

§ 23.15 Supplementing Expert Disclosures

The duty to supplement expert testimony disclosures extends not only to the report prepared and provided under Rule 26(a)(2)(B), but also to any deposition of the expert. n1 Any additions or changes to an expert's reports or depositions must be disclosed by the time a party's pretrial disclosures are due. n2

Failure to supplement the expert disclosures when required can lead to the exclusion of the expert's testimony. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryEvidenceTestimonyExpertsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(a)(2)(E), (e)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(e)(1).*

(n3)Footnote 3. *Walsh v. McCain Foods Ltd., 81 F.3d 722, 727 (7th Cir. 1996) .*

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CHAPTER 23 Discovery of Experts
B. Making Expert Witness Disclosures

2-23 Federal Litigation Guide § 23.16

§ 23.16 Preparing and Certifying Expert Witness Information

[1] Making Proper Disclosures

Unless otherwise directed by the court, expert witness disclosures made under Rule 26(a)(2) must be:

- Made in writing n1
- Signed n2
- Served on the other parties n3

Expert witness disclosures are generally not to be filed unless ordered by the court, or unless they will be used in connection with a motion, the trial, or an appeal.

[2] Preparing Proper Expert Witness Report

The report accompanying the expert witness disclosures must be made in writing and be prepared and signed by the witness. n4

Counsel may assist experts in preparing the reports, but the report, which is intended to set forth the substance of the direct examination, should accurately reflect the witness' future testimony. n5

Unless otherwise stipulated or ordered by the court, if an expert witness is not required to provide a written report, the expert disclosure must include both of the following: n6

- The subject matter on which the witness is expected to present evidence under *Federal Rule of Evidence 702*, *703*, or *705*
- A summary of the facts and opinions to which the witness is expected to testify

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryEvidenceTestimonyExpertsGeneral OverviewEvidenceTestimonyExpertsHelpfulness

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 26(a)(4).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(a)(2)(B), (4).*

(n3)Footnote 3. *Fed. R. Civ. P. 26(a)(4).*

(n4)Footnote 4. *Fed. R. Civ. P. 26(a)(2)(B).*

(n5)Footnote 5. *Fed. R. Civ. P. 26(a)* Committee Note (1993).

(n6)Footnote 6. *Fed. R. Civ. P. 26(b)(2)(C)* (effective 12/1/10).

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CHAPTER 23 Discovery of Experts
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2-23 Federal Litigation Guide § 23.17

§ 23.17 Considering the Impact of the Witnesses Report on Privileged Matter

The written report requirement for experts specially employed to provide testimony nullifies virtually any claim of attorney-client privilege a litigant may make with regard to factual materials furnished to an expert. This holds true whether or not the materials were ultimately relied on by the expert.

If an attorney provides work product to an expert who considers it in forming opinions that he or she will be testifying to at trial, this information is no longer protected by the work product privilege and must be disclosed. n1

Effective December 1, 2010, Rules 26(b)(3)(A) and (B) protect drafts of any expert report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded. n2

Additionally, Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any expert 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 do any of the following: n3

- Relate to compensation for the expert's study or testimony
- Identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed
- Identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewEvidenceTestimonyExpertsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See American Fidelity Assurance Co. v. Boyer, 225 F.R.D. 520, 521 (D.S.C. 2004)* .

(n2)Footnote 2. *Fed. R. Civ. P. 26(b)(4)(B).*

(n3)Footnote 3. *Fed. R. Civ. P. 26(b)(4)(C).*

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2-23 Federal Litigation Guide § 23.18

§ 23.18 CHECKLIST: Expert Witness Disclosures Under Rule 26(a)(2)

The following checklist can be used when the expert witness disclosure requirements of Rule 26(a)(2) are applicable in the case.

☐ Unless otherwise stipulated or ordered by the court, the parties must prepare and provide expert witness disclosures as required under *Fed. R. Civ. P. 26(a)(2)(B)*.

☐ Determine which witnesses must be included in the disclosures as experts:

- ☐ Those retained or specially employed to provide expert testimony in the case.
- ☐ Those whose duties as an employee of the party regularly involve giving expert testimony.
- ☐ Testifying experts.
- ☐ Treating physicians.
- ☐ Direct witnesses.
- ☐ Cross examination witnesses.
- ☐ Rebuttal witnesses (30 days after other parties' disclosures).

☐ Provide to other parties the identity of any expert witness who may testify at trial as required under *Fed. R. Civ. P. 26(a)(2)(A)*.

☐ Have each expert witness subject to the disclosure requirements prepare a written report. Counsel may provide assistance, but cannot prepare report. n1 The report must contain the following information, pursuant to *Fed. R. Civ. P. 26(a)(2)(B)*:

- ☐ A complete statement of all opinions that the expert will express and their basis and reasons.
- ☐ The facts or data considered by the witness in forming the opinions
- ☐ Any exhibits to be used as a summary of or in support of the witness's opinions.
- ☐ The witness's qualifications, including a list of all publications written by the witness within the preceding 10 years.
- ☐ The compensation to be paid for the study and testimony.
- ☐ A list of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

☐ Report need not include rebuttal evidence. n2

☐ Review report to assure it is complete. Experts may not testify about matters not included in report.

☐ Prepare expert witness disclosures in writing as required by *Fed. R. Civ. P. 26(a)(4)*.

☐ Have expert sign written report, pursuant to *Fed. R. Civ. P. 26(a)(2)(B)*.

☐ Unless otherwise stipulated or ordered by the court, if an expert witness is not required to provide a written report, the expert disclosure must include both of the following under *Fed. R. Civ. P. 26(b)(2)(C)*:

- ☐ The subject matter on which the witness is expected to present evidence under *Federal Rule of Evidence 702*, *703*, or *705*
- ☐ A summary of the facts and opinions to which the witness is expected to testify

☐ Serve expert witness disclosures on the other parties as required under *Fed. R. Civ. P. 26(a)(4)*.

☐ Supplement expert witness disclosures with any changes or additions by the time pretrial disclosures under Rule 26(a)(3) are due.

■ **FORM:** For a sample form of expert witness disclosures, see *§ 23.100*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewEvidenceTestimonyExpertsGeneral OverviewEvidenceTestimonyExpertsHelpfulness

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(a)* Committee Note (1993).

(n2)Footnote 2. *ABB Air Preheater, Inc. v. Regenerative Envtl. Equip. Co., 167 F.R.D. 668, 672-673 (D.N.J. 1996)* (rebuttal evidence need not appear in first report submitted by patentee's experts).

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CHAPTER 23 Discovery of Experts
B. Making Expert Witness Disclosures

2-23 Federal Litigation Guide §§ 23.19. through 23.29

[Reserved]

§§ 23.19.[Reserved]

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CHAPTER 23 Discovery of Experts
C. Deposing Expert Witnesses

2-23 Federal Litigation Guide § 23.30

§ 23.30 Determining Whether Expert May Be Deposed

Once the parties have made all pre-trial disclosures regarding experts who may testify at trial, Rule 26(b)(4) allows the parties to depose any person who has been identified as an expert who may testify at trial. n1

A party may, through interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specifically employed by another party in anticipation of litigation or preparation for trial who is not expected to be called as a witness at trial only under either of the following circumstances: n1.1

- The expert has conducted a court ordered mental or physical examination under Rule 35 n2

- Upon a showing a exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means

Discovery can never be had concerning experts who were "informally consulted." n3 Such experts include those consulted at social occasions or those briefly consulted by telephone to whom only general information was provided and no follow-up consultation occurred. An expert may be categorized as an informal expert if she was not of assistance to the attorney, had insufficient credentials, or was otherwise inappropriate to the case.

An expert who acquired information and formed an opinion as to the disputed matter, not in preparation for litigation, but as an actor or observer, is subject to the same broad discovery under Rule 26(b)(1) as any other occurrence witness. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsOral DepositionsEvidenceTestimonyExpertsGeneral OverviewEvidenceTestimonyExpertsHelpfulness

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(b)(4).*

(n2)Footnote 1.1. *See Fed. R. Civ. P. 26(b)(4)(B).*

(n3)Footnote 2. *See Fed. Rule Civ. P. 35(b).*

(n4)Footnote 3. *Fed. R. Civ. P. 26(b)(4)* Committee Note (1993); *See also U.S.M. Corp. v. American Aerosols, Inc., 631 F.2d 420 (6th Cir. 1980)* .

(n5)Footnote 4. *Sipes v. United States, 111 F.R.D. 59 (S.D. Cal. 1986)* ; *Quarantillo v. Consolidated Rail Corp, 106 F.R.D. 435 (W.D.N.Y. 1985)* .

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CHAPTER 23 Discovery of Experts
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2-23 Federal Litigation Guide § 23.31

§ 23.31 Conducting Informal Investigation of Expert Before Deposition

Although information exchanged pursuant to Rule 26(a)(2) will generally serve as the foundation for expert depositions, informal investigation of experts may provide additional insight into the background and credentials of the expert. One approach to informal investigation is to ask your own expert to conduct an investigation of an opposing expert's reputation and credentials. An expert knowledgeable about the field may have sufficient friendly contacts with other professionals to facilitate a few discreet inquiries. Newspapers, magazines, and internet sites often rely on experts for quotable material and may also be useful. Websites for professional associations often list members and include background information. Researching prior testimony may also be helpful. Any inconsistencies between an expert's prior trial or deposition testimony and current proposed testimony may be exploited.

Finally, a client can participate in the investigation of the opposing expert if the client is engaged in a business in the expert's field of expertise. The client or one its employees may be familiar with the expert or may have attended a seminar at which the expert participated. Industry contacts may produce information regarding other companies that have had experience with the expert, either in litigated matters or in a consulting capacity.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryMethodsOral DepositionsEvidenceTestimonyExpertsGeneral OverviewEvidenceTestimonyExpertsHelpfulness

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CHAPTER 23 Discovery of Experts
C. Deposing Expert Witnesses

2-23 Federal Litigation Guide § 23.32

§ 23.32 Avoiding Ex Parte Communications With Retained Experts

Some courts have held that an ex parte contact by one party of another party's expert while the expert is still employed is a violation of Rule 26(b)(4)(B). Because this rule allows a party to discover the opinions of testifying and consulting experts, by implication, it prohibits ex parte contacts with expert witnesses. n1 Thus, the prohibition against ex parte communications is not based on the language of the rule, but rather on the concept of fairness. n2

It has been argued that ex parte communications with an opposing party's experts should not be prohibited when those experts also played a role in the underlying transactions or occurrences that gave rise to the lawsuit. At least one court has rejected this argument. While acknowledging that an expert witness might possess two subsets of information (one involving historic fact, and the other accumulated in preparation for expert testimony), the district court concluded that ex parte communications should be prohibited as to both types of information. In practical terms, the court felt it would be too difficult to separate the two categories of information, and ex parte communications would only invite controversy, overreaching, and professional misconduct. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryMethodsOral DepositionsEvidenceTestimonyExpertsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Olson v. Snap Prods., Inc., 183 F.R.D. 539, 542 (D. Minn. 1998)* .

(n2)Footnote 2. *See Procter & Gamble Co. v. Haugen, 184 F.R.D. 410, 412 (D. Utah 1999)* .

(n3)Footnote 3. *See Olson v. Snap Prods., Inc., 183 F.R.D. 539, 542 (D. Minn. 1998)* .

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CHAPTER 23 Discovery of Experts
C. Deposing Expert Witnesses

2-23 Federal Litigation Guide § 23.33

§ 23.33 Deposing Experts Expected to Testify

[1] Conducting Deposition After Receipt of Expert Witness Report

Rule 26(b)(4)(A) provides for the pretrial deposition of expert witnesses who are expected to testify at trial. n1 If, however, a report is required from the expert witness under Rule 26(a)(2)(B), the deposition may not be conducted until after the report is provided. n2 The purpose of this restriction is to reduce or eliminate the need for depositions. n3

Once a party has designated an expert witness as someone who will testify at trial, the later withdrawal of that designation may neither prevent the deposition of that witness by the opposing party nor the expert's testimony at trial. n4

[2] Considering the Applicability of the Work Product Doctrine in Expert Depositions

Effective December 1, 2010, Rules 26(b)(3)(A) and (B) protect drafts of any expert report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded. n5

Additionally, Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any expert 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 do any of the following: n6

- Relate to compensation for the expert's study or testimony
- Identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed
- Identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed

[3] Deposing Court-Appointed Experts

Experts appointed by the court also may be deposed. n7 The court will generally determine the type and extent of discovery permitted, and set this out in the order appointing the expert. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryMethodsOral DepositionsEvidenceTestimonyExpertsGeneral OverviewEvidenceTestimonyExpertsCourt-Appointed ExpertsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(b)(4)(A).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(b)(4)(A).*

(n3)Footnote 3. *See Smith v. State Farm Fire & Cas. Co., 164 F.R.D. 49, 53 (S.D. W. Va. 1995) .*

(n4)Footnote 4. *See House v. Combined Ins. Co. of Am., 168 F.R.D. 236, 245-247 (N.D. Iowa 1996) .*

(n5)Footnote 5. *Fed. R. Civ. P. 26(b)(4)(B).*

(n6)Footnote 6. *Fed. R. Civ. P. 26(b)(4)(C).*

(n7)Footnote 7. *Fed. R. Evid. 706.*

(n8)Footnote 8. *See* Manual for Complex Litigation 21.48, 21.51 (4th ed. 2004).

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CHAPTER 23 Discovery of Experts
C. Deposing Expert Witnesses

2-23 Federal Litigation Guide § 23.34

§ 23.34 Deposing Experts Specially Retained in Preparation of Trial, but Not Expected to Testify

[1] Showing of Exceptional Circumstances Required

A party may use interrogatories or a deposition to discover facts known or opinions held by an expert specially retained by a party in anticipation of litigation or preparation for trial, but not expected to be called as a witness, only under the following circumstances: n1

- The expert has conducted a court ordered mental or physical examination under Rule 35 n2
- Upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means

In determining whether a witness is an ordinary fact witness or an expert protected by Rule 26(b)(4)(D), the court examines the total factual situation to determine whether the witness obtained the information in the normal course of business or was hired to make an evaluation in connection with expected litigation. For an expert to be hired "in anticipation of litigation," a lawsuit need not have been filed, but there must have existed more than a remote possibility of litigation. n3

The purpose of this Rule is prevent a party from replacing the work of its own experts with that of its opponent. n4 The party seeking discovery has a heavy burden of proving that the required exceptional circumstances exist. n5 Exceptional circumstances may be established by demonstrating that the party seeking discovery is unable to obtain equivalent information that is essential to the preparation of the case from other sources. n6 This includes situations in which the object or condition observed by the non-testifying expert is no longer observable by experts hired by the party seeking discovery. n7 A second situation commonly recognized as constituting exceptional circumstances is when it is possible to replicate the expert discovery, but the costs would be judicially prohibitive. n8

[2] Evaluating Policy Factors

Once a court finds that the party seeking discovery has met its initial burden of showing exceptional circumstances, the court, before ordering discovery, still must analyze the policy considerations underlying Rule 26(b)(4)(D) to determine if they outweigh the exceptional circumstances. Four commonly articulated policy considerations are: n9

- The interest in allowing counsel to obtain the expert advice they need to properly evaluate and present their clients' positions without fear that every consultation with an expert may yield grist for the discovery mill

- The view that each side should prepare its own case at its own expense

- The concern that it would be unfair to the expert to compel its testimony and that experts might become unwilling to serve as consultants if they suspected their testimony would be compelled

- The risk of prejudice to the party who retained the expert as a result of the mere fact of retention

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsOral DepositionsEvidenceTestimonyExpertsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(b)(4)(D).*

(n2)Footnote 2. *Fed. R. Civ. P. 35(b).*

(n3)Footnote 3. *Bank Brussels Lambert v. Chase Manhattan Bank, 175 F.R.D. 34, 43 (S.D.N.Y. 1997) .*

(n4)Footnote 4. *See Hartford Fire Ins. Co. v. Pure Air on the Lake Ltd. Partnership, 154 F.R.D. 202, 207 (N.D. Ind. 1993) .*

(n5)Footnote 5. *See Hartford Fire Ins. Co. v. Pure Air on the Lake Ltd. Partnership, 154 F.R.D. 202, 208-209 (N.D. Ind. 1993) .*

(n6)Footnote 6. *See In re Shell Oil Refinery, 132 F.R.D. 437, 442 , clarified by 134 F.R.D. 148 (E.D. La. 1990) .*

(n7)Footnote 7. *See Braun v. Lorillard Inc., 84 F.3d 230, 236 (7th Cir. 1996) .*

(n8)Footnote 8. *See Bank Brussels Lambert v. Chase Manhattan Bank, 175 F.R.D. 34, 44-45 (S.D.N.Y. 1997) .*

(n9)Footnote 9. *See Bank Brussels Lambert v. Chase Manhattan Bank, 175 F.R.D. 34, 45 (S.D.N.Y. 1997) .*

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CHAPTER 23 Discovery of Experts
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2-23 Federal Litigation Guide § 23.35

§ 23.35 Stipulating to Discovery of Experts

In cases where both parties clearly will retain experts to testify at trial, consider the possibility of entering into a stipulation regarding discovery of expert witnesses. Rule 26(a)(2)(D) provides the flexibility to tailor expert discovery to the needs of a particular case by stipulation.

Rules 16 and 26(f) provide for a discovery conference, which serves as a convenient mechanism to establish ground rules for expert discovery under the supervision of the court. Because Rule 26(a)(2) sets certain requirements for expert discovery, court approval of any alteration is required. However, often the timing of expert discovery is a big issue, as well as whether depositions will occur. Parties can reduce subsequent controversy by entering a stipulation about these basic issues.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsStipulationsEvidenceTestimonyExpertsGeneral Overview

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CHAPTER 23 Discovery of Experts
C. Deposing Expert Witnesses

2-23 Federal Litigation Guide § 23.36

§ 23.36 Preparing the Expert for Deposition

[1] Reviewing Opinion Testimony

Counsel should not assume that an expert is prepared to testify at a deposition. It is counsel's responsibility to ensure that the expert is prepared on the issues that are critical to the case. No matter how experienced the expert, a meeting several days in advance of the deposition is essential. Make sure the expert understands the fundamental problems that are to be resolved by his or her testimony. Since many experts do not speak in public frequently, insist that the expert articulate opinions in advance of the deposition, as well as the basis for the opinions.

Prepare practice questions to ask the expert on aspects of the expert opinion which may be troublesome and also help the expert to prepare some suggested responses which are consistent with the expert's opinion.

[2] Reviewing the Expert's Report Before Deposition

The expert report exchanged pursuant to Rule 26(a)(2) will often serve as a chief basis of inquiry by the adversary, it is therefore critical to review the report and prepare testimony regarding:

- Opinions to be offered and the basis for the opinions
- The facts or data considered by the witness in forming the opinions
- The exhibits used to support or summarize opinions
- Qualifications as an expert
- All publications, even those written more than ten years ago
- Participation in other litigation, even more than four years ago
- Compensation for testimony offered

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryMethodsOral DepositionsEvidenceTestimonyExpertsGeneral OverviewEvidenceTestimonyExpertsHelpfulness

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CHAPTER 23 Discovery of Experts
C. Deposing Expert Witnesses

2-23 Federal Litigation Guide § 23.37

§ 23.37 Preparing To Take An Expert Deposition

[1] Learning the Expert's Field of Expertise

The first step in preparing for the expert's deposition is to learn the field of expertise thoroughly. A complete command of all facts of the case is essential in order to place the expert's opinions in context. Prior to an expert deposition, thoroughly review the expert's report and any information gathered through informal investigation.

Counsel should always use their own expert to help prepare for an expert deposition. Moreover, unless costs prohibit it, counsel's expert should attend a deposition of the opposing expert. It also helps to review physical evidence with an expert as part of the preparation. If the case involves the scene of an accident, a construction site, or other physical location where the operative facts occurred, visiting the scene with an expert will give a feel for the events that transpired and will assist greatly in questioning the opponent's expert by providing a basis of personal knowledge from which to create questions.

[2] Inquiring About the Expert's Qualifications

It is important to determine the level of expertise of opposing experts. Detailed inquiry about the expert's qualifications will assist in evaluating the expertise of the witness and assist on the determination of whether to attack the expert's qualifications. Thoroughly probe the witness's educational and employment background and determine the extent of the witness' involvement in the industry involved in the litigation. Many experts appear qualified on paper, but have no direct knowledge of an area peculiar to a contested issue or no direct experience in that area. Thorough inquiry also may bring forth incomplete, inaccurate, or questionable disclosures under Rule 26(a)(2).

[3] Inquiring About the Expert's Retention

Generally it is helpful to determine when the expert was retained. If an expert is retained shortly before deposition and trial, you may later be able to create the impression that his or her testimony was bought or that the expert hastily rushed into forming opinions. Determine whether the expert was given an "assignment" to reach a certain opinion requested by the attorney. Ascertain exactly when the expert first formed the opinion rendered at the deposition. Sometimes experts will give an opinion during their first contact with an attorney. That opinion obviously will be based upon information provided by the attorney and will be offered before the expert has formally reviewed the documents or other materials in the case.

Also find out precisely how the expert was retained and whether or not the expert has been retained by opposing counsel or the opposing party in the past or is a friend of the opponent. If the expert has been retained in the past, it can be useful to delve into the specific circumstances of that retainer. If the expert is a close friend of the party retaining him, or of that party's counsel, the expert's credibility and objectivity will be in doubt.

Finally, while the Rule 26(a)(2) report will provide information regarding "compensation to be paid for the study and testimony," it does not require more. Thus, it is necessary to discover the expert's rate of compensation and the number of hours spent on the project. An expert who charges $10,000 a day or one who has charged $5,000 for one hour of work generally will not be well received by the jury. Also determine whether the expert has been paid anything to date or whether it is understood that he will be paid at the conclusion of the case.

[4] Inquiring About Testimony in Other Cases

Rule 26(a)(2) requires the disclosure all prior deposition or trial testimony going back four years. Many cases, however, have longer histories; and many experts have longer histories as well. Since many experts keep a record of the cases in which they have offered testimony and sometimes include prior litigation experience in their curriculum vitae, this is still an essential area of inquiry during an expert deposition.

[5] Inquiring About Publications

Rule 26(a)(2) limits publications disclosed to the preceding ten years. Thus, this area should also be explored both before and at an expert deposition. The problem with questioning an expert about publications during a deposition is essentially the same problem of faulty recall that plagues deposition questions regarding testimony in other cases. The best approach is to handle this area of inquiry by a prior internal investigation of the expert. It is better practice to review the publications in advance of the deposition and in light of the anticipated testimony as set forth in the expert's report to see if there are inconsistencies between the anticipated testimony and the content of the publications.

[6] Inquiring About Facts and Materials Given to the Expert

Rule 26(b)(4) establishes counsel's right to facts or data considered by the witness in forming the opinions. Obtain all of the facts given to, and considered by, the expert in rendering his or her opinion. Obviously, an understanding of the factual predicate of the opinion is necessary to formulate an attack on the opinion. As a part of gathering these facts, ask the expert to identify all documents that were relied upon to form the opinion being offered.

Also ask the expert for the names of each and every person that the expert has talked to regarding the facts of the case. Many times experts will personally interview witnesses and will not reduce their statements to writing. Elicit from the expert the factual data obtained from each person interviewed and the expert's assumptions based on that data. After the deposition, contact or, if possible, depose those persons and determine whether or not the expert has accurately ascertained their knowledge of the facts. Also determine whether such persons know of a fact that the expert failed to discover or disclosed facts that the expert chose to ignore.

[7] Inquiring About Exhibits in Support of Opinions

As part of the effort to determine the factual basis of the expert's opinion, interrogate the expert regarding all exhibits attached to the expert's report and establish a record of the expert's reliance on any documents used in preparation of the report.

[8] Inquiring About Reliance on Legal Standards

Find out whether the expert considered or relied upon any codes, statutes, rules or regulations in forming the offered

opinion. Keep in mind that out-of-state experts are probably not familiar with all state or local regulations which govern a given industry or discipline. Such regulations can provide fertile ground for impeachment if the out-of-state expert has rendered opinions without considering them.

[9] Inquiring About the Field of Expertise

Test the general competence and knowledge of the expert by inquiring into generally accepted principles in the art or science which will be the subject of the expert's trial testimony. It may be possible to develop favorable admissions or grounds for impeachment. Certainly, a jury will be suspicious of an expert who was unable to explain a general principle at deposition but later at trial provides an erudite explanation.

[10] Inquiring About the Expert's Opinions

Explore fully each opinion of the expert. It is often useful strategy to ask the expert to list all his or her opinions in the case at the very beginning of the deposition. This may take the expert off guard and commit him to candid opinions before he has the opportunity to sense possible points of criticism. Also, understanding the complete spectrum of the expert's opinions at the outset of the deposition will provide context for other areas of inquiry. At the end of the deposition counsel should have a complete list of all opinions and the factual basis for each opinion. If, at trial, the expert attempts to offer new or additional opinions, a basis either to exclude the new opinions or to impeach the witness will have been established. n1

Moreover, in developing the expert's opinions, ask for definitions whenever the expert uses a technical term, even if the term or concept appears understandable. Impeachment at trial loses its effect if the expert's meaning and use of the term differed from counsel's or his or her expert's understanding of the term.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryMethodsOral DepositionsEvidenceTestimonyExpertsGeneral OverviewEvidenceTestimonyExpertsCredibilityImpeachmentEvidenceTestimonyExpertsHelpfulness

FOOTNOTES:
(n1)Footnote 1. *See Raymond v. Raymond Corp., 938 F.2d 1518 (1st Cir. 1991)* (an expert was not allowed to testify as to an opinion which was never expressed either in his deposition or official report).

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CHAPTER 23 Discovery of Experts
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2-23 Federal Litigation Guide § 23.38

§ 23.38 Paying Expert Fees in Context of Discovery

[1] Compensating the Expert to Obtain Discovery

No compensation must be paid for preparation of the mandatory expert report under Rule 26(a)(2). However, to accommodate a party's need to have discovery of experts in advance of trial and to rectify any unfairness to the party retaining the expert, Rule 26(b)(4)(E) n1 empowers the court to require the party seeking expert discovery to pay a fair portion of the fees and expenses of the expert. When an expert witness's deposition is noticed, counsel can request that his or her adversary pay all fees which the expert will charge as a result of the deposition. This includes payments for travel time, travel expenses, and time the expert expended in preparing for, giving, and reviewing the deposition. n1.1 Although not all of the expenses are automatically recoverable, parties usually reach reciprocal agreement about the payments made to experts. n2

Even if a deposition is limited solely to an expert's qualifications, and does not seek the expert's opinions in the case, a fee must be paid. n3 When deposing an expert on facts observed as an actor, and not on material prepared in anticipation of litigation, the party seeking discovery does not have to pay any fees to the expert. n4

The rule requiring the party seeking discovery to pay the expert a reasonable fee does not require that the expert's fee be paid in advance of the deposition. One court found that the plaintiff's attorney was wrong in unilaterally terminating the deposition of plaintiff's expert because defendants' counsel did not tender witness fees at the start of the deposition. n4.1

[2] Evaluating Experts' Fees

In determining the reasonableness of a requested fee to compensate an expert for the time spent responding to discovery demands, the court considers: n5

- The expert's area of expertise
- The education and training required to provide the expertise that is sought
- The prevailing rates for other comparably respected experts
- The nature, quality and complexity of the information provided by the expert

- The cost of living in the applicable geographic area

- Any other factor that may assist the court in achieving the proper balance of interests implicated by Rule 26

Courts also consider the fee actually charged to the party who retained the expert, and the fees traditionally charged by the expert on related matters. n6 An agreement among counsel as to the appropriate fee is not controlling, unless that fee is approved by the court. n7 A flat fee as compensation for an expert witness deposition is generally considered to be improper because there should be some reasonable relationship between the services rendered and the remuneration to which an expert is entitled. n7.1

[3] Seeking Fees Within Reasonable Time

The Rules do not contain a time limit within which the court order for the expert's fees must be sought. The courts, however, have held that if the fee application is not brought within a reasonable time, the court does not abuse its discretion in rejecting the application. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryMethodsOral DepositionsEvidenceTestimonyExpertsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. Although expert discovery beyond the mandatory disclosure is permissible under a Rule 26(b) without a motion, Rule 26(b)(4)(E) still requires compensation. *Griffith v. Mt. Carmel Medical Center, 157 F.R.D. 499 (D. Kan. 1994)* .

(n2)Footnote 1.1. *See Fisher-Price, Inc. v. Safety 1st, Inc., 217 F.R.D. 329, 331 (D. Del. 2003)* .

(n3)Footnote 2. For example, some courts have held preparation time recoverable, *Hose v. Chicago & Northern Western Transp. Co., 154 F.R.D. 222 (S.D. Iowa 1994)* ; *Carter-Wallace, Inc. v. Hartz Mountain Indus., 553 F. Supp. 45, 53 (S.D.N.Y. 1982)* ; *E.E.O.C. v. Sears, Roebuck & Co., 138 F.R.D. 523, 526 (N.D. Ill. 1991)* , while others have held the opposite, *Cotton v. Consolidation Coal Co., 457 F.2d 641, 646-47 (6th Cir. 1972)* ; *Rhee v. Witco Chem. Corp., 126 F.R.D. 45, 47-48 (N.D. Ill. 1989)* .

(n4)Footnote 3. *Keith v. Van Dorn Plastic Mach. Co., 86 F.R.D. 458 (E.D. Pa. 1980)* .

(n5)Footnote 4. *Congrove v. St. Louis-San Francisco Ry. Co., 77 F.R.D. 503 (W.D. Mo. 1978)* . In *Parsons v. General Motors Corp., 31 Fed. R. Serv. 2d 1186 (N.D. Ga. 1981)* , the court denied a motion for the award of fees because all that the party seeking discovery acquired was information pertinent to the impeachment of the expert, not facts acquired or developed in anticipation of litigation. *See also Water Rights v. Northern Colo. Water Conservancy Dist., 677 P.2d 320 (Colo. 1984)* (treating physicians and other "actor or viewer" experts are not entitled to an expert witness fee under Rule 26(b)(4)).

(n6)Footnote 4.1. *See Harris v. Costco Wholesale Corp., 226 F.R.D. 675, 676 (S.D. Cal. 2005)* .

(n7)Footnote 5. *See Mathis v. NYNEX, 165 F.R.D. 23, 24-25 (E.D.N.Y. 1996)* .

(n8)Footnote 6. *See Bowen v. Monahan, 163 F.R.D. 571, 573-574 (D. Neb. 1995)* .

(n9)Footnote 7. *See U.S. Energy Corp. v. NUKEM, Inc., 163 F.R.D. 344, 347 (D. Colo. 1995)* .

(n10)Footnote 7.1. *Massasoit v. Carter, 227 F.R.D. 264, 265 (M.D.N.C. 2005)* ; *Mannarino v. United States, 218 F.R.D. 372, 375 (E.D.N.Y. 2003)* .

(n11)Footnote 8. *See Ellis v. United Airlines, Inc., 73 F.3d 999, 1011 (10th Cir.)* , *cert. denied, 517 U.S. 1245 (1996)* .

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CHAPTER 23 Discovery of Experts
C. Deposing Expert Witnesses

2-23 Federal Litigation Guide §§ 23.39 through 23.99

[Reserved]

§§ 23.39[Reserved]

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CHAPTER 23 Discovery of Experts
C. Deposing Expert Witnesses

2-23 Federal Litigation Guide § 23.100

§ 23.100 Expert Witness Disclosure Statement Under Rule 26(a)(2)

[1] FORM

Expert Witness Disclosure Statement Under Rule 26(a)(2)

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

[*Party designation and name of disclosing party*] intends to call the following persons to testify as expert witnesses:

[*Names*]

[*Attach a report that contains the following:*

(1) a complete statement of all opinions the witness will express, including the basis and reasons for the opinions;

(2) the facts or data considered by the witness in forming the opinions;

(3) the witness's qualifications, including a list of all publications written in the last 10 years;

(4) the compensation for study and testimony paid to the witness; and

(5) a list of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

For each witness, attach a list of exhibits that will be used as a summary or in support of the witness's opinions]

[2] Use of Form

This is a form of expert witness disclosure statement pursuant to *Fed. R. Civ. P. 26(a)(2)*. The form must be accompanied by a report from each witness and a list of all exhibits that support or summarize the expert opinions.

[3] Required Expert Witness Disclosures

Under *Fed. R. Civ. P. 26(a)(2)*, unless otherwise stipulated or ordered by the court, the parties must provide the following to other parties at least 90 days before the trial date or the date the case is to be ready for trial: [*see* § 28.51[1]]:

- The identity of any expert witnesses who may be used at trial to present evidence under the following Rules:
  - Fed. R. Civ. P. 702 (allowing opinion evidence that will assist the trier of fact to determine a factual issue)
  - Fed. R. Civ. P. 703 (allowing expert opinion based on material provided before or during trial that may not be admissible)
  - Fed. R. Civ. P. 705 (allowing expert to state reason for an offered opinion without first disclosing the facts or data relied on to form the opinion)
- A written report prepared and signed by the witness

[4] Contents of Expert Witness's Report

The expert witness's report required under *Fed. R. Civ. P. 26(a)(2)* must contain the following information:

- A complete statement of all opinions the expert will express and the expert's basis and reason for each opinion
- The facts or data considered by the witness in forming the opinions
- Any exhibits to be used as a summary of or in support of the witness's opinions
- The witness's qualifications, including a list of all publications written by the witness within the preceding 10 years
- The compensation to be paid for the study and testimony
- A list of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years

Unless otherwise stipulated or ordered by the court, if the expert witness is not required to provide a written report, the expert disclosure must include both of the following under *Fed. R. Civ. P. 26(b)(2)(C)*:

- The subject matter on which the witness is expected to present evidence under *Federal Rule of Evidence 702*, *703*, or *705*
- A summary of the facts and opinions to which the witness is expected to testify

[5] Writing and Signature Requirements

Expert witness disclosures under *Fed. R. Civ. P. 26(a)(2)* must be:

- Written [*Fed. R. Civ. P. 26(a)(4)*]

- Signed [*Fed. R. Civ. P. 26(a)(4)*] by at least one attorney of record in the attorney's individual name, with the attorney's address or, if unrepresented, by the party, with the party's address [*Fed. R. Civ. P. 26(g)(1)*]

- Certified. The attorney's or party's signature certifies that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made [*Fed. R. Civ. P. 26(g)(1)*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryMethodsOral DepositionsEvidenceTestimonyExpertsGeneral OverviewEvidenceTestimonyExpertsHelpfulness

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Appendix 23: Appendix to Chapter 23

2-23 Federal Litigation Guide Appendix 23:.syn

§ 23.syn Synopsis to Appendix 23: Appendix to Chapter 23

IMPLEMENTATION OF EXPERT DISCLOSURE IN UNITED STATES DISTRICT COURTS

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Appendix 23: Appendix to Chapter 23

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IMPLEMENTATION OF EXPERT DISCLOSURE IN UNITED STATES DISTRICT COURTS

District Court	Expert Disclosure Under Rule 26(a)(2)
Alabama-Middle District	26(a)(2)(A) & (B) in effect, 26(a)(2)(B) not in effect.
Alabama-Northern District	Yes
Alabama-Southern District	Yes
Alaska	Yes
Arizona	Yes
Arkansas-Eastern District	Only if ordered by the judge in the specific case

	or agreed to by the parties.
Arkansas-Western District	Only if ordered by the judge.
California-Central District	26(a)(2)(A) & (B) in effect, 26(a)(2)(C) not in effect.
California-Eastern District	26(a)(2)(A) & (C) in effect, 26(a)(2)(B) not in effect.
California-Northern District	Yes
California-Southern District	By specific court order only.
Colorado	Yes
Connecticut	No
Delaware	Yes
District of Columbia	Yes
Florida-Middle District	In effect for standard (track 2) cases but

		not in other cases unless ordered by the judge.
	Florida-Northern District	Yes
	Florida-Southern District	No
	Georgia-Middle District	Yes
	Georgia-Northern District	Yes
	Georgia-Southern District	Yes
	Guam	Yes
	Hawaii	Yes
	Idaho	In effect, except that when in conflict, local rules supersede federal rule.
	Illinois-Central District	Yes
	Illinois-Northern District	Yes
	Illinois-Southern District	Yes
	Indiana-Northern District	Yes
	Indiana-Southern District	Yes.

	Local rules allow variation by stipulation.
Iowa-Northern District	26(a)(2)(A) is in effect, but controlled by the Rule 16(b) scheduling order and the Rule 26(f) discovery plan. 26(a)(2)(B) & (C)-No.
Iowa-Southern District	26(a)(2)(A) is in effect, but controlled by the Rule 16(b) scheduling order and the Rule 26(f) discovery plan. 26(a)(2)(B) & (C) are-No.
Kansas	Yes

	Kentucky-Eastern District	Yes
	Kentucky-Western District	Yes
	Louisiana-Eastern District	Yes. The scope and timing of disclosures are directed by the court pursuant to the CJRA Plan.
	Louisiana-Middle District	Yes. The scope and timing of disclosures are directed by the court pursuant to the CJRA Plan.
	Louisiana-Western District	Yes
	Maine	Yes
	Maryland	No, except for a limited number of case types.
	Massachusetts	Yes

	Michigan-Eastern District	Yes
	Michigan-Western District	Yes, as directed by the case management order in the specific case.
	Minnesota	Yes, subject to application by the judge in the specific case.
	Mississippi-Northern District	Yes
	Mississippi-Southern District	Yes
	Missouri-Eastern District	Yes
	Missouri-Western District	Yes
	Mississippi-Southern District	Yes
	Montana	Yes
	Nebraska	Yes
	Nevada	26(a)(2)(A) & (C) are in effect, 26(a)(2)(

		B) is not in effect.
	New Hampshire	No
	New Jersey	Yes
	New Mexico	Yes
	New York-Eastern District	CJRA Plan takes precedence over federal rule.
	New York-Northern District	No
	New York-Southern District	Yes
	New York-Western District	Yes
	North Carolina-Eastern District	Yes
	North Carolina-Middle District	Yes
	North Carolina-Western District	Yes
	North Dakota	Yes
	NMI	Yes
	Ohio-Northern District	Yes
	Ohio-Southern District	Yes

Oklahoma-Eastern District	No
Oklahoma-Northern District	Yes
Oklahoma-Western District	Yes
Oregon	Yes
Pennsylvania-Eastern District	No
Pennsylvania-Middle District	Yes
Pennsylvania-Western District	Yes
Puerto Rico	No
Rhode Island	No
South Carolina	Controlled by local rule.
South Dakota	Yes
Tennessee-Eastern District	Yes
Tennessee-Middle District	Yes
Tennessee-Western District	Yes
Texas-Eastern District	CJRA Plan controls where there is a conflict with the

		federal rules.
	Texas-Northern District	Application at the discretion of each judge.
	Texas-South District	Yes
	Texas-Western District	No
	Utah	Yes
	Vermont	No
	Virgin Islands	Yes
	Virginia-Eastern District	No
	Virginia-Western District	Yes
	Washington-Eastern District	Yes
	Washington-Western District	26(a)(2)(A) & (C) are in effect, 26(a)(2)(B) is not in effect, but the individual judge may order it in the specific case.

West Virginia-Northern District	No, pending adoption of new local rules.
West Virginia-Southern District	Yes
Wisconsin-Eastern District	No
Wisconsin-Western District	Yes
Wyoming	Yes

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CHAPTER 24 Discovery of Computer-Based Information *

2-24 Federal Litigation Guide 24.syn

§ 24.syn Synopsis to Chapter 24: Discovery of Computer-Based Information *

§ 24.01 Establishing an Effective Discovery-Management Strategy
[1] Addressing Electronic Information Issues Early in the Litigation
[2] Understanding Procedural Requirements Under Federal Rules

§ 24.02 Evaluating Differences Between Hard Copy and Electronic Records
[1] Embedded Data
[2] Hidden Data and Other Markers
[3] Residual-Deleted Data

§ 24.03 Locating Electronic Files For Discovery Purposes
[1] Accessing Electronic Information
[2] Files on Individual Computers and Networks May Be Subject to Discovery
[3] Files on Back-Up Systems May Be Subject to Discovery
[4] Archived Files May Be Subject to Discovery
[5] Files on Computer Storage Media May Be Subject to Discovery
[6] Files on Retired Computer Systems May Be Subject to Discovery

§ 24.04 Managing Computer-Based Information For Litigation Purposes
[1] Preserving Computer-Based Documents as Potential Evidence
[2] Notifying Party to Stop Records Destruction in Accordance With Records Disposition Policy
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§ 24.05 Considering E-mail Messages in the Context of Discovery
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[2] Evaluating Employee Privacy Rights with Regard to Employer E-mail Systems

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§ 24.11 General Discovery Rules Govern Discovery of Computer-Based Information

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§ 24.13 Disclosing Information Regarding Experts Under Rule 26(a)(2)

§ 24.14 Using Interrogatories and Depositions to Determine Extent of Discoverable Computer-Based Information

§ 24.15 Requesting Expedited Discovery to Preserve Electronic Information

§ 24.16 Including Electronic Information Issues in Discovery Plan

§ 24.17 Considering Electronic Information at Rule 16 Pretrial Conference

§ 24.18 Utilizing Ex Parte Seizure to Preserve Electronic Information

§§ 24.19 through 24.20 [Reserved]

§ 24.21 Requested Matter Must Be Relevant to Claim or Defense of Party

§ 24.22 Evaluating Discovery Limits Under Rule 26(b)

§ 24.23 Protecting Privileged Matter from Discovery

§ 24.24 Considering Effect of Disclosure of Privileged Computer-Based Information
[1] Evidence Rule 502 Governs the Scope of Waiver and the Effect of Inadvertent Disclosure of Privileged Material
[2] Considering Scope of Waiver for Disclosure Made in a Federal Proceeding
[3] Considering the Consequences of Inadvertent Disclosure
[4] Considering Disclosures Made in State Proceedings
[5] Controlling Effect of Federal Court Order
[6] Controlling Effect of Party Agreement

§ 24.25 Invoking the Attorney-Client Privilege to Protect E-mail Content

§ 24.26 Protecting Electronic Draft Reports and Communications of Expert Witnesses

§§ 24.27 through 24.30 [Reserved]

§ 24.31 Producing Reasonably Accessible Electronically Stored Information

§ 24.32 Balancing Costs and Potential Benefits of Discovery

§ 24.33 Shifting Cost of Production Based on Undue Burden or Expense
[1] Seeking Cost-Shifting Order
[2] Considering Factors Relevant to Cost-Shifting
[3] Timing of Request for Cost-Shifting Order

§ 24.34 Assessing Likely Benefits of Requests for Electronically Stored Information
[1] Seeking Electronically Stored Information with Independent Evidentiary Significance
[2] Seeking Matter Which Exists Only in Electronic Form
[3] Seeking Electronically Stored Information to Determine Authenticity of Document
[4] Seeking Electronically Stored Information to Verify or Impeach Expert Testimony
[5] Seeking Electronically Stored Information Developed by Non-Testifying Expert

§ 24.35 Assessing Degree of Intrusiveness of Discovery Request
[1] Seeking Electronic Information from Individual Computer-Based Record
[2] Seeking Electronic Information from Single Computer Hard Drive

[3] Seeking Electronic Information from Multiple Computers
[4] Seeking Electronic Information from Back-Up Systems

§ 24.36 Considering Cost of Producing Documents in Requested Format

§ 24.37 Creating Special Program to Retrieve Requested Electronically Stored Information May Be Required
[1] Producing Electronically Stored Information in "Reasonably Usable Form" May Require Software Development
[2] Applying Rule 26(b)(2) Proportionality Analysis to Creation of Software Programs

§ 24.38 Weighing Burden and Expense of On-Site Computer Inspection
[1] Conducting On-Site Computer Inspection on Party's Consent
[2] Conducting On-Site Computer Inspection Over Party's Objections
[3] Accessing Deleted Files Through Mirror-Imaging

§ 24.39 Protecting Against Disclosure of Privileged or Confidential Documents During On-Site Inspection

§§ 24.40 through 24.50 [Reserved]

§ 24.51 CHECKLIST: Requesting Production of Electronically Stored Information

§ 24.52 CHECKLIST: Responding to Electronic Discovery Requests

§§ 24.53 through 24.60 [Reserved]

§ 24.61 Failing to Produce Computer-Based Information May Result in Sanctions

§ 24.62 Destroying Computer-Based Evidence May Result in Sanctions

§ 24.63 Destroying Records Per Routine Policy Not Ordinarily Sanctionable Conduct

§ 24.64 Destroying Records Before Commencement of Litigation Per Reasonable Policy Not Sanctionable

§ 24.65 Destroying Records After Commencement of Litigation Can Lead to Sanctions

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CHAPTER 24 Discovery of Computer-Based Information *

2-24 Federal Litigation Guide Scope

Scope

SCOPE

This chapter addresses the discovery of computer-based and other electronic records. Although the discovery of computer-based information raises many of the same problems experienced in traditional discovery of hard copy documents, it also raises problems peculiar to electronically stored information. Not only can the volume of electronically stored information far exceed the information contained in traditional hard copy files, but electronically stored information is more likely to be duplicated, more easily manipulated, contains embedded data, and may be restored if deleted.

The chapter provides coverage of the following topics:

- Special characteristics of electronically stored information in the context of traditional discovery
- Managing and preserving electronically stored information for litigation purposes
- Rules and procedures governing discovery of electronically stored information
- General limits on discovery of electronically stored information
- Weighing costs and burdens of requests for production of electronically stored information against likely benefits
- Sanctions for failure to produce discoverable electronic records

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CHAPTER 24 Discovery of Computer-Based Information *
A. Evaluating Special Characteristics of Electronic Information in the Context of Discovery

2-24 Federal Litigation Guide § 24.01

§ 24.01 Establishing an Effective Discovery-Management Strategy

[1] Addressing Electronic Information Issues Early in the Litigation

The information in a computer system is constantly changing, with data added and erased daily. Early recognition that computer-based information will likely be at issue in litigation is key to an effective discovery-management strategy. The Manual for Complex Litigation encourages parties to address the discovery of computer-based information early in the case: "[a]ny discovery plan must address the relevant issues, such as the search for, location, retrieval, form of production and inspection, preservation, and use at trial of information stored in mainframe or personal computers or accessible 'online.' " n1

In general, the sooner information about the parties' respective computer systems is exchanged in the litigation the better. For example in commercial litigation involving electronic information, the name and version of software applications, including custom applications, should be identified at the outset of the litigation. Other items that should be identified include any record-disposition policy, the frequency and nature of back-up systems and the media used to store backed-up data, and the names and e-mail addresses of key individuals familiar with pertinent computer systems. These items should be disclosed pursuant to Rule 26(a)(1) initial disclosures, and, if not disclosed initially, they should be requested. n2

Early identification of computer-based information is necessary to ensure that a party is aware of relevant evidence and the duty to preserve it. Recognition that computer-based information will be at issue is also necessary to notify a party to adjust or halt its records-disposition practices, including disposition of records in a back-up system.

After some preliminary exchange of information has been completed, more focused requests for relevant information should be obtained through interrogatories and document requests. At this stage, for example, the key persons who have knowledge of the facts at issue and the relevant computer system should be identified. n3

If a party has a reasonable concern that computer-based information may be imminently destroyed, the party may seek expedited discovery or a court order on preservation. As the parties obtain more information that may be relevant in the case, they should take steps to narrow the search of computer based records by limiting, for example, the search to a specific time period, computers of selected persons, and specific back-up systems.

[2] Understanding Procedural Requirements Under Federal Rules

The Federal Rules of Civil Procedure now explicitly address the disclosure, discovery, and exchange of electronically stored information as follows:

- **Rule 26(f).** Parties required to confer on all discovery issues, including electronically stored information, at least 21 days prior to the scheduling conference n4

- **Rule 26(a)(1)(B).** Parties required to disclose electronically stored information as well as documents that it may use to support its claims or defenses n5

- **Rule 26(b)(2).** Responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible, subject to the Rule 26(b)(2)(C) limitations that apply to all discovery - the responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing n6

- **Rule 33(d).** Allows a responding party to substitute access to documents or electronically stored information for an interrogatory answer only if the burden of deriving the answer will be substantially the same for either party n7

- **Rule 34(b).** Allows the requesting party to designate the form or forms in which it wants electronically stored information produced n8

- **Rule 37(e).** Absent exceptional circumstances, a court may not impose sanctions under the 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 n9

- **Rule 45.** Electronically stored information may be sought by subpoena, and the subpoena may designate a form or forms for production of electronic data n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedurePretrial MattersSubpoenas

FOOTNOTES:
(n1)Footnote 1. *See* Manual for Complex Litigation § 11.446 (Federal Judicial Center 4th ed. 2004).

(n2)Footnote 2. *See Fed. R. Civ. P. 26(a).*

(n3)Footnote 3. *See Marker v. Union Fidelity Life Ins. Co., 125 F.R.D. 121, 125-126 (M.D.N.C. 1989) .*

(n4)Footnote 4. *Fed. R. Civ. P. 26(f).*

(n5)Footnote 5. *Fed. R. Civ. P. 26(a)(1)(A)(ii).*

(n6)Footnote 6. *Fed. R. Civ. P. 26(b)(2).*

(n7)Footnote 7. *Fed. R. Civ. P. 33(d).*

(n8)Footnote 8. *Fed. R. Civ. P. 34(b)(1)(C).*

(n9)Footnote 9. *Fed. R. Civ. P. 37(e)*.

(n10)Footnote 10. *Fed. R. Civ. P. 45*.

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CHAPTER 24 Discovery of Computer-Based Information *
A. Evaluating Special Characteristics of Electronic Information in the Context of Discovery

2-24 Federal Litigation Guide § 24.02

§ 24.02 Evaluating Differences Between Hard Copy and Electronic Records

[1] Embedded Data

Documents generated on computers often contain embedded data that is affixed to the document at its creation and subsequent modification. Embedded data that identifies the author, creation date, and modification dates remain on a computer's harddrive and may even be retrieved when the information is stored on a CD-ROM or other media. Therefore, a printout or hard copy version of a computer-generated document may not reflect all the information contained in the electronic version of the document. n1

Embedded data may assist in evaluating the authenticity of a document. For example, the relationship and arrangement of a particular file with other electronic files in a directory listing may offer helpful information regarding its authenticity. This data can be particularly useful when earlier drafts differ or the authenticity of an original document is disputed. n2

[2] Hidden Data and Other Markers

A hard copy printout does not reveal comments inserted in an electronic document. Selected passages, which are not visible when the document is printed, can be marked as hidden text in many software programs. This option provides an opportunity to insert comments in the margins or directly in the text of an electronic document that are visible only on a video monitor. Passages in the document may also be highlighted in color for emphasis. Hidden data may be relevant to a claim or defense and subject to discovery depending on the facts of the case.

[3] Residual-Deleted Data

Computer-based data and documents are constantly revised, edited, and ostensibly discarded by deletion. However, the deletion process does not permanently or completely destroy a computer file. Such residual data may be discoverable if relevant to the issues in a particular case. n3

Off-the-shelf software programs are available that can quickly retrieve "deleted" files that have not been overwritten. However, expert technicians are generally required to recover deleted computer files without compromising any information on the computer. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Armstrong v. Executive Office of the President, Office of Admin., 1 F.3d 1274, 1280 (D.C. Cir. 1993)* .

(n2)Footnote 2. *See Gates Rubber Co. v. Bando Chem. Indus., 167 F.R.D. 90, 112 (D. Colo. 1996)* . For a complete discussion, see 7 *Moore's Federal Practice, § 37A.03[1]* (Matthew Bender 3d ed.).

(n3)Footnote 3. *See Antioch Co. v. Scrapbook Borders, Inc., 210 F.R.D. 645, 652 (D. Minn. 2002)* .

(n4)Footnote 4. *See Alexander v. FBI, 188 F.R.D. 111, 117 (D.D.C. 1998)* .

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CHAPTER 24 Discovery of Computer-Based Information *
A. Evaluating Special Characteristics of Electronic Information in the Context of Discovery

2-24 Federal Litigation Guide § 24.03

§ 24.03 Locating Electronic Files For Discovery Purposes

[1] Accessing Electronic Information

Electronically stored information generally can be searched and sorted in many ways. Documents that contain a specific word, name, or other item can be located quickly. However, not all electronic files are searchable. For example, an image of a document may or may not be searchable for particular text, depending on the attributes of the particular image file.

Although the search capabilities of electronic documents may eliminate some discovery burdens, others may be exacerbated. For example, the potentially greater number of electronic documents produced in discovery requires more attention to determine whether they may contain privileged matter, which may require time-consuming manual review. n1 Moreover, the rapid evolution of computer technology results in the frequent replacement of software programs. Organizations often put a low priority on maintaining the ability to access data created using previous software. Thus, finding such data can be difficult and expensive.

[2] Files on Individual Computers and Networks May Be Subject to Discovery

A computer network connects personal computers and allows users to share andmodify information contained within the system. Information and data contained in a shared network may be subject to discovery.

Network users typically have the ability to save files on their desktop or elsewhere on their computers to avoid linking those files to the network, and individual computers will contain data subject to discovery even in the networked environment. Increased telecommuting by employees also multiplies the probability that work-related information is generated or stored on laptop or home personal computers, and those computers may therefore be subject to discovery even in the context of a business dispute. n2

[3] Files on Back-Up Systems May Be Subject to Discovery

Businesses and other organizations routinely establish file-backup and other records-retention policies, which must be determined and considered when requesting or responding to requests for computer-based information. Although practices vary, a computer's active data files can be copied regularly and sent to a separate file server. The back-up tapes usually include all word-processing files, spreadsheets, models, ande-mail messages and depending on the

organization's rotational cycle, back-up records may be retained for several months or longer. In addition, many computer software applications include automatic back-up systems that make copies of documents at intervals determined by the user's preference.

[4] Archived Files May Be Subject to Discovery

Archived data is generally stored at locations apart from active files. This safeguard is designed to protect against loss due to a catastrophe. Many businesses and organizations have a comprehensive records retention and disposition policy that sets out procedures for archiving selected data as permanent records. In some industries and commerce, federal regulations require permanent archiving of certain records. Archived data may be contained in retired "legacy" computer systems, which may require more extensive and expensive searches. For a complete discussion, see 7 *Moore's Federal Practice, § 37A.04[5][e]* (Matthew Bender 3d ed.).

[5] Files on Computer Storage Media May Be Subject to Discovery

Data files can be stored in numerous media which may be subject to discovery, including magnetic tapes, a computer's internal hard drive, or on diskettes, zip drives, CD-Roms, or other portable storage devices.

[6] Files on Retired Computer Systems May Be Subject to Discovery

Often information contained in an earlier computer system, referred to as "legacy data," is incompatible with the newer generations of computer systems and cannot be easily transferred to existing databases. Such information is not readable by operational computers but must be retrieved from older, retired models. Some organizations have retired several generations of computer systems, which exacerbates these problems. In addition, even locating all retired computer systems can be difficult, particularly when no formal retirement policy has been followed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryPrivileged MattersGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Procter & Gamble Co. v. Haugen, 179 F.R.D. 622, 632 (D. Utah 1998)* .

(n2)Footnote 2. *See Simon Prop. Group, L.P. v. mySimon, Inc., 194 F.R.D. 639, 641 (S.D. Ind. 2000)* .

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CHAPTER 24 Discovery of Computer-Based Information *
A. Evaluating Special Characteristics of Electronic Information in the Context of Discovery

2-24 Federal Litigation Guide § 24.04

§ 24.04 Managing Computer-Based Information For Litigation Purposes

[1] Preserving Computer-Based Documents as Potential Evidence

A litigant has an affirmative duty to preserve potentially relevant evidence in its possession, custody, or control. n1 The scope of the duty to preserve is a broad one, commensurate with the breadth of permissible discovery. n2 However, even though a party is responsible for preserving relevant evidence, the party is not required to retain every document in its possession after a lawsuit commences. n3 Further, a party need not always preserve every routine draft and edit of a document. If the editing is performed in the ordinary course of business, a party need not take extraordinary steps to preserve each change. n4

The duty to preserve relevant evidence extends to electronically stored information, which may include databases, word-processing documents, spread-sheets, source codes, and e-mail messages contained in various computer storage media, including back-up systems that may be subject to a discovery request. n5

To avoid the risk of sanctions for destroying electronically stored evidence, it is critical to identify early in the course of litigation the scope of the computer-based evidence that needs to be preserved. While the requesting party should confine its requests for electronically stored information to that which is relevant, the responding party should take measures to safeguard against the inadvertent destruction of relevant evidence, including backing up information and recovering residual-deleted files.

[2] Notifying Party to Stop Records Destruction in Accordance With Records Disposition Policy

It is advisable to notify the opposing party when a party contends that it may be necessary to adjust or stop its record-disposition practices in order to prevent the loss of potentially relevant evidence. Absent exceptional circumstances, a court may not impose sanctions on a party under the Federal Rules for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system. n6

The protection provided under Rule 37(e) applies only to sanctions under the Federal Rules, and it does not affect other sources of authority to impose sanctions or rules of professional responsibility. n7

[3] Administering Electronic Records During Ongoing Litigation

Large corporations involved in multiple lawsuits on an ongoing basis are in a quandary when administering a reasonable records disposition policy. Destruction ofcorporate records at any single point in time may involve evidence relevant to some ongoing litigation. The sanctions imposed on parties for destruction of relevant evidence can be severe, including mistrial or an adverse inference instruction, n8 although some defenses, such as the opposing party's failure to notify the party to stop destroying records, may mitigate the severity of potential sanctions. The most prudent course is to halt all destruction or, more sensibly, to provide some alternative means of preserving the data by transferring it to another storage medium whenever litigation is imminent or ongoing. n9

[4] Destroying Documents as Part of Back-Up System Procedure

Many organizations routinely back-up their computer-based data, often on large magnetic tape reels that are reused on a rotational basis every other month or so. When tapes are reused, earlier backed-up data is overwritten and replaced with newer back-up data. A party has the duty to ensure that relevant electronic evidence contained in back-up tapes is not destroyed whenever litigation is imminent or ongoing. The routine recycling of magnetic tapes that may contain relevant evidence should be immediately halted on commencement of litigation.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

FOOTNOTES:
(n1)Footnote 1. *See Danis v. USN Communs., Inc., 2000 U.S. Dist. LEXIS 16900, at *4 (N.D. Ill. Oct. 20, 2000)* .

(n2)Footnote 2. *See Fed. R. Civ. P. 26*; *see also Herbert v. Lando, 441 U.S. 153, 177, 99 S. Ct. 1635, 60 L. Ed. 2d 115 (1979)* .

(n3)Footnote 3. *See Danis v. USN Communs., Inc., 2000 U.S. Dist. LEXIS 16900, at *99 (N.D. Ill. Oct. 20, 2000)* (citing **Moore's Federal Practice**).

(N4)Footnote 4. *See McGuire v. Acufex Microsurgical, Inc., 175 F.R.D. 149, 156 (D. Mass. 1997)* .

(n5)Footnote 5. *See New York State NOW v. Cuomo, 1998 U.S. Dist. LEXIS 10520, at *3-4 (S.D.N.Y. July 13, 1998)* .

(n6)Footnote 6. *Fed. R. Civ. P. 37(e)*.

(n7)Footnote 7. *Fed. R. Civ. P. 37(e)* Committee Note (2006).

(n8)Footnote 8. *Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 101 (2d Cir. 2002)* .

(n9)Footnote 9. *See Smith v. Texaco, 951 F. Supp. 109, 112 (E.D. Tex. 1997)* .

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CHAPTER 24 Discovery of Computer-Based Information *
A. Evaluating Special Characteristics of Electronic Information in the Context of Discovery

2-24 Federal Litigation Guide § 24.05

§ 24.05 Considering E-mail Messages in the Context of Discovery

[1] Retrieving E-mail Messages May Involve Significant Cost and Burden

E-mail correspondence, if otherwise relevant, is subject to discovery. n1 Because of the unique nature of e-mail, the cost and burden in retrieving e-mail messages, particularly from back-up systems, can be substantial. n2 If a request for production is challenged and cannot be resolved between the parties, the court must determine whether the costs and burdens in retrieving e-mails from a back-up system outweigh the likely benefits. n3

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. n4

Once a party has shown that a source of electronically stored information is not reasonably accessible, the requesting party may still obtain discovery by showing good cause, considering the limitations of Rule 26(b)(2)(C) that balance the costs and potential benefits of discovery. The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case. n5

[2] Evaluating Employee Privacy Rights with Regard to Employer E-mail Systems

Employees' e-mail messages that are relevant to the claims or defenses of a party are routinely requested as part of discovery. Although e-mail messages may contain personal and private matters about an employee, they must be produced, if otherwise discoverable, in response to a Rule 34 motion. n6 However, on a satisfactory showing, a court may issue a protective order to limit disclosure. n7

Although an e-mail message or personal computer file may contain private information that was produced or transmitted under a mistaken belief that it would remain private, the general rule is that an employee has no reasonable privacy expectation in an e-mail communication sent over the employer's e-mail system. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryUndue BurdensComputer & Internet LawPrivacy & SecurityCompany Communications

FOOTNOTES:

(n1)Footnote 1. *See Williams v. Massachusetts Mut. Life Ins. Co., 226 F.R.D. 144, 146 (D. Mass. 2005)* .

(n2)Footnote 2. *See* Linnen v. A.H. Robins Co., (June 15, 1999) .

(n3)Footnote 3. *See Playboy Enters. v. Welles, 60 F. Supp. 2d 1050, 1054 (S.D. Cal. 1999)* .

(n4)Footnote 4. *Fed. R. Civ. P. 26(b)(2)(B).*

(n5)Footnote 5. *Fed. R. Civ. P. 26(b)(2)* Committee Note (2006).

(n6)Footnote 6. *See Metropolitan Opera Ass'n v. Local 100, Hotel Employees &. Rest. Employees Int'l Union, 212 F.R.D. 178, 222 (S.D.N.Y. 2003)* .

(n7)Footnote 7. *See Fed. R. Civ. P. 26(c).*

(n8)Footnote 8. *See Smyth v. Pillsbury Co., 914 F. Supp. 97, 101 (E.D. Pa. 1996)* .

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CHAPTER 24 Discovery of Computer-Based Information *
A. Evaluating Special Characteristics of Electronic Information in the Context of Discovery

2-24 Federal Litigation Guide §§ 24.06 through 24.10

[Reserved]

§§ 24.06[Reserved]

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CHAPTER 24 Discovery of Computer-Based Information *
B. Rules and Procedures Governing Discovery of Electronic Records

2-24 Federal Litigation Guide § 24.11

§ 24.11 General Discovery Rules Govern Discovery of Computer-Based Information

The general rules of discovery under Federal Rules 26 through 37 apply to electronically stored information. The following rules make specific mention of electronically stored information:

- **Rule 26(a)(1)(A).** Disclosure of electronically stored information n1
- **Rule 26(b)(2).** Responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible n2
- **Rule 26(f).** Discovery issues pertaining to electronically stored information to be conferred upon 21 days prior to the scheduling conference n3
- **Rule 33(d).** Allowing access to electronically stored information in lieu of an interrogatory answer n4
- **Rule 34(b).** Requesting party may designate the form in which it wants electronically stored information produced n5
- **Rule 37(e).** No sanctions for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system n6
- **Rule 45.** Seeking electronically stored information by subpoena n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 26(a)(1)(A)(ii).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(b)(2).*

(n3)Footnote 3. *Fed. R. Civ. P. 26(f).*

(n4)Footnote 4. *Fed. R. Civ. P. 33(d).*

(n5)Footnote 5. *Fed. R. Civ. P. 34(b)(1)(C).*

(n6)Footnote 6. *Fed. R. Civ. P. 37(e).*

(n7)Footnote 7. *Fed. R. Civ. P. 45.*

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CHAPTER 24 Discovery of Computer-Based Information *
B. Rules and Procedures Governing Discovery of Electronic Records

2-24 Federal Litigation Guide § 24.12

§ 24.12 Considering Initial Disclosure Obligations Under Rule 26(a)(1)

As part of a party's initial disclosure duties, Rule 26(a)(1) requires the party to provide to other parties a copy of, or a description by category and location of, all documents, electornically stored information, and tangible things that are in the possession, custody, or control of that party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment. n1 This requirement applies in all cases, except for categories of cases enumerated in the rule and cases excepted by a court order or by party stipulation. n2 If a party fails to disclose the information supporting its claims or defenses, that information may not be used as evidence at a trial or hearing. n3

When relevant, the disclosing party should identify the nature of its computer system--including back-up system, network system, and e-mail system--as well as any software applications used to operate those systems. However, the disclosing party should not be required to attempt to search back-up systems or to retrieve deleted files in an exhaustive effort to locate all potentially relevant evidence as part of this initial disclosure obligation. Further, a party should not be held liable for sanctions or other penalties for failing to disclose this evidence as part of its initial disclosure obligation, even when that evidence is subsequently used in the litigation. The difficulty in retrieving this information provides "substantial justification" to excuse such an exhaustive search effort. n4

If a party fails to disclose relevant matter under the initial disclosure requirement, the opposing party may first serve a discovery request and, if not responded to, file a motion to compel disclosure under Rule 37(a)(3). n5 Before filing a motion to compel disclosure, a party must attempt to resolve the dispute with the other party. This is another good opportunity to identify relevant computer-based information and the nature of the medium where it is stored. A proffer showing the relevance and need of the requested material should accompany the motion.

For complete discussion of initial disclosure, see Ch. 10, *Planning and Preparation for Discovery*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See Fed. R. Civ. P. 26(a)(1)(A)(ii).*

(n2)Footnote 2. *See Fed. R. Civ. P. 26(a)(1).*

(n3)Footnote 3. *See Fed. R. Civ. P. 37(c)(1).*

(n4)Footnote 4. *Fed. R. Civ. P. 37(c)(1).*

(n5)Footnote 5. *Fed. R. Civ. P. 37(a)(3).*

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2-24 Federal Litigation Guide § 24.13

§ 24.13 Disclosing Information Regarding Experts Under Rule 26(a)(2)

A party must disclose in a written statement the "basis and reasons" and "the facts or data" relied on by a witness retained or specially employed to provide expert testimony at trial. n1 The disclosures must be made at least 90 days before trial or earlier if otherwise ordered by the court. n2 The case law is unsettled whether communications to a testifying expert from the attorney involving "opinion" work product are subject to disclosure or protected under the privilege-immunity doctrine when the expert considered computer-based information in forming an opinion, including information contained in a computerized attorney litigation support system. n3

Information used by consulting, non-testifying experts is usually not discoverable, unless "exceptional circumstances" are shown under Rule 26(b)(4). n4 However,information furnished by a non-testifying, consulting expert that has been "considered" by a testifying expert in forming opinions must be disclosed in the expert's written report and is discoverable. n5 The party resisting discovery has the burden to show that its expert has not "considered" information furnished to the expert in forming his or her opinions. n6

Effective December 1, 2010, Rules 26(b)(3)(A) and (B) protect drafts of any expert report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded. n7

Additionally, Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any expert 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 do any of the following: n8

- Relate to compensation for the expert's study or testimony
- Identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed
- Identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed

For further discussion of expert testimony disclosure, see Ch. 10, *Planning and Preparation for Discovery*; and Ch. 23, *Discovery of Experts*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 26(a)(2)*; *see Hoffman v. United Telecomms., Inc., 117 F.R.D. 436, 439 (D. Kan. 1987)* .

(n2)Footnote 2. *Fed. R. Civ. P. 26(a)(2)(D)*.

(n3)Footnote 3. *See Musselman v. Phillips, 176 F.R.D. 194, 197-199 (D. Md. 1997)* .

(n4)Footnote 4. *See Fed. R. Civ. P. 26(b)(4)*.

(n5)Footnote 5. *See Trigon Ins. Co. v. United States, 204 F.R.D. 277, 282-283 (E.D. Va. 2001)* .

(n6)Footnote 6. *See United States Fidelity & Guar. Co. v. Braspetro Oil Servs. Co., No. 97 Civ. 6124, 2002 U.S. Dist. LEXIS 111, at *29 (S.D.N.Y., Jan. 4, 2002)* .

(n7)Footnote 7. *Fed. R. Civ. P. 26(b)(4)(B)*.

(n8)Footnote 8. *Fed. R. Civ. P. 26(b)(4)(C)*.

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§ 24.14 Using Interrogatories and Depositions to Determine Extent of Discoverable Computer-Based Information

Interrogatories may be useful in determining the extent of discoverable electronic information in a case. n1 For example, an interrogatory can be used to identify a responding party's computer network specialist and any records-retention policy. n2

A requesting party must specify the information to be discovered sufficiently to allow the responding party to locate and identify the sought-after records. n3 Once computer-based information is identified, depositions of the responsible persons can lead to information that ascertains the potential pool of computers and computer systems that may eventually be examined, as well as the likelihood that time-consuming and expensive recovery of deleted files or retrieval of documents from a back-up system will be pursued. An interrogatory may also be used to request further analysis of the responding party's computer records or for production of records when a party needs to undertake its own analysis of computer data. n4

Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts, or summaries. n5 A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained. n6

Rule 33(d) allows a responding party to substitute access to electronically stored information for an interrogatory answer only if the burden of deriving the answer will be substantially the same for either party. Under those circumstances, the responding party must do each of the following: n7

- Specify 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

- Give the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries

For further discussion of the use and scope of interrogatories, see Ch. 12, *Interrogatories*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesUseCivil ProcedureDiscoveryMethodsOral Depositions

FOOTNOTES:
(n1)Footnote 1. *See United States v. Personal Computer Ctr., Inc., No. 90-2220-S, 1991 U.S. Dist. LEXIS 16131, at *2-*3 (D. Kan. Oct. 29, 1991)* .

(n2)Footnote 2. *See Laufman v. Oakley Bldg. & Loan Co., 72 F.R.D. 116, 123 (S.D. Ohio 1976)* .

(n3)Footnote 3. *See Fed. R. Civ. P. 33(d).*

(n4)Footnote 4. *International Ass'n of Machinists v. United Aircraft Corp., 220 F. Supp. 19, 20-21 (D. Conn.1963)* , *aff'd on other grounds, 337 F.2d 5 (2d Cir. 1964)* (responding party required to provide analysis of computer records in lieu of dumping 120,000 pages of personnel records requiring analysis by requesting party).

(n5)Footnote 5. *Fed. R. Civ. P. 33(d).*

(n6)Footnote 6. *Fed. R. Civ. P. 33(d).*

(n7)Footnote 7. *Fed. R. Civ. P. 33(d).*

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CHAPTER 24 Discovery of Computer-Based Information *
B. Rules and Procedures Governing Discovery of Electronic Records

2-24 Federal Litigation Guide § 24.15

§ 24.15 Requesting Expedited Discovery to Preserve Electronic Information

Under ordinary circumstances, discovery is deferred until the Rule 26(f) conference. n1 However, relevant electronic evidence may be lost at the onset of a case because a computer may be deleting relevant evidence as part of routine operations. To prevent inadvertent destruction of relevant evidence, a court may either enter a protective order under Rule 26(c) or, on a party's motion under Rule 26(d), order expedited discovery before the completion of Rule 26(a)(1) initial disclosure or a Rule 26(f) attorney conference. n2

A party may request expedited discovery when the party has reasonable grounds to suspect that the opposing party is destroying relevant electronic evidence that will cause irreparable harm. Under these circumstances, an on-site inspection of computers and mirror imaging of all electronic records can be particularly helpful to ensure preservation of relevant evidence. n3 Expedited discovery can also be helpful to accelerate the disposition of a case involving computer equipment that was seized in accordance with a temporary restraining order but that is essential to ongoing business operations. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsGeneral OverviewEvidenceDemonstrative EvidenceComputer-Generated Evidence

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 26(d), (f).*

(n2)Footnote 2. *See Fed. R. Civ. P. 26(a)(1), (d), (f); Antioch Co. v. Scrapbook Borders, Inc., 210 F.R.D. 645, 651 (D. Minn. 2002) .*

(n3)Footnote 3. *See Antioch Co. v. Scrapbook Borders, Inc., 210 F.R.D. 645, 652-653 (D. Minn. 2002) .*

(n4)Footnote 4. *See LEXIS-NEXIS v. Beer, 41 F. Supp. 2d 950, 953 (D. Minn. 1999)* (expedited discovery ordered to make mirror-image copy of computer hard drive in trade secrets case); *Religious Tech. Ctr. v. F.A.C.T.NET, Inc., 901 F. Supp. 1519, 1522-1523 (D. Colo. 1995)* (expedited discovery ordered to quickly resolve copyright infringement case in which extensive computer equipment, computer hardware, and voluminous documents were seized).

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CHAPTER 24 Discovery of Computer-Based Information *
B. Rules and Procedures Governing Discovery of Electronic Records

2-24 Federal Litigation Guide § 24.16

§ 24.16 Including Electronic Information Issues in Discovery Plan

Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and inany event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), to discuss any issues relating to preserving discoverable information, and to develop a proposed discovery plan that indicates the parties' views and proposals concerning: n1

- What changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made

- 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 upon particular issues

- Any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced

- Any issues relating to claims of privilege or of protection as trial-preparation material, including--if the parties agree on a procedure to assert such claims after production--whether to ask the court to include their agreement in an order

- 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

- Any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c)

Rule 26(f) directs the parties to discuss discovery of electronically stored information during their discovery-planning conference. Parties should consider and discuss whether electronic information is reasonably accessible to the party that has it, including the burden or cost of retrieving and reviewing the information. Rule 26(f)(3) explicitly directs the parties to discuss the form or forms in which electronically stored information might be produced. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryMethodsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(f).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(f)(3).*

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CHAPTER 24 Discovery of Computer-Based Information *
B. Rules and Procedures Governing Discovery of Electronic Records

2-24 Federal Litigation Guide § 24.17

§ 24.17 Considering Electronic Information at Rule 16 Pretrial Conference

Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time: n1

- To join other parties and to amend the pleadings
- To file motions
- To complete discovery, including electronic discovery

The scheduling order also may include: n2

- Modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted
- Provisions for disclosure or discovery of electronically stored information
- Any agreements the parties reach for asserting claims of privilege or of protection as trial preparation material after production
- The date or dates for conferences before trial, a final pretrial conference, and trial
- Any other matters appropriate in the circumstances of the case

If computer-based records are at issue, certain subjects should be considered at the pretrial conference, including the following potential matters:

- The types of computer records that may be required in discovery, including e-mail messages, word-processing files, and databases

- Whether back-up systems or archived data may be requested
- Whether expert testimony may be based on computerized data
- Whether the substantive allegations in the complaint directly involve computer records
- Whether the discovery process may involve a large mass of documents

A party at the Rule 16 conference may request a preservation order ensuring that electronic documents will not be destroyed or lost. If necessary, for example, a mirror image copy of specific computer hard drives may be requested to ensure that no information will be lost through inadvertent or deliberate erasure.

For further discussion of pretrial conferences, see Ch. 27, *Pretrial Conferences*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesScheduling Conferences

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 16(b).*

(n2)Footnote 2. *Fed. R. Civ. P. 16(b).*

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CHAPTER 24 Discovery of Computer-Based Information *
B. Rules and Procedures Governing Discovery of Electronic Records

2-24 Federal Litigation Guide § 24.18

§ 24.18 Utilizing Ex Parte Seizure to Preserve Electronic Information

Computer-based records may seemingly be deleted quickly and easily, although remnants may remain or evidence of the deletion may be retrieved from the affected computer. This characteristic of electronic evidence offers opportunities for surreptitious concealment or destruction and often serves as the basis for requesting an ex parte order seizing computer-based records. However, an ex parte temporary restrainingorder seizing a computer may be issued under Rule 65(b) only in exceptional circumstances. n1

A party must show compelling reasons that the extraordinary remedy of an ex parte seizure is essential to prevent imminent destruction of records, that the jeopardized information is essential to the case, and that no other less intrusive means are available to secure the information. n2 It is insufficient to allege that destruction of computerized evidence is easily accomplished or that the responding party is allegedly involved in a criminal activity and thus more likely to destroy evidence. n3

As a threshold matter, evidence that a party is "likely to take the opportunity" to conceal or destroy evidence must be shown. For example, a showing that a party has a history of concealing evidence may provide persuasive grounds for issuing an ex parte seizure order. n4

Often, means less drastic than an ex parte seizure order can effectively ensure that computer-based evidence is preserved if improper destruction is suspected. n5 However, if an ex parte seizure order will be issued, the court should impose adequate safeguards and limitations on its execution to prevent overbroad and intrusive searches. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersEvidenceDemonstrative EvidenceComputer-Generated Evidence

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 65(b)*; *see also Religious Tech. Ctr. v. F.A.C.T.NET, Inc., 901 F. Supp. 1519, 1522 (D. Colo. 1995)* .

(n2)Footnote 2. *See Fed. R. Civ. P. 65(b)*; *see also Religious Tech. Ctr. v. Netcom On-Line Communications Servs., 923 F. Supp. 1231, 1259-1264 (N.D. Cal. 1995)* .

(n3)Footnote 3. *See Adobe Sys. v. South Sun Prods. Inc., 187 F.R.D. 636, 641 (S.D. Cal. 1999)* .

(n4)Footnote 4. *See, e.g., LEXIS-NEXIS v. Beer, 41 F. Supp. 2d 950, 953 (D. Minn. 1999)* .

(n5)Footnote 5. *See Adobe Sys. v. South Sun Prods. Inc., 187 F.R.D. 636, 642-643 (S.D. Cal. 1999)* .

(n6)Footnote 6. *See Interlink Int'l Fin. Servs., Inc. v. Block, 145 F. Supp. 2d 312, 314-315 (S.D.N.Y. 2001)* .

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CHAPTER 24 Discovery of Computer-Based Information *
B. Rules and Procedures Governing Discovery of Electronic Records

2-24 Federal Litigation Guide §§ 24.19 through 24.20

[Reserved]

§§ 24.19[Reserved]

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CHAPTER 24 Discovery of Computer-Based Information *
C. Considering Limitations on Discovery of Computer-Based Information

2-24 Federal Litigation Guide § 24.21

§ 24.21 Requested Matter Must Be Relevant to Claim or Defense of Party

As a threshold issue, the requested matter must, in accordance with Rule 26(b)(1), be relevant to a pleaded claim or defense of a party. n1 The party resisting a discovery request ordinarily has the initial burden to show lack of relevance if the discovery appears relevant. n2 It is not sufficient to merely recite standard objections that the request is "overly broad, burdensome, oppressive and irrelevant." n3 On the other hand, if the relevancy of the discovery is not apparent, the burden to show its relevancy may be shifted to the party seeking discovery. n4 For example, although electronically stored information may include drafts and many iterations of a particular document, only the latest version may appear relevant and subject to production. A party requesting earlier iterations may bear the burden to show a specific reason for their production, such as to show fabrication of that document. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryRelevanceCivil ProcedureDiscoveryUndue Burdens

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(b)(1)*; *see Procter & Gamble Co. v. Haugen, 179 F.R.D. 622, 632-633 (D. Utah 1998)* .

(n2)Footnote 2. *See Mackey v. IBP, Inc., 167 F.R.D. 186, 193 (D. Kan. 1996)* .

(n3)Footnote 3. *See Momah v. Albert Einstein Med. Ctr., 164 F.R.D. 412, 417 (E.D. Pa. 1996)* .

(n4)Footnote 4. *See Alexander v. FBI, 194 F.R.D. 316, 325 (D.D.C. 2000)* .

(n5)Footnote 5. *See Anti-Monopoly, Inc. v. Hasbro, Inc., 1995 U.S. Dist. LEXIS 16355, at *6-*8 (S.D.N.Y. Nov. 3, 1995)* .

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CHAPTER 24 Discovery of Computer-Based Information *
C. Considering Limitations on Discovery of Computer-Based Information

2-24 Federal Litigation Guide § 24.22

§ 24.22 Evaluating Discovery Limits Under Rule 26(b)

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. n1

The frequency or extent of use of the discovery methods otherwise permitted under the Federal Rules of Civil Procedure and by any local rule shall be limited by the court if it determines that any of the following conditions exist: n2

- The discovery sought is unreasonably cumulative or duplicative, or isobtainable from some other source that is more convenient, less burdensome, or less expensive

- The party seeking discovery has had ample opportunity by discovery in theaction to obtain the information sought

- The burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues

The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c). n3

Once a responding party establishes that a source of electronically stored information is not reasonably accessible, the requesting party may still obtain discovery by showing good cause, considering the limitations of Rule 26(b)(2)(C) that balance the costs and potential benefits of discovery. The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case. n4

Appropriate considerations may include: n5

- The specificity of the discovery request
- The quantity of information available from other and more easily accessed sources
- The failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources
- The likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources
- Predictions as to the importance and usefulness of the further information
- The importance of the issues at stake in the litigation
- The parties' resources

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryRelevanceCivil ProcedureDiscoveryUndue Burdens

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(b)(2)(B).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(b)(2)(C).*

(n3)Footnote 3. *Fed. R. Civ. P. 26(b)(2)(C).*

(n4)Footnote 4. *Fed. R. Civ. P. 26(b)(2)* Committee Note (2006).

(n5)Footnote 5. *Fed. R. Civ. P. 26(b)(2)* Committee Note (2006).

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CHAPTER 24 Discovery of Computer-Based Information *
C. Considering Limitations on Discovery of Computer-Based Information

2-24 Federal Litigation Guide § 24.23

§ 24.23 Protecting Privileged Matter from Discovery

The risk of privilege waiver, and the work necessary to avoid such a waiver, add to the costs and delay of discovery. When electronically stored information is involved, the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume and the difficulty of reviewing electronically stored information. n1

When a party withholds information otherwise discoverable by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information which is privileged or protected, will enable other parties to assess the applicability of the privilege or protection. n2

If information is produced in discovery that 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 and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(b)(5)* Committee Note (2006).

(n2)Footnote 2. *Fed. R. Civ. P. 26(b)(5)(A).*

(n3)Footnote 3. *Fed. R. Civ. P. 26(b)(5)(B).*

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CHAPTER 24 Discovery of Computer-Based Information *
C. Considering Limitations on Discovery of Computer-Based Information

2-24 Federal Litigation Guide § 24.24

§ 24.24 Considering Effect of Disclosure of Privileged Computer-Based Information

[1] Evidence Rule 502 Governs the Scope of Waiver and the Effect of Inadvertent Disclosure of Privileged Material

The attorney-client privilege and work product protection are fundamental to our legal system. They encourage businesses and individuals to obtain legal counsel when appropriate by protecting the confidentiality of communications between clients and their attorneys, and documents prepared by attorneys to assist their clients in litigation.

The ever-expanding amount of information kept in computerized form increases the potential exposure of privileged matter during discovery. When vast amounts of information are transmitted and stored electronically and can be automatically collected and searched, it is all too easy for a document containing privileged information to be overlooked, even in the face of efforts to prevent it.

Evidence Rule 502 resolves some long-standing disputes in the courts about the legal effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product, specifically disputes involving the scope of disclosure and inadvertent disclosure.

Evidence Rule 502 does not alter the substantive law regarding attorney-client privilege or work-product protection in any other respect, including the burden on the party invoking the privilege (or protection) to prove that the particular communication or information qualifies for it.

[2] Considering Scope of Waiver for Disclosure Made in a Federal Proceeding

Rule 502(a) establishes the scope of waiver resulting from an inadvertent disclosure. The Rule provides that any waiver is limited to actual material disclosed and does not extend to other material on the same subject, unless the disclosure is done intentionally to gain tactical advantage, in which case waiver would be extended to all related material.

The Rule specifically provides that when the disclosure is made in a federal proceeding or to a federal officer or agency and waives the attorney-client privilege or work-product protection, the waiver extends to undisclosed communications if all of the following circumstances are met: n1

- The waiver is intentional

- The disclosed and undisclosed communications concern the same subject matter
- As a matter of fairness, the disclosed and undisclosed communications ought to be considered together

[3] Considering the Consequences of Inadvertent Disclosure

When made in a federal proceeding or to a federal office or agency, a disclosure does not operate as a waiver in a federal or state proceeding if each of the following is true: n2

- The disclosure is inadvertent
- The holder of the privilege or protection took reasonable steps to prevent disclosure
- The holder promptly took reasonable steps to rectify the error, including (if applicable) following *Fed.R.Civ.P. 26(b)(5)(B)*.

[4] Considering Disclosures Made in State Proceedings

When a disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure: n3

- Would not be a waiver if it had been made in a federal proceeding; or
- Is not a waiver under the law of the state where the disclosure occurred.

[5] Controlling Effect of Federal Court Order

A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court, in which event the disclosure is also not a waiver in any other federal or state proceeding. n4

[6] Controlling Effect of Party Agreement

An agreement between parties that protects against privilege waivers in the event of inadvertent disclosures is binding only on those parties, and does not apply to nonparties unless incorporated in a court order. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Evid. 502(a)*.

(n2)Footnote 2. *Fed. R. Evid. 502(b)*.

(n3)Footnote 3. *Fed. R. Evid. 502(c)*.

(n4)Footnote 4. *Fed. R. Evid. 502(d)*.

(n5)Footnote 5. *Fed. R. Evid. 502(e).*

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CHAPTER 24 Discovery of Computer-Based Information *
C. Considering Limitations on Discovery of Computer-Based Information

2-24 Federal Litigation Guide § 24.25

§ 24.25 Invoking the Attorney-Client Privilege to Protect E-mail Content

A communication from a client to an attorney for the purpose of obtaining legal advice that is intended to be confidential is privileged and protected from discovery. The party asserting the attorney-client privilege has the burden to expressly assert the privilege and describe the nature of the information withheld from discovery sufficiently to "enable other parties to assess the applicability of the privilege." n1 Whether an e-mail message is privileged will often turn on one of the following:

- Whether the communications were made for the purpose of giving legal advice n2
- Whether the party intended the message to be confidential and kept it confidential n3

It is usually insufficient to list an "e-mail strand" in a privilege log as a single privileged document, and instead, counsel must break down and list each e-mail within a strand separately on the privilege log. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersAttorney-Client Privilege

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(b)(5)*; *see also Zapata v. IBP, Inc., 1994 U.S. Dist. LEXIS 16285, at *22-*23 (D. Kan. Nov. 10, 1994)* .

(n2)Footnote 2. *See TVT Records v. Island Def Jam Music Group, 214 F.R.D. 143, 144-145 (S.D.N.Y. 2003)* .

(n3)Footnote 3. *See, e.g., United States v. Chevrontexaco Corp., 241 F. Supp. 2d 1065, 1078 (N.D. Cal. 2002)* .

(n4)Footnote 4. *See In re Universal Service Fund Telephone Billing Practices Litig., 232 F.R.D. 669, 674 (D. Kan. 2005)* .

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CHAPTER 24 Discovery of Computer-Based Information *
C. Considering Limitations on Discovery of Computer-Based Information

2-24 Federal Litigation Guide § 24.26

§ 24.26 Protecting Electronic Draft Reports and Communications of Expert Witnesses

Effective December 1, 2010, Rules 26(b)(3)(A) and (B) protect drafts, including electronic drafts, of any expert report or disclosure required under Rule 26(a)(2). n1

Additionally, Rules 26(b)(3)(A) and (B) protect communications, including e-mail communications, between the party's attorney and any expert witness required to provide a report under Rule 26(a)(2)(B), except to the extent that the communications do any of the following: n2

- Relate to compensation for the expert's study or testimony
- Identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed
- Identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersAttorney-Client Privilege

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(b)(4)(B).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(b)(4)(C).*

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CHAPTER 24 Discovery of Computer-Based Information *
C. Considering Limitations on Discovery of Computer-Based Information

2-24 Federal Litigation Guide §§ 24.27 through 24.30

[Reserved]

§§ 24.27[Reserved]

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2-24 Federal Litigation Guide § 24.31

§ 24.31 Producing Reasonably Accessible 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. n1

The responding party must identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing. n2 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. n3

If the requesting party seeks discovery of information from sources identified as not reasonably accessible, the parties should discuss the burdens and costs of accessing and retrieving the information, the needs that may establish good cause for requiring all or part of the requested discovery even if the information sought is not reasonably accessible, and conditions on obtaining and producing the information that may be appropriate. n4

If the parties cannot agree whether, or on what terms, sources identified as not reasonably accessible should be searched and discoverable information produced, the parties may raise the issue either by a motion to compel discovery or by a motion for a protective order. n5

The parties must confer before bringing either motion. If the parties do not resolve the issue and the court must decide, the responding party must show that the identified sources of information are not reasonably accessible because of undue burden or cost. The requesting party may need discovery to test this assertion. Such discovery may take the form of requiring the responding party to conduct a sampling of information contained on the sources identified as not reasonably accessible; allowing some form of inspection of such sources; or taking depositions of witnesses knowledgeable about the responding party's information systems. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryUndue Burdens

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(b)(2)(B).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(b)(2)* Committee Note (2006).

(n3)Footnote 3. *Fed. R. Civ. P. 26(b)(2)* Committee Note (2006).

(n4)Footnote 4. *Fed. R. Civ. P. 26(b)(2)* Committee Note (2006).

(n5)Footnote 5. *Fed. R. Civ. P. 26(b)(2)* Committee Note (2006).

(n6)Footnote 6. *Fed. R. Civ. P. 26(b)(2)* Committee Note (2006).

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CHAPTER 24 Discovery of Computer-Based Information *
D. Weighing Costs and Burdens of Electronic Discovery Requests Against Likely Benefits

2-24 Federal Litigation Guide § 24.32

§ 24.32 Balancing Costs and Potential Benefits of Discovery

Once a responding party establishes that a source of electronically stored information is not reasonably accessible, the requesting party may still obtain discovery by showing good cause, considering the limitations of Rule 26(b)(2)(C) that balance the costs and potential benefits of discovery. The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case. n1

Appropriate considerations may include: n2

- The specificity of the discovery request
- The quantity of information available from other and more easily accessed sources
- The failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources
- The likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources
- Predictions as to the importance and usefulness of the further information
- The importance of the issues at stake in the litigation
- The parties' resources

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 26(b)(2)* Committee Note (2006).

(n2)Footnote 2. *Fed. R. Civ. P. 26(b)(2)* Committee Note (2006).

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2-24 Federal Litigation Guide § 24.33

§ 24.33 Shifting Cost of Production Based on Undue Burden or Expense

[1] Seeking Cost-Shifting Order

The Federal Rules of Civil Procedure do not expressly provide a court with the power to shift discovery costs. However, the Committee Note to Rule 34(a) refers to the proportionality analysis found in Rule 26(b) in situations involvingdiscovery of electronically stored information. n1 Rule 26(b)(2) explicitly provides that a judge may limit discovery if the burden or expense of the proposed discovery outweighs its likely benefit. n2 This plenary power to deny discovery altogether has been interpreted toinclude the lesser power to allocate discovery costs between parties. n3

A court has wide discretion in fashioning a fair and appropriate plan to apportion discovery costs. Thus, costs may be allocated between parties and need not be borne fully by one or the other party. n4 In determining whether to shift costs incurred in discovery of computer-based information from the responding party to the requesting party, courts apply a proportionality analysis by considering the factors set out in Rule 26(b)(2)(C)(iii). n5

[2] Considering Factors Relevant to Cost-Shifting

One court has determined that disputes regarding the scope and cost of discovery of electronic data requires a three-step analysis. n6 First, it is necessary to understand the responding party's computer system thoroughly, with respect to both active and stored data. For data kept in an accessible format, the usual rules of discovery apply: the responding party should pay the costs of producing responsive data. A court should consider cost-shifting only when electronic data is relatively inaccessible. Second, because the cost-shifting analysis is so fact-intensive, it is necessary to determine what data may be found on the inaccessible media. Thus, the responding party may be required to restore and produce responsive documents from a small sample of the requested backup tapes. Third, in conducting the cost-shifting analysis, the following seven-factor test should be applied, weighted more or less in the order stated by the court: n7

- The extent to which the request is specifically tailored to discover relevant information
- The availability of the information from other sources
- The total cost of production, compared to the amount in controversy
- The total cost of production compared to the resources available to each party

- The relative ability of each party to control the costs and its incentive to do so
- The importance of the issues at stake in the litigation
- The relative benefits to the parties of obtaining the information
- The resources available to each party.

[3] Timing of Request for Cost-Shifting Order

The cost-shifting issue arises usually at one of two stages. A party may resist a discovery request as burdensome and seek a protective order. n8 Instead of denying discovery altogether, the court may condition some discovery on the payment of costs. A party may also resist a motion compelling discovery under Rule 37(a) by relying on the proportionality analysis. n9

The parties must attempt to resolve the dispute without court intervention. Cost shifting should be considered during these discussions. Cost shifting makes particularly good sense when the relevancy or importance of the requested information is marginal and the retrieval costs are significant. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryUndue Burdens

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 34(a)*, Committee Note of 1970.

(n2)Footnote 2. *Fed. R. Civ. P. 26(b)(2).*

(n3)Footnote 3. *See Byers v. Illinois State Police, No. 99 C 8105, 2002 U.S. Dist. LEXIS 9861, at *33-*34 (N.D. Ill. May 31, 2002)* .

(n4)Footnote 4. *See* Manual for Complex Litigation § 11.446 (Federal Judicial Center 4th ed. 2004).

(n5)Footnote 5. *See Rowe Entertainment, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 428-429 (S.D.N.Y. 2002)* ; *see also Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 324 (S.D.N.Y. 2003)* .

(n6)Footnote 6. *Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 324 (S.D.N.Y. 2003)* .

(n7)Footnote 7. *See Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 324 (S.D.N.Y. 2003)* .

(n8)Footnote 8. *See Fed. R. Civ. P. 26(c).*

(n9)Footnote 9. *See Fed. R. Civ. P. 26(b)(2)(C)(iii).*

(n10)Footnote 10. Report of Honorable Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Committee on Rules of Practice and Procedure, 181 F.R.D. 24, 36-37 (1998).

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CHAPTER 24 Discovery of Computer-Based Information *
D. Weighing Costs and Burdens of Electronic Discovery Requests Against Likely Benefits

2-24 Federal Litigation Guide § 24.34

§ 24.34 Assessing Likely Benefits of Requests for Electronically Stored Information

[1] Seeking Electronically Stored Information with Independent Evidentiary Significance

Electronically stored information that in itself bears independent evidentiary significance is subject to production absent an overriding privilege claim. n1 Information with independent evidentiary significance is essential to prove a party's case and almost always outweighs the costs and burdens incurred in retrieving the information under the proportionality analysis. An obvious example is discovery of a computer software program that is subject to trademark or copyright infringement claims. n2 Other examples include computerized accounting records, n3 and e-mail messages that are relevant to prove a discrimination claim. n4

Nevertheless, a blanket discovery request for all computer-based documents that may have independent evidentiary significance, without any limits, is unreasonable. For example, a mere suspicion that a responding party will fail to produce all relevant information in accordance with a discovery request, including electronic documents bearing evidentiary significance, is insufficient to order production of all computerized data. n5

[2] Seeking Matter Which Exists Only in Electronic Form

If computer-based information represents the sole source of relevant evidence and no hard copy printout or other evidence of the document exists, a responding partymust demonstrate extraordinary hardship to resist discovery under the Rule 26(b)(2) proportionality analysis. n6 For example, relevant e-mail correspondence is subject to discovery even though it exists only in electronic format. n7

[3] Seeking Electronically Stored Information to Determine Authenticity of Document

Many software computer programs retain a record of all inputted changes and revisions to a document. The computer's ability to retain a comprehensive record of all earlier edits and versions of a document can be particularly useful in ascertaining the authenticity of a disputed document. n8 Retrieving some of the earlier edits or versions may be easy, while an extraordinary effort may be required to retrieve other changes.

Because it is so easy to allege that a document has been altered or testimony fabricated, a party alleging tampering must come forward with evidence more than mere speculation under the Rule 26(b)(2) proportionality analysis. n9 In weighing the likely benefits against the costs, a substantial probability of document tampering should be shown when

both the likelihood of finding relevant evidence of tampering is low and the burden of its retrieval is heavy. If a discovery request is intrusive and unlikely to culminate in providing relevant and useful information, it is unreasonable and should be denied by the court. n10

[4] Seeking Electronically Stored Information to Verify or Impeach Expert Testimony

The underlying electronically stored information relied on by an expert to develop a model or other simulation that may be used at trial is subject to discovery. n11 Effective cross-examination of the expert often may require some understanding of how the computer program works that may only be obtained by examining the database, source code, information explaining the source code, and a user's manual. n12

[5] Seeking Electronically Stored Information Developed by Non-Testifying Expert

Electronically stored information relied on by an expert retained or specially employed in anticipation or preparation of trial but who is not expected to be called as a witness at trial is nonetheless discoverable under Rule 26(b)(4) "on showing of exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means." n13 For example, information relied on by an expert in developing computer models or other computer-based exhibits may be subject to discovery. n14

A party seeking discovery of an opponent's non-testifying expert may be responsible for paying the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert. n15

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryRelevanceCivil ProcedureDiscoveryUndue BurdensEvidenceDemonstrative EvidenceComputer-Generated Evidence

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 26(b)(1).*

(n2)Footnote 2. *See Sega Enters. v. MAPHIA, 948 F. Supp. 923, 927 (N.D. Cal. 1996) .*

(n3)Footnote 3. *See Smith v. MCI Telecommunications Corp., 137 F.R.D. 25, 26 (D. Kan. 1991) .*

(n4)Footnote 4. *See Strauss v. Microsoft Corp., 1995 U.S. Dist. LEXIS 7433, at *11-*12 (S.D.N.Y. June 1, 1995) .*

(n5)Footnote 5. *See Alexander v. FBI, 188 F.R.D. 111, 115 (D.D.C. 1998) .*

(n6)Footnote 6. *See Armstrong v. Bush, 139 F.R.D. 547, 555 (D.D.C. 1991) .*

(n7)Footnote 7. *See In re Brand Name Prescription Drugs Antitrust Litig., 1995 U.S. Dist. LEXIS 8281, at *1 (N.D. Ill. June 13, 1995) .*

(n8)Footnote 8. *See* Premier Homes and Land Corp. v. Cheswell, No. 3:02cv495LN, *2002 U.S. Dist. LEXIS 24946, at *3 (D. Mass. Dec. 19, 2002) .*

(n9)Footnote 9. *See Sattar v. Motorola, Inc., 138 F.3d 1164, 1171 (7th Cir. 1998) .*

(n10)Footnote 10. *See Fennell v. First Designs, Ltd., 83 F.3d 526, 532 (1st Cir. 1996) .*

(n11)Footnote 11. *See Fed. R. Civ. P. 26(a)(2)(B).*

(n12)Footnote 12. *See Shu-Tao Lin v. McDonnell Douglas Corp., 574 F. Supp. 1407, 1412 (S.D.N.Y. 1983)* , *aff'd in part, reversed in part, 742 F.2d 45 (2d Cir. 1984)* (preferred practice is to provide adversary all underlying data supporting computer analysis or model well before trial).

(n13)Footnote 13. *See Fed. R. Civ. P. 26(b)(4)(D).*

(n14)Footnote 14. *See Pearl Brewing Co. v. Jos. Schlitz Brewing Co., 415 F. Supp. 1122, 1134 (S.D. Tex. 1976)* .

(n15)Footnote 15. *See Fed. R. Civ. P. 26(b)(4)(E).*

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CHAPTER 24 Discovery of Computer-Based Information *
D. Weighing Costs and Burdens of Electronic Discovery Requests Against Likely Benefits

2-24 Federal Litigation Guide § 24.35

§ 24.35 Assessing Degree of Intrusiveness of Discovery Request

[1] Seeking Electronic Information from Individual Computer-Based Record

The extent of discovery intrusiveness is ordinarily quite low if a single or a fewidentified computer records are requested. The request is probably reasonable under the Rule 26(b)(2)(iii) analysis even if the likelihood of obtaining relevant evidence is uncertain. This is because a request for a few records is unlikely to be burdensome, so the relevance test is applied in a more relaxed fashion. For example, a request for a computer record containing a list of file names is probably reasonable. n1 Moreover, retrieval of a relevant earlier version of a single document that was later edited may not be intrusive and may be subject to discovery. n2 However, a request for an entire computer database that likely contains information irrelevant to the pleaded claims and defenses is undoubtedly too broad. n3

[2] Seeking Electronic Information from Single Computer Hard Drive

A computer's hard drive or a software program often contains non-discoverable documents, such as confidential or irrelevant files. A showing that a search of a hard drive will likely result in finding the requested information is required to prevent what would otherwise be a "fishing expedition." n4 A limited search of a computer's hard drive is less likely to be intrusive and impose undue burdens and expense under the Rule 26(b)(2) analysis. For example, the authors and dates on which each document is entered and revised are contained on a computer file screen. The degree of intrusiveness in producing the file screen is much less than in producing the contentsof each computer document file. n5

Despite its intrusiveness, a thorough examination of a computer hard drive may be necessary to locate "residual-deleted" files, which are removed from a computer's directory and may be located anywhere on it. The case for such a thorough examination is compelling if a party concedes that files have been tampered with. For example, a complete hard drive search is warranted if the responding party asserts that no documents were deleted, yet later admits that a file had been deleted. n6

When an inspection by the opposing party of a computer's hard drive is appropriate, adequate safeguards must be taken to protect any confidential and privileged documents that are likely to be stored in the database. Ordinarily, the protocol for protecting disclosure of privileged and confidential documents is negotiated between the parties. n7

[3] Seeking Electronic Information from Multiple Computers

Discovery of documents that may be located in a large number of computers raises distinct problems. In a networked computer system in which computers are linked, a single word-search request can locate information contained in any of the linked computers. Large organizations and businesses frequently have several networked drives. Under these circumstances, each of the networked drives might have to be searched. Moreover, computers also have individual drives that are available to the user but that are not on the network, such as the "C" drive. Searches of networked drives might not locate relevant documents contained in non-networked drives. Separate searches need to be executed to locate documents on non-networked drives. n8 The degree of intrusiveness under the Rule 26(b)(2) analysis depends on the extent of the search.

A party seeking intrusive corporate-wide discovery must demonstrate a particularized need and relevance for the information. n9 Copying a significant number of computer hard drives can cause disruption to ongoing business operations and should be allowed only on a showing of sufficient justification. n10 The reasonableness of the request will be significantly affected by the number of individuals and computers affected.

Relevant computer-generated information may be located off-site, for example, on laptop computers or home computers. Accordingly, a request to discover information on all computers may extend to employees' personal home computers that are used for business purposes. n11 Locating and retrieving data from off-site computers pose many practical problems. It may, for example, be difficult to distinguish a laptop computer used for personal or business purposes. n12

[4] Seeking Electronic Information from Back-Up Systems

A party may be required to retrieve data from computer back-up systems notwithstanding the substantial expense and burden involved, n13 because the cost and burden in retrieving computer data from a back-up system are ordinary and foreseeable risks in doing business. n14 Courts have held that requiring the responding party to pay all costs is fair because the responding party has presumably selected the particular computer system to further some current business purpose. Moreover, it is unfair to penalize a requesting party for a business decision made by the responding party. The cases adopting this principle are particularly fact-driven, however, and involve major litigation with huge sums at stake, parties with sizeable resources, and potential evidence that was important in resolving issues, all of which support requiring the responding party to pay the production costs. n15

Courts are beginning to examine more closely requests requiring the responding party to pay all costs for producing e-mails from back-up tapes, particularly because the benefits derived by a responding party from a computer back-up system may be limited. The responding party has little choice in selecting a back-up system that meets discovery demands because the systems are designed to permit disaster recovery and not archival presentation. n16 Consequently, the mere fact that a responding party opts to use a particular back-up system should not justify imposing discovery costs on that party in all cases. n17 Instead, the Rule 26(b)(2)(iii) proportionality analysis should be applied to the particular circumstances of a case to determine whether costs should be allocated among the parties.

If the likely benefits from evidence obtained from a search of back-up systems are marginal, the discovery request may be denied or costs allocated among the parties under the Rule 26(b)(2)(iii) proportionality analysis, especially on a showing of highcosts incurred in retrieving the information. n18

The more likely it is that a backup tape contains information that is relevant to a claim or defense, the fairer it is that the party from whom the information is sought be made to search at its own expense. n19

If court-ordered recovery of data from back-up tapes eventually reveals that no relevant evidence was contained in it or that the requesting party ignored the information retrieved from it, costs incurred in the recovery process can later be assessed against the requesting party. n20

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryRelevanceCivil ProcedureDiscoveryUndue BurdensEvidenceDemonstrative EvidenceComputer-Generated Evidence

FOOTNOTES:

(n1)Footnote 1. *See Momah v. Albert Einstein Med. Ctr., 164 F.R.D. 412, 418 (E.D. Pa. 1996)* .

(n2)Footnote 2. *See McGuire v. Acufex Microsurgical, Inc., 175 F.R.D. 149, 151-152 (D. Mass. 1997)* .

(n3)Footnote 3. *See Murlas v. Mobil Oil Corp., 1995 U.S. Dist. LEXIS 3489, at *12-*13 (N.D. Ill. March 16, 1995)* .

(n4)Footnote 4. *See Fennell v. First Stage Designs, Ltd., 83 F.3d 526, 532 (1st Cir. 1996)* .

(n5)Footnote 5. *See Momah v. Albert Einstein Med. Ctr., 164 F.R.D. 412, 418 (E.D. Pa. 1996)* (information from computer list screen relevant to show whether documents were back dated to support plaintiff's discharge from employment).

(n6)Footnote 6. *See LEXIS-NEXIS v. Beer, 41 F. Supp. 2d 950, 953-954 (D. Minn. 1999)* .

(n7)Footnote 7. *See Mary Imogene Bassett Hosp. v. Sullivan, 136 F.R.D. 42, 48-50 (N.D.N.Y. 1991)* .

(n8)Footnote 8. *See Alexander v. FBI, 188 F.R.D. 111, 117 (D.D.C. 1998)* .

(n9)Footnote 9. *See Mackey v. IBP, Inc., 167 F.R.D. 186, 195-196 (D. Kan. 1996)* .

(n10)Footnote 10. *See* In re Grand Jury Subpoena Duces Tecum Dated November 15, 1993, *846 F. Supp. 11, 13-14 (S.D.N.Y. 1994)* (government request for copy of company officers' hard drives and all floppy disks created by officers unreasonable, particularly when "key word" search could identify requested information).

(n11)Footnote 11. *See Century-ML Cable Corp. v. Carrillo, 43 F. Supp. 2d 176, 178 (D.P.R. 1998)* .

(n12)Footnote 12. *See Gates Rubber Co. v. Bando Chem. Indus., 167 F.R.D. 90, 126 (D. Colo. 1996)* (plaintiff sanctioned for bringing unsupportable claims that defendant employee stored business records or documents on disks in personal lap-top computer and that he had duty to preserve disks from overwriting).

(n13)Footnote 13. *See* Linnen v. A.H. Robins Co., (June 15, 1999) ; *see also Byers v. Illinois State Police, No. 99 C 8105, 2002 U.S. Dist. LEXIS 9861, at *35-*36 (N.D. Ill. May 31, 2002)* .

(n14)Footnote 14. *See* Danis v. USN Communs., Inc., No. 98 C 7482, n.29 (N.D. Ill. Oct. 20, 2000) .

(n15)Footnote 15. *See* Linnen v. A.H. Robins Co., (June 15, 1999) .

(n16)Footnote 16. *See McPeek v. Ashcroft, 202 F.R.D. 31, 32 (D.D.C. 2001)* .

(n17)Footnote 17. *See Rowe Entm't, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 429 (S.D.N.Y. 2002)* .

(n18)Footnote 18. *See Alexander v. FBI, 194 F.R.D. 316, 332 (D.D.C. 2000)* .

(n19)Footnote 19. *See McPeek v. Ashcroft, 212 F.R.D. 33, 34-35 (D.D.C. 2003)* .

(n20)Footnote 20. *See* Danis v. USN Communs., Inc., (N.D. Ill. Oct. 20, 2000) .

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CHAPTER 24 Discovery of Computer-Based Information *
D. Weighing Costs and Burdens of Electronic Discovery Requests Against Likely Benefits

2-24 Federal Litigation Guide § 24.36

§ 24.36 Considering Cost of Producing Documents in Requested Format

Any party may serve on any other party a request to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or sample 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--translated, if necessary, by the respondent into reasonably usable form, or to inspect, copy, test, or sample any designated tangible things that constitute or contain matters within the scope of Rule 26(b) and that are in the possession, custody or control of the party upon whom the request is served. n1

The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d). n2

If objection is made to the requested form or forms for producing electronically stored information--or if no form was specified in the request--the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested. n3

Unless the parties otherwise agree, or the court otherwise orders: n3.1

- A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request

- If a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable

- A party need not produce the same electronically stored information in more than one form

If a party requests information in a format other than the format in which the information is kept in the ordinary course of business and the request is challenged by the responding party, the court will likely weigh the burden and costs of production against its likely benefits to evaluate the reasonableness of the request. n4 The requesting party may, however, offer to pay the additional costs incurred in providing documents in an alternative format. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryUndue Burdens

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 34(a)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 34(b).*

(n3)Footnote 3. *Fed. R. Civ. P. 34(b).*

(n4)Footnote 3.1. *Fed. R. Civ. P. 34(b).*

(n5)Footnote 4. *See Fed. R. Civ. P. 26(b)(2)(C)(iii).*

(n6)Footnote 5. *See National Union Elec. Corp. v. Matsushita Elec. Indus., 494 F. Supp. 1257, 1262 (E.D. Pa. 1980)* (significant problem of allocating costs in producing computer-readable program was bypassed when defendants expressed willingness to pay costs).

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2-24 Federal Litigation Guide § 24.37

§ 24.37 Creating Special Program to Retrieve Requested Electronically Stored Information May Be Required

[1] Producing Electronically Stored Information in "Reasonably Usable Form" May Require Software Development

Relying on Rule 34's requirement to provide information in a reasonably usable form, some courts have compelled a responding party to modify or develop a software program to retrieve relevant evidence. n1

[2] Applying Rule 26(b)(2) Proportionality Analysis to Creation of Software Programs

The reasonableness of a request to modify or develop special software to retrieve relevant evidence is evaluated under the Rule 26(b)(2) proportionality analysis. If the costs are not substantial and the resources of the responding party are sizeable, a responding party is likely to be required to develop necessary software retrieval programs. n2 However, a discovery request for computer records that are only marginally relevant and that would impose significant burdens on a party may be unwarranted. n3

If the responding party claims that the retrieval effort involves undue expense, a court may consider the extent of the burden and apportion the costs of its production. However, an allegation that the retrieval of relevant records is burdensome because the indexing system adopted by the responding party precludes an efficient search does not support cost sharing. Providing access to a mass of documents with no discernible indexing or filing system does not comply with the discovery rules, even when the documents are retained in that state in the usual course of business. n4 In this situation, the requesting party should show that the costliness of the discovery procedure involved is a product of the responding party's record-keeping system over which the requesting party has no control. n5

The expense involved in modifying or developing special software can make an otherwise reasonable discovery request unreasonable. However, if the requesting party voluntarily offers to pay for some of the programming cost, or itself develops the software program, production of the requested computer data is more likely to be required. n6 Nevertheless, if the request requires inputting new information into a computer, in addition to developing software programs to analyze the information, the request may be unduly burdensome.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryRelevance

FOOTNOTES:

(n1)Footnote 1. *See National Union Elec. Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1257, 1260-1262 (E.D. Pa. 1980)* ; *see also In re Brand Name Prescription Drugs Antitrust Litig., 1995 U.S. Dist. LEXIS 8281, at *2-*4 (N.D. Ill. June 13, 1995)* .

(n2)Footnote 2. *Fed. R. Civ. P. 26(b)(2)(C)(iii)*; *see also Mackey v. IBP, Inc., 167 F.R.D. 186, 199 (D. Kan. 1996)* .

(n3)Footnote 3. *See Marker v. Union Fidelity Life Ins. Co., 125 F.R.D. 121, 124-125 (M.D.N.C. 1989)* .

(n4)Footnote 4. *See Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73, 76 (D. Mass. 1976)* .

(n5)Footnote 5. *See In re Brand Name Prescription Drugs Antitrust Litig., 1995 U.S. Dist. LEXIS 8281, at *7-*8 (N.D. Ill. June 13, 1995)* .

(n6)Footnote 6. *See Mackey v. IBP, Inc., 167 F.R.D. 186, 199 (D. Kan. 1996)* .

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2-24 Federal Litigation Guide § 24.38

§ 24.38 Weighing Burden and Expense of On-Site Computer Inspection

[1] Conducting On-Site Computer Inspection on Party's Consent

In general, a party may, under Rule 34(a), request to inspect and copy any tangible thing that is discoverable under Rule 26(b). n1 A computer can be inspected on agreement of both parties. A limited on-site computer inspection can be especially cost effective. In addition, the parties may use word-search requests that are executed immediately in both parties' presence. However, the parties should agree on a protocol establishing inspection procedures. n2 Under this arrangement,pertinent documents can be marked and later delivered after the responding party has had an opportunity to review them for privilege purposes.

[2] Conducting On-Site Computer Inspection Over Party's Objections

The on-site inspection of a computer is particularly intrusive and raises specific concerns for a responding party. As a practical matter, a responding party ordinarily will not permit open inspection of a computer, because a computer's databases often contain information that is not relevant to the claims and defenses pleaded in a complaint or that is subject to a claim of privilege, such as attorney-client, work product, trademark, or copyright privileges. n3 Furthermore, Rule 34(a) does not permit unrestricted, direct access to computer information and no court will order this intrusive discovery unless the likely benefits of recovering relevant evidence from the computer inspection outweigh the significant burdens. n4

[3] Accessing Deleted Files Through Mirror-Imaging

Mirror imaging is the preferred method to preserve a record of a computer's files, including deleted files. n5 The mirror-imaging process ensures that the retrieval process itself does not destroy information in the computer, particularly deleted files that have not been permanently destroyed. However, the process may require the attention of a professional computer technician, although many back-up systems make mirror images of computer drives. n6

A mirror-image copy of a computer's hard drive represents a snapshot of the computer's records. It contains all the information in the computer, including embedded, residual, and deleted data. It preserves all information and eliminates any potential inadvertent destruction of evidence, including the creation dates of the files that had overwritten the deleted files. n7

The copying process can result in the affected computer being unavailable to the user for a few hours. n8 However, technological advances continue to accelerate the process, reducing the time needed to make a mirror image. For example, portable mirror-imaging equipment is available to perform the process at the computer's location. Nevertheless, the disruption to an ongoing business can still be significant, particularly if many computers are involved or if computers are located in different places, and may in some circumstances outweigh the benefits of discovery. Courts apply the proportionality test to a request for an on-site inspection or mirror imaging, weighing the burdens (including the extent of the disruption to ongoing business operations and attendant costs) against the potential for finding relevant information that cannot be located by other means. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewEvidenceDemonstrative EvidenceComputer-Generated Evidence

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 34(a).*

(n2)Footnote 2. *See Strasser v. Bose Yalamanchi, M.D., P.A., 669 So. 2d 1142, 1144-1145 (Fla. Dist. Ct. App. 4th Dist. 1996)* (court suggested option of plaintiff sending representative to access and inspectdefendant's computer in presence of defendant's representative under agreed set of procedures).

(n3)Footnote 3. *See* McCurdy Group, LLC v. Am. Biomedical Group, Inc., No. 00-6183, 2001 U.S. App. LEXIS 10570, at *20-*23 (10th Cir May 21, 2001) .

(n4)Footnote 4. *See In re Ford Motor Co., 345 F.3d 1315, 1316 (11th Cir. 2003) .*

(n5)Footnote 5. *See Gates Rubber Co. v. Bando Chem. Indus., 167 F.R.D. 90, 99-100 (D. Colo. 1996) .*

(n6)Footnote 6. *See LEXIS-NEXIS v. Beer, 41 F. Supp. 2d 950, 953 (D. Minn. 1999) .*

(n7)Footnote 7. *See Gates Rubber Co. v. Bando Chem. Indus., 167 F.R.D. 90, 103 (D. Colo. 1996) .*

(n8)Footnote 8. *See Playboy Enters. v. Welles, 60 F. Supp. 2d 1050, 1054 (S.D. Cal. 1999) .*

(n9)Footnote 9. *Fed. R. Civ. P. 26(b)(2)(C)(iii).*

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2-24 Federal Litigation Guide § 24.39

§ 24.39 Protecting Against Disclosure of Privileged or Confidential Documents During On-Site Inspection

A protocol requiring the presence of the responding party's counsel when the requesting party's counsel or representative searches a seized computer and segregation of any claimed privileged material is often essential to ensure confidentiality of otherwise privileged documents. n1 Parties may also agree to inspection by a third party selected by both parties who has signed a confidentiality contract agreeing not to disclose the information to unauthorized individuals. n2

If the parties do not mutually agree on a confidentiality protocol, a responding party may seek a protective order under Rule 26(c) to prevent disclosure of any privileged document that may be revealed during an inspection. n3 A court may also appoint an expert to review the electronic data during an inspection. n4 As an officer of the court, the expert can be bound to maintain confidentiality.

Confidentiality safeguards are especially prudent when a mirror image or an exact duplicate of a computer's hard drive is undertaken during an on-site inspection. n5 Not only does a mirror image contain all the computer's files, but it also will capture residual-deleted files and embedded data generated with each file. Thus, earlier drafts of documents can be located, and the identity of authors, creation dates, and modification dates all will be available to the requesting party. Adequate safeguards must be adopted to ensure that privileged documents contained in a mirror-image copy are not disclosed.

If a mirror image copy of a hard drive is ordered, a protocol should be established to ensure the confidentiality of its information, including provisions preventing waiver of privilege, limiting the presence of persons during the mirrorimaging process, and providing a custodian for the mirror image copy. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryProtective Orders

FOOTNOTES:

(n1)Footnote 1. *See Religious Tech. Ctr. v. F.A.C.T.NET, Inc., 901 F. Supp. 1519, 1522 (D. Colo. 1995)* .

(n2)Footnote 2. *See Simon Prop. Group, L.P. v. MySimon, Inc., 194 F.R.D. 639, 643 (S.D. Ind. 2000)* .

(n3)Footnote 3. *Fed. R. Civ. P. 26(c)*.

(n4)Footnote 4. *See Cerruti 1881 S.A. v. Cerruti, Inc., 169 F.R.D. 573, 582 (S.D.N.Y. 1996)* .

(n5)Footnote 5. *See Gates Rubber Co. v. Bando Chem. Indus., 167 F.R.D. 90, 100 (D. Colo. 1996)* .

(n6)Footnote 6. *See Playboy Enters. v. Welles, 60 F. Supp. 2d 1050, 1055 (S.D. Cal. 1999)* .

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CHAPTER 24 Discovery of Computer-Based Information *
D. Weighing Costs and Burdens of Electronic Discovery Requests Against Likely Benefits

2-24 Federal Litigation Guide §§ 24.40 through 24.50

[Reserved]

§§ 24.40[Reserved]

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2-24 Federal Litigation Guide § 24.51

§ 24.51 CHECKLIST: Requesting Production of Electronically Stored Information

The following is a checklist of factors to consider when preparing production requests for electronic information:

☐ Consider different forms of discoverable electronically stored information, including hard drives, databases, other storage media, e-mails, software, and residual-deleted data, as well as home computers, laptops, and mobile handheld devices in which relevant information may be available

☐ Determine whether creation of special programs to retrieve electronic data is necessary

☐ Consider formal discovery requests pertaining to opposing party's computer environment, systems, and processes, including party's record retention and destruction policies, if information was not provided in initial disclosure

☐ Consider formal discovery requests for electronically stored information relied on:

- ☐ By opponent's expert as basis for his or her opinion;
- ☐ For creation of computer model or simulation.

☐ Determine whether on-site computer inspection is appropriate

☐ Focus discovery requests by seeking relevant information from:

- ☐ Individual files
- ☐ Individual hard drives

- ☐ Computer database accessed by individual users, and/or
- ☐ Any of opponent's computer systems and equipment with respect to distinct period of time

☐ Determine format of production desired, including:

- ☐ Electronic copies only (specifying preferred storage medium)
- ☐ Paper copies only, or
- ☐ Electronic and paper copies

☐ Consider special issues surrounding production of e-mails, such ascost and burden of retrieval, and potential privileged nature of attorney-client communications

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryRelevanceCivil ProcedureDiscoveryUndue Burdens

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§ 24.52 CHECKLIST: Responding to Electronic Discovery Requests

The following is a useful checklist for responding to electronic discovery requests:

- ☐ Determine whether objection is appropriate based on:
  - ☐ Relevancy
  - ☐ Assertion that request seeks cumulative or duplicative materials, and/or
  - ☐ Assertion that alternative, more convenient, means to obtain information is available
- ☐ Previous opportunity to obtain the information through discovery
- ☐ Not reasonably accessible because of undue burden or cost
- ☐ Privilege such as work product
- ☐ Carefully review computer-based information being disclosed to avoid inadvertent disclosure of privileged information and risk of waiver of privilege
- ☐ Consider entering into confidentiality agreement with opposition, or seeking court order, to maintain privileged status of documents despite disclosure

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryRelevanceCivil ProcedureDiscoveryUndue Burdens

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CHAPTER 24 Discovery of Computer-Based Information *
E. Checklists for Electronic Discovery Requests and Responses

2-24 Federal Litigation Guide §§ 24.53 through 24.60

[Reserved]

§§ 24.53[Reserved]

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CHAPTER 24 Discovery of Computer-Based Information *
F. Discovery Sanctions Involving Electronic Records

2-24 Federal Litigation Guide § 24.61

§ 24.61 Failing to Produce Computer-Based Information May Result in Sanctions

As a general matter, a party to civil litigation has a duty to preserve relevant information, including electronically stored information, when that party "has notice that the evidence is relevant to litigation or ... should have known that the evidence may be relevant to future litigation." n1 It is the responsibility of the parties to ensure that relevant electronically stored information is preserved, and when that duty is breached, a district court may exercise its authority to impose appropriate discovery sanctions. n2

Sanctions should be considered only if the court finds all of the following: n3

- A clear duty to preserve
- A culpable failure to preserve and produce relevant electronically stored information
- A reasonable probability of material prejudice to the adverse party

In some instances, the district court may issue a preserving order to compel the forensic imaging and production of computer hard drives as a means by which to preserve relevant electronic evidence. Because all litigants are obligated to preserve relevant information in their possession, preservation orders generally must be premised on a demonstration that a real danger of evidence destruction exists, a lack of any other available remedy, and a showing that the preservation order is an appropriate exercise of the court's discretion. n4

A party may choose on its own to preserve information through forensic imaging, and district courts have, for various reasons, compelled the forensic imaging and production of opposing parties' computers. n5 Nevertheless courts have been cautious in requiring the mirror imaging of computers where the request is extremely broad in nature and the connection between the computers and the claims in the lawsuit are unduly vague or unsubstantiated in nature. n6 Thus, even if acceptable as a means to preserve electronic evidence, compelled forensic imaging is not appropriate in all cases, and courts must consider the significant interests implicated by forensic imaging before ordering such procedures. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMisconductLegal EthicsSanctionsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 436 (2d Cir. 2001)* ; *see also Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216-18 (S.D.N.Y. 2003)* .

(n2)Footnote 2. *Fed. R. Civ. P. 37(b), (e)*; *John B. v. Goetz, 531 F.3d 448, 459-460 (6th Cir. 2009)* .

(n3)Footnote 3. *See John B. v. Goetz, 531 F.3d 448, 459-460 (6th Cir. 2009)* .

(n4)Footnote 4. *See John B. v. Goetz, 531 F.3d 448, 459-460 (6th Cir. 2009)* .

(n5)Footnote 5. *See John B. v. Goetz, 531 F.3d 448, 459-460 (6th Cir. 2009)* .

(n6)Footnote 6. *See John B. v. Goetz, 531 F.3d 448, 459 (6th Cir. 2009)* .

(n7)Footnote 7. *See Fed. R. Civ. P. 34(a)* Advisory Committee Note (2006).

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CHAPTER 24 Discovery of Computer-Based Information *
F. Discovery Sanctions Involving Electronic Records

2-24 Federal Litigation Guide § 24.62

§ 24.62 Destroying Computer-Based Evidence May Result in Sanctions

Spoliation is the intentional destruction, mutilation, alteration, or concealment of evidence that may be used by another party in pending or future litigation. n1 Although a party is not required to retain every document in its possession once litigation has commenced, n2 the party must preserve evidence that the party knows or should know is relevant to a claim or defense of any party, or that may lead tothe discovery of relevant evidence. n3

Sanctioning a party for the intentional destruction of relevant electronically stored and paper-based or other physical evidence raises spoliation issues. However, theaffirmative duty to preserve relevant computer-based evidence raises unique problems. Computer files are routinely destroyed in the normal course of business without regard to pending or ongoing litigation when tapes are reused in back-up systems, files are disposed of under a record retention-disposition policy, e-mail messages are automatically deleted on a scheduled basis, and residual-deleted data is overwritten as part of daily computer operations.

Often no record exists that identifies which computer-based documents are destroyed, and no method exists to determine whether the records are relevant to the litigation. n4 In such cases, requesting a "mirror-image" of the relevant computer system and back-up files early in the case is essential to ensuring data retention. n5 In these cases, no sanction may be imposed absent some showing that the destroyed documents or files were indeed relevant. However, the exact contents of destroyed electronic documents need not be known. A showing that the destroyed documents fell within a category of documents that were relevant and had some materiality to the litigation may be adequate to impose appropriate sanctions. n6

A computer's residual-deleted data is overwritten and lost whenever a computer is in operation, including when the computer is turned on. n7

The only way to prevent destruction of potential electronic evidence is to halt further computer operations or to make an mirror image copy of the hard drive preserving all files, both of which may involve substantial cost and burden. Unless a specific request is made, or the party is aware that potential residual-deleted files exist that may contain relevant evidence, a party is not automatically obligated to take extraordinary steps either to stop computer operations or make a mirror image copy of computer files. n8 Nevertheless, the better practice is to address potential problems as quickly as possible after commencement of litigation.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsGeneral OverviewEvidenceRelevanceSpoliationLegal EthicsSanctionsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779-780 (2d Cir. 1999)* ; *Zubulake v. UBS Warburg, LLC, 2004 U.S. Dist. LEXIS 13574, at *26 (S.D.N.Y. July 20, 2004)* .

(n2)Footnote 2. *See Danis v. USN Communs., Inc., 2000 U.S. Dist. LEXIS 16900, at *99 (N.D. Ill. Oct. 20, 2000)* .

(n3)Footnote 3. *See Fed. R. Civ. P. 26.*

(n4)Footnote 4. *See Procter & Gamble Co. v. Haugen, 179 F.R.D. 622, 631 (D. Utah 1998)* .

(n5)Footnote 5. *See § 24.38[3].*

(n6)Footnote 6. *See Zubulake v. UBS Warburg, LLC, 2004 U.S. Dist. LEXIS 13574, at *12-*26 (S.D.N.Y. July 20, 2004)* (detailing plaintiff's efforts to show spoliation of relevant computer files and back-ups tapes); *Gates Rubber Co. v. Bando Chem. Indus., 167 F.R.D. 90, 115 (D. Colo. 1996)* .

(n7)Footnote 7. *See Gates Rubber Co. v. Bando Chem. Indus., 167 F.R.D. 90, 112 (D. Colo. 1996)* .

(n8)Footnote 8. *Zubulake v. UBS Warburg, LLC, 2004 U.S. Dist. LEXIS 13574, at *12-*26 (S.D.N.Y. July 20, 2004)* (detailing plaintiff's efforts to demonstrate defendant's destruction of relevant e-mails and back-up tapes).

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CHAPTER 24 Discovery of Computer-Based Information *
F. Discovery Sanctions Involving Electronic Records

2-24 Federal Litigation Guide § 24.63

§ 24.63 Destroying Records Per Routine Policy Not Ordinarily Sanctionable Conduct

Absent exceptional circumstances, a court may not impose sanctions under the federal 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. n1

The protection provided under Rule 37(e) applies only to sanctions under the Federal Rules, and it does not affect other sources of authority to impose sanctions or rules of professional responsibility. n2

A party's record-retention policy is itself subject to discovery. The routine deletion of e-mail messages and temporary files may destroy relevant information subject to discovery. In general, the destruction of a document does not raise an adverse inference of spoliation if it is done in accordance with a routine housekeeping records retention and disposition policy and without knowledge that the destroyed document is relevant to the claim or defense of any party in pending or imminent litigation. n3 Conversely, destroying documents in a manner inconsistent with a record-disposition policy may be persuasive evidence that the destruction was not done in good faith. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMisconductEvidenceRelevanceSpoliationLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 37(e).*

(n2)Footnote 2. *Fed. R. Civ. P. 37(e)* Committee Note (2006).

(n3)Footnote 3. *See Coates v. Johnson & Johnson, 756 F.2d 524, 551 (7th Cir. 1985) .*

(n4)Footnote 4. *See In re Prudential Ins. Co. of Am. Sales Practices Litig., 169 F.R.D. 598, 615 (D.N.J. 1997) .*

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CHAPTER 24 Discovery of Computer-Based Information *
F. Discovery Sanctions Involving Electronic Records

2-24 Federal Litigation Guide § 24.64

§ 24.64 Destroying Records Before Commencement of Litigation Per Reasonable Policy Not Sanctionable

Destroying a relevant document before litigation is commenced in accordance with an established record-disposition schedule that was adopted in furtherance of legitimate business purposes may be reasonable and may not be subject to sanction. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsGeneral OverviewLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Stanton v. National R.R. Passenger Corp., 849 F. Supp. 1524, 1528 (M.D. Ala. 1994)* .

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CHAPTER 24 Discovery of Computer-Based Information *
F. Discovery Sanctions Involving Electronic Records

2-24 Federal Litigation Guide § 24.65

§ 24.65 Destroying Records After Commencement of Litigation Can Lead to Sanctions

If litigation is imminent or has commenced, destruction of evidence can lead to severe sanctions--even if it is destroyed in accordance with an established recordretention and disposition policy. n1 Sanctions for spoliation are within the trial court's discretion and may include an adverse inference instruction to the jury. n2

For a complete discussion of discovery enforcement, see Ch. 22, *Enforcement of Discovery*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsGeneral OverviewEvidenceRelevanceSpoliationLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Zubulake v. UBS Warburg, LLC, 2004 U.S. Dist. LEXIS 13574, at *26 (S.D.N.Y. July 20, 2004)* ; Linnen v. A.H. Robins Co., (June 15, 1999) .

(n2)Footnote 2. *Zubulake v. UBS Warburg, LLC, 2004 U.S. Dist. LEXIS 13574, at *27 (S.D.N.Y. July 20, 2004)* .

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CHAPTER 25 Trial Planning and Preparation *

3-25 Federal Litigation Guide 25.syn

§ 25.syn Synopsis to Chapter 25: Trial Planning and Preparation *

§ 25.01 Developing an Overall Case Plan

§ 25.02 Maintaining a "To Do" List

§ 25.03 Preparing a Statement of Claims and/or Defenses

§ 25.04 Formulating a Case Theme
[1] Presenting the Case in a Persuasive Manner
[2] Advancing the Theme at Trial

§ 25.05 Maintaining a Trial Notebook Throughout Litigation

§ 25.06 Evaluating the Importance of the Final Pretrial Order

§§ 25.07through 25.10 [Reserved]

§ 25.11 Understanding Burden of Proof
[1] Evaluating Burden of Going Forward
[2] Satisfying the Burden of Going Forward
[3] Evaluating Burden of Persuasion
[4] Satisfying the Burden of Persuasion
[5] Allocating Burden of Proof Based on Burden of Pleading

§ 25.12 Evaluating Manners of Proof

§ 25.13 Considering Legal Presumptions When Preparing for Trial
[1] Understanding Presumptions
[2] Distinguishing Presumptions from Inferences
[3] Presumption Generally Shifts Burden of Going Forward With Evidence, Not Burden of Persuasion
[4] Evaluating Standards of Proof for Presumptions
[5] Rebutting Presumptions
[6] Considering Presumptions in Diversity Cases

§ 25.14 Considering Inferences as Manner of Proof
[1] Understanding Inferences
[2] Arguing Issues That Depend on Inference
[3] Judge May Indicate that Inference May Be Drawn From Evidence

§§ 25.15through 25.19 [Reserved]

§ 25.20 Considering the Importance of Witness Testimony at Trial
[1] Preparing for Use of Witness Testimony at Trial
[2] Evaluating Witness Credibility
[3] Preparing to Use Deposition Testimony at Trial

§ 25.21 Preparing to Offer Documents at Trial
[1] Evaluating Strength of Documents for Trial
[2] Seeking Stipulations of Admissibility of Documents Before Trial
[3] Presenting Documents at Trial

§ 25.22 Preparing to Use Demonstrative Exhibits at Trial
[1] Generating Demonstrative Exhibits for Trial
[2] Planning the Introduction of Demonstrative Evidence

§ 25.23 Sources of Admissions for Use at Trial

§ 25.24 Using Admissions Made in Pleadings at Trial

§ 25.25 Using Rule 36 Admissions at Trial
[1] Requesting Admission of Undisputed Facts
[2] Understanding the Effect of Admissions under Rule 36
[3] Presenting Admissions to the Jury

§ 25.26 Using Interrogatory Admissions at Trial
[1] Offering Interrogatory Answers Into Evidence
[2] Explaining the Significance of Interrogatory Answers to the Jury

§ 25.27 Using Deposition Admissions at Trial
[1] Certifying Deposition Transcript Before Trial
[2] Reviewing Deposition Transcripts for Favorable Admissions
[3] Impeaching Witness With Deposition Admissions

§ 25.28 Using Stipulated Admissions at Trial

§ 25.29 Considering the Use of Judicial Notice at Trial
[1] Understanding Judicial Notice
[2] Deciding Whether to Request Judicial Notice

§ 25.30 Preparing an Order of Proof

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CHAPTER 25 Trial Planning and Preparation *

3-25 Federal Litigation Guide Scope

Scope

SCOPE

Success or failure in litigation, and ultimately at trial, follows from the level of pretrial planning and preparation that goes into a case. Proper planning for trial begins at the outset of litigation with the mapping out of the legal foundation for the case, as well as the development of a case theme. The legal foundation and the case theme will shape the course of litigation and will ultimately be presented at trial. The legal foundation requires consideration of the essential elements of the claims or defenses being litigated, while the case theme requires consideration of how to characterize and present the case in the most persuasive manner.

Part A of the chapter provides a discussion of trial planning tools and resources for use throughout the course of litigation, and it covers the following topics:

- Case plans
- "To do" lists
- Statement of claims and/or defenses
- Case themes
- Trial notebooks
- Final pretrial orders

Part B concerns the burden of proof at trial and includes discussion of the following:

- Burden of going forward
- Burden of persuasion
- Manners of proof

- Presumptions
- Inferences

Finally, Part C provides a discussion of forms of proof and includes coverage of the following topics:

- Witness testimony
- Documentary evidence
- Demonstrative evidence
- Party admissions
- Discovery responses
- Stipulations
- Judicial notice

Part C concludes with a discussion of the importance of preparing an order of proof in preparation of trial.

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CHAPTER 25 Trial Planning and Preparation *
A Trial Planning Tools and Resources

3-25 Federal Litigation Guide § 25.01

§ 25.01 Developing an Overall Case Plan

An overall case plan should be developed at the outset of litigation for all actions being prosecuted or defended in federal court. The case plan provides a framework for developing the legal foundation of the case, as well as the theme of the case for trial. The case plan should be revised as needed as litigation progresses. Initially, the case plan should contemplate the following:

- **Client Objectives.** What are the client's objectives? Some clients, particularly those with limited resources, may be most concerned with a quick resolution, while others may be most concerned with a specific outcome.

- **Case Strategy.** How can the client's objectives be best achieved? The case strategy should include a plan for voluntary exchange of information at the outset of litigation, a discovery plan, a plan for motion practice, and ultimately a trial plan.

- **Negotiation Strategy.** Can the case be resolved informally without the need for protracted and expensive litigation?

- **Case Deadlines.** What deadlines have been set by the court in pretrial conferences and case management conferences? Consider deadlines for discovery cut-off, and the filing of motions during the early stages of litigation.

- **Case Weaknesses.** What are the problems with the case and how can weaknesses be overcome?

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedureTrialsGeneral Overview

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CHAPTER 25 Trial Planning and Preparation *
A Trial Planning Tools and Resources

3-25 Federal Litigation Guide § 25.02

§ 25.02 Maintaining a "To Do" List

By keeping a "to do" list throughout the lifetime of a case, counsel can track everything that is being done and that must later be done in preparation of trial. Such a list may be kept manually or electronically. Some software companies offer programs that are designed to help plan and schedule litigation in preparation of trial.

As to each item or project, the "to do" list may be used to record:

- The nature of the project
- Who is to do each item
- The deadline by which it is to be completed

The list might differentiate between long-term and short-term projects. It may also be broken down according to the type of activity, such as research, discovery problems, interviews, "for trial" projects, and miscellaneous projects. "For trial" items would include such matters as drafting jury instructions, issuance of trial subpoenas, and drafting voir dire questions.

The "to do" list should be updated regularly and a copy of it should be distributed to everyone who is working on the case. The list's function is not only to keep track of the various projects, but also to serve as a checklist by which persons working on the case can measure their responsibilities.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedureTrialsGeneral Overview

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CHAPTER 25 Trial Planning and Preparation *
A Trial Planning Tools and Resources

3-25 Federal Litigation Guide § 25.03

§ 25.03 Preparing a Statement of Claims and/or Defenses

In plannning for trial, it generally is beneficial to prepare a statement of each cause of action and/or defense that is raised in the action. Such a statement generally should include:

- A breakdown of each element of the claims or defenses
- A brief identification of the various ways in which each element is to be established

A statement of claims or defenses will help to avoid potential oversights in any case going to trial. Often, claims or defenses subtly change through the course of litigation. Decisions affecting the strategy for establishing the elements of a claim or defense are also subject to change. Strong witnesses may supplant weak ones as more depositions or statements are taken. Documents and demonstrative evidence, such as photographs or engineering plans, may be used to buttress or even replace live testimony. As a result, a regular review of the statement of claims and defenses will allow for timely and meaningful decisions in your trial preparation strategy.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedureTrialsGeneral Overview

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CHAPTER 25 Trial Planning and Preparation *
A Trial Planning Tools and Resources

3-25 Federal Litigation Guide § 25.04

§ 25.04 Formulating a Case Theme

[1] Presenting the Case in a Persuasive Manner

The central case theme is the overarching story that explains the case. Often, the successful construction of a convincing theme is more important than the strict analysis of the elements of each claim or defense. It is critical to decide on a perspective from which to present the facts, and then to explain every aspect of the case in a way that is consistent with that perspective. The theme of the case will impact all aspects of litigation including the original pleadings, pretrial conference planning, discovery, and motion practice. Ultimately, the theme of the case will determine what evidence is presented in what order at trial to best persuade the trier of fact.

[2] Advancing the Theme at Trial

The case theme should act as a centerpiece of trial presentation and may be advanced in the following ways:

- **Opening Statement.** The theme of the case should determine what evidence is to be mentioned in the opening statement, in what order, and with what emphasis

- **Expert Testimony.** This is one of the most common and usually the most effective ways to promote nonevidentiary themes since experts deal in opinions and the reasons for those opinions, or the philosophy underlying the opinions n1

- **Testimony by Other Witnesses.** Themes can also be advanced by fact witnesses

- **Documents.** The case theme may be illustrated or even specifically argued from documents that are admissible for other reasons

- **Innuendo.** Themes often can be advanced as elements incidental to other evidence, questions, or colloquy

- **Closing Argument.** Because you are permitted to discuss not only the evidence but also the inferences and innuendos arising from it, closing argument provides a final opportunity to advance the case theme

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsClosing ArgumentsGeneral OverviewCivil ProcedureTrialsOpening StatementsGeneral OverviewEvidenceTestimonyExpertsAdmissibility

FOOTNOTES:
(n1)Footnote 1. *Federal Rules of Evidence 703*, *704*, and *705* provide the relevant parameters governing the admissibility of expert testimony.

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CHAPTER 25 Trial Planning and Preparation *
A Trial Planning Tools and Resources

3-25 Federal Litigation Guide § 25.05

§ 25.05 Maintaining a Trial Notebook Throughout Litigation

Trial notebooks are often helpful to organize a case for trial. The precise format of the trial notebook will vary from case to case. Often it will consist of binders with separate sections delineated for easy access at trial. Some practitioners use both binders and electronic files that may be accessed on a laptop computer. The trial notebook will evolve as trial preparation progresses and it may include:

- **"To-Do" List.** This section includes a record of tasks to be performed in preparation of trial n1
- **Chronology.** A short chronology of events that emphasizes the theme of the case
- **Statement of Claims and/or Defenses.** A basic checklist of the items to be proved or explored that includes a breakdown of each element of the claims or defenses with identification of the various ways in which each element is to be established at trial n2
- **Complaint.** A copy of the complaint
- **Responsive Pleadings/Motions/Answers.** Copies of pleadings in response to the complaint
- **Key Documents.** Documents that are critical to the factual or legal development of the case
- **Law.** Copies of critical cases or points of law, along with notes and memoranda
- **Interrogatory Answers/Answers to Requests for Admission/Key Documents.** Significant documents produced or disclosed during the course of discovery
- **Deposition Outlines/Summaries.** Outlines for the most significant remaining depositions and abstracts of the more significant depositions taken to date
- **Opening Statement.** A draft or an outline of the opening statement
- **Order of Proof.** A checklist of the order of presentation of argument and evidence at trial

- **Examination Outlines for Individual Witnesses.** A separate section for each witness with relevant documents, discovery responses, and deposition testimony (if the witness is going to authenticate a critical document, the specific questions laying the proper evidentiary foundation should be attached to the individual exhibits in that witness' folder)

- **Copies of Motion in Limine/Memoranda of Law.** Appropriate motions with supporting legal authority to object to the introduction of evidence or testimony that may be considered improper or prejudicial

- **Draft Instructions/Forms of Verdict.** Copies of relevant jury instructions and forms of verdict

- **Notes for Closing Argument.** Notes of points that should be stressed or answered in closing argument

- **Final Pretrial Order.** The final pretrial order governs who may be called as witnesses; may contain binding stipulations; and may limit the questions, evidence, exhibits, and legal theories to be presented at trial

The trial notebook takes different forms depending on the type of case, the size of the legal team handling the case, and its stage of development. The notebook is a single reference point to which you should be able to turn at any time and under any circumstances for information as to the essential elements and problems of the case.

From a practical standpoint, since the trial notebook typically will contain an *enormous* amount of counsel's thoughts and work product, counsel should maintain a backup copy of all the contents of the notebook.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedureTrialsGeneral OverviewEvidenceTestimonyPresentation of Evidence

FOOTNOTES:
(n1)Footnote 1. *See § 25.02 supra*.

(n2)Footnote 2. *See § 25.03 supra*.

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CHAPTER 25 Trial Planning and Preparation *
A Trial Planning Tools and Resources

3-25 Federal Litigation Guide § 25.06

§ 25.06 Evaluating the Importance of the Final Pretrial Order

The critical importance of the final pretrial order cannot be overemphasized: the final pretrial order supersedes the pleadings; governs who may be called as witnesses (and possibly impeachment witnesses and rebuttal witnesses); may contain binding stipulations; and may limit the questions, evidence, exhibits, and legal theories to be presented at trial. n1 Matters not preserved in the final pretrial order are eliminated from the case. n2 Thus, a witness not disclosed prior to the entry of the order may be precluded from testifying, n3 and documents not previously identified may not be permitted to be introduced at trial. n4

Great care is required in preparing the final pretrial order, as many, if not most, judges will insist that it be followed with precision. The trial court, but not the parties, has a certain amount of latitude to deviate from final pretrial order. n5 If counsel is required to prepare the order, the individual judge's rules should be consulted. In general, a final pretrial order should clearly state the following: n6

- Facts establishing jurisdiction and venue
- A statement of the case
- The date and time that the trial will commence
- All rulings made at the final pretrial conference
- A summary of all factual and legal issues to be tried, and any issues to be severed and tried separately
- Witnesses to be called
- Expert witnesses to be called, and a summary of their qualifications
- Exhibits to be presented at trial; identification of exhibits to be admitted without objection, and summary of any objections

- Discovery excerpts from stenographic and video depositions, responses to interrogatories, and requests for admission
- Undisputed facts and judicially noticed facts
- Order of proof, including procedures for presenting testimony and exhibits
- Whether additional or specified evidence is precluded
- Procedures for selection, management, and instruction of jury, including deadlines for submitting proposed voir dire questions and jury instructions
- Any objections that are sustained, denied, or deemed waived
- Estimated length of trial
- Verdict stipulations

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedureTrialsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. Pretrial conferences and orders are discussed in detail in ch. 27.

(n2)Footnote 2. *See Southern Cal. Retail Clerks Union v. Bjorklund, 728 F.2d 1262, 1264 (9th Cir. 1984)* .

(n3)Footnote 3. *See Geiserman v. MacDonald, 893 F.2d 787, 791 (5th Cir. 1990)* .

(n4)Footnote 4. *See Devices for Medicine, Inc. v. Boehl, 822 F.2d 1062, 1067 (Fed. Cir. 1987)* .

(n5)Footnote 5. *See HBE Leasing Corp. v. Frank, 22 F.3d 41, 45 (2d Cir. 1994)* .

(n6)Footnote 6. *See, e.g.,* Manual for Complex Litigation (Third), §§ 21.67, 40.3, 41.63 (1995).

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CHAPTER 25 Trial Planning and Preparation *
A Trial Planning Tools and Resources

3-25 Federal Litigation Guide §§ 25.07through 25.10

[Reserved]

§§ 25.07[Reserved]

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CHAPTER 25 Trial Planning and Preparation *
B Burden of Proof at Trial

3-25 Federal Litigation Guide § 25.11

§ 25.11 Understanding Burden of Proof

[1] Evaluating Burden of Going Forward

If at trial a party fails to adduce sufficient proof as a matter of law for any claim or defense at issue, the party may fail to meet the burden of going forward with that claim or defense. Under Rule 50(a), federal trial courts have a procedure for avoiding the time and expense of a jury trial on issues or claims for which there is insufficient proof as a matter of law. n1 If the trial court decides there is insufficient evidence to find for a party on an issue, the court may determine that issue against that party and grant a Rule 50(a) motion for judgment against that party with respect to a claim or defense that, under controlling law, cannot be maintained or defeated without a finding on that issue before the case is submitted to the jury. n2

[2] Satisfying the Burden of Going Forward

It is virtually impossible to define the nature or to quantify the amount of evidence that is sufficient to satisfy the burden of going forward. Clearly, some evidence, whether it be direct or circumstantial, must be adduced in support of the proposition at issue. The sufficiency of the evidence is tested by its probative value, not by its volume. A "scintilla" of evidence will not suffice to create a jury question, especially on an issue as to which the burden of proof belongs to the party opposing a motion for judgment as a matter of law. n3 The evidence adduced generally must be such that a reasonable person could draw from it an inference of the existence of the particular fact to be proved.

The problem of insufficient evidence usually arises in situations where proof of an essential element of a case must be made by inference from circumstantial evidence. Generally, no problem occurs when direct evidence is relied on in support of a proposition. Except in rare cases, such as those in which a witness' testimony is flatly contradicted by physical facts, or the testimony on its face is not believable, the testimony of even one witness may be enough to satisfy the burden of going forward. This is true even when the testimony of the witness is in dispute. However, the credibility of the witness or his or her persuasive qualities relate to the burden of persuasion, and not usually to the burden of producing evidence. Similarly, facts appearing in an admissible document or other evidentiary exhibit generally are sufficient even when challenged.

If the opposing party fails to meet the burden of going forward, counsel should make a Rule 50(a) motion for judgment as a matter of law at the close of the opposing party's case, keeping in mind that the court will view the evidence in the light most favorable to the opponent. n4 This motion should clearly state how the evidence is deficient. n5

If initially denied, a motion for judgment as a matter of law should be renewed at the close of trial and after an unfavorable verdict. Failure to do so will jeopardize post-trial and appellate rights. n6

[3] Evaluating Burden of Persuasion

In a civil case, the party with the burden of proof generally must persuade the jury that a certain proposition is more likely true than untrue. The probative value of the evidence, the wording of the jury instructions, and the jury's reaction to the respective parties and their case will all combine to determine which party has carried the burden of persuasion.

[4] Satisfying the Burden of Persuasion

In federal courts, proof by a preponderance means proof that leads the jury to find, after considering all evidence, that a fact in controversy is more likely true than not, otherwise termed the "preponderance of probability." While the preponderance test will apply in most cases in federal court, counsel is cautioned to determine the level of proof that will be required as to each contested issue at trial and to tailor evidentiary presentations and argument to meet or defeat the applicable standard. In a diversity case, the applicable burden is generally a matter of state law. n7

[5] Allocating Burden of Proof Based on Burden of Pleading

In most cases, the party who has the burden of pleading a fact will also have both the burden of going forward and the burden of persuasion. The pleadings, therefore, will provide a useful road map in apportioning the burdens of proof.

Looking to the pleadings to determine the allocation of the burdens, however, is not foolproof. In some situations the burdens do not follow the pleadings. For example, under *Rule 8(c) of the Federal Rules of Civil Procedure*, contributory negligence is an affirmative defense which must be pleaded by the defendant. Where federal jurisdiction is based on diversity and the applicable state substantive law requires the plaintiff to prove due care or lack of contributory negligence, the burden of producing evidence and persuading the trier may rest with the plaintiff, irrespective of who has the burden of pleading. n8

Finally, reference to which party has pleaded a claim or defense may be irrelevant in a matter of first impression where there are no established pleading rules. In such circumstances, allocation of the burdens will depend on a number of factors, including:

- The natural tendency to place the burden on the plaintiff as the party initiating the action
- Policy considerations
- Convenience
- Fairness, such as placing the burdens on a party who has the only available knowledge or information concerning an issue

As a practical matter, counsel should never knowingly fail to introduce evidence essential to any claim or defense based on a belief that the court will ultimately determine that the opposing party has the burden of proof.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofGeneral

OverviewEvidenceProcedural ConsiderationsBurdens of ProofAllocationEvidenceProcedural ConsiderationsBurdens of ProofBurden ShiftingEvidenceProcedural ConsiderationsBurdens of ProofUltimate Burden of Persuasion

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 50(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 50(a)*; *see* ch. 38 *infra*.

(n3)Footnote 3. *Bailey v. Board of County Comm'rs, 956 F.2d 1112, 1119 (11th Cir. 1992)* ; *Veranda Beach Club v. Western Sur. Co., 936 F.2d 1364, 1375 (1st Cir. 1991)* . *See also* McCormick on Evidence, § 338; 9 *MOORE'S Federal Practice, § 50.02[2]* (Matthew Bender 3d ed.).

(n4)Footnote 4. *Jones v. Century Oil U.S.A., Inc., 957 F.2d 84, 85 (3d Cir. 1992)* ; *Fane v. Zimmer, Inc., 927 F.2d 124, 128 (2d Cir. 1991)* .

(n5)Footnote 5. *Price v. Lockheed Space Operations Co., 856 F.2d 1503, 1505 n.6 (11th Cir. 1988)* .

(n6)Footnote 6. *Windsor Shirt Co. v. New Jersey Nat'l Bank, 793 F. Supp. 589, 594 (E.D. Pa. 1992)* .

(n7)Footnote 7. *McEwen v. Delta Air Lines, Inc., 919 F.2d 58, 59 (7th Cir. 1990)* .

(n8)Footnote 8. *Palmer v. Hoffman, 318 U.S. 109, 116-117, 63 S. Ct. 477, 87 L. Ed. 645 (1943)* . *See* 2A Moore's Federal Practice, § 8.27[2] (Matthew Bender).

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CHAPTER 25 Trial Planning and Preparation *
B Burden of Proof at Trial

3-25 Federal Litigation Guide § 25.12

§ 25.12 Evaluating Manners of Proof

Well before trial commences, counsel must become familiar with the legal elements of the claims or defenses and prepare to adduce legally sufficient evidence at trial to prove each of those elements. At trial, a party must prove each element of the claim or defense in one of the following ways:

- By law or legal presumption
- By one of the traditional evidentiary resources (testimony, documents, judicial admissions, etc.)
- By inference derived from either or both of the foregoing

Counsel should pay particular attention to those elements of the claim or defense which can or seemingly must be proved by inference only. Is inference enough? Does the direct evidence really support the intended inference? Should an expert be used to draw the inference for the trier of fact? Most importantly, how do you make it clear to the court or jury that this inferential element of the case, on which the direct evidence is silent, is being or has been proved?

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofAllocationEvidenceProcedural ConsiderationsBurdens of ProofBurden ShiftingEvidenceProcedural ConsiderationsCircumstantial & Direct Evidence

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CHAPTER 25 Trial Planning and Preparation *
B Burden of Proof at Trial

3-25 Federal Litigation Guide § 25.13

§ 25.13 Considering Legal Presumptions When Preparing for Trial

[1] Understanding Presumptions

A presumption is a procedural rule affecting the finder of fact. Under this rule, if a basic fact is established, then the fact-finder must accept that the presumed fact has also been established, unless the presumption is rebutted. n1 Failure to present sufficient evidence to create a presumption may result in the case being taken from the jury when the presumed fact is one of the elements of a particular claim. n2 However, a "presumption is not evidence and may not be given weight as evidence." n3

Although a presumption is not a form of evidence, it has evidentiary value. A presumption can have the effect of shifting the burden of going forward, the burden of persuasion, or both. Presumptions serve one or more of four distinct functions: n4

- They serve to "avoid a factual impasse" when direct proof of a fact is unavailable
- They shift the burden of persuasion on an issue
- They permit the judge to instruct the jury on the relationship between facts
- They allocate burdens of production

[2] Distinguishing Presumptions from Inferences

An inference is distinguished from a presumption in that in an inference, the existence of a particular fact may be deduced from the existence of another fact by the ordinary rules of reasoning and logic whereas in a presumption, the existence of a particular fact must be assumed because of a rule of law. n5 For example, in most jurisdictions the tort rule of res ipsa loquitur provides that if certain basic facts are proven, a jury may--but need not--find negligence. It is an inference (permissive), not a presumption (mandatory).

[3] Presumption Generally Shifts Burden of Going Forward With Evidence, Not Burden of Persuasion

Under *Rule 301 of the Federal Rules of Evidence*, the effect of a presumption is to shift to the other party the burden of

production, that is, the burden of going forward with evidence to rebut or meet the presumption. A party's failure to meet this burden of production may result in the case being taken from the jury. n6 Evidence presented to rebut a presumption generally must be sufficient to overcome a directed verdict. n7

Under Rule 301, a presumption does not shift the burden of persuasion or the "burden of proof in the sense of nonpersuasion," that is, the degree to which a party must prove each element of the case. That burden remains on the party on whom it was originally cast. n8 Thus, once the presumption arises, the party opposing the presumption need only come forward with sufficient evidence to avoid a directed verdict. After this amount of rebuttal evidence is presented, the presumption disappears from the case. n9

As a practical matter, counsel must pay close attention to the jury charges concerning a presumption to ensure that the burdens of production and persuasion are kept separate and are properly allocated. n10

[4] Evaluating Standards of Proof for Presumptions

Rule 301 says nothing about how much evidence is needed to create a presumption that will shift the burden of production. However, the presumed facts in most civil cases must be proved by a preponderance of the evidence. n11 The type of evidence required to establish the presumed fact, and create the presumption, varies depending on the issues involved. The courts have, in many cases, set forth specific elements that must be shown to invoke a particular presumption. n12

As explicitly acknowledged in Rule 301, Congress may provide that a higher standard of proof apply to some presumptions. n13 The courts may require a standard of proof higher than mere probability with respect to a presumed proposition of fact if the cause of action is one that, as a matter of substantive policy, requires proof by more than a preponderance. For example, a denaturalization case, while technically a civil litigation, requires "clear, unequivocal, and convincing" evidence. n14 Civil commitment, n15 libel, n16 and deportation n17 cases also require a standard of proof higher than a preponderance of the evidence.

However, exceptions to the preponderance of the evidence standard used in most civil cases, are "uncommon," n18 and are ordinarily "reserved to protect particularly important interests in a limited number of civil cases." n19

[5] Rebutting Presumptions

Rule 301 says nothing about how much evidence is needed to rebut a presumption, n20 although the evidence necessary to rebut will be less than the burden of persuasion in the case. The opponent of the presumed fact, in order to rebut, generally has the burden of presenting enough evidence so that a reasonable jury could be convinced of the non-existence of the presumed fact. n21 This evidentiary requirement has been variously described as the need to come forward with "only some evidence" n22 or the amount of evidence "that would be sufficient to overcome a directed verdict." n23

[6] Considering Presumptions in Diversity Cases

Under Rule 302, the federal court must apply state law, rather than federal procedural law, to determine the existence and effect of a presumption concerning a fact that is an element of a claim or defense that has its source in state law. n24 Since it is limited to presumptions concerning facts that "are an element of a claim or defense," the rule applies only when the presumption operates as a rule of substantive law. n25

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceInferences & PresumptionsGeneral OverviewEvidenceInferences &

PresumptionsPresumptionsEffectsEvidenceInferences & PresumptionsPresumptionsRebuttal of PresumptionsEvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewEvidenceProcedural ConsiderationsWeight & Sufficiency

FOOTNOTES:

(n1)Footnote 1. *See Cammer v. Bloom, 711 F. Supp. 1264, 1290 & n.45 (D.N.J. 1989) , appeal dismissed, 993 F.2d 875 (1993) .*

(n2)Footnote 2. *See Klein v. Trustees of Indiana Univ., 766 F.2d 275, 280-281 (7th Cir. 1985) .*

(n3)Footnote 3. *See Routen v. West, 142 F.3d 1434, 1439 (Fed. Cir. 1998) .*

(n4)Footnote 4. *See* Allen, Presumptions in Civil Actions Reconsidered, *66 Iowa L. Rev. 843, 845 (1981).*

(n5)Footnote 5. *See Herbert v. Wal-Mart Stores, Inc., 911 F.2d 1044, 1047 (5th Cir. 1990) .*

(n6)Footnote 6. *See* Louisell, *Construing Rule 301: Instructing the Jury on Presumptions in Civil Actions and Proceedings, 63 Va. L. Rev. 281, 286 (1977).*

(n7)Footnote 7. *See Sinatra v. Heckler, 566 F. Supp. 1354, 1359-1360 (E.D.N.Y. 1983) .*

(n8)Footnote 8. *See Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659-660, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989) .*

(n9)Footnote 9. *See America Online, Inc. v. AT & T Corp., 243 F.3d 812, 818 (4th Cir. 2001) .*

(n10)Footnote 10. *See Sharp v. Coopers & Lybrand, 649 F.2d 175, 186, 189 n. 21 (3d Cir. 1981) , cert. denied, 455 U.S. 938 (1982) .*

(n11)Footnote 11. *See Price Waterhouse v. Hopkins, 490 U.S. 228, 253, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) .*

(n12)Footnote 12. *See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 508-509, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993) .*

(n13)Footnote 13. *See Alabama By-Products. Corp. v. Killingsworth, 733 F.2d 1511, 1514 (11th Cir. 1984) .*

(n14)Footnote 14. *See California ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater, 454 U.S. 90, 93 n.6, 102 S. Ct. 172, 70 L. Ed. 2d 262 (1981) .*

(n15)Footnote 15. *See Addington v. Texas, 441 U.S. 418, 428, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979) .*

(n16)Footnote 16. *See Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 50, 91 S. Ct. 1811, 29 L. Ed. 2d 296 (1971) .*

(n17)Footnote 17. *See Woodby v. INS, 385 U.S. 276, 285-286, 87 S. Ct. 483, 17 L. Ed. 2d 362 (1966) .*

(n18)Footnote 18. *See Price Waterhouse v. Hopkins, 490 U.S. 228, 253, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) .*

(n19)Footnote 19. *See California ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater, 454 U.S. 90, 93, 102 S. Ct. 172, 70 L. Ed. 2d 262 (1981) .*

(n20)Footnote 20. *See Fed. R. Evid. 301.*

(n21)Footnote 21. *See North Mississippi Communications, Inc. v. Jones, 874 F.2d 1064, 1069 (5th Cir. 1989)* .

(n22)Footnote 22. *See Clay v. Traders Bank, 708 F.2d 1347, 1351 (8th Cir. 1983)* .

(n23)Footnote 23. *See Sinatra v. Heckler, 566 F. Supp. 1354, 1359-1360 (E.D.N.Y. 1983)* .

(n24)Footnote 24. *Fed. R. Evid. 302*.

(n25)Footnote 25. *See National Indus., Inc. v. Republic Nat'l Life Ins. Co., 677 F.2d 1258, 1266 (9th Cir. 1982)* .

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CHAPTER 25 Trial Planning and Preparation *
B Burden of Proof at Trial

3-25 Federal Litigation Guide § 25.14

§ 25.14 Considering Inferences as Manner of Proof

[1] Understanding Inferences

Inference has been defined as "the process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or state of facts, already proved or admitted." n1 The determination of a fact by inference is not unique to the judicial process. Since many of the assumed facts on which we base our everyday existence are derived by inference, the chief pitfalls to be avoided with respect to inference issues are overconfidence by the plaintiff and a failure of critical examination by the defendant in assuming that an *apparent* inference is really valid.

[2] Arguing Issues That Depend on Inference

Issues that depend on inference should be supported by testimony and the introduction of relevant evidence, as well as by specific argument regarding the reference. The judge or jury must not be left in doubt on those issues. While argument in this context refers primarily to closing arguments, it also refers to opening statements and to argument of any objections to which the inference is relevant.

[3] Judge May Indicate that Inference May Be Drawn From Evidence

The judge may indicate to the jury the inferences that may rationally be drawn from evidence before it. n2 If an inference may be drawn from the nonproduction of evidence or of a witness, the trial court should make certain that its suggestion of a hypothesis is reasonable and that in any event the jury is aware that it is free to draw its own conclusions. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceInferences & PresumptionsGeneral OverviewEvidenceInferences & PresumptionsInferencesEvidenceInferences & PresumptionsPresumptionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Computer Identics Corp. v. Southern Pac. Co., 756 F.2d 200, 204 (1st Cir. 1985)* ; *Greiner v.*

Volkswagenwerk Aktiengesellschaft, 429 F. Supp. 495, 498 (E.D. Pa. 1977) .

(n2)Footnote 2. *See Fook v. United States, 164 F.2d 716, 717 (D.C. Cir. 1947)* , *cert. denied, 333 U.S. 838 (1948)* .

(n3)Footnote 3. *See United States v. Lawrenson, 298 F.2d 880, 885 (4th Cir. 1962)* , *cert. denied, 370 U.S. 947 (1962)* .

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CHAPTER 25 Trial Planning and Preparation *
B Burden of Proof at Trial

3-25 Federal Litigation Guide §§ 25.15through 25.19

[Reserved]

§§ 25.15[Reserved]

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CHAPTER 25 Trial Planning and Preparation *
C Forms of Proof

3-25 Federal Litigation Guide § 25.20

§ 25.20 Considering the Importance of Witness Testimony at Trial

[1] Preparing for Use of Witness Testimony at Trial

Because live testimony involves an individual and the human interest associated with an individual's personal recollection of events, it is the most effective of all the evidentiary tools. Careful trial planning requires the preparation of witness questions to be asked on direct examination, as well as the drafting of anticipated questions for cross-examination. As the litigation progresses, pertinent witness questions will arise and may be compiled in the trial notebook or other trial planning resources that may be used.

Pretrial preparation of witnesses is a critical part of planning for trial. A live witness sustains interest and projects a personality with which the court and the jury can identify. Unlike a document or other exhibit, a live witness can perceive and correct misunderstandings or ambiguities and can moderate his or her tone and demeanor to suit the circumstances of the moment. n1 Parties and friendly witnesses should be apprised of the importance of their testimony, and they should have an understanding of how their testimony fits into the overall theme of the case.

[2] Evaluating Witness Credibility

To properly plan for trial, counsel must evaluate the credibility of the parties and witnesses who are likely to testify at trial. Depositions generally are the best method to evaluate a witness' credibility. Depositions not only give counsel a first-hand opportunity to determine witness credibility, they may also provide relevant testimony for impeachment purposes at trial.

A live witness is subject to cross-examination and may be caught in, and ruthlessly embarrassed by, falsehoods and inconsistencies. The witness' personality may not be attractive because he or she is argumentative, boastful, crude, insincere, deceptive, or, worse yet, dishonest. A skillful cross-examiner usually can exploit these personality traits before the trier of fact. Moreover, uncorroborated oral testimony may be the flimsiest of all evidence. Without support from documents or other corroborating evidence, live testimony may be perceived as entirely fabricated, and the success of your entire case will depend on what the fact finder concludes about the credibility of the witness.

[3] Preparing to Use Deposition Testimony at Trial

Not all testimony is presented "live." Deposition transcripts must sometimes be used to present testimony under oath to

the jury. n2 Deposition testimony is often a weak form of evidence and it may have limited impact on the trier of fact. Even when properly read, deposition testimony may come across as bland. There are many reasons for this: the witness is not present; personality may emerge only through words read by someone else; and, unlike a document that the judge and the jury can see and feel, those words are merely heard. When it is anticipated that deposition testimony will be needed for trial due to the unavailability of the witness for trial, a videotaped deposition should be considered.

Nevertheless, deposition testimony must occasionally be used. There are even occasions when its use is desirable. For example, if the character of a witness is in question or if the witness' appearance is distracting or suggests untrustworthiness, counsel may prefer to present the witness' testimony by reading the deposition transcript.

If a significant amount of deposition testimony is to be read, counsel should plan to intersperse other more absorbing and interesting types of evidence. Counsel should also edit the transcript carefully to eliminate irrelevant material. Finally, the questions and especially the testimony of the recorded witness should be read by individuals who are both familiar with the transcript and capable of reading it as though the words were being spoken spontaneously by a live witness sitting on the witness stand. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsDepositionsEvidenceProcedural ConsiderationsObjections & Offers of ProofOffers of ProofEvidenceTestimonyGeneral OverviewEvidenceTestimonyCredibilityRehabilitation

FOOTNOTES:
(n1)Footnote 1. *See* ch. 33 *infra*.

(n2)Footnote 2. *See § 33.15 infra*.

(n3)Footnote 3. *See* discussion in *§ 33.15 infra*.

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CHAPTER 25 Trial Planning and Preparation *
C Forms of Proof

3-25 Federal Litigation Guide § 25.21

§ 25.21 Preparing to Offer Documents at Trial

[1] Evaluating Strength of Documents for Trial

Documents generated in the course of the events or transaction that are the subject-matter of the lawsuit--as distinguished from demonstrative or other exhibits specially prepared for the litigation--are an extremely effective form of evidence, especially if they corroborate the testimony of key witnesses. Throughout the course of litigation, counsel should flag all documents that may eventually be offered at trial.

Documents are critical at trial because they can be seen and physically handled by the jury. With the exception of forgeries, documents are immutable; unlike human beings, documents do not forget. Documents can be taken into the jury room or to the judge's chambers, and if the testimony of the witness is either forgotten or confused, the language of the documents is still there, available to be read by all.

[2] Seeking Stipulations of Admissibility of Documents Before Trial

Whenever possible, obtain stipulations of admissibility or of authenticity in advance in order to reduce the time required to lay a foundation for their use at trial. If you are unable to obtain such a stipulation and contemplate an objection to the admission of a document, prepare appropriate motions *in limine* and other pretrial motions.

[3] Presenting Documents at Trial

Counsel should keep in mind some basic principles relating to the presentation of documents: n1

- Present the documents in the most logical and informative sequence, *i.e.,* in such a way that the background necessary to understand them is available at the time they are presented and read

- A document is best presented by a witness who can place it in the chronological sequence of relevant testimony and explain what the document is, why it was written, and even what it says

- If several critical documents will be used extensively at trial, refer to the individual documents with an easily remembered shorthand name (use of a name, such as the "Reed memo" or the "Krause report," will create a more memorable connection between the document itself and the testimony or argument

that relates to it)

- Even if copies of a document are distributed to the jury, the key passages should be read aloud so that the jurors can see and hear the relevant words simultaneously

- In the case of particularly important or complicated documents, consider enlargened forms of visual presentation (such as with an overhead projector or other electronic means) in conjunction with oral reading from the document and/or distribution of "hard" copies to the jury

- During the closing argument, physically display to the jury the critical documents that have been admitted into evidence and read the relevant passages which support the relevant claims or defense

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceDocumentary EvidenceGeneral OverviewEvidenceDocumentary EvidenceWritingsGeneral OverviewEvidenceDocumentary EvidenceWritingsTranscripts & TranslationsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. These and other techniques relating to the presentation of documents are considered in detail in ch. 34 *infra* .

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CHAPTER 25 Trial Planning and Preparation *
C Forms of Proof

3-25 Federal Litigation Guide § 25.22

§ 25.22 Preparing to Use Demonstrative Exhibits at Trial

[1] Generating Demonstrative Exhibits for Trial

Demonstrative exhibits are those exhibits prepared specifically for use at trial, usually for the purpose of explaining or simplifying some aspects of the factual background of the case. Demonstrative exhibits include those that use words or numbers (charts, tables, graphs, etc.), as well as those that use illustrations or physical representations (pictures, drawings, models, electronic reanactments through use of special computer software, mock-ups, etc.).

Physical or illustrative exhibits present their own problems of authentication and presentation, but if properly prepared and handled, they can save thousands of words and prevent confusion. On the other hand, written or numerical demonstrative exhibits present all of the problems of the ordinary documents, and more. Having been prepared specially for the lawsuit, demonstrative exhibits of this type are particularly vulnerable to claims, suggestions, or suspicions of bias. By definition, they deal with a complicated subject. Worse yet, in the technical, financial, and statistical areas, they deal with subjects beyond the experience of the average juror or judge.

[2] Planning the Introduction of Demonstrative Evidence

As with documentary evidence in general, many of the problems associated with demonstrative exhibits can be minimized. Consider the following:

- Demonstrative exhibits should always be introduced by a witness who not only authenticates them, but also explains their substance and their format, such as scale, calibrations and headings

- Each demonstrative exhibit should be as simple as possible; three simple charts explaining a given set of propositions in logical sequence are better than a single more complicated chart that combines all the information

- Demonstrative exhibits should be carefully planned from the perspective of one who comes to the case and its factual background essentially "cold"

- Remember that demonstrative exhibits may be excluded if they are found to be cumulative, confusing, a waste of time, or if they unduly emphasize certain aspects of the proponent's case n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceDemonstrative EvidenceGeneral OverviewEvidenceDemonstrative EvidenceAdmissibilityEvidenceDemonstrative EvidenceComputer-Generated EvidenceEvidenceDemonstrative EvidenceFoundational RequirementsEvidenceDocumentary EvidenceWritingsSummaries

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Evid. 403*.

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CHAPTER 25 Trial Planning and Preparation *
C Forms of Proof

3-25 Federal Litigation Guide § 25.23

§ 25.23 Sources of Admissions for Use at Trial

At trial, counsel must utilize the full arsenal of evidence to enhance the persuasiveness of the case, to facilitate the introduction of other evidence, and to avoid wasting trial time. The effective presentation of a case at trial involves not only the skillful presentation of exhibits and testimony that are competent, relevant, and material, but also the effective use of admissions and stipulations.

Admissions are the words of a party opponent offered into evidence against that party. Admissions are excluded from the category of inadmissible hearsay and play a valuable role in the trial of a lawsuit by eliminating issues or facilitating proof of matters in dispute. The following sources of admissions should be considered in preparation for trial:

- Statements made in the pleadings
- Responses to formal requests to admit
- Statements contained in documents
- Responses to interrogatories
- Answers to deposition questions

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureTrialsGeneral OverviewEvidenceHearsayExemptionsStatements by Party OpponentsGeneral OverviewEvidenceJudicial AdmissionsGeneral OverviewEvidenceRelevanceGeneral Overview

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CHAPTER 25 Trial Planning and Preparation *
C Forms of Proof

3-25 Federal Litigation Guide § 25.24

§ 25.24 Using Admissions Made in Pleadings at Trial

The final pleadings on which a case is tried define the fact issues on which proof must be adduced at trial. The court will look to the pleadings as part of the record in passing on the relevancy of evidence and in determining what issues should be submitted to the jury for decision. When used for these purposes, the pleadings may constitute judicial admissions and are treated similarly to Rule 36 admissions.

Therefore, before the start of trial, always review the allegations of the complaint along with the admissions and denials contained in the answer. Many times basic facts such as dates, locations, and ownership are admitted in the initial pleadings. This, of course, obviates the necessity for proof at trial. If a pleading or any allegation therein is amended, withdrawn, or superseded by a substitute pleading, it ceases to be a judicial admission but it may be introduced as an evidentiary admission. n1

Admissions contained in pleadings are judicial admissions, unless the admission is contained in an alternative or hypothetical pleading. n2 Also keep in mind that a party's pleading in one case, whether final or later withdrawn, can be used as an evidentiary admission in other litigation. n3

Although a verified pleading usually is considered to be part of the record without the need for formal introduction, do not wait until closing argument to discuss an admission contained in a pleading. Counsel can gain several tactical advantages by introducing such an admission during the presentation of the evidence: you can immediately ask for, and usually get, an instruction regarding the significance of the admission; you may be able to use the admission as compelling on-the-spot corroboration of other evidence in your case thereby imbuing all of your evidence with an added aura of accuracy; and such an admission may facilitate the introduction of additional evidence or may be a necessary predicate for a presumption or inference needed to avoid a directed verdict.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureTrialsGeneral OverviewEvidenceJudicial AdmissionsPleadingsEvidenceRelevanceGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Sunkyong Int'l, Inc. v. Anderson Land & Livestock Co., 828 F.2d 1245, 1249 (8th Cir. 1987)* .

(n2)Footnote 2. *See* 2 *Weinstein's Federal Evidence, § 410.09* (Matthew Bender 2d ed.).

(n3)Footnote 3. *Dugan v. EMS Helicopters, Inc., 915 F.2d 1428, 1432 (10th Cir. 1990)* .

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CHAPTER 25 Trial Planning and Preparation *
C Forms of Proof

3-25 Federal Litigation Guide § 25.25

§ 25.25 Using Rule 36 Admissions at Trial

[1] Requesting Admission of Undisputed Facts

Requests for admission n1 are written requests seeking admission of facts about which there is no real dispute. n2 Requests may be directed to any party to the action, including co-parties and adverse parties, n3 and they may call for the admission of any of the following: n4

- Statements of fact
- Opinions of fact
- The application of law to facts
- The genuineness of documents

[2] Understanding the Effect of Admissions under Rule 36

An admission made under Rule 36 may be used as a judicial admission only in the pending action. n5 Moreover, an admission binds only the specific party to whom the request is directed. n6 Even if the requesting party offers admitted facts into evidence, the requesting party may also offer more favorable or contradictory evidence. n7 Matters admitted in accordance with Rule 36, whether explicitly admitted or admitted by default, are conclusively established for purposes of the pending action, unless the court, on motion, permits the withdrawal or amendment of the admission. n8

A matter that is deemed admitted requires no further proof. n9 Any matter conclusively established is treated as a judicial admission, not an evidentiary admission. An admission under Rule 36 is comparable to an admission in a pleading or a stipulation drafted by counsel for use at trial, as opposed to an evidentiary admission of a party for use at trial.

[3] Presenting Admissions to the Jury

A Rule 36 admission may be used at trial in any way that will further the case or facilitate introduction of other evidence. Admissions regarding facts may be read to the jury at the appropriate time or may be marked as exhibits for

introduction into evidence. If an answer to a request admits the authenticity of a document, counsel may proceed to introduce the document and need not either read the admission or call a sponsoring witness. However, the jury may not fully comprehend the significance of admissions that are simply shuffled to them with numerous other documentary exhibits, and the better practice generally is to read the admissions to the jury.

On the other hand, if the admission is signed by the opposing party, counsel may want to have that party read the admission to the jury during cross-examination, after an appropriate foundation has been laid. The jury will not soon forget a damaging admission read to them by a party who has conceded the harmful fact. In closing argument, when you refer to that fact, you can remind the jurors that they heard the admission directly from the opposing party.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsWithdrawalsCivil ProcedureTrialsGeneral OverviewEvidenceJudicial AdmissionsPleadings

FOOTNOTES:
(n1)Footnote 1. Requests to admit are discussed in detail in ch. 19.

(n2)Footnote 2. *Fed. R. Civ. P. 36.*

(n3)Footnote 3. *Fed. R. Civ. P. 36(a)*; *Fed. R. Civ. P. 26(b).*

(n4)Footnote 4. *Fed. R. Civ. P. 36(a).*

(n5)Footnote 5. *Fed. R. Civ. P. 36(b)*; *Kohler v. Leslie Hindman, Inc., 80 F.3d 1181, 1185 (7th Cir. 1996) .*

(n6)Footnote 6. *Fed. R. Civ. P. 36(b)*; *Riberglass, Inc. v. Techni-Glass Indus., Inc., 811 F.2d 565, 566-567 (11th Cir. 1987) .*

(n7)Footnote 7. *Fed. R. Civ. P. 36(b)*; *Brook Village North Assocs. v. General Elec. Co., 686 F.2d 66, 75 (1st Cir. 1982) .*

(n8)Footnote 8. *Fed. R. Civ. P. 36(b)*; *Local Union No. 38, Sheet Metal Workers' Int'l Ass'n v. Tripodi, 913 F. Supp. 290, 294 (S.D.N.Y. 1996) .*

(n9)Footnote 9. *Herrera v. Scully, 143 F.R.D. 545, 550 (S.D.N.Y. 1992) .*

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CHAPTER 25 Trial Planning and Preparation *
C Forms of Proof

3-25 Federal Litigation Guide § 25.26

§ 25.26 Using Interrogatory Admissions at Trial

[1] Offering Interrogatory Answers Into Evidence

If you intend to rely on an admission contained in an interrogatory answer as evidence, you must introduce the answer into evidence. n1 Answers to interrogatories may be used at trial in much the same way as other pretrial statements of a party. The fact that interrogatory answers have been prepared by counsel, and not by the party, is not a ground for disregarding the answers. n2

An answer to an interrogatory may be introduced into evidence as an admission by a party-opponent since it is a statement which is excluded from the definition of hearsay by *Federal Rule of Evidence 801(d)(2)*. n3 Objections to the admissibility of the interrogatory answer may be made at the time the answer is offered. n4 Such an admission is an evidentiary admission, which may be rebutted by the party against whom it is offered. n5 When there is a conflict between interrogatory answers and other admissions or evidence adduced at trial, it is up to the finder of fact to weigh all the evidence and resolve the conflict.

[2] Explaining the Significance of Interrogatory Answers to the Jury

Since the answers have been sworn to, there is no need to authenticate them before publishing them to the jury. However, it is important to explain to the jury the relevance of such answers. As a foundation, counsel can establish that the interrogatory responses are answers to questions which deal with the subject matter of the lawsuit, they are in writing, they are signed by the party, they are given under oath, and they were probably drafted with the assistance of counsel. Having the party who made the response read it to the jurors generally will have a far greater impact on them than if counsel reads it.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesUseCivil ProcedureTrialsGeneral OverviewEvidenceHearsayExemptionsGeneral OverviewEvidenceHearsayExemptionsStatements by Party OpponentsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See Heilig v. Studebaker Corp., 347 F.2d 686, 689 (10th Cir. 1965)* ; *Montgomery Ward & Co. v. Fotopoulos, 32 F.R.D. 333, 334 (D. Minn. 1963)* .

(n2)Footnote 2. *See Victory Carriers, Inc. v. Stockton Stevedoring Co., 388 F.2d 955, 959 (9th Cir. 1968)* . Interrogatories are discussed in general in ch. 12.

(n3)Footnote 3. *See Gridiron Steel Co. v. Jones & Laughlin Steel Corp., 361 F.2d 791, 794 (6th Cir. 1966)* ; *Heilig v. Studebaker Steel Corp., 347 F.2d 686, 689 (10th Cir. 1965)* ; *Gadaleta v. Nederlandsch-Amerekaansche Stoomvart, 291 F.2d 212, 213 (2d Cir. 1961)* ; 7 *Moore's Federal Practice, § 33.160* (Matthew Bender 3d ed.).

(n4)Footnote 4. *Montgomery Ward & Co. v. Fotopoulos, 32 F.R.D. 333, 334 (D. Minn. 1963)* .

(n5)Footnote 5. *See Fidelity & Deposit Co. v. Hudson United Bank, 653 F.2d 766, 777 (3d Cir. 1981)* .

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CHAPTER 25 Trial Planning and Preparation *
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3-25 Federal Litigation Guide § 25.27

§ 25.27 Using Deposition Admissions at Trial

[1] Certifying Deposition Transcript Before Trial

When deciding whether to use a deposition as substantive evidence, counsel should carefully review *Rules 30* and *32 of the Federal Rules of Civil Procedure*, which govern the taking, filing and use of depositions at court proceedings. n1 This review will often occur during the preparation of your order of proof in advance of trial. Specifically, counsel should be sure that all depositions which are to be used at trial have been properly certified and filed by the court reporter who transcribed them.

[2] Reviewing Deposition Transcripts for Favorable Admissions

Whether the case involves one or 100 depositions, review of deposition transcripts is often an essential part of trial preparation. When searching a deposition transcript for favorable admissions or impeaching material, note specific page and line references along with the words used by the witness in the deposition. The page and line reference of the impeaching testimony may be noted in the margin of your planned cross-examination. The language of the statements may then be incorporated into the cross-examination of the witness. Impeachment of a witness with deposition testimony is much more effective when the witness is confronted with the *exact words* of a prior inconsistent statement.

[3] Impeaching Witness With Deposition Admissions

Admissions made by a party-opponent in a deposition are often used most effectively on cross-examination. n2 Having a party-opponent confirm a damaging admission contained in a deposition is probably the most effective way of presenting it to the trier of fact. If the party-opponent is not available for trial, the testimony containing the admission should be read to the jury.

The most important fact to remember about admissions is that they may be read or otherwise presented to the jury at any time. Thus, a genuine and self-contained admission included in a deposition may be read to the jury at any time, in isolation from other portions of the deposition. This can be a particularly effective impeachment device.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureTrialsGeneral OverviewEvidenceDocumentary EvidenceWritingsTranscripts & TranslationsDeposition TranscriptsEvidenceTestimonyCredibilityImpeachmentGeneral OverviewEvidenceTestimonyCredibilityImpeachmentPrior Inconsistent Statements

FOOTNOTES:

(n1)Footnote 1. Depositions are discussed in detail in chs. 16, 17, and 18.

(n2)Footnote 2. Cross-examination is discussed in detail in ch. 35.

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CHAPTER 25 Trial Planning and Preparation *
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3-25 Federal Litigation Guide § 25.28

§ 25.28 Using Stipulated Admissions at Trial

The strategic questions of when to use an admission and how to keep the admission fresh in the minds of the judge and jury most commonly arise in connection with stipulations. Since a stipulation conclusively establishes a given fact or resolves a given issue, repeated references or supplemental proof concerning that fact or issue are repetitive and usually objectionable. Thus, you might be precluded from commenting on a very favorable aspect of your case for much of the trial. In particular, if the trial court follows the practice of reading the stipulation of uncontested facts to the jury at the beginning of the trial, key admissions are likely to be forgotten by the jury, and if further references to the admission are prohibited, your only opportunity to comment on or argue the admission will be in opening statement and closing argument.

On request during the final pretrial conference, the court may well allow both sides to read any portion of the stipulation of uncontested facts to the jury at the point in the evidence where the particular stipulations are relevant, *whether or not* the court has read the entire stipulation to the jury at the beginning of the trial. Also, stipulations very often can form the predicate for questions and/or explanatory testimony.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsStipulationsCivil ProcedureTrialsGeneral OverviewEvidenceGeneral OverviewEvidenceJudicial AdmissionsGeneral Overview

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3-25 Federal Litigation Guide § 25.29

§ 25.29 Considering the Use of Judicial Notice at Trial

[1] Understanding Judicial Notice

Facts in dispute generally are determined by the jury on the basis of evidence adduced by the parties and admitted into evidence by the trial judge. When facts are not subject to reasonable dispute, however, the court may take judicial notice of their existence.

Rule 201 of the Federal Rules of Evidence prescribes the instances in which, and the procedures by which, the court may take judicial notice of facts. n1 The rule relates only to adjudicative facts, which are facts about the particular event that gave rise to the lawsuit and explain who did what, when, where, how, and with what motive and intent. n2 To be judicially noticed under Rule 201, the facts must be either:

- Generally known within the local geographic area in which the trial court sits, or
- Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned

There is no limitation on the kinds of facts that may be judicially noticed. Among the numerous matters of which courts take judicial notice are geographical facts, historical facts, medical facts, n3 matters relating to banking and government, n4 and the laws of the various states of the United States. n5 Judicial notice may also be taken even on appeal of records and decisions in other actions. n6

[2] Deciding Whether to Request Judicial Notice

Judicial notice may be taken at any time during the proceedings, including appeal. In a civil case, the facts that have been judicially noticed are established conclusively and the jury will be instructed that it must accept them as such. Adverse parties, on timely request, are entitled to be heard on the propriety of taking judicial notice of the matter proposed.

While Rule 201 empowers a court to take judicial notice, you should not request it unless taking judicial notice will save a substantial amount of trial time and then only if you are armed with authority that clearly demonstrates that judicial notice is proper under the circumstances. If your adversary is likely to oppose the taking of judicial notice, it

may be a safer practice to prove the matter at trial, even though you believe that the trial judge may be disposed to grant your request. By doing so, you avoid the risk of reversal if an appellate court later finds that the matter should not have been judicially noticed. On the other hand, the opportunity to obtain judicial notice at any stage of the proceedings is particularly useful if you discover after your evidence is closed that you have omitted necessary evidence regarding well recognized facts. You may then request by motion that the court judicially notice those facts. In federal court, such a motion may be granted even when made for the first time on appeal.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceGeneral OverviewEvidenceJudicial AdmissionsGeneral OverviewEvidenceJudicial NoticeGeneral OverviewEvidenceJudicial NoticeScientific & Technical Facts

FOOTNOTES:
(n1)Footnote 1. *Federal Rule of Evidence 201* provides:

> (a) Scope of rule.--This rule governs only judicial notice of adjudicative facts.
>
> (b) Kinds of facts.--A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
>
> (c) When discretionary.--A court may take judicial notice, whether requested or not.
>
> (d) When mandatory.--A court shall take judicial notice if requested by a party and supplied with the necessary information.
>
> (e) Opportunity to be heard.--A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
>
> (f) Time of taking notice.--Judicial notice may be taken at any stage of the proceeding.
>
> (g) Instructing jury.--In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

(n2)Footnote 2. Davis, *Judicial Notice, 55 Colum. L. Rev. 945, 952 (1955)*, cited in the Committee Comments.

(n3)Footnote 3. *See, e.g., Steffan v. Cheney, 780 F. Supp. 1, 8 n.14 (D.D.C. 1991)* (judicial notice of statistics concerning contracting of HIV).

(n4)Footnote 4. *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ., 780 F. Supp. 221, 234 (D. Del. 1991) , rev'd on other grounds, 4 F.3d 1103 (3d Cir. 1993)* (judicial notice of racial discrimination); *Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co., 767 F. Supp. 1269, 1279 (S.D.N.Y. 1991) , aff'd, 970 F.2d 1138 (2d Cir. 1992) , cert. granted, 507 U.S. 983 (1993) .*

(n5)Footnote 5. *Levy v. Scranton, 780 F. Supp. 897, 900 (N.D.N.Y. 1991)* (judicial notice of legislative history).

(n6)Footnote 6. *In re American Biomaterials Corp., 954 F.2d 919, 922 (3d Cir. 1992)* (judicial notice of guilty plea).

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3-25 Federal Litigation Guide § 25.30

§ 25.30 Preparing an Order of Proof

The order of proof reflects your plan for the presentation of your case. As reflected by the order of proof, the presentation must cover all of the "bases"--the elements of the claims or defenses--and must also advance the important themes to the maximum possible extent. The order of the presentation should sustain the fact finder's interest and it should open strong and finish strong.

In all but the very simplest of cases, this plan must be reduced to a writing known as an order of proof. The order of proof is within the court's discretion and will be addressed at the final pretrial conference. The plan typically identifies:

- Sequentially every witness to be called
- Every document to be introduced
- Every stipulation or admission to be read
- Every other event that will transpire as part of the presentation of the case

In reality, the sequence of the case will be at the mercy of the judge's and witnesses' schedules and of the inherent uncertainties in predicting the length and course of a trial.

Also, as the case unfolds, your tactics may change. An issue may seem more important than it previously did or new and unexpected issues may arise. Such events may require adjustments in the order of proof. At the time of its preparation, though, the order of proof should represent your best judgment as to the most logical and effective way to present your case. It may be revised as circumstances require. If, in spite of changes, it has been carefully prepared and updated, it should represent a master checklist against which the progress *and completeness* of the case can be measured.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedureTrialsGeneral

OverviewEvidenceGeneral OverviewEvidenceProcedural ConsiderationsPreliminary QuestionsAdmissibility of EvidenceGeneral Overview

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CHAPTER 26 Conduct and Demeanor of Attorneys *

3-26 Federal Litigation Guide 26.syn

§ 26.syn Synopsis to Chapter 26: Conduct and Demeanor of Attorneys *

§ 26.01 General Rules.

§ 26.02 Special Problems.
[1] Reargument of Issues.
[2] Improper Questions.
[3] Ex Parte Communications With the Court.
[4] Difficulty With the Judge.
[5] Dealing With Your Adversary's Sharp or Unethical Conduct.
[5.--1] Tactics.
[5.--2] Remedies.
[6] The Lying Witness.

§ 26.03 Trial Publicity.

§ 26.04 Bibliography.
[1] Law Reviews and Periodicals.

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CHAPTER 26 Conduct and Demeanor of Attorneys *

3-26 Federal Litigation Guide Scope

Scope

SCOPE

This chapter explores some considerations relating to the conduct and demeanor of an attorney at trial. The chapter begins with an examination of general rules such as basic honesty and good faith when dealing with clients, adversaries, the court, and the jury, and the necessity for controlling the conduct of your client.

Also addressed are special problems that may arise, including ethical considerations, improper questions, and ex parte communications with the court.

The chapter concludes with a discussion of trial publicity.

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CHAPTER 26 Conduct and Demeanor of Attorneys *

3-26 Federal Litigation Guide § 26.01

§ 26.01 General Rules.

As a trial lawyer your goal is to win. To attain that objective, you must attempt to control many variables such as the credibility of your client, the composition of the jury, the witnesses, the issues, and your opposing counsel. But the variable over which you have the greatest control is your demeanor, both in and out of the courtroom. The purpose of this chapter is to set forth some general rules and considerations that apply to your conduct.

"Conduct" encompasses everything from basic honesty and fair dealing to your attire and demeanor at the counsel table. Remember that you are always on display during a jury trial. Your credibility and effectiveness with both the judge and the jury will be greatly influenced by the way you conduct yourself during the trial. Jurors will form impressions of you based on your conduct outside the courtroom, as well as inside. While going to and from court and waiting in courthouse hallways, always assume that jurors can see you. Prospective jurors may remember you from the day before while they were going to and from other courtrooms. You are always on stage.

At the outset we are concerned with those affirmative aspects--in some instances, nuances--of conduct and demeanor that not only comply with your fundamental ethical obligations as a trial lawyer, but also create the favorable atmosphere and impression that can influence the outcome of the case. n1 Such an atmosphere and impression can be promoted in a variety of ways, some large and some (seemingly) small.

Basic honesty and good faith. Trial lawyers who both in fact and in appearance meet their obligation to deal honestly and in good faith will most favorably impress the court and the jury. Fostering an image of fair dealing is particularly important with respect to the jurors. They are generally unfamiliar with the adversary process and can sometimes misunderstand courtroom events. For example, they may view your objections as an attempt to keep the truth from them. To counter this, you should attempt to resolve key evidentiary issues before trial by means of pretrial motions or motions *in limine*. n2 During trial you should try to take up sensitive matters out of the presence of the jury. Addressing these matters during recesses minimizes potential juror resentment at being excused during the course of the proceedings.

If an action might have an adverse effect, however remote, on the court's or the jury's perception of your personal honesty or good faith, do not pursue it. This practical rule should govern decisions whether to engage in numerous stratagems, large and small.

For example, failing to produce a nonprivileged document that is responsive to a proper notice or demand is clearly

unethical, and the consequences to you and to your client's cause are potentially disastrous. Similarly unadvisable is the "ploy" of attempting to impede the flow of your adversary's examination by quarreling over some technical aspects of his description of a document, or claiming to be unable to locate your copy of the document; although not necessarily a breach of ethics, it is a petty strategy. The court and the jury will likely recognize it as such and your client's cause and your own credibility will be impaired. n3

While ethical issues should not be resolved on a crass "what if I get caught" basis, this analysis is an easy way to test your own subjective reaction to a given course of conduct.

Professionalism. You will best serve your client and bolster your credibility by adopting an attitude of thorough-going professionalism. Your job is to advance your client's interests, but you are also obliged to insure that your client's interests are served, and justice determined, in the most straightforward and expeditious manner.

In practical terms, this means that you should speak to the point at issue, that your objections should be crisp, that you should not make frivolous or harassing objections, and that you should not unnecessarily disrupt or delay the proceeding.

A smart adversary will seek to project the same image of quiet professionalism. If your adversary fails to do so, do not be concerned so long as the trial judge adequately controls the trial. To the contrary, incompetent, sharp or otherwise irregular conduct on the part of your adversary will underscore your own competence and professionalism.

Force. Except in the rarest of circumstances, do not raise your voice or become visibly angry in the courtroom. Real or uncontrolled lapses of temper will almost always hurt your credibility with the court and jury.

It is possible to be aggressive without being loud or abusive. Indeed, with respect to histrionics and decibels, the best advocacy is often *understated*. At trial, effective force is the product of careful preparation, cogent analysis, incisive cross-examination, persistence, eloquence and good sense. Calculated, and carefully controlled, displays of temper may occasionally have their place, but they should be reserved for situations in which your adversary has committed a genuinely serious breach of proper conduct, and they should always be carefully measured.

This does not mean that you should never show emotion. Indeed, effective use of emotion will enhance your case by creating sympathy or outrage at the right time. An older case even held:

[t]ears have always been considered legitimate arguments before a jury ... we know of no rule or jurisdiction in the court below to check them. It would appear to be of the natural rights of counsel which no court or consititution could take away. ... Indeed, if counsel has them at his command, it may seriously be questioned whether it is not his professional duty to shed them whenever proper occasion arises. n4

Respect. Although everyone in the courtroom recognizes that the trial lawyer is an advocate, your advocacy should be restrained and dignified. Your attitude toward the court, your opponent and the witnesses should always be one of respect. Advocacy does not require that a lawyer be discourteous, unfeeling or offensive in the courtroom. Such conduct is unseemly and will likely prejudice both judge and jury against your case.

Adopt a respectful attitude, one that is forthright and candid, not patronizing or, in the case of the court, fawning. Refrain from ridiculing an incompetent or bumbling adversary who may well have the sympathy of the court or the jury. The judge and the jury are also likely to recognize and resent conduct that is artificially solicitous of them or of their comfort.

Always address the court as "your Honor," not "Judge."

Preparation. At trial, there are few things that will enhance the judge and the jury's perception of your credibility and professionalism more than preparation. Preparation not only means knowing the issues, the legal authorities, and the technical aspects of your case, but also requires having your exhibits and witnesses ready and available so that the trial can proceed expeditiously. Such groundwork seldom goes unappreciated.

Dealings with your adversary. Both good practice and some local rules require that, except under unusual circumstances, you should address the court, not your adversary, particularly when the jury is present. Thus the proper form is: "Objection, your Honor; Mr. Jones is mischaracterizing the testimony"; not "Tom, that's a gross mischaracterization of the record." Or, at a more mundane level: "Your Honor, could we identify that document by its exhibit number"; not: "Tom, what's the number of that exhibit?" And, when you refer to other lawyers, you should do so formally, not by their first names.

These are matters of local custom, and you should be prepared to adapt your conduct to that custom. For example, you would not want to seem distant and stiff when your adversary, with the apparent approval of the court, is relaxed and informal. However, until the local ground rules are established, you should err on the conservative, formal side of the line.

Arguments directly with your adversary should be avoided except in the most exceptional circumstances. Even in extreme cases, they should occur only in defense of attacks launched by your adversary and only when it is clear that the court will not redress or correct the situation. n5

Never make insulting or disparaging remarks to, or concerning, your adversary. Not only will such comments make you seem petty, vengeful, or out of control, but they may damage your ability to work with that lawyer or firm in the future. Remember that lawyers do not have friends or enemies among co-counsel or opposing counsel. Do not impair your long-term interests in a fit of pique.

The jury. Jurors, like most people, form first impressions from which they are not easily dissuaded. If they take an initial liking to you, they will be predisposed to be sensitive to your point of view. During the trial, they will continue to evaluate you, to dispel or confirm the decisions they have already made about you. How you talk to them and the judge, how you ask questions and your every action will influence their judgment of what kind of person you are and the amount of trust they can place in you. The confidence you win from them will be carried over into the jury room.

You should raise questions regarding the comfort or convenience of the jury only if some problem clearly exists. Direct smiles of jurors should be returned but not offered. Casual nods and good mornings to jurors as they enter or leave the jury box should be given only if the court, your adversary or court functionaries do likewise.

You should approach or stand close to the jury box only if the physical arrangement of the courtroom requires you to do so, and you should never lean on the railing of the jury box. Asides or *sotto voce* remarks intended to be heard by the jury are absolutely forbidden and will almost certainly impair your standing with the jury.

Witnesses. You should treat your witnesses formally. Address and refer to them only by their last name. Some counsel believe that first name references add a little personal flair to their case and give the jurors the sense that they know the witness personally. The prevailing view, however, is that first name references tend to make the jury feel that the witness is too close to you or your case to be objective, and does not comport with the formalism they expect in the courtroom.

Your Client's Conduct. The need to control your client's conduct during the trial is only in part a matter of your responsibility to the judicial system. Just as you and your demeanor are "on trial," so is your client and your client's demeanor. Everything that is appropriate with respect to your own conduct is equally applicable to your client.

This is a subject to which many trial lawyers do not give adequate attention. Since the trial lawyer is experienced in the atmosphere and controversy of a courtroom, and in most situations is several steps removed in terms of personal involvement, he can easily forget that his client may not understand the importance of maintaining an appearance of calm throughout the proceeding, or that, because of the client's personal involvement, it may be very difficult to maintain that appearance. Also, as a practical matter, if your client is seated at the counsel table, you will normally have your back turned to the client and will not normally observe his demeanor, facial expressions or other reactions. Thus, as a matter of sound trial preparation, you should carefully instruct your client as to what is expected and proper in the way of courtroom demeanor. The best preparation for trial is to videotape a practice direct examination and a mock cross-examination of the client. Watching themselves on videotape is the best way to discourage bad habits and unfortunate mannerisms. n6

And remember to tell your client that conduct *outside* the courtroom is also subject to scrutiny. Disagreeable behavior in hallways and courthouse parking lots may be just as devastating to a case as improper demeanor in the courtroom. Caution your client to avoid behavior which may be perceived as offensive by any jurors. Convince a client who smokes to abstain in or around the courthouse. Advise your client to avoid excesses in dress, makeup or jewelry.

Conduct at the counsel table. Your attitude at the counsel table should be one of attention and respect. Sit in an erect or forward position; do not lounge. Keep the counsel table itself as orderly as possible. Those present at the counsel table (lawyers, clients and client representatives) obviously should communicate by whispers or by notes as freely as necessary, but unnecessary consultations, whispered remarks, or notes should be avoided.

Avoid grimaces, sneers or other facial expressions intended as commentary on the evidence or other aspects of the proceedings. The same, of course, is true of expressions of surprise or disappointment in the face of unfavorable developments. In the former case, the jury may not agree with your apparent assessment of the evidence and may in any event feel that your silent commentary is inappropriate. In the latter case, the jury may not fully have understood the import of the evidence being received and your reaction will only draw it to their attention. If the adverse nature of the evidence is clear, your reaction will underscore it. Indeed, it is very common for jurors to glance in the direction of counsel to see how he is taking an adverse development. In that event an attitude or expression of calm may reassure the jurors that your case has not been seriously hurt; at a minimum, it may leave them puzzled, wondering whether the evidence is really as negative as it seems.

Whispered remarks or conversations unrelated to the evidence being received, particularly if accompanied by a smile or other facial expression, can easily be misunderstood as a reaction to, or commentary on, the evidence that is being received. As a result, while discussions at the counsel table concerning problems other than those of the moment are often necessary, they should be held to a minimum. In general, you and others at the counsel table should be concentrating, and concentrating seriously, on the matters at hand. Give the excitable client who cannot contain himself a notepad to write on. Ask him to pass notes to you, rather than engage in fevered conversations. Of course, even the passing of notes can be distracting, so impress on the client the need to appear calm and confident even when things are not going so well.

In some so-called "seated" jurisdictions, all examination is conducted from the counsel table unless there is an affirmative reason (perhaps that the witness is hard of hearing) to use a rostrum or unless the witness or a demonstrative exhibit must be approached. In other jurisdictions, examination should be conducted from the counsel table only with the permission of the court and then only when it is necessary to simultaneously refer to a large number of exhibits.

Before starting a trial in an unfamiliar court, always learn the local rules governing trial demeanor. Follow them. It is embarrassing and reflects on your competence to be admonished by the judge because you did not stand when making an objection as required by local rules. In addition to formal court rules, you should learn what particular practices an unfamiliar trial judge requires in the courtroom. Other attorneys and the court clerk are usually a good source of this information.

Promptness. You should be prompt both at the beginning of each court session and when you return to the courtroom after recesses or other short breaks. Jurors become impatient with counsel they perceive to be wasting time. Judges, too, are irritated when lawyers are not present and ready to proceed. Chronic tardiness irritates judges and jurors. Although the jurors (who will spend a lot of idle time in the jury room under any circumstances) may not know who has caused any particular delay, they will likely learn through a stray comment by the marshal or otherwise if you are the cause of frequent delays.

Many judges also employ a double standard for returning from recesses. They expect the lawyers to be ready when they are, but do not mind lengthening the break for their personal convenience. Even if the judge usually does not take the bench at the indicated time, do not conclude that he will always be late. Assume that court will resume at the time stated by the judge.

Delays for personal convenience. Requests for continuances, recesses or other delays based on your personal situation or convenience should be made only in extreme or "hardship" situations. All such appeals should obviously be made outside the presence of the jury.

The extended courtroom. Marshals, clerks, court reporters and other court functionaries are part of the courtroom scene and should be treated with courtesy and respect. They are employees, and quite likely, personal friends of the judge. In all but the shortest of trials, they may also become friendly with individual jurors. Consequently, conferences in the halls should be conducted at a safe distance from anyone who might overhear. Save boisterous remarks and other jocular conduct for the privacy of your office. Remember that you are always on display. Be professional, polite, and reserved around court officers, as well as any part of the courthouse where jurors or potential jurors may be found.

Attire. Your dress should be consistent with that generally followed in the district where your case is being tried; within that context, it should be conservative. The courtroom is no place for a personal statement on attire or any other subject. Gerry Spence and Melvin Belli, and a few others, can succeed with flamboyance in the courtroom. Most of us can not. By the same token, if you have a Rolls Royce (or any expensive or outrageous car) and a Chevrolet, drive the Chevrolet to court. Jurors may see you in the parking lot and decide that you do not need any more money.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewLegal EthicsGeneral OverviewLegal EthicsProfessional ConductGeneral OverviewLegal EthicsProfessional ConductOpposing Counsel & PartiesLegal EthicsProfessional ConductTribunals

FOOTNOTES:
(n1)Footnote 1. *See* Colter, *Connecting with Jurors,* 29 Trial 114 (Feb. 1993) (goal is to strike a rapport with the jury).

(n2)Footnote 2. *See § 37.05[2].*

(n3)Footnote 3. *See* Savell, *Why Are They Picking on Us?, 78 A.B.A.J. 72, 73 (Nov. 1992).*

(n4)Footnote 4. *Ferguson v. Moore, 98 Tenn. 342, 39 S.W. 341, 343 (1897) .*

(n5)Footnote 5. *See § 26.02[5] infra.*

(n6)Footnote 6. *See* Capello, *Preparing CEOs for Trial,* 15 Trial Diplomacy J. 317 (1992).

* Chapter 26 revised in 1993 by Richardson R. Lynn, Nimmo, Baker & Lynn, Nashville, Tennessee; Assistant Dean of Academic Affairs, Pepperdine University School of Law, Malibu, California.

Federal Litigation Guide
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CHAPTER 26 Conduct and Demeanor of Attorneys *

3-26 Federal Litigation Guide § 26.02

§ 26.02 Special Problems.

[1] Reargument of Issues.

Ethical Consideration 7-22 of the A.B.A. Model Code of Professional Responsibility provides:

Respect for judicial rulings is essential to the proper administration of justice; however, a litigant or his lawyer may, in good faith and within the framework of the law, take steps to test the correctness of a ruling of a tribunal.

Among other things, this ethical consideration raises the familiar question of how often and aggressively a trial lawyer should seek to reargue evidentiary or other issues that have already been decided by the court. n1 The question is primarily a matter of litigation tactics, not professional ethics. It is possible to pursue an objection or other issue to the point where an order of contempt is entered. But long before that, you will undoubtedly have passed the point at which, as a tactical matter, reargument is futile, imprudent, or both. There may be situations in which the issue is so critical or in which the court's decision is so premature or ill-advised that repeated rearguments are justified. There are also judges who can be "moved" simply by the persistence of counsel. All of these are situations which must be judged on their own facts. You must balance the importance of the issue at stake against the likely adverse effect upon both the court and the jury of your unwillingness to accept the court's ruling on a particular issue.

[2] Improper Questions.

Testing the ruling of the court by reargument or other legitimate means is obviously different from trying to reach your objective through improper questions or statements. If the court has found a particular line of evidence irrelevant or prejudicial, it is improper for you to allude to the irrelevant or prejudicial material in the jury's presence. Flagrant abuse of this principle may justify a finding of contempt. n2

Similarly, where the court has not ruled on the admissibility of a particular fact or line of evidence, if you know that it is both prejudicial and subject to a debatable objection, you may be either required or well advised to raise the issue with the court outside the presence of the jury. This type of situation obviously calls for the exercise of a more discriminating judgment. It would be a tactical mistake for a trial lawyer to needlessly anticipate objections which might not be forthcoming. On the other hand, seeking to introduce material that is both marginally relevant and highly prejudicial can provoke a sharp objection claiming foul play and a rebuke from the court. These consequences are serious indeed. At a minimum, in these circumstances you will be well advised to raise a doubtful evidentiary issue outside the presence of the jury. This course should also be followed if you have a clear indication that your adversary objects to the

admissibility of the evidence. You will have to judge other, more marginal cases on their own facts, taking into account the practice of the judge before whom the case is being tried, the extent to which the evidence is known to or has been discussed with opposing counsel, the way in which similar issues have been treated during the course of the trial, and other, comparable considerations.

If the fact or evidentiary matter in issue is central to a party's case, the question of reference to it in opening statements should be discussed with the court before the trial begins. In some cases, a request for an *in limine* ruling may be appropriate. n3

[3] Ex Parte Communications With the Court.

On the matter of ex parte communications with the court, your duty as a trial lawyer is quite clear. You should not only refrain from initiating such communications but should also seek to avoid even casual conversations with the court that might be misinterpreted. n4 This prohibition extends to communications with the judge's law clerks about the merits of the case. n5 This is more than a tactical issue, it is an ethical one.

Rule 3.5 of the Model Rules of Professional Conduct states in part:

A lawyer shall not:

(a) Seek to influence a judge ... or other official by means prohibited by law;

(b) Communicate ex parte with such a person except as permitted by law;

A unavoidable problem arises when, one attorney arrives in chambers for a discussion of evidentiary or other matters prior to the arrival of his adversary. The duration of these ex parte "presences" will vary, but many judges can be quite relaxed or conversational in their manner. Others, anxious to proceed, will push ahead with background or nominally preliminary matters. Typically, the lawyer will have no choice but to follow the court's lead, at least to the point of responding to questions on neutral matters. However, the lawyer should attempt to confine his statements to noncontroversial matters. If the discussion unavoidably progresses to any more substantial issue, he should be careful to note those points on which he knows or believes his adversary may have a differing view.

Though it should never occur, a lawyer can occasionally be faced with a situation in which the judge, perhaps by telephone, initiates an ex parte discussion of the merits of the case or of a substantial procedural issue. Although the practicalities of this situation may be difficult and may be resolved in differing ways, the lawyer's ethical obligation is absolute. He should decline to discuss the case.

Other *ex parte* communications are also improper. It is unethical to communicate with a party whom you know is represented by counsel. n6 While all contacts with jurors during trial are forbidden, there may be limited access to jurors allowed after trial, depending on local rules.

[4] Difficulty With the Judge.

Judges may be preemptive or restrictive in dealing with a lawyer who seeks to present evidence or advance arguments that the judge believes to be legally unsupported or of doubtful relevance. Other judges can be abusive in their treatment of lawyers generally or in their attitude toward a particular party. Still others may be silent or indifferent in a situation in which your adversary seeks to obtain unfair advantages through a fundamental misuse of the judicial system. n7 Then the weight of the court's rulings and attitude will be added, or at least seem to be added, to the force of your adversary's arguments. n8

Often there is nothing you can do to offset directly the actions of the judge. Unless a case has sufficient merit to justify an appeal, you must deal with the situation at the trial judge's level.

The first thing to do when you feel the judge is being unfairly one-sided is to step back and take an objective view of the personal dynamics. What is the reason for the judge's actions? Is it something personal? Is it something political? Is it something involving the case, the litigants or opposing counsel? Next, devise a strategy to counteract the effects of what the judge is doing. Your strategy will depend on the nature of the case, whether it is being tried to the court or to a jury, and the harm caused by the judge's words or rulings.

One way to get the judge's attention about the way in which you think you are being unfairly treated is to begin building a record, even if an appeal is unlikely. Many judges are bored by the routine and do not think about how their dismissive or rude conduct is perceived. Stating for the record what you think the judge's demeanor or gestures have been may lead to an apology (of sorts) and an end to the conduct. With other judges who are just bullies, bulding the record of their inappropriate conduct shows that you are willing to stand up to them. For example:

Your honor, I would point out for the record, respectfully, that after the witness gave that last answer, you threw your glasses down on the bench and whirled around in your chair to face the back wall of the courtroom.

After a few statements like that are entered in the record, most judges will settle down.

However onerous the task may be, your duty to your client requires that you do everything in your power to compel the court to permit a full and fair exposition of your client's case. Common sense suggests that this will more likely be accomplished if you deal with the court with quiet force and patient argument, rather than loud or rambling harangues or threats to "take the case up." This is true for several reasons. First, your chances of persuading the judge to change his attitude will be improved if your approach is both rational and calm. Second, an alternative purpose of your strategy will be to inform and, hopefully, to persuade the jury of the justice of your contentions, whether or not you are successful in convincing the court. Finally, you will be making a record for appeal, and that record will be more effective if your position is cogently stated.

[5] Dealing With Your Adversary's Sharp or Unethical Conduct.

Another difficult situation arises when your adversary seeks to obtain improper advantage through a misuse of the judicial system. The techniques employed by such an adversary can run the full gamut of unethical, sharp or overly aggressive practices: excessive or inflamatory remarks during opening statement or closing argument, abusive or grossly deceptive cross-examination, objections which incorporate blatantly argumentative material, failure to honor commitments to the court or to you with respect to the production of documents or scheduling of witnesses, repeated comment or questioning on prejudicial matters not relevant to the case, and so on and on.

Such tactics may, of course, be self-defeating. However, you cannot be sure that both the court and the jury will recognize them as grossly unethical. You must deal with the situation as best you can, seeking the aid of the court if it is forthcoming. Occasionally, such aid is not given. Indeed, almost by definition, the type of situation discussed in this section cannot occur unless the trial judge defaults on his responsibility to control the trial. You may then have no alternative but to respond in kind, and in extreme cases you may need to resort to one or more of the relatively few formal remedies available to you.

[5.--1] Tactics.

While each adversary and every situation must be assessed individually, your first attempt--both as a matter of professional responsibility and as a matter of tactics--should normally be to seek the assistance of the court along traditional lines. Such assistance is most readily and properly given in two forms: (1) by sustaining objections to, and

instructing the jury to disregard, particular statements or testimony and (2) through judicial warnings or admonitions to your adversary to refrain from improper conduct. n9

Objections and requests for instructions to disregard are most appropriate in response to irrelevant, prejudicial, or grossly argumentative matter. Requests for warnings or admonitions to your adversary are generally more appropriate where counsel makes remarks unrelated to particular questions--for example, when your adversary attempts to argue the facts during the course of his own objections. In the broader sense, however, the two tactics are interchangeable, and warnings or admonitions should be requested if counsel engages in any persistent or flagrant conduct.

If your adversary is in fact engaged in sharp or marginally unethical conduct, and if the court is rendering rulings in your favor on at least a few of your objections, there will normally be no potential "downside" to making repeated objections and requesting that your opponent be admonished. The very essence of your problem is that your adversary may gain an unfair advantage with the jury. If this is so, your objections should have the effect of underscoring the doubtful character of his conduct, and even a few favorable rulings from the court will suggest to the jury that your position is the proper one.

Since your purpose is to neutralize your opponent's conduct in the minds of the jurors, your objections and requests should normally be made in open court. Capitalize on your opportunity to present a professional contrast to your adversary. State your objection completely. Be explicit as to the nature of the impropriety of your adversary's conduct. Address the court and not counsel. Do not be angry or emotional. The same arguments designed to convince the court that the opponent's conduct is improper will also covey that message to the jury. But do not appear to be whining about the conduct, as if this were a dispute on the playground. Argue clearly why it is unfair and that you have not been guilty of any similar conduct.

However, if the judge is generally defaulting in his obligation to control the trial, you may wish to seek a conference in chambers where your adversary's conduct can be discussed and attacked on a comprehensive basis. Such a conference may well be prudent and may sometimes be effective where isolated objections or requests for admonitions are not. Generally, though, the judge who is unwilling or unable to control the trial in response to normal procedural mechanisms will not be influenced by such an appeal, regardless of how thorough and cogent it may be. Still, one advantage of the conference in chambers is to interrupt the momentum in the courtroom. It will give the other lawyer a chance to cool off if he was acting in the heat of the moment. And, it will give you a longer period of time to consider how best to counter the conduct when you return to the courtroom.

Sometimes the judge to whom the case is being tried may require that objections be made outside the presence of the jury. The problem is unlikely to arise in this context since the judge who imposes such a requirement is likely to be in firm control of the trial.

When a conference out of the jury's presence occurs, remember that you have a dual purpose: you not only want to put a stop to the objectionable conduct, you must also make a record for use in the event of an appeal. Insist that the court reporter be present so that your objections and the comments of opposing counsel and the court can be recorded contemporaneously. Attempts to summarize on the record later is a poor substitute for an actual transcript of the proceedings.

If the trial court does not provide the support that you require and your adversary persists in his tactics, you must decide whether 1) to continue to appeal to the court for corrective rulings or 2) to meet your adversary on his own ground.

As to the first question--whether to persist in your objections and requests--the answer will usually be yes. At the most basic level, you must make and preserve your record for appeal. Perhaps more importantly, you must continue the fight with your adversary with every weapon available to you. Continued objections will enable you to do that in two ways: (1) by characterizing your adversary's conduct as improper; and (2) by using your objections as "springboards" for your

own expositions of the evidence and of your theories of the case. The benefits of this approach must be weighed against the risk that the jury will interpret the court's repeated denials of your objections and requests as express or tacit approval of your adversary's conduct or theories. This effect will be heightened if the judge has the jury's respect and if the jury interprets your continued objections as criticism of the court's conduct. No matter how incompetent you think the judge to be, the jury undoubtedly continues to regard the judge as a god, or at least their best friend in the courtroom. They will punish attacks on their friend. For these reasons, your continuing objections should be carefully couched as criticisms of your adversary, and not of the court. To the extent your objections unavoidably imply criticism of the judge, that criticism should be confined to the formal aspects of the proceedings and should avoid any adverse suggestion as to the judge's personal integrity.

The only situation in which you should abstain from all objections, except those necessary to preserve your record on appeal, is that where the judge's unwillingness to control the trial is combined with an apparent bias against your client's case. In that event, of course, the judge's rulings on your objections are likely to contain comments on the evidence or other remarks detrimental to your client's cause.

The second question--whether to meet your adversary on his own grounds--is much more difficult to assess. To a much larger degree, it depends on the particular circumstances in which the problem arises. The primary considerations are:

1. Do your adversary's tactics appear to be effective with the jury?

2. Are those tactics combined with a personality and method of approach which are ultimately likely to be self-defeating?

3. To what extent are you able to neutralize your adversary's tactics by the conventional means of objections and comments to the court?

4. To what extent, given all the circumstances of the case, can you respond to your adversary in kind without destroying your own credibility?

The most likely result of this analysis will be that you should strike some sort of a compromise between the straightforward, high level approach which would normally be appropriate and a full resort to your adversary's tactics (which, bear in mind, you have deplored and will most likely continue to deplore through your objections and other statements). Thus, if your adversary flavors his objections with extensive characterizations or argument of the evidence, you can properly insist on the opportunity to respond not only to the objection but to his comments on the evidence as well. Frequently, it is also advisable to interrupt a rambling, argumentative objection to dispute the facts on which the objection is nominally based. Any factual assertion by your adversary is vulnerable to rebuttal along the lines: "That may well be true, your honor, but the evidence also *shows* ...," followed by an exposition of relevant evidence favorable to your client's position. Finally, of course, you can also include argumentative material in your own objections and in other colloquy with the court.

[5.--2] Remedies.

Motions for mistrial aside, there are only three formal remedies available at trial to an attorney seeking to control egregious conduct on the part of the adversary during trial: (1) a motion or separate suit asking for a finding of contempt of court; (2) a separate complaint before an appropriate disciplinary body; and (3) a motion for the award of attorneys' fees and costs pursuant to *28 U.S.C. § 1927*. (*Rule 11 of the Federal Rules of Civil Procedure* is commonly thought of as the rule which imposes sanctions on lawyers; however, it is limited to pleadings and motions. Oral statements in court are not governed by Rule 11.) n10

Some of these remedies, even if successful, may not bear fruit until after the immediate need for them has passed, and

those that depend on the discretion or forcefulness of the trial court may fall upon the same deaf ears that have declined to rule favorably on objections directed to the conduct in question and have thereby created or exacerbated the problem in the first instance. At least one court has noted that the district court is not normally the arbiter of attorney ethics, unless unethical conduct threatens to taint the trial. n11

And even if granted at the trial or disciplinary level, such remedies may fall victim to the judicial philosophy expressed in *In re* Dellinger. n12 Though that action was an appeal from findings of contempt in a criminal case, the thoughts expressed are all too typical of some judges, particularly at the appellate level, who are unfamiliar with the realities of trial practice:

[M]ere disrespect or insult cannot be punished where it does not involve an actual and material obstruction. This is particularly true with respect to attorneys where the "heat of courtroom debate" may prompt statements which are ill-considered and might later be regretted. Substantial freedom of expression should be tolerated in this area since "[j]udges are supposed to be men of fortitude, able to thrive in a hardy climate." However, ... although it is elusive, there is a line beyond which disrespect becomes obstruction. When the remarks create an imminent prejudice to a fair and dispassionate proceeding, that line has been crossed. ...

...

... Attorneys have a right to be persistent, vociferous, contentious, and imposing, even to the point of appearing obnoxious, when acting in their client's behalf. An attorney may with impunity take full advantage of the range of conduct that our adversary system allows. Given this extreme liberality necessary to a vital bar and thus the effective discovery of truth through the adversary process, an attorney possesses the requisite intent only if he knows or reasonably should be aware in view of all the circumstances, especially the heat of controversy, that he is exceeding the outermost limits of his proper role and hindering rather than facilitating the search for truth. n13

On the other hand, many trial judges take a harder view of the parameters of proper trial conduct and seek to expand the scope and impact of the available remedies. In addition, a trial judge who lacks the initiative or consistency of approach to control a trial through conventional means may take a different attitude when offered a concrete, formal vehicle by which the improper conduct can be redressed. Finally, though unlikely, the unscrupulous adversary may follow a more conservative course when confronted with the reality of formal proceedings which may result either in damage to his own professional reputation or in pecuniary loss to himself or his client.

Contempt. Civil contempt findings mean that the "key to the jailhouse door" is in the wrongdoer's pocket. When the offensive conduct ends, the fines or inprisonment ends. Criminal contempt is imposed for a fixed amount of money or jail time to punish past conduct. An attorney may be subject to both civil and criminal contempt proceedings for failing to obey a court order. n14

Though findings or hearings for contempt of court are normally entered or initiated by the court itself, a motion for a finding of contempt can be made by others, including attorneys for parties in the case aggrieved by the improper conduct. However, the motion must be addressed to conduct which either offends the dignity of the court or prevents the proper conduct of proceedings. Accordingly, the motion must normally show that the adversary's conduct (1) creates an obstruction blocking the judge's performance of his duties and (2) delays the proceedings.

Disciplinary proceedings. Disciplinary proceedings against attorneys relating to improper conduct during a trial are not commonly brought until the trial is concluded, and a decision in any such proceeding would not, in any event, be forthcoming until after any but the very longest of trials was over. n15 However, we are not aware of any procedural limitation requiring a complainant to wait until the trial is concluded before initiating a disciplinary action. Indeed, you may wish to institute such a proceeding immediately in order to obtain whatever cautionary effect it may have upon your adversary.

The decision whether to seek an order of contempt before instituting disciplinary proceedings is a difficult one. Your relations with the trial judge might be seriously impaired if you do not first seek his aid in the control of proceedings currently pending before him. On the other hand, the need to resort to a remedy so indirect as disciplinary proceedings will not have arisen if all judicial remedies short of a motion for contempt have not proved fruitless. Also, an unfavorable ruling on the motion for contempt will probably blunt whatever cautionary influence the institution of disciplinary proceedings might have on your adversary and might well reduce the chances of a favorable result in the disciplinary action itself. It is probably advisable to move for an order of contempt before filing disciplinary proceedings (the ruling on the motion might be deferred), because disciplinary proceedings are the most indirect, and perhaps the least effective, of the available remedies. n16

28 U.S.C. § 1927. This statute authorizes the imposition of costs and attorney's fees as a personal obligation upon an attorney "who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously." Sanctions under § 1927 may also be imposed on an attorney who does not reevaluate the merits of his claims or advances an unreasonable claim or one that "is not brought with a reasonable good faith belief that it is justified." n17 Section 1927 is powerful because it authorizes the imposition of costs and attorney's fees upon the infringing attorney "personally," a potential consequence that might inhibit some attorneys where "mere" injury to their reputation, or costs assessed against their client, would not.

In Barnd v. City of Tacoma, n18 a suit for false arrest and imprisonment, the attorney for the defendant was ordered to pay the plaintiff's attorney's fees incurred because the defense attorney caused a mistrial. In a motion *in limine,* the judge ruled that the defense could not introduce evidence of the plaintiff's prior arrest record. Despite this ruling, the defense attorney expressly referred to plaintiff's prior arrests. On motion of plaintiff, the court ordered a mistrial, and two days later assessed fees against the defense attorney. n19

Little used during the first twenty years after its enactment (only a handful of reported cases were decided under the statute between 1948, the date of enactment, and 1966), resort to § 1927 is now more frequent. The holding of Barnd supports an action for costs and attorney's fees whenever your adversary has delayed the proceedings by willfully disregarding a court order. However, nothing in the statute or in the reasoning of Barnd requires that the objectionable conduct be in violation of an express order of the court, and there is clearly no requirement that the objectionable conduct must result in a mistrial. n20

Note that trial tactics undertaken in good faith having the *effect* of delaying proceedings are not grounds for § 1927 sanctions. In E. & J. Gallo Winery v. Consorzio Del. Gallo Nero, n21 the defendant filed a motion under Rule 56(f) to delay the plaintiff's original summary judgment motion for four months. The plaintiff argued that the Rule 56(f) motion was made in bad faith because the defendant had not taken any of the depositions necessary for opposition to summary judgment and that the opposition did not rely on any of the numerous documents produced during discovery. The district court denied sanctions because parallel settlement negotiations were being conducted and that the plaintiff was at least partially responsible for the delay.

[6] The Lying Witness.

Infrequently, you may suspect that a witness is lying and will perjure himself if called to testify. The facts you have gained in discovery may indicate that the witness could not possibly have been at a certain meeting or that a certain event could not possibly have occurred. Or, a witness may directly tell you that he will do anything to win the case for his side.

Confronted with this situation, your first obligation is to ascertain, to the extent you can, whether the witness is in fact lying. You can confront the witness directly or you can conduct your own investigation to ascertain the truth. You are duty bound to your client to present relevant admissible evidence unless you know, or from facts within your

knowledge you should know, that testimony is false, fraudulent or perjured.

The law and disciplinary rules prohibit the use of false, fraudulent or perjured testimony. n22 One court has succinctly remarked that "[u]nder any standard of proper ethical conduct, an attorney should not sit by silently and permit his client to commit what may have been perjury, and which certainly would mislead the court and the opposing party on a matter vital to the issue under consideration." n23 You cannot allow your client to take the stand to give false testimony. You must try to dissuade the client from committing perjury; failing that, you must try to convince the client to correct the perjury. If the client rejects these efforts, you should attempt to withdraw from the representation and decline further employment. n24 Failure to takes these steps may subject you to discipline. There is an A.B.A. ethics opinion requiring counsel in a civil case to disclose the client's perjury to the court. n25

In short, resist the temptation to look the other way and win the case at all costs. In many instances, the very facts causing you to expect false testimony will be known to your adversary. Skillful examination will destroy the witness and your whole case. You may lose both the case and your career.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewLegal EthicsGeneral OverviewLegal EthicsProfessional ConductGeneral OverviewLegal EthicsProfessional ConductOpposing Counsel & PartiesLegal EthicsProfessional ConductTribunals

FOOTNOTES:
(n1)Footnote 1. There are, obviously, other ways (including certification, mandamus and interlocutory appeal) in which rulings of the trial court may be tested.

(n2)Footnote 2. *U.S. v. Allocco, 994 F.2d 82 (2d Cir. 1993)* (attorney who intended to, and did, obstruct administration of justice was correctly held in contempt).

(n3)Footnote 3. *See § 37.05[2] infra.*

(n4)Footnote 4. *United States v. Napue, 834 F.2d 1311 (7th Cir. 1987)* . Unless actual bias is shown, a judge will not be disqualified on the basis of contacts with defendant and certain parties. *In re Beard, 811 F.2d 818 (4th Cir. 1987)* .

(n5)Footnote 5. *See Vanzant v. R. L. Products., Inc., 139 F.R.D. 435 (S.D. Fla. 1991)* .

(n6)Footnote 6. *United States v. Ryans, 903 F.2d 731 (10th Cir.)* , *cert. denied, 498 U.S. 855, 111 S. Ct. 152, 112 L. Ed. 2d 118 (1990)* .

(n7)Footnote 7. *See § 26.02[5] infra.*

(n8)Footnote 8. However, where the court questions witnesses in an effort to move a trial forward and comments on counsel's preparedness, but neither comments on the case's ultimate issues nor appears to be an advocate, a motion for mistrial for judicial bias is properly denied. *Shad v. Dean Witter Reynolds, Inc., 799 F.2d 525 (9th Cir. 1986)* .

(n9)Footnote 9. *See* ch. 37 *infra.*

(n10)Footnote 10. *Hamer v. Career College Assoc., 979 F.2d 758 (9th Cir. 1992)* .

(n11)Footnote 11. *Koch v. Koch Indus., Inc., 798 F. Supp. 1525 (D. Kan. 1992)* . *But see In re Shell Oil Refinery, 144 F.R.D. 73 (E.D. La. 1992)* (court has the authority to control the conduct of persons who appear before it).

(n12)Footnote 12. *461 F.2d 389 (7th Cir. 1972) . See also,* United States *ex rel. Robson v. Oliver, 470 F.2d 10, 13 (7th Cir. 1972) .*

(n13)Footnote 13. *461 F.2d at 400* (citations omitted).

(n14)Footnote 14. *See, e.g., Taberer v. Armstrong World Indus., Inc., 954 F.2d 888 (3d Cir. 1992)* (upholding criminal contempt sanctions against attorney who defied magistrate judge's order to appear).

(n15)Footnote 15. Even in a "marathon" trial of, say, six months or a year, the lawyer against whom the disciplinary proceeding was brought would undoubtedly request that a hearing be delayed until the trial was concluded.

(n16)Footnote 16. For a discussion of the proper standards for imposing sanctions for meritless litigation, *see In re Ruben, 825 F.2d 977 (6th Cir. 1987) .*

(n17)Footnote 17. *Moore v. Western Surety Co., 140 F.R.D. 340* (N.D. Miss. 1991, *aff'd without opinion, 977 F.2d 578 (5th Cir. 1992) .*

(n18)Footnote 18. *664 F.2d 1339 (9th Cir. 1982) .*

(n19)Footnote 19. The Ninth Circuit remanded the case for additional findings by the lower court on, *inter alia,* whether defense counsel acted willfully or in bad faith. *664 F.2d at 1343 .*
Attorney's fees and costs were properly taxed against counsel who pressed objections to a referee's decision, despite having stipulated that this decision would not be reviewable. *Baker Indus. v. Cerberus, Ltd., 764 F.2d 204 (3d Cir. 1985) .*
See generally, Rothschild and Fenton, *Rule 11: Stop, Think, and Inverstigate, 11 Litig. 13 (Winter 1985)* (noting that § 1927 sanctions are rarely imposed for anything less than egregious conduct). Even where the court does not give actual notice that such sanctions are being considered, sanctions may be imposed under § 1927 for breach of a local rule where counsel's conduct is willful and counsel has adequate opportunity to defend himself. *See Toombs v. Leone, 777 F.2d 465 (9th Cir. 1985) .*

(n20)Footnote 20. *Tom Growney Equip. v. Shelley Irrigation Development, 834 F.2d 833, 835 (9th Cir. 1987) . Cf. United States v. Bingham, 769 F. Supp. 1039 (N.D. Ill. 1991) .*

(n21)Footnote 21. *782 F. Supp. 457, 470-71 (N.D. Cal. 1991) .*

(n22)Footnote 22. *See* Model Rules of Professional Conduct Rule 3.3(a)(4)(c).

(n23)Footnote 23. *In re Carroll, 244 S.W.2d 474, 474-75 (Ky. 1951) . See also Nix v. Whiteside, 475 U.S. 157, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986) .*

(n24)Footnote 24. McErlean, *Mistakes: What Do You Do When Your Client Lies?, 15 Litig. 8 (Winter 1989).*

(n25)Footnote 25. A.B.A. Comm. on Ethics and Prof. Resp., Formal Op. 87-353 (1987).

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CHAPTER 26 Conduct and Demeanor of Attorneys *

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§ 26.03 Trial Publicity.

A practical reality of litigation today is that publicity, whether in the form of formal press reports or word-of-mouth community opinion, may affect the way in which a trier of fact, judge or jury, perceives pending civil litigation. Although the problems may be greater in the area of criminal litigation, given the sensational nature of many cases and the penalties that an adverse decision may impose upon a defendant, the issues in civil litigation may also capture the interest of a community. It is important for you to be familiar with both the rules that assist in controlling publicity at its source, including extrajudicial attorney comment, and those which seek to minimize the effects of publicity once control is no longer possible.

Publicity problems underscore the long-standing tension between *First Amendment* rights and the state's substantial interest in assuring a fair and impartial trial. In the criminal context, the Supreme Court has described such trials as "the most fundamental of all freedoms." n1 In civil litigation, triers of fact annually determine the disposition of millions of dollars in treble damages, recompense for personal injuries and commercial awards. The state's interest in preventing prejudice from out-of-court statements, and in protecting the dignity and proper function of judicial proceedings, extends to civil trials as well.

Courts and legislatures have acknowledged that the right to a fair trial "can be impaired by lawyers' unrestrained, prejudicial comment" before and during trial. n2 At the same time, however, they have recognized that "lawyers' responsibility to protect the fairness of the judicial process does not mean that lawyers and litigants surrender their *First Amendment* rights at the courthouse door." n3 In an effort to protect the fairness of trials while preserving the rights of attorneys and the public, both state and federal courts have established rules to govern the range of permissible statements by attorneys about pending litigation.

As attorneys, you and your opponent are the persons most knowledgeable about the facts underlying the case. If, for example, you have obtained information through discovery that reflects police surveillance of local citizens, or government destruction of damaging documents, or a corporate policy to dump toxic waste into a community, you and your adversary may be the only persons who have had first-hand exposure to the records of such facts. Where the materials are covered by an agreed protective order, you will probably be bound not to disclose them except in court, for the sole purpose of furthering the lawsuit. Where no protective order exists, two key questions emerge: (1) is your client's interest served by public discussion of the basis for your lawsuit, and (2) do the prevailing "no-comment" rules in your jurisdiction permit you to engage in such a discussion.

Inevitably, emergency situations will occur in civil litigation where a statement must be made to correct highly prejudicial or harmful statements or allegations published in the news media. This situation is most likely to occur in bankruptcy or reorganization situations, antitrust litigation, or lawsuits regarding defects in consumer products.

Pretrial publicity can be an effective litigation tool that accomplishes goals more quickly or thoroughly than litigation itself. The risk of public disclosure of damaging facts may affect the willingness of your opponent--or your client--to settle. An interested press and public have substantial power to intrude upon the lives of individuals and the workings of corporations. Corporations whose marketing efforts may be severely hampered by adverse publicity often decide to settle a claim rather than subject their plans or past practices to public scrutiny and comment. Individuals involved in divorce or defamation cases may wish to avoid the presence of reporters, photographers, spectators or private detectives around their homes, businesses and family members.

You may decide that publicity will improve your client's settlement posture. It may also assist you in locating useful information for trial, such as other parties with similar claims and facts about your opponent from new sources. However, publicity may also be harmful. There are serious risks of being misquoted, disclosing client confidences, revealing trial strategies to your adversary, and angering the trial judge. Publicity may also focus public attention on any negative features of your client or case. For these reasons, no comments--even permissible comments--should be made to the press unless you have first discussed the intended publicity, and the perceived reasons for it, with your client. Although media publicity can aid in building a legal practice, and can be an ego booster, never allow that fact to influence your judgment regarding whether to seek publicity in a given case. Of course, the client may refuse to permit you to make any public comment. Your zeal for notoriety must not undermine your representation of your client.

Always keep in mind that certain kinds of publicity may jeopardize the impartiality of the trier of fact, whether judge or jury. If you use extrajudicial statements as a means of buttressing your case, you may create support for a motion for change of venue or for a mistrial. Because you, as an attorney involved in the case, are a knowledgeable source of facts, your words may be presented by the press and accepted by the public as more credible and reliable than those of your client or witnesses. With that credibility, however, comes the power to influence community opinion, or even the judge. n4 Because of such risks, many practitioners believe it is rarely to counsel's strategic advantage to attempt to try a case in the media.

You should not, by yourself or through others, n5 publish or cause to be published any matter concerning a case that might interfere with a fair trial. Generally, the best comment is no comment. In situations where some comment is necessary, you may make a statement to the press, but you may not do so anonymously and you should not go beyond quotations from court records or from official documents. A good practice might be simply to refer the media to certain documents on file with the court. In most jurisdictions, you may not comment on the merits, nor should you make any comment regarding intended evidence, proof or witnesses. n6

Additionally, in light of potentially significant prejudice from attorney comments, the disciplinary rules of most jurisdictions limit carefully the content of such remarks. Accordingly, if you believe that publicity would serve your client's interests, it is important to familiarize yourself with the applicable rules for both the jurisdictions in which you are licensed and the jurisdiction in which the trial is to take place. The rules vary between jurisdictions, but usually resemble one of several models. One such model is former ABA Canon 20, which provides:

Newspaper Discussion of Pending Litigation.

Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify statement to the public, it is unprofessional to make it anonymously. An ex parte reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases, it is better to avoid any ex parte statement. n7

This kind of general condemnation of public statements by attorneys has been rejected in many jurisdictions as the equivalent of a prior restraint upon political speech. n8 Several courts have emphasized that those most knowledgeable about facts unearthed in the course of an investigation must be free to comment publicly upon issues of political and social interest, such as government abuse, neglect of public needs, and commercial practices, that may arise in the course of civil litigation.

In response to such criticism, some jurisdictions adopted the "no- comment" rule embodied in Disciplinary Rule 7-107 of the Code of Professional Responsibility:

A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) Evidence regarding the occurrence or transaction involved.

(2) The character, credibility or criminal record of a party, witness, or prospective witness.

(3) The performance or result of any examinations or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

(5) Any other matter reasonably likely to interfere with a fair trial of the action.

In an effort to balance the restriction on *First Amendment* rights against the right to a fair trial, many courts have incorporated an additional requirement that any statement within the categories of DR 7-107 pose a "reasonable likelihood" of harm to a fair hearing before an attorney's comments will be deemed violative of the rule. n9 Other jurisdictions, however, insist that this "reasonable likelihood" standard permits too broad a limitation of an attorney's right to free speech. For example, in *Chicago Council of Lawyers v. Bauer*, n10 the court held that an attorney's comments must pose "a serious and imminent threat of interference with a fair trial" before they can be restrained by court rule.

The ABA's Model Rule of Professional Conduct 3.6 states:

A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

As a practical matter, Supreme Court precedent precludes any substantial limitations upon the press itself. The press may be foreclosed from comment:

only when (1) pretrial publicity is likely to be so pervasive that it probably will have an effect on jurors; (2) there are no alternative methods of dealing with the problem through (a) change of venue, (b) postponement of the trial, (c) questioning jurors closely during voir dire, (d) clear instructions at trial, or (e) sequestration of the jury; and (3) the prior restraint will be effective. n11

But the mere fact that the press may have a right to comment on civil cases does not require that you encourage that comment. n12

Although substantive limitations are generally unavailable, there are procedural restrictions that may be placed upon the

press to limit their impact upon the parties, the witnesses and the jury. For example, the local court rules for the federal court for the Northern District of Oklahoma provide that the court may order that no member of the news media be permitted within the bar railing, allocate a certain number of seats to news media representatives, insulate witnesses from news interviews during the trial period, prohibit the photographing or sketching of jurors within the environs of court, and require the clearing of entrances to the hallways at various points during the trial in order to protect the jury and witnesses from any contact with reporters or photographers. n13 If your clients or witnesses reasonably fear harassment by the press, you may wish to move that the court order such protective measures.

Aside from these restrictions, neither courts nor attorneys can control media discussion of a lawsuit to any significant degree. You may, however, rely upon the local disciplinary rules to restrain the comments of your adversary. Escalating a media war begun by your adversary may result in sanctions against the client and sanctions and/or discipline against the attorney.

In some cases, you may find that formal publicity is limited, but the community grapevine has produced extensive discussion of your case or client. For example, if your client is a large local employer who has recently laid off a substantial number of its workers, your client may encounter hostility and unfavorable word-of-mouth reports when a plaintiff sues it for wrongful termination. The jury pool may include friends and relatives of former employees, who have heard unfavorable opinions about your client.

Where the lawsuit or the parties have been widely discussed and evaluated within the community, it becomes important to elicit that fact upon voir dire. If the informal publicity has created an adverse sentiment against your client, you should seek a change of venue or make certain that the questions and instructions are designed to impress upon the jurors their duty to ignore any extrajudicial statements when weighing the evidence presented in court.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewLegal EthicsGeneral OverviewLegal EthicsProfessional ConductGeneral OverviewLegal EthicsProfessional ConductOpposing Counsel & PartiesLegal EthicsProfessional ConductTribunals

FOOTNOTES:
(n1)Footnote 1. *Estes v. Texas, 381 U.S. 532, 540, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965)* .

(n2)Footnote 2. *Hirschkop v. Snead, 594 F.2d 356, 363-4 (4th Cir. 1979)* .

(n3)Footnote 3. *In re Halkin, 598 F.2d 176, 186 (D.C. Cir. 1979)* , *cited with approval in Seattle Times v. Rhinehart, 467 U.S. 20, 104 S. Ct. 2199, 2207, n.18, 81 L. Ed. 2d 17 (1984)* .

(n4)Footnote 4. At least one court of appeals has noted that "[p]retrial publicity has not been shown to be a source of interference to fair bench trials." *Hirschkop v. Snead, 594 F.2d 356, 371 (4th Cir. 1979)* . Other courts disagree. *See Levine v. United States Court for the Cent. Dist. of Cal., 764 F.2d 590, 595 (9th Cir. 1985)* ; *In re Halkin, 598 F.2d 176, 193 (D.C. Cir. 1979)* ("... the threat of prejudicial publicity is entitled to some weight in a bench trial ..."); *Chicago Counsel of Lawyers v. Bauer, 522 F.2d 242, (7th Cir. 1975)* , *cert. denied, 427 U.S. 912 (1976)* .

(n5)Footnote 5. A lawyer may not avoid discipline for improper public comment in the media by directing a third person, including his client, to approach the press. Ala. State Bar Ethics Op. 89-21 (1989).

(n6)Footnote 6. *See* Code of Professional Responsibility DR 7-107(G) and Model Rules of Professional Conduct Rule 3.3(a)(4)(c).

(n7)Footnote 7. Code of Professional Responsibility, as amended by the District of Columbia Court of Appeals,

retaining Canon 20 of the Canons of Professional Ethics, quoted in *In re Halkin 598 F.2d 176, 181 (D.C. Cir. 1979)* . *See also* Model Code of Professional Responsibility DR 7-107(G); Hardy, Comment, *Order in the Courtroom, Silence on the Courthouse Steps: Attorneys Muzzled by Ethical Disciplinary Rules, 22 Seton Hall L. Rev. 1401 (1992).*

(n8)Footnote 8. *See Gentile v. State Bar of Nevada, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991)* (a Nevada Supreme Court rule similar to Model Rule 3.6 of the A.B.A. Models Rules of Professional Conduct was invalidated as void for vagueness as applied).

(n9)Footnote 9. *Hirschkop v. Snead, 594 F.2d 356, (4th Cir. 1979)* ; *see also* citations in *In re Halkin, 598 F.2d 176, 193 (D.C. Cir. 1979)* .

(n10)Footnote 10. *522 F.2d 242 (7th Cir. 1975) . See also Levine v. United States Court for the Cent. Dist. of Cal., 764 F.2d 590, 595 (9th Cir. 1980)* .

(n11)Footnote 11. *In re Halkin, 598 F.2d 176, 183 n.14 (D.C. Cir. 1979)* ; *quoting Nebraska Press Ass'n v. Stewart, 427 U.S. 539, 562, 563-4, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976)* .

(n12)Footnote 12. *See Gentile v. State Bar of Nevada, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991)* .

(n13)Footnote 13. Local Rule 27(1) of the Northern District of Oklahoma.

* Chapter 26 revised in 1993 by Richardson R. Lynn, Nimmo, Baker & Lynn, Nashville, Tennessee; Assistant Dean of Academic Affairs, Pepperdine University School of Law, Malibu, California.

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CHAPTER 26 Conduct and Demeanor of Attorneys *

3-26 Federal Litigation Guide § 26.04

§ 26.04 Bibliography.

[1] Law Reviews and Periodicals.

Attack on Rambo: Bar Courtesy Codes Spread, 14 Bar Leader 11 (Nov.-Dec. 1988).

Broder, *When the Opponent Plays Hardball ... the Practitioner Need Not Play Lowball,* 25 Trial 62 (1989).

Brown, *Narcissism, Manners, and Morals: Can Grace and Collegiality Be Salvaged?, 13 Litig. 17 (Winter 1987).*

Carlson, *Argument to the Jury: Passion, Persuasion, and Legal Controls, 33 St. Louis U.L.J. 787 (1989).*

Colter, *Connecting with Jurors,* 29 Trial 114 (Feb. 1993).

Dombroff, *Unfair Tactics in Examining Witnesses,* 21 Trial 65 (Feb. 1985).

Elliot, *"I'd Love to Tell You, But ..." Ethical Constraints on the Lawyer's Right to Disclose, 66 Conn. B. J. 321 (1992).*

Fitzwater, *Toward a Renaissance of Professionalism in Trial Advocacy, 20 Tex. Tech. L. Rev. 787 (1989).*

Gaetke, *Lawyers as Officers of the Court, 42 Vand. L. Rev. 39 (1989).*

Gerber, *Victory v. Truth: The Adversary System and Its Ethics, 19 Ariz. St. L.J. 3 (1987).*

Gold, *Psychological Manipulation in the Courtroom, 66 Neb. L. Rev. 562 (1987).*

Green, *Government Lawyers and the Press,* 5 Com. & L. 3 (Summer 1983).

Kanner, *Welcome Home Rambo: High-minded Ethics and Low-down Tactics in the Courts, 25 Loy. L.A. L. Rev. 81 (1991).*

Kornstein, *The Qualities of an American Advocate, 61 N.Y. St. B.J. 8 (1989).*

Marks, *Honesty Pays-- Especially in the Law Business,* 33 Decalogue J. 31 (Oct. 1987).

Oatley, *Negotiating Techniques for Lawyers,* 6 Advocates Q. 214 (Aug. 1985).

Park, *Don't Speak for Yourself: The Lawyer's Duty to Refrain from Expressing Personal Opinion at Trial,* 36 Fed. B. News & J. 36 (1989).

Potter, *Settlement of Claims and Litigation: Legal Rules, Negotiation Strategies, and In-House Guidelines, 41 Bus. Law. 515 (1986).*

Savelle, *Why Are They Picking On Us?,* 78 A.B.A.J., Nov. 1992, at 72.

Smith, *The Advocate's Use of Social Science Research into Nonverbal and Verbal Communications: Zealous Advocacy or Unethical Conduct? 134 Mil. L. Rev. 173 (Fall 1991).*

Sayler, *Rambo Litigation: Why Hardball Tactics Won't Work, 74 ABA J. 78* (Mar. 1, 1988).

Sprinkle, *Professional Responsibility, 57 UMKC L. Rev. 735 (1989).*

Thompson, *Tactics that Get Lawyers Sued, 10 Cal. Law. 48 (1990).*

Weidman & McGuire, *Troublesome Trials-- Improper Conduct of Counsel,* 16 Trial Law. Q. 5 (1984).

Yannello, *Trial Advocacy on Trial, 7 Ohio N.U. L. Rev. 3 (1980).*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewLegal EthicsGeneral OverviewLegal EthicsProfessional ConductGeneral OverviewLegal EthicsProfessional ConductOpposing Counsel & PartiesLegal EthicsProfessional ConductTribunals

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CHAPTER 27 The Pretrial Conference

3-27 Federal Litigation Guide 27.syn

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§ 27.01 Pretrial Conferences Promote Active Judicial Case Management
[1] Rule 16 Is Primary Source of Court's Case Management Authority
[2] General Objectives of Pretrial Conferences
[3] Importance of Local Rules and Individual Judges' Practices

§ 27.02 Referring Case to Magistrate Judge
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[2] Scope of Assignments to Magistrate Judges Vary
[3] Standard of Review of Magistrate Judge's Ruling

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§ 27.32 Purpose of Scheduling Conference

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§ 27.71 Final Pretrial Conference Discretionary Unless Mandated by Local Rule

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CHAPTER 27 The Pretrial Conference

3-27 Federal Litigation Guide Scope

Scope

SCOPE

One of the major changes in federal practice in recent years has been the increasing emphasis on case management through early and continuing judicial involvement in the pretrial process. The goal is to manage and control the pretrial process to avoid wasteful and unduly expensive activities, and to expedite the process of achieving a disposition of the case. Accordingly, litigation strategy must be planned from the outset with the concept firmly in mind of participating in one or more conferences.

Rule 16 grants the trial judge significant discretion in using pretrial conferences to simplify issues for expeditious trial, to eliminate surprise, and to facilitate settlement. Additionally, many judges enter standard pretrial orders to facilitate the cooperation of counsel, and to eliminate unnecessary cost or delay in the pretrial process. Local rules may also set forth requirements and guidelines for the efficient conduct of pretrial proceedings.

Typically, the court will hold a series of pretrial conferences. An early conference will usually focus on scheduling and establishing deadlines for matters such as motions and discovery. Subsequent interim conferences may focus on the extent and timing of discovery, or whether summary judgment motions may be appropriate.

The final pretrial conference will ordinarily be held as close as possible to the trial date, and will deal with ground rules for trial, simplifying the issues to be tried, the order of the presentation of evidence, identifying witnesses and exhibits, and final pretrial motions, such as motions in limine to exclude evidence. The order entered after the final pretrial conference, generally referred to as the final pretrial order, will dictate the framework for the trial; the order will supersede the pleadings in the case, and may be modified only upon a showing of manifest injustice. As a result, substantial care must be given to drafting the order and preparing for the conference at which its terms will be determined.

This chapter discusses the effective use of pretrial conferences, from the initial scheduling conference, through the final pretrial conference. The chapter is organized by the chronological sequence in which counsel are most likely to encounter the operation of Rule 16 and related local rules. The chapter outlines the critical legal, strategic, and tactical issues surrounding pretrial conferences, and includes:

- **Advice concerning practice under Rule 16 and related local rules**
- **Warnings about the dangers inherent in failing to comply with the requirements of those rules**

- **Observations about ranges of real world pretrial conference practices**
- **Discussion of settlement conferences and the use of special masters in the pretrial context**
- **Overview of enforcement of pretrial conference orders and other pretrial conference obligations**

The chapter also includes sample forms, including a proposed discovery plan, and a report of the parties' Rule 26(f) planning meeting.

For expanded coverage of pretrial conferences, *see* Moore's Federal Practice, Ch. 16, *Pretrial Conferences; Scheduling; Management* (Matthew Bender 3d ed.).

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CHAPTER 27 The Pretrial Conference
A. Understanding Pretrial Conference Objectives

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§ 27.01 Pretrial Conferences Promote Active Judicial Case Management

[1] Rule 16 Is Primary Source of Court's Case Management Authority

Rule 16 is the principal source of the powers and tools that district courts may use to achieve the fundamental purpose stated in Rule 1 of securing "the just, speedy, and inexpensive determination of every action and proceeding." n1

Rule 16 promotes a concept of active judicial management of the case development process in most civil actions to reach a swift, inexpensive, and just resolution of litigation, with the participation and cooperation of counsel and the parties. n2 The Manual for Complex Litigation suggests that effective case management should generally be active, substantive, timely, ongoing, firm but fair, and carefully prepared. n3

[2] General Objectives of Pretrial Conferences

The court is responsible for ensuring that each case is positioned as quickly and as efficiently as possible for disposition. Accordingly, judges direct pretrial activity, including fixing deadlines for completing the major pretrial tasks and for trial, and are encouraged to actively participate in designing case-specific plans for structuring litigation as efficiently as possible for disposition by settlement, motion, or trial. Rule 16 authorizes and regulates the use of a wide range of case management tools and powers, principally through pretrial conferences, and authorizes a wide range of sanctions for violations of pretrial orders. n4

The court may, in its discretion, direct the attorneys for the parties and any unrepresented parties to appear for a pretrial conference or conferences for case management purposes, including the following: n5

- Expediting the disposition of the action
- Establishing early and continuing control so that the case will not be protracted because of lack of management
- Discouraging wasteful pretrial activities
- Improving the quality of the trial through more thorough preparation

- Facilitating the settlement of the case

[3] Importance of Local Rules and Individual Judges' Practices

The variety of practices under Rule 16 among sitting federal judges can be confusing. At the outset, it is imperative for counsel to consult the local rules of the particular district, and the individual judge's rules.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial Orders

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 16*; *see Fed. R. Civ. P. 1*.

(n2)Footnote 2. *Lamborn v. Dittmer, 873 F.2d 522, 527 (2d Cir. 1989)* (citing **Moore's Federal Practice**).

(n3)Footnote 3. Manual for Complex Litigation 10.13 (4th ed. 2004); *see* Manual for Complex Litigation 10.1, 11.1, 11.2 (4th ed. 2004).

(n4)Footnote 4. *Fed. R. Civ. P. 16*.

(n5)Footnote 5. *Fed. R. Civ. P. 16(a)*.

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CHAPTER 27 The Pretrial Conference
A. Understanding Pretrial Conference Objectives

3-27 Federal Litigation Guide § 27.02

§ 27.02 Referring Case to Magistrate Judge

[1] Magistrate Judge May Handle Significant Pretrial Activity

As a result of the congested dockets in district courts, and the need to allocate judicial resources, district judges may appoint magistrate judges to handle significant pretrial activity, particularly with respect to scheduling and planning. n1 Because these delegations are increasingly common, practitioners must be familiar with the rules under which the referrals are made, as well as the procedures and standards that apply when a party seeks to have the district judge reconsider a non-dispositive ruling made in the first instance by a magistrate judge. n2

[2] Scope of Assignments to Magistrate Judges Vary

The types of assignments that may be given to magistrate judges vary significantly, even within the same court. For example, some district judges assign all responsibility for handling all discovery disputes in all their cases to magistrate judges, while others almost never refer discovery matters to magistrate judges. Some judges selectively refer particular discovery disputes to magistrate judges. Further, some judges assign substantial case management responsibilities to magistrate judges, whereas others never assign substantial case management responsibilities.

Counsel should consult the local rules of the particular district, as well as the individual judge's rules, regarding assignment of cases to magistrate judges.

[3] Standard of Review of Magistrate Judge's Ruling

When reconsidering a magistrate judge's ruling or report and recommendation, the standard of review applied by a district court varies with the type of decision made, and the basis for the decision. Interlocutory scheduling orders issued by a magistrate judge, for example, may be reviewable by a district judge under the *clearly erroneous* or the *abuse of discretion standard*. The *clearly erroneous* standard is applied to findings of fact made by magistrate judges that support rulings on non-dispositive motions, or the exercise of case-management discretion. n3

By contrast, a district judge reviews those aspects of a magistrate judge's decision that involve interpretations of applicable law under the *contrary to law* standard, meaning de novo review. District judges must also apply the de novo standard when ruling on objections to a magistrate judge's report and recommendation on a potentially dispositive motion. n4

Counsel should be aware that if a magistrate judge enters the scheduling order in a case assigned to a district judge, the parties may ask the district judge to reconsider the magistrate judge's decision. A party must file any challenge within 14 days after being served with a copy of the order; any objections not timely filed are waived. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMagistratesPretrial OrdersCivil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial Orders

FOOTNOTES:
(n1)Footnote 1. *See 28 U.S.C. § 636.*

(n2)Footnote 2. *See* [3], *below.*

(n3)Footnote 3. *See 28 U.S.C. § 636(b)(1)(A).*

(n4)Footnote 4. *See 28 U.S.C. § 636(a)(4), (b)(1), (c)(4); Fed. R. Civ. P. 72.*

(n5)Footnote 5. *Fed. R. Civ. P. 72(a).*

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CHAPTER 27 The Pretrial Conference
A. Understanding Pretrial Conference Objectives

3-27 Federal Litigation Guide § 27.03

§ 27.03 Appointing Special Master

[1] Appointment Procedure

Unless a statute provides otherwise, a court may appoint a special master only to: n1

- Perform duties consented to by the parties, or
- Hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if warranted by special circumstances or by the need to perform an accounting or resolve a difficult computation of damages, or
- Address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district or magistrate judge

Consent of the parties is *not* required as a condition of the reference, nor does their consent mandate a reference. n2

[2] Reference Must Aid Judge

The purpose of a special master is to assist the district judge by reporting on matters, supervising various pretrial phases of litigation, taking on burdensome discovery tasks, negotiating settlements, and issuing rulings on preliminary issues. Since special masters do not satisfy the criteria set by Article III of the U.S. Constitution for the exercise of judicial power, district judges must decide all dispositive issues of fact and law. n3

[3] Advantages and Disadvantages of Special Masters

A special master may be able to devote more time to the case, and may have developed a specialized expertise in a pertinent field that may be of great value when the case involves esoteric or highly technical matters. n4

On the other hand, the appointment of a special master may increase the cost of litigation, particularly if the parties are obligated to pay the special master's compensation. n5

[4] Court Fixes Compensation of Special Master

The court, in its discretion, fixes the amount of the master's compensation. However, if a magistrate judge is designated to serve as a special master, the amount of compensation is determined by statute. The court determines whether the special master's compensation is to be charged to the parties, or paid out of a fund or subject matter of the action that is in the court's custody or control. n6

[5] Seeking Review of Special Master's Determination

In acting on a master's order, report, or recommendations, the court must afford an opportunity to be heard and may receive evidence, and may take any of the following actions: n7

- Adopt or affirm
- Modify
- Wholly or partly reject or reverse
- Resubmit to the master with instructions

A party may file objections or file a motion to adopt or modify the master's order, report, or recommendations no later than 21 days from the time of the master's order, report, or recommendations are served, unless the court sets a different time. n8

The court must decide de novo all objections to findings of fact made or recommended by a master unless the parties stipulate with the court's consent that: n9

- The master's findings will be reviewed for clear error, or
- The findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final

The court must decide de novo all objections to conclusions of law made or recommended by a master. n10

Unless the order of appointment 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. n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMagistratesGeneral OverviewCivil ProcedureJudicial OfficersMastersAppointmentsCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial Orders

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 53(a).*

(n2)Footnote 2. *Stauble v. Warrob Inc., 977 F.2d 690, 695 (1st Cir. 1992)* ; *Reed v. Cleveland Bd. of Educ., 607 F.2d 737, 747-748 (6th Cir. 1979)* ; *Cademartori v. Marine Midland Trust Co., 18 F.R.D. 277 (S.D.N.Y. 1955)* .

(n3)Footnote 3. *See Madrigal Audio Labs., Inc. v. Cello Ltd., 799 F.2d 814, 818 (2d Cir. 1986)* .

(n4)Footnote 4. *See, e.g., New York State Ass'n for Retarded Children v. Carey, 706 F.2d 956, 962-963 (2d Cir.*

1983) , *cert. denied*, *464 U.S. 915 (1983)* .

(n5)Footnote 5. *See* [4], *below* (compensation of special master).

(n6)Footnote 6. *See Fed. R. Civ. P. 53(g)*; *see also 28 U.S.C. § 636(b)(2)*.

(n7)Footnote 7. *Fed. R. Civ. P. 53(f)(1)*.

(n8)Footnote 8. *Fed. R. Civ. P. 53(f)(2)*.

(n9)Footnote 9. *Fed. R. Civ. P. 53(f)(3)*.

(n10)Footnote 10. *Fed. R. Civ. P. 53(f)(4)*.

(n11)Footnote 11. *Fed. R. Civ. P. 53(f)(5)*.

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CHAPTER 27 The Pretrial Conference
A. Understanding Pretrial Conference Objectives

3-27 Federal Litigation Guide §§ 27.04 through 27.09

[Reserved]

§§ 27.04[Reserved]

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CHAPTER 27 The Pretrial Conference
B. Scheduling Initial Conference of Parties; Planning for Discovery

3-27 Federal Litigation Guide § 27.10

§ 27.10 Parties Must Confer at Least 21 Days Prior to Scheduling Conference

The first pretrial conference is the initial conference between opposing counsel mandated by Rule 26(f). Counsel must confer at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b) to accomplish the following: n1

- Discuss the nature and basis of their claims and defenses
- Discuss the possibilities for a prompt settlement or other resolution of the case
- Make or arrange for the required initial disclosures
- Develop a proposed discovery plan

Counsel should consult the local rules of the particular district, as well as the individual judge's rules, for any provisions regarding the initial conference of parties.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesScheduling Conferences

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(f).*

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CHAPTER 27 The Pretrial Conference
B. Scheduling Initial Conference of Parties; Planning for Discovery

3-27 Federal Litigation Guide § 27.11

§ 27.11 Drafting Proposed Discovery Plan at Initial Conference of Parties; Filing Report Outlining Plan

The proposed discovery plan which the parties are required to develop at the initial conference of parties n1 must indicate the parties' views and proposals concerning: n2

- What changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made
- 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 upon particular issues
- Any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced
- Any issues relating to claims of privilege or of protection as trial-preparation material, including-if the parties agree on a procedure to assert such claims after production-whether to ask the court to include their agreement in an order
- 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
- Any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c)

A written report outlining the discovery plan must be submitted to the court within 14 days after the initial meeting of parties. n3

Counsel should consult the local rules of the particular district, as well as the individual judge's rules, for any provisions regarding content and filing requirements for discovery plans.

It may be productive for the scheduling order to state expressly that any motion to compel discovery must be filed prior to the date discovery closes rather than the later deadline in the scheduling order for filing "all other motions." There is not much authority on the topic and it is split. The better view is that the discovery deadline fixes the time for filing

motions to compel discovery. n4

However, there is some authority to the contrary. n5

A form of report of the parties' planning meeting can be found at § 27.101.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesScheduling Conferences

FOOTNOTES:
(n1)Footnote 1. *See § 27.10.*

(n2)Footnote 2. *Fed. R. Civ. P. 26(f).*

(n3)Footnote 3. *Fed. R. Civ. P. 26(a), (f).*

(n4)Footnote 4. *Days Inn Worldwide, Inc. v. Sonia Investments, 237 F.R.D. 395, 398 (N.D. Tex. 2006) .*

(n5)Footnote 5. *See e.g., Greene v. Swain County P'ship for Health, 342 F. Supp. 2d 442, 449 (W.D.N.C. 2004) .*

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CHAPTER 27 The Pretrial Conference
B. Scheduling Initial Conference of Parties; Planning for Discovery

3-27 Federal Litigation Guide § 27.12

§ 27.12 CHECKLIST: Initial Conference of Parties; Planning for Discovery

☐ Schedule initial conference of parties, pursuant to Rule 26(f), to be held at least **21 days** prior to scheduling conference is held or scheduling order is due under Rule 16(b).

☐ Review topics required to be discussed.

☐ Prepare proposed discovery plan at initial meeting of parties. Consult local rules, as well as individual judges' rules, regarding contents of proposed discovery plan.

☐ File report outlining discovery plan within 14 days after the initial conference of parties. Consult local rules, as well as individual judges' rules, regarding filing requirements.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesScheduling Conferences

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CHAPTER 27 The Pretrial Conference
B. Scheduling Initial Conference of Parties; Planning for Discovery

3-27 Federal Litigation Guide §§ 27.13 through 27.19

[Reserved]

§§ 27.13[Reserved]

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CHAPTER 27 The Pretrial Conference
C. Preparing and Filing Scheduling Order

3-27 Federal Litigation Guide § 27.20

§ 27.20 Scheduling Order Mandatory Unless Exempted by Local Rule

Except in categories of actions expressly exempted by local rule as inappropriate, n1 the judge or magistrate judge must enter a pretrial scheduling order, after receiving the Rule 26(f) proposed discovery report from the parties, if required, n2 or after consulting with the attorneys for the parties and any unrepresented parties. n3 The scheduling order must be issued as soon as practicable, but in any event the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared. n4

The scheduling order, sometimes referred to as a *case management order*, is the court's primary method to control its calendar, assert control over the case management process, and define the parameters and subsequent course of the case. The requirement of a scheduling order permits the court to intervene early to set realistic deadlines for discovery and other aspects of pretrial case development, as well as to position the case for settlement, alternative dispute resolution, or trial.

All sides to a federal action should, from the earliest time, analyze their discovery needs in order to be ready for the initial meeting of parties. n5 While scheduling orders are frequently altered in the course of the case, district judges vary in their willingness to substantially alter the schedules, and counsel generally must be prepared to show unanticipated needs to procure substantial changes.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesScheduling Conferences

FOOTNOTES:
(n1)Footnote 1. *See § 27.23.*

(n2)Footnote 2. *See § 27.11* (drafting and filing proposed discovery plan).

(n3)Footnote 3. *Fed. R. Civ. P. 16(b)(1).*

(n4)Footnote 4. *Fed. R. Civ. P. 16(b)(2).*

(n5)Footnote 5. *See § 27.10* (initial meeting of parties).

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CHAPTER 27 The Pretrial Conference
C. Preparing and Filing Scheduling Order

3-27 Federal Litigation Guide § 27.21

§ 27.21 Mandatory and Optional Topics to Be Addressed by Scheduling Order

The scheduling order *must* limit the time to join other parties, amend the pleadings, complete discovery, and file motions. n1 The scheduling order *may* also include: n2

- Modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted
- Provisions for disclosure or discovery of electronically stored information
- Any agreements the parties reach for asserting claims of privilege or of protection as trial preparation material after production
- The date or dates for conferences before trial, a final pretrial conference, and trial
- Any other matters appropriate in the circumstances of the case

The scheduling of discovery deadlines is a critical component of the scheduling order. Rule 16(b)(3)(B) specifically alerts the court to address the handling of discovery of electronically stored information in the scheduling order. n3

Rule 16(b)(3)(B) also includes among the topics that may be addressed in the scheduling order any agreements that the parties reach to facilitate discovery by minimizing the risk of waiver of privilege or work-product protection. n4 Parties may agree to a wide variety of arrangements. For example, they may agree that if privileged or protected information is inadvertently produced, the producing party may by timely notice assert the privilege or protection and obtain return of the materials without waiver. n5 An order that includes the parties' agreement may be helpful in avoiding delay and excessive cost in discovery. Rule 16(b)(3)(B) recognizes the propriety of including such agreements in the court's order. n6

An agreement that protects against privilege waivers in the event of inadvertent disclosures is binding only on those parties, and does not apply to nonparties unless incorporated in a court order. n7

Counsel should consult the local rules of the particular district, as well as the individual judge's rules, for any provisions

regarding topics to be addressed in the scheduling order.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesScheduling Conferences

FOOTNOTES:
(n1)Footnote 1. *See Grochowski v. Phoenix Constr., 318 F.3d 80, 86 (2d Cir. 2003)* ; *Bradford v. DANA Corp., 249 F.3d 807, 809 (8th Cir. 2001)* .

(n2)Footnote 2. *Fed. R. Civ. P. 16(b)(3).*

(n3)Footnote 3. *See Fed. R. Civ. P. 16(b)(3)(B)(iii).*

(n4)Footnote 4. *See Fed. R. Civ. P. 16(b)(3)(B)(iv).*

(n5)Footnote 5. *Fed. R. Civ. P. 16(b)* Committee Note (2006).

(n6)Footnote 6. *Fed. R. Civ. P. 16(b)* Committee Note (2006).

(n7)Footnote 7. *Fed. R. Evid. 502(e).*

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CHAPTER 27 The Pretrial Conference
C. Preparing and Filing Scheduling Order

3-27 Federal Litigation Guide § 27.22

§ 27.22 Contact Between Judge and Litigants Mandatory Prior to Issuance of Scheduling Order

[1] Providing Input to Judge Prior to Issuance of Scheduling Order

The judge may not issue a scheduling order without having first either received from the litigants the proposed discovery plan report, n1 or consulted with the attorneys for the parties and any unrepresented parties by a scheduling conference, n2 telephone, mail, or other suitable means. n3

This preliminary contact serves the following purposes:

- The parties are given an opportunity at the outset to inform the court of potential procedural and substantive problems, as well as personal scheduling conflicts, that might affect the pretrial schedule
- The court may tailor the scheduling order to the needs of the individual case
- The court may assert control over the litigation and the parties from the outset

[2] Manner of Initial Contact Between Judge and Litigants Not Prescribed

Under Rule 16, the required contact between the judge and the litigants which forms the basis for the court's scheduling order n4 need not be in person or by telephone. The manner of contact is discretionary, and it is sufficient to solicit and receive input from counsel in writing or electronically. n5

The receipt of a written report outlining the discovery plan is one method to satisfy this requirement. n6 Practices vary between courts, between individual judges in the same court, and between types of cases. Counsel should consult the pertinent local rules, as well as any individual judges' rules.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesScheduling Conferences

FOOTNOTES:

(n1)Footnote 1. *See § 27.11* (drafting and filing proposed discovery plan).

(n2)Footnote 2. *See § 27.31* (scheduling conferences).

(n3)Footnote 3. *Fed. R. Civ. P. 16(b)(3)(B)(iv).*

(n4)Footnote 4. *See* [1], *above.*

(n5)Footnote 5. *See, e.g., Restrepo v. Colgate Univ., 149 F.R.D. 17, 19 (N.D.N.Y. 1993)* .

(n6)Footnote 6. *Fed. R. Civ. P. 26(f)*; *see § 27.11* (drafting and filing proposed discovery plan).

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CHAPTER 27 The Pretrial Conference
C. Preparing and Filing Scheduling Order

3-27 Federal Litigation Guide § 27.23

§ 27.23 Local Rules May Exempt Categories of Cases From Scheduling Order Requirement

Local rules may exempt categories of cases from the scheduling order requirement. The only means for exempting categories of cases from the scheduling order requirement is by local rule. n1 Individual judges, acting on their own initiative and their own authority, may not issue standing orders that purport to exempt certain categories of cases from the scheduling order requirement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesScheduling Conferences

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 16(b)(1).*

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CHAPTER 27 The Pretrial Conference
C. Preparing and Filing Scheduling Order

3-27 Federal Litigation Guide § 27.24

§ 27.24 Seeking Modification of Scheduling Order

[1] Modification of Scheduling Order Requires Showing of Good Cause

A scheduling order may not be modified except by leave of court on a showing of good cause. n1 Courts have wide discretion in determining good cause. n2 A court is more likely to respond favorably to a motion seeking an extension if counsel has not waited until the last minute to file the request. n3 An attorney's "excusable neglect" does not constitute good cause for modifying a Rule 16(b) scheduling order; instead, good cause requires a showing that, despite diligence, the party could not have reasonably met the schedule ordered. n4

[2] Strategic Consideration

Counsel should review the scheduling order deadlines and inform the court at the earliest possible moment if problems arise in complying with the schedule. A showing of good cause ordinarily requires that counsel establish an inability to meet the scheduled deadlines despite exercising due diligence. Accordingly, counsel should describe with specificity the actions that have been taken to comply with the scheduling order. Counsel should also propose a new schedule that contemplates getting the case trial-ready as quickly as possible under the changed circumstances. The proposed new dates should be as close to the dates originally fixed as feasible, and that fact should be pointed out in the request.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesScheduling Conferences

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 16(b)(4)*; *see also Andretti v. Borla Performance Indus., 426 F.3d 824, 830 (6th Cir. 2005)* ; *see also Southwestern Bell Tel. Co. v. City of El Paso, 346 F.3d 541, 546 (5th Cir. 2003)* .

(n2)Footnote 2. *See Doe v. Hawaii Dep't of Educ., 351 F. Supp. 2d 998, 1007 (D. Hawaii 2004)* ; *Colorado Visionary Academy v. Medtronic, Inc., 194 F.R.D. 684, 687-688 (D. Colo. 2000)* .

(n3)Footnote 3. *See Harding v. Federal Reserve Bank, 707 F.2d 46, 52 (2d Cir. 1983)* .

(n4)Footnote 4. *See Arnold v. Krause, Inc., 232 F.R.D. 58, 65 (W.D.N.Y. 2004)* .

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CHAPTER 27 The Pretrial Conference
C. Preparing and Filing Scheduling Order

3-27 Federal Litigation Guide §§ 27.25 through 27.29

[Reserved]

§§ 27.25[Reserved]

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CHAPTER 27 The Pretrial Conference
D. Attending Discretionary Scheduling Conferences

3-27 Federal Litigation Guide § 27.30

§ 27.30 Different Districts Use Different Labels to Describe *Scheduling Conference*

Different district courts use different labels to describe the first conference between counsel, unrepresented parties, and the judge or magistrate judge. Some districts label the conference a *scheduling conference,* while others call it an *initial status conference,* an *initial pretrial conference,* an *initial case management conference,* a *Rule 16 conference,* or a *first discovery conference*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesScheduling Conferences

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CHAPTER 27 The Pretrial Conference
D. Attending Discretionary Scheduling Conferences

3-27 Federal Litigation Guide § 27.31

§ 27.31 Scheduling Conference Discretionary Unless Mandated by Local Rule

Judges may, but are not required to, hold a scheduling conference before issuing a scheduling order. Although some form of communication between the court and the parties is required before the court issues its scheduling order, n1 that communication may be by: n2

- Scheduling conference
- Telephone communication
- Mail communication
- Other suitable means
- Report outlining the proposed discovery plan n3

Counsel should consult the local rules of the particular district, as well as the individual judge's rules, regarding any scheduling conference requirements.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesScheduling Conferences

FOOTNOTES:
(n1)Footnote 1. *See § 27.22.*

(n2)Footnote 2. *Fed. R. Civ. P. 16(b)(1)(B).*

(n3)Footnote 3. *See § 27.11.*

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CHAPTER 27 The Pretrial Conference
D. Attending Discretionary Scheduling Conferences

3-27 Federal Litigation Guide § 27.32

§ 27.32 Purpose of Scheduling Conference

The purpose of the discretionary scheduling conference is to prepare and adopt a case specific management plan that will be memorialized in the court's scheduling order. n1 Scheduling orders put limits on the time to do the following: n2

- Join other parties
- Amend the pleadings
- File motions
- Complete discovery

The scheduling order also may include: n3

- Modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted
- Provisions for disclosure or discovery of electronically stored information
- Any agreements the parties reach for asserting claims of privilege or of protection as trial preparation material after production
- The date or dates for conferences before trial, a final pretrial conference, and trial
- Any other matters appropriate in the circumstances of the case

For discussion of scheduling orders, see *§§ 27.20 -27.24*.

At the Scheduling Conference, the parties must also be prepared to discuss the topics outlined in Rule 16(c), which broadly describes the issues that courts might address over the full range of pretrial conferences, from the scheduling

conference to the final pretrial conference. n4 For discussion of the topics outlined in Rule 16(c), see *§ 27.56[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesScheduling Conferences

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 16(b).*

(n2)Footnote 2. *Fed. R. Civ. P. 16(b)(3)(A).*

(n3)Footnote 3. *Fed. R. Civ. P. 16(b)(3)(B).*

(n4)Footnote 4. *Fed. R. Civ. P. 16(c).*

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CHAPTER 27 The Pretrial Conference
D. Attending Discretionary Scheduling Conferences

3-27 Federal Litigation Guide § 27.33

§ 27.33 Timing of Scheduling Conference

If a discretionary scheduling conference is held at all, n1 it is ordinarily held after the key defendants have been served with process, and the parties have had an opportunity to meaningfully meet their initial disclosure and discovery planning obligations. For cases that are not relatively simple, scheduling conferences are ordinarily held several months after the filing of the complaint (assuming the plaintiff served the key defendants promptly). The conference will be particularly productive, and of greater tactical use, if the parties have accomplished the following tasks:

- Completed some of the core investigative homework
- Attempted to identify for one another the factual and legal issues that are likely to be most important
- Shared the names of likely witnesses
- Identified key documents, or shared specific information about the volume and kinds of documents to be examined, and estimated the timing of document production
- Explored settlement possibilities, and identified obstacles that must be overcome to make any negotiations productive
- Attempted to settle at least the basic elements of a plan for completing their initial and expert disclosures, n2 and for conducting necessary discovery

The timing of the scheduling conference may be affected by the early filing of motions, or by a party's early pursuit of equitable relief. When it is substantially likely that an early motion will resolve the case, the judge might postpone the scheduling conference until that motion is resolved, or devote the first conference to helping the parties establish a plan for generating the evidence needed to resolve the motion. Similarly, if a ruling on a petition for a temporary restraining order or preliminary injunction is likely to significantly affect the nature or the viability of the litigation, the judge might postpone the scheduling conference until those issues are resolved.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesScheduling Conferences

FOOTNOTES:
(n1)Footnote 1. *See § 27.31* (scheduling conference discretionary unless mandated by local rule).

(n2)Footnote 2. *See Fed. R. Civ. P. 26(a)(1).*

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CHAPTER 27 The Pretrial Conference
D. Attending Discretionary Scheduling Conferences

3-27 Federal Litigation Guide § 27.34

§ 27.34 Who Must Attend Discretionary Scheduling Conference

If the court does require a scheduling conference, n1 the conference must be attended by attorneys for the parties, as well as by all unrepresented parties. At least one of the attorneys for each party participating in the conference must be authorized to enter into stipulations, and to make admissions regarding all matters that might reasonably be anticipated to be discussed at the conference. In addition, when appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesScheduling Conferences

FOOTNOTES:
(n1)Footnote 1. *See § 27.31* (scheduling conference discretionary unless mandated by local rule).

(n2)Footnote 2. *Fed. R. Civ. P. 16(c)(1).*

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CHAPTER 27 The Pretrial Conference
D. Attending Discretionary Scheduling Conferences

3-27 Federal Litigation Guide § 27.35

§ 27.35 Importance of Preparing for Scheduling Conference

Before attending the scheduling conference, counsel should have a well thought-out description of their position, as well as a rationalized discovery plan. Counsel should also be prepared to identify probable motions. Many judges will press for quicker discovery than counsel prefer, so counsel must be prepared to explain exactly what they want, and how long it will take. If expert testimony may be used at trial, a schedule will be imposed for an exchange of information, and the availability of experts for pretrial examination. If the court is given the impression that one party's counsel is ill-prepared, has not decided on what is needed, and has no schedule in mind, the court may watch for dilatory conduct in the future, to the detriment of that party. Conversely, counsel who seem to understand all issues in the case, what witnesses and documents will be needed for discovery purposes, and the like, may receive deference from the court on such matters throughout the conduct of the case.

Counsel should attempt to determine the court's attitude toward discovery scope and scheduling in advance of the scheduling conference. As a last resort, chambers may provide copies of other scheduling orders upon request. Examples of the potential benefits of careful preparation include:

- Counsel might persuade the court to hear a potentially dispositive motion significantly earlier than might otherwise occur, and to limit discovery to evidence related to the motion until the court renders its decision

- Counsel might persuade the court to impose severe restrictions on discovery generally; restrictions that the court might not have imposed if it had received the benefit of fully-informed input from the unprepared lawyer

- Counsel might persuade the court to stage discovery in ways that are calculated to develop a view of the evidence that favors their client

- Counsel might simply persuade the court to put the case on an appreciably faster (or slower) track than usual

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesScheduling Conferences

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CHAPTER 27 The Pretrial Conference
D. Attending Discretionary Scheduling Conferences

3-27 Federal Litigation Guide § 27.36

§ 27.36 Court Annexed ADR Typically Discussed at Scheduling Conference

The scheduling conference may include discussion of court annexed alternative dispute resolution programs. Some districts mandate court annexed ADR in certain types of actions, and other districts provide voluntary ADR programs. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesScheduling Conferences

FOOTNOTES:
(n1)Footnote 3. *See In re Atl. Pipe Corp., 304 F.3d 135, 145 (1st Cir. 2002)* .

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CHAPTER 27 The Pretrial Conference
D. Attending Discretionary Scheduling Conferences

3-27 Federal Litigation Guide §§ 27.37 through 27.49

[Reserved]

§§ 27.37[Reserved]

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CHAPTER 27 The Pretrial Conference
E. Attending Interim Pretrial Conferences and Settlement Conferences

3-27 Federal Litigation Guide § 27.50

§ 27.50 Different Districts Use Different Labels to Describe *Interim Pretrial Conferences*

Different district courts use different labels to describe periodic pretrial conferences authorized by Rule 16(c). n1

Some districts label the conferences *interim pretrial conferences,* while others call them status conferences, discovery planning conferences, Rule 16 conferences, and interim or intermediate case management conferences. For clarity, this chapter refers to the first conference between the court and counsel as a *scheduling conference*, n2 and refers to all other conferences as *interim pretrial conferences*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesScheduling Conferences

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 16(c).*

(n2)Footnote 2. *See § 27.30.*

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CHAPTER 27 The Pretrial Conference
E. Attending Interim Pretrial Conferences and Settlement Conferences

3-27 Federal Litigation Guide § 27.51

§ 27.51 Purpose of Interim Pretrial Conference

An interim pretrial conference provides an opportunity for the presiding judicial officer and counsel to revisit the issues in the case; to determine whether the case is progressing as scheduled; and to refine or add detail to the operative scheduling or interim pretrial order. Status conferences are discretionary with the judge, and may cover virtually any procedural or substantive issue relevant to the case.

The Federal Rules of Civil Procedure rules do not prescribe specific procedures for interim pretrial conferences. Rather, local rules, and more typically, individual judge's rules may specify conference procedures. For example, counsel may be required prior to the pretrial conference to submit written statements or reports addressing matters related to case development. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedurePretrial MattersConferencesScheduling Conferences

FOOTNOTES:
(n1)Footnote 1. *See § 27.58[5].*

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CHAPTER 27 The Pretrial Conference
E. Attending Interim Pretrial Conferences and Settlement Conferences

3-27 Federal Litigation Guide § 27.52

§ 27.52 Interim Pretrial Conference Discretionary Unless Required by Local Rule

The judge has discretion to hold one or more interim pretrial conferences. n1 Local rules may require judges to hold interim pretrial conferences in specified categories of cases, or in specified circumstances. Counsel should consult the individual judge's rules, which often contain provisions regarding interim pretrial conferences.

Under the activist case management philosophy that underlies Rule 16, judges and counsel are encouraged not to assume that the case development plan fashioned at the scheduling conference n2 should remain rigidly fixed. Rather, judges and counsel should periodically review pretrial developments, and expect to make adjustments in the original plan, or even to move the pretrial process in a different direction, as disclosures, discovery, motion activity, or external developments provide new information or changed litigation circumstances. External developments are most likely to be relevant to the parties' views about settlement, such as when a dramatic change in a party's economic circumstances makes that party significantly more or less interested in settlement.

It is useful to attempt to ascertain, as early as possible, whether the assigned judge or magistrate judge will actively manage the case. Most judges fit into one of two styles--either they actively manage the case and conduct periodic pretrial conferences, or they don't manage the case at all and have few if any pretrial conferences.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesScheduling Conferences

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 16(a).*

(n2)Footnote 2. *See § 27.32.*

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CHAPTER 27 The Pretrial Conference
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3-27 Federal Litigation Guide § 27.53

§ 27.53 Procedures for Conducting Interim Pretrial Conferences

The procedures for conducting interim pretrial conferences vary from one district to another, and from judge to judge. Conferences may be conducted formally in the courtroom, with the judge on the bench, and with all proceedings recorded. Alternatively, interim pretrial conferences may be more productive when conducted less formally, either in chambers or by telephone or video-conference, and off the record.

Counsel should consult the individual judge's rules to ascertain how the judge tends to handle interim pretrial conferences. Counsel should also speak with the judge's courtroom deputy for guidance.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesScheduling Conferences

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CHAPTER 27 The Pretrial Conference
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3-27 Federal Litigation Guide § 27.54

§ 27.54 Requesting Interim Pretrial Conference

If the case might benefit from an interim pretrial conference, counsel should consider making a request to the assigned judge. Counsel are usually in a better position than the judge to observe developing pretrial matters, and a request for n interim pretrial conference signifies that counsel are taking their pretrial responsibilities seriously. Counsel should state any changed circumstances that give rise to the need for a conference, explain how a conference would contribute to the pretrial case development process, and propose an agenda.

If counsel for all parties agree on the proposed changes, they should consider submitting a stipulation, accompanied by a written explanation of the new circumstances, and the reasons that support the proposed new terms of the pretrial order. This approach is most promising when the stipulated changes do not jeopardize the dates that the court feels are most critical to docket control, especially the dates for trial and the final pretrial conference. If counsel propose new critical dates or deadlines, full and persuasive rationale should be presented to the court. It would be unwise for counsel to act inconsistently with the governing pretrial order until formal court approval is secured for the changes.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesScheduling Conferences

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3-27 Federal Litigation Guide § 27.55

§ 27.55 Attendance Requirements at Interim Pretrial Conferences

At a minimum, every unrepresented party and at least one attorney for each represented party must participate in every interim pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means in order to consider possible settlement of the dispute. n1

At least one of the participating attorneys for each represented party must have authority to enter stipulations and make admissions with respect to any matter that he or she should reasonably anticipate may be discussed at the conference. n2 Courts may impose a broad range of sanctions if no appearance is made on behalf of a party at an interim pretrial conference. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesScheduling Conferences

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 16(c)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 16(c).*

(n3)Footnote 3. *Fed. R. Civ. P. 16(f)*; *see § 27.82[2]* (types of available sanctions).

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CHAPTER 27 The Pretrial Conference
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3-27 Federal Litigation Guide § 27.56

§ 27.56 Subjects for Consideration at Interim Pretrial Conferences

[1] Listing of Rule 16(c) Interim Pretrial Conference Topics

Rule 16(c) provides that the following matters may be considered and acted on at any pretrial conference: n1

- The formulation and simplification of the issues, including the elimination of frivolous claims and defenses
- The necessity or desirability of amendments to the pleadings
- The possibility of obtaining admissions of fact and of documents to avoid unnecessary proof, stipulations as to the authenticity of documents, and advance rulings on evidence admissibility
- The avoidance of unnecessary proof and cumulative evidence, and any limitations or restrictions on the use of expert testimony under *Fed. R. Evid. 702*
- The appropriateness and timing of summary adjudication n2
- The control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to Rule 26 and Rules 29 through 37
- The identification of witnesses and documents
- The need and schedule for filing and exchanging pretrial briefs
- The date or dates for further conferences and for trial
- The advisability of referring some or all of the case to a magistrate judge or special master
- Settlement, and the use of any authorized ADR methods

- The form and substance of the pretrial order
- The disposition of pending motions
- The need for adopting special procedures for managing potentially difficult or protracted actions involving complex issues, multiple parties, difficulty legal questions, or unusual proof problems
- An order for separate trial pursuant to Rule 42(b) with respect to a claim, counterclaim, cross-claim, or third party claim, or with respect to any particular issue in the case
- An order directing a party or parties to present certain evidence early in the trial with respect to a manageable issue that could, on the evidence, be the basis for judgment as a matter of law under Rule 50(a), or a judgment on partial findings under Rule 52(c)
- An order setting a reasonable limit on the time allowed for presenting evidence
- Any other matters that might facilitate the just, speedy, and inexpensive disposition of the action

[2] Developments Specific to Case Dictate Subjects Considered at Interim Pretrial Conference

Rule 16(c) broadly describes the topics that may be addressed at the interim pretrial conferences over the course of the litigation. n2 Some of the listed items, such as the identification of the disputed legal and factual issues, and the control and scheduling of disclosures and discovery, are likely to receive considerable attention at the beginning and interim stages of the pretrial period. Other items, such as reviewing remaining claims and defenses, are more likely to be considered at the final pretrial conference. n3 Ordinarily, the developments specific to an individual case dictate which subjects are actually considered. The court, counsel, and unrepresented parties may suggest agenda items for these conferences.

[3] Consult Local Rules and Individual Judge's Rules

Local rules should be consulted regarding any interim pretrial conference topics not enumerated in Rule 16(c). More commonly, individual judges' rules set forth additional interim pretrial conference topics.

[4] Use of Court-Appointed Experts

A judge may consider and propose the use of a court-appointed expert at a scheduling or interim pretrial conference. n4 A court-appointed expert may help provide an early foundation for stipulations, reduce the scope of discovery, facilitate early settlement, reduce the adversarial nature of the proceedings and conflicts between the parties' experts, and potentially identify, clarify, and narrow the disputed issues.

A judge contemplating the appointment of a court-appointed expert must issue an order to show cause why expert witnesses should not be appointed. n5 The judge may solicit nominations for the appointment from the parties; n6 when one of the primary purposes of an appointment is to encourage an early settlement, the appointment of an expert who enjoys the confidence of all of the parties may be particularly beneficial. The court may consider specifying a date by which the expert must complete the investigation and file a report.

This procedure is rarely used, but could be an effective tool to propose, particularly if the proponent is confident regarding an appropriate issue.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial OrdersEvidenceTestimonyExpertsAdmissibilityEvidenceTestimonyExpertsCourt-Appointed ExpertsProcedures

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 16(c)(2).*

(n2)Footnote 2. *See In re New Motor Vehicles Canadian Exp. Antitrust Litig., 229 F.R.D. 35, 40 (D. Me. 2005)* .

(n3)Footnote 2. *See* [1], *above*.

(n4)Footnote 3. *See § 27.72* (final pretrial conference agenda).

(n5)Footnote 4. *See Fed. R. Evid. 706*.

(n6)Footnote 5. *Fed. R. Evid. 706*.

(n7)Footnote 6. *See Fed. R. Evid. 706*.

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3-27 Federal Litigation Guide § 27.57

§ 27.57 Interim Pretrial Conference Orders

[1] Court May Enter Interim Pretrial Conference Order

After any pretrial conference held pursuant to Rule 16, the court should issue "an order reciting the action taken". n1 The Supreme Court has ruled that the word"shall" in this sentence *authorizes*, but does not *compel*, judicial action. n2

Counsel should consult the local rules, as well as the individual judge's rules, to determine whether pretrial conference orders are required, and if so, whether it is counsel's responsibility to draft a proposed order. Even if a pretrial conference order is not required, counsel should nevertheless consider requesting the opportunity to present a proposed order, or at least a memorandum summarizing the results of the conference. An order (or memorandum) stating the decisions and stipulations made at the pretrial conference assists the parties in keeping track of the litigation; reduces the risk of confusion, friction between parties, inefficiency, and unfairness; and provides a record for appellate review. Additionally, in the course of preparing a writing, the judge or counsel may identify additional matters that should be addressed.

[2] Seeking Modification of Interim Pretrial Conference Order

An interim pretrial conference order controls the subsequent course of the action, unless modified by a subsequent order. n3 Rule 16 does not identify the standard that the court should apply in determining whether to modify an interim pretrial conference order. The absence of an articulated standard of review does not necessarily mean thatmotions to modify interim pretrial conference orders should be freely granted. Rather, judges should generally apply a standard that is essentially mid-way between *freely given* and *to prevent manifest injustice*. n4

Counsel should review the interim pretrial conference order deadlines, and inform the court at the earliest possible moment if problems arise in complying with the order. A showing of good cause ordinarily requires that counsel establish an inability to meet the scheduled deadlines despite exercising due diligence. n5 Accordingly, counsel should describe with specificity the actions that have been taken to comply with the order. Counsel should also propose a new schedule that contemplates getting the case trial-ready as quickly as possible under the changed circumstances. The proposed new dates should be as close to the dates originally fixed as feasible, and that fact should be pointed out in the request.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedurePretrial MattersConferencesScheduling Conferences

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 16(d).*

(n2)Footnote 2. *Gutierrez De Martinez v. Lamagno, 515 U.S. 417, 433 n.9, 115 S. Ct. 2227, 132 L. Ed. 2d 375 (1995) .*

(n3)Footnote 3. *Fed. R. Civ. P. 16(d).*

(n4)Footnote 4. *See Fed. R. Civ. P. 16* Committee Note (1993).

(n5)Footnote 5. *See Doe v. Hawaii Dep't of Educ., 351 F. Supp. 2d 998, 1007 (D. Hawaii 2004) .*

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CHAPTER 27 The Pretrial Conference
E. Attending Interim Pretrial Conferences and Settlement Conferences

3-27 Federal Litigation Guide § 27.58

§ 27.58 Settlement Conferences

[1] Settlement Conferences Discretionary Unless Mandated by Local Rule

Although settlement may be discussed at every pretrial conference, n1 courts may hold conferences specifically for the purpose of discussing and encouraging settlement. n2

Counsel should consult the local rules, as well as the individual judge's rules, to determine whether settlement conferences are mandatory or discretionary, and whether counsel may initiate a request for a settlement conference.

[2] Settlement Cannot Be Coerced

The law encourages pretrial settlement discussions, and favors the voluntary settlement of civil suits. n3

The presiding judicial officer has considerable discretion in determining the applicable procedure for a settlement conference. However, the officer may not coerce a settlement or impose sanctions if the parties do not settle the case when the officer deems a settlement appropriate. n4

[3] Referring Settlement Conference to Magistrate Judge or Special Master

Settlement conferences may be hosted by district court judges, magistrate judges, or other neutral mediators. Few district court judges conduct settlement conferences in their own cases, particularly in nonjury cases. Rather, judges typically refer the settlement conference to a magistrate judge, special master, or other neutral mediator. n5

However, there are district judges who are willing to involve themselves in settlement, which can pose a sensitive issue for counsel. When the district judge volunteers involvement in settlement discussions, and seeks the consent of all parties to that involvement, a dilemma is presented, particularly in nonjury cases. Counsel should make every possible effort to find others who have participated in settlement conferences with the assigned judge, in an effort to gain as much insight as possible into the judge's settlement approach. Counsel must determine whether settlement is so much in the client's interest that it is worth the risk of frank discussions with the court. In some instances, the opportunity to make the court aware of all surrounding facts, whether developed in discovery or otherwise, in a confidential setting, presents an opportunity that is otherwise not available. Because the consequences of agreeing to the court's involvement can be substantial, client participation in the decision is extremely important.

[4] Benefits of Settlement Conference; Strategy Considerations

Settlement conferences may be beneficial to the litigants even if an early settlement is not achieved. The advantages of settlement conferences include the following:

- Assisting the parties in understanding the factual and legal issues in the case, including identifying strengths and weaknesses of their own positions
- Highlighting remaining disclosure, discovery, or motion practice needed to position the case for settlement or trial
- Providing an opportunity for extended dialogue across party lines regarding the pertinent evidence and law
- Offering the litigants an opportunity to present the equities of their case to a representative of the court system

Counsel should determine the manner in which the settlement conference is conducted, whether the conference is joint or separate, the expected degree of client participation, and the need for filing a settlement conference statement at or prior to the conference. n6 If counsel agree that a settlement conference would be most productive if structured in a specific manner, counsel should suggest that structure or format to the presiding judicial officer, preferably in a joint writing submitted prior to the scheduled conference. Focusing on settlement, even when ultimately unsuccessful, frequently enables counsel to identify the principal obstacles to settlement, and to tailor a discovery or motion plan that attacks those obstacles.

[5] Preparing and Filing Settlement Conference Statement

Settlement conference statements, if required at all, ordinarily outline the facts ofthe case, the contentions of the parties, and the damages. Counsel should consult the individual judge's rules to determine whether settlement conference statements must be filed.

[6] CHECKLIST: Preparing for Settlement Conference

A settlement conference requires extensive preparation, mostly with the client, irrespective of whether the client will be present at the conference. Every effort should be made to determine the attitude and methods of the judge, magistrate judge, or other neutral presiding. The client's goals, as well as minimums, should be explored and tested. Damage theories should be fully rationalized. Damage calculations should be made and tested, and proof of damages should be organized. If the client is to be present, prepared the client for questions that may be put to him or her directly. Decide in advance what will and will not be said about the underlying facts. Warn the client that the neutral may find it useful to emphasize the problems with the client's case, so that the client will not react inappropriately or unproductively.

Anticipate to the extent possible the adversary's settlement approach. Prepare to use the neutral as a testing ground for the facts, theories, and damage calculations and proof.

The following checklist should be consulted as well:

☐ Ascertain applicable procedure for settlement conference, including whether client needs to attend or remain available for consultation by telephone.

☐ If required, prepare settlement conference statement prior to conference, which should clearly

state any conditions applicable to offer or demand for settlement, such as nondisclosure requirement.

☐ Determine whether any conference obligations must be met prior to settlement conference.

☐ Explore settlement possibilities with client, including ramifications of settlement.

☐ Review contentions, summaries of proposed testimony, and settlement demands with client.

☐ Ascertain whether counsel should confer with co-parties, regarding any conflicting contentions and overall settlement.

☐ Prepare to candidly respond to settlement inquiries by court, avoiding any representations that contradict client's expectations and counsel's own settlement authority.

☐ Consider requesting court annexed or private ADR.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesScheduling Conferences

FOOTNOTES:
(n1)Footnote 1. *See § 27.56* (subjects for consideration at interim pretrial conferences).

(n2)Footnote 2. *Fed. R. Civ. P. 16(c).*

(n3)Footnote 3. *ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988, 997 (2d Cir. 1983)* .

(n4)Footnote 4. *See Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985)* .

(n5)Footnote 5. *See §§ 27.02* (referring case to magistrate judge), 27.03 (appointing special master).

(n6)Footnote 6. *See* [5], *below* (preparing and filing settlement conference statement).

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CHAPTER 27 The Pretrial Conference
E. Attending Interim Pretrial Conferences and Settlement Conferences

3-27 Federal Litigation Guide §§ 27.59 through 27.69

[Reserved]

§§ 27.59[Reserved]

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CHAPTER 27 The Pretrial Conference
F. Attending Final Pretrial Conference; Preparing Final Pretrial Order

3-27 Federal Litigation Guide § 27.70

§ 27.70 Definition of *Final Pretrial Conference*

Final pretrial conference is a the term used by Rule 16(c) to describe the conference between counsel, unrepresented parties, and the judge, at which a trial plan is formulated.

Typically, the final pretrial conference is chronologically the last conference in the case. However, subsequent conferences may be conducted to discuss such matters as last minute settlement possibilities, or trial adjournments.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesFinal Pretrial Conferences

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CHAPTER 27 The Pretrial Conference
F. Attending Final Pretrial Conference; Preparing Final Pretrial Order

3-27 Federal Litigation Guide § 27.71

§ 27.71 Final Pretrial Conference Discretionary Unless Mandated by Local Rule

Judges have discretion to determine whether to hold a final pretrial conference, and what to include on the agenda. n1 As a practical matter, most federal judges conduct final pretrial conferences in most mainstream civil cases. Counsel should consult the local rules, and more importantly, the individual judge's rules, to determine whether final pretrial conferences are required, and if so, to ascertain the agenda and procedures that will be followed at the conference. Even if not required by the assigned judge, counsel should consider requesting a final pretrial conference for the purpose of streamlining the trial.

If a final pretrial conference is required, it should be held as close to the time of trial as is reasonable under the circumstances of the case. n2 The time between any final pretrial conference and the trial should be as short as possible to avoid the inefficiency involved in having the preparations repeated because of a delay between the last conference and trial.

The section should be read in conjunction with § 27.74, dealing with final pretrial orders.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesFinal Pretrial Conferences

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 16(e).*

(n2)Footnote 2. *See Fed. R. Civ. P. 16(e).*

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CHAPTER 27 The Pretrial Conference
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3-27 Federal Litigation Guide § 27.72

§ 27.72 Final Pretrial Conference Agenda

[1] Formulating Trial Plan

The primary purpose of a final pretrial conference is to formulate a specific plan for the trial of the action, including a program for facilitating the admission of evidence. n1 A detailed trial plan might specify the following matters:

- The juncture at which opening statements will be made (a defendant may elect to give some or all of its opening statement after the plaintiff has presented itscase in chief), and the time allotted for the opening statements
- The order in which each witness will testify (except those called solely for impeachment or rebuttal) or each deposition excerpt will be read, and the time allotted for each direct and cross-examination
- The sequence in which documentary and other exhibits will be introduced, and identification of the witnesses who will sponsor the exhibits
- When any demonstrations will be performed or site visits made
- The junctures, if any, at which interim summarizations or arguments may be presented by counsel
- The order in which closing arguments will be presented, and the time allotted for each

[2] Other Appropriate Final Pretrial Conference Topics

[2.--1] Substantive Issues

Although the primary purpose of a final pretrial conference is to formulate a specific plan for the trial of the action, n2 counsel should consult the local rules and the individual judge's rules for any specific final pretrial conference agenda requirements. Rule 16(c) broadly describes virtually all topics that courts might address over the full range of pretrial conferences, from the scheduling conference to the final pretrial conference. n3 Some of the listed topics, such as the control and scheduling of disclosures and discovery, are likely to receive considerable attention in the beginning and interim stages of the pretrial period. Other topics, such as reviewing remaining claims and defenses, are more likely to

be considered at the final pretrial conference than at an initial or interim conference.

Counsel might expect the following topics to be discussed at the final pretrial conference:

- Remaining or renewed prospects for settlement
- Remaining claims and defenses, to ensure that the parties agree as to the nature of the claims and defenses to be tried, to ascertain whether any pleadings require amendment, and to determine whether any claims or defenses can be eliminated voluntarily or by order
- Summary judgment possibilities
- Bifurcation of trial issues, such as liability and damages, or sequencing the trial of a particular claim or defense, a related cluster of claims or defenses, or a specific issue or set of issues
- The resolution of any remaining discovery or disclosure disputes, and if appropriate, the need for any orders mandating the prompt completion of any unfinished but clearly necessary discovery activity
- Identifying any factual, evidentiary, and procedural matters that can be resolved by stipulation (particularly regarding foundational evidentiary issues) or additional admissions
- Rulings on the admissibility of evidence and motions in limine
- Identification and marking of proffered documents and other exhibits
- Remaining disputes about demonstrative evidence, visual aids, summaries, charts, or other graphics, including the submission and exchange of all proposed items
- The scope, purposes, form, and projected duration of each witness's testimony, including testimony to be read to the jury or into the record from deposition transcripts
- Any time limits imposed on the parties for particular parts of the trial or for all trial purposes
- Whether and how to present input from special masters or any court-appointed neutral experts
- For jury trials, the composition and voir dire of the jury, proposed jury instructions, as well as court policy toward jurors regarding written copies of instructions, taking and using notes, and whether and how jurors may ask questions
- For nonjury trials, any disputes regarding proposed findings of fact and conclusions of law submitted to the court
- Resolving any disputes regarding verdict forms and previously submitted special interrogatories

[2.--2] Logistical Matters

If a final pretrial conference is held, counsel and the court should review logistical matters, such as the following:

- The dates and times for trial

- The hours each day that the court will keep the trial in session, including lunch breaks
- Whether the trial will be interrupted because of other court responsibilities, such as a motion calendar
- Any arrangements for special equipment or facilities, such as video-monitors, slide projectors, displays for large graphics, or equipment and space for demonstrations
- Security for sensitive trial materials and access to the courtroom when trial is not in session
- Arrangements for expedited transcripts
- Arrangements for interpreters

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesFinal Pretrial Conferences

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 16(e).*

(n2)Footnote 2. *Fed. R. Civ. P. 16(e)*; *see* [1], *above*.

(n3)Footnote 3. *See Fed. R. Civ. P. 16(c) see § 27.56[1]* (listing of Rule 16(c) interim pretrial conference topics).

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CHAPTER 27 The Pretrial Conference
F. Attending Final Pretrial Conference; Preparing Final Pretrial Order

3-27 Federal Litigation Guide § 27.73

§ 27.73 Final Pretrial Conference Attendance Requirements

If a final pretrial conference is required, n1 it must be attended by at least one of the attorneys who will conduct the trial for each of the parties, as well as by any unrepresented party. n2 As with all pretrial conferences, at least one of the participating attorneys for each party must have authority to enter into stipulations, and to make admissions regarding all matters that might reasonably be anticipated to be discussed. n3

Additional attendance requirements may be imposed by local rules, or by the individual judge's rules.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesFinal Pretrial Conferences

FOOTNOTES:
(n1)Footnote 1. *See § 27.71* (final pretrial conference discretionary unless mandated by local rule).

(n2)Footnote 2. *Fed. R. Civ. P. 16(e).*

(n3)Footnote 3. *Fed. R. Civ. P. 16(c).*

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CHAPTER 27 The Pretrial Conference
F. Attending Final Pretrial Conference; Preparing Final Pretrial Order

3-27 Federal Litigation Guide § 27.74

§ 27.74 Preparing Final Pretrial Order

[1] Final Pretrial Order Generally Required

After any Rule 16 pretrial conference, including a final pretrial conference, the court should issue "an order shall be entered reciting the action taken". n1 The Supreme Court has ruled that the word "shall" in this sentence *authorizes*, but does not *compel*, judicial action. n2

Counsel should consult the local rules, as well as the individual judge's rules, to determine whether a final pretrial conference order is required, and if so, the requirements of the order, and whether it is counsel's responsibility to draft the proposed order.

Most federal judges require a final pretrial order. Even if a final pretrial conference order is not required, counsel should nevertheless consider requesting the opportunity to present a proposed order. An order stating the decisions and stipulations made at the final pretrial conference reduces the risk of confusion, and provides a record for appellate review.

[2] Final Pretrial Order Controls Course of Case

The final pretrial order controls the subsequent course of the action, unless modified by subsequent order. n3

The critical importance of the final pretrial order cannot be overemphasized: the final pretrial order supersedes the pleadings; governs who may be called as witnesses (and possibly impeachment witnesses and rebuttal witnesses); may contain binding stipulations; and may limit the questions, evidence, exhibits, and legal theories to be presented at trial. Matters not preserved in the final pretrial order are eliminated from the case. n4 Thus, a witness not disclosed prior to the entry of the order may be precluded from testifying, n5 and documents not previously identified may not be permitted to be introduced at trial. n6

Great care is required in preparing the final pretrial order, as many, if not most, judges will insist that it be followed with precision. The trial court, but not the parties, has a certain amount of latitude to deviate from final pretrial order. n7

[3] Drafting Final Pretrial Order

The final pretrial order must recite all actions taken and rulings made at the final pretrial conference. n8 If counsel is required to prepare the order, the individual judge's rules should be consulted. For illustrative purposes, a final pretrial order should clearly state the following: n9

- Facts establishing jurisdiction and venue
- A statement of the case
- The date and time that the trial will commence
- All rulings made at the final pretrial conference
- A summary of all factual and legal issues to be tried, and any issues to be severed and tried separately
- Witnesses to be called
- Expert witnesses to be called, and a summary of their qualifications
- Exhibits to be presented at trial; identification of exhibits to be admittedwithout objection, and summary of any objections
- Discovery excerpts from stenographic and video depositions, responses to interrogatories, and requests for admission
- Undisputed facts and judicially noticed facts
- Order of proof, including procedures for presenting testimony and exhibits
- Whether additional or specified evidence is precluded
- Procedures for selection, management, and instruction of jury, including deadlines for submitting proposed voir dire questions and jury instructions
- Any objections that are sustained, denied, or deemed waived
- Status of discovery, disclosure, and motions
- Procedures for consolidation, severance, or transfer of cases
- Estimated length of trial
- Verdict stipulations
- Statement that the order may not be modified except to prevent manifest injustice

The burden is on the parties, rather than the court, to assure that the pretrial order accurately reflects their respective positions regarding the issues, legal theories, and all other included matters. Likewise, it is the parties' responsibility to make necessary revisions and later to seek amendments, if necessary, in a timely fashion. n9.1

[4] Seeking Modification of Final Pretrial Order

[4.--1] Modification Appropriate Only to Prevent Manifest Injustice

The final pretrial order may be modified only to prevent *manifest injustice*. n10 The term *manifest injustice* is not defined by Rule 16, but is clearly more stringent than the standard applicable to modification of any other pretrial order. n11

The Second Circuit approaches the issue of *manifest injustice* with relative flexibility: motions to modify final pretrial orders should be granted when the interests of justice make such a course desirable. n12

The Fifth Circuit has indicated that an amendment of a pretrial order should be permitted when no substantial injury will result to the opposing party, the refusal to allow the amendment might result in injustice to the movant, and the inconvenience to the court is slight. n13

[4.--2] Factors Typically Considered

Courts generally consider the following types of factors in determining whether the *manifest injustice* standard of Rule 16(e) for modifying a final pretrial order has been satisfied:

- Whether the moving party should have anticipated the circumstances that give rise to the need for modification
- Whether granting the modification would unfairly impair the opposing party's ability to litigate the merits of the case
- Whether the modification would impose unjustifiable expenses or disruptions on another party
- Whether the party resisting the proposed modification should have known that the movant intended to proceed in the manner proposed in the motion
- Whether the need for the modification is the result of a good faith oversight
- Prejudice to the movant if the motion were denied
- Whether the proposed changes are extensive or modest

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial Orders

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 16(d).*

(n2)Footnote 2. *Gutierrez De Martinez v. Lamagno, 515 U.S. 417, 433 n.9, 115 S. Ct. 2227, 132 L. Ed. 2d 375 (1995) .*

(n3)Footnote 3. *Fed. R. Civ. P. 16(d).*

(n4)Footnote 4. *See Youren v. Tintic Sch. Dist., 343 F.3d 1296, 1305 (10th Cir. 2003)* .

(n5)Footnote 5. *Geiserman v. MacDonald, 893 F.2d 787, 791 (5th Cir. 1990)* (if a pretrial order or local rule requires disclosure of witnesses, the court may exclude testimony by undisclosed witnesses, when party seeking to introduce evidence from those witnesses offers no justification for delay in disclosure).

(n6)Footnote 6. *See Devices for Medicine, Inc. v. Boehl, 822 F.2d 1062, 1067 (Fed. Cir. 1987)* (documents not marked and identified before trial, as required by pretrial order, were properly excluded); *see also Armstrong v. Burdette Tomlin Mem'l Hosp., 276 F. Supp. 2d 264, 277 (D.N.J. 2003)* .

(n7)Footnote 7. *HBE Leasing Corp. v. Frank, 22 F.3d 41, 45 (2d Cir. 1994)* .

(n8)Footnote 8. *Fed. R. Civ. P. 16(d).*

(n9)Footnote 9. *See, e.g.*, Manual for Complex Litigation (Third), §§ 21.67, 40.3, 41.63 (1995).

(n10)Footnote 9.1. *See Wilson v. Muckala, 303 F.3d 1207, 1215 (10th Cir. 2002)* .

(n11)Footnote 10. *Fed. R. Civ. P. 16(e).*

(n12)Footnote 11. *See Fed. R. Civ. P. 16* Committee Note (1983).

(n13)Footnote 12. *Madison Consultants v. FDIC, 710 F.2d 57, 62 n.3 (2d Cir. 1983)* .

(n14)Footnote 13. *DP Solutions, Inc. v. Rollins, Inc., 353 F.3d 421, 435 (5th Cir. 2003)* .

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CHAPTER 27 The Pretrial Conference
F. Attending Final Pretrial Conference; Preparing Final Pretrial Order

3-27 Federal Litigation Guide §§ 27.75 through 27.79

[Reserved]

§§ 27.75[Reserved]

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CHAPTER 27 The Pretrial Conference
G. Enforcing Pretrial Conference Orders and Other Pretrial Conference Obligations

3-27 Federal Litigation Guide § 27.80

§ 27.80 Imposing Sanctions for Failing to Comply With Pretrial Order or Other Pretrial Conference Obligations

[1] Failing to Attend or Substantially Prepare for Conference

Courts may impose sanctions if a party or party's attorney fails to attend a scheduled pretrial conference or to substantially prepare for the conference without sufficient excuse. n1

Sanctions may also be imposed if the lead counsel does not attend a final pretrial conference, n2 but instead sends a substantially unprepared attorney. n3

[2] Failing to Participate in Good Faith in Pretrial Conference

Courts have broad authority to sanction a party or an attorney who fails to participate in good faith in a pretrial conference. n4 Courts may also impose sanctions for failing to participate in good faith in the development and submission of a proposed discovery plan. n5

Determining fair standards for evaluating whether a party or counsel has participated in a conference in *good faith* may be difficult. Presumably, a court could find that counsel failed to participate in good faith if counsel refused to enter even the most basic of stipulations when no ground for the refusal existed, or if counsel refused to engage in any analytical discussion of claims, defenses, or evidence. n6

[3] Failing to Obey Pretrial Order

Courts may impose sanctions if a party or party's attorney fails to obey a pretrial order without sufficient excuse. n7

Pretrial orders should be enforced vigorously, and material breaches should be sanctioned. n8

In general, the imposition of sanctions under Rule 16(f) does not require a finding of bad faith or obstinate conduct. n9 A negligent failure to comply with Rule 16 can justify the imposition of sanctions under some circumstances. n10 Even an inadvertent failure to comply may justify the imposition of sanctions when the conduct results in prejudice. n11

However, the Fifth Circuit requires a clear record of delay or contumacious conduct to impose sanctions. n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMisconductCivil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesSanctionsLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 16(f)(1)*; *see also O. Ahlborg & Sons, Inc. v. United States, 233 F.R.D. 224, 226 (D. Mass. 2005)* .

(n2)Footnote 2. *See § 27.73* (final pretrial conference attendance requirements).

(n3)Footnote 3. *See Ha-Lo Indus. v. Your Favorite Producers, Inc., 164 F.R.D. 233, 234 (N.D. Ill. 1995)* .

(n4)Footnote 4. *Fed. R. Civ. P. 16(f)(1)*.

(n5)Footnote 5. *Fed. R. Civ. P. 26(f)*; *Fed. R. Civ. P. 37(g)*.

(n6)Footnote 6. *See Salahuddin v. Harris, 782 F.2d 1127, 1133 (2d Cir. 1986)* .

(n7)Footnote 7. *Fed. R. Civ. P. 16(f)(1)*.

(n8)Footnote 8. *See Harding v. Federal Reserve Bank, 707 F.2d 46, 52 (2d Cir. 1983)* .

(n9)Footnote 9. *Ayers v. City of Richmond, 895 F.2d 1267, 1270 (9th Cir. 1990)* .

(n10)Footnote 10. *O. Ahlborg & Sons, Inc. v. United States, 233 F.R.D. 224, 226 (D. Mass. 2005)* .

(n11)Footnote 11. *See e.g., Tracinda Corp. v. DaimlerChrysler AG, 502 F.3d 212, 242 (3d Cir. 2007)*.

(n12)Footnote 12. *See S.E.C. v. First Houston Capital Res. Fund, Inc., 979 F.2d 380, 382 (5th Cir. 1992)* .

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CHAPTER 27 The Pretrial Conference
G. Enforcing Pretrial Conference Orders and Other Pretrial Conference Obligations

3-27 Federal Litigation Guide § 27.81

§ 27.81 Sanctions May Be Imposed Upon Motion or Sua Sponte

Sanctions for failing to comply with a pretrial order or other pretrial conference obligation may be imposed upon motion or the judge's own initiative. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesSanctions

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 16(f)(1).*

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CHAPTER 27 The Pretrial Conference
G. Enforcing Pretrial Conference Orders and Other Pretrial Conference Obligations

3-27 Federal Litigation Guide § 27.82

§ 27.82 Court Determines Appropriate Sanction

[1] Selection of Sanction Discretionary

The court has discretion to impose whichever sanction it deems appropriate under the circumstances of the particular case. n1

In exercising its discretion, the court will typically examine the following factors:

- The nature and consequences of the violation
- The extent and nature of the alleged violation, and its effect on the other parties and the administration of justice
- The mental state or degree of culpable behavior: willfulness, recklessness, negligence, or bad faith is not required, but may affect the severity of the sanction
- Who is responsible for the violation: counsel, party, or both
- Whether the violation resulted from forces beyond the party's control
- Whether the violation is an isolated incident, or part of a pattern of conduct

To ensure an adequate record for appellate review, counsel should request that the court memorialize its findings and reasons on the record, or in a written order.

[2] Types of Available Sanctions

The range of sanctions available for failing to comply with a pretrial order or other pretrial conference obligation is extremely broad, and includes:

- Reprimand

- Imposition of costs, including attorney's fees, caused by the violation
- Excluding evidence or a claim or defense
- Striking pleadings or parts of pleadings
- Granting or denying additional time for discovery
- Continuing or staying the proceedings
- Contempt
- Dismissing a claim or the action n2
- Entering a default judgment

The imposition of *monetary* sanctions under Rule 16(f)(2) does not require a showing of prejudice in order to justify the sanctions. n3 In the absence of prejudice, however, courts may decline to impose sanctions that preclude a party from presenting evidence or that otherwise would compromise a party's ability to litigate the merits of an action. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesSanctionsLegal EthicsSanctionsReprimands

FOOTNOTES:
(n1)Footnote 1. *See Sieck v. Russo, 869 F.2d 131, 134 (2d Cir. 1989)* .

(n2)Footnote 2. *See Gripe v. City of Enid, 312 F.3d 1184, 1188-1189 (10th Cir. 2002)* .

(n3)Footnote 3. *See Fed. R. Civ. P. 16(f)(2)*; *John v. Louisiana, 899 F.2d 1441, 1448-1449 (5th Cir. 1990)* .

(n4)Footnote 4. *7-Eleven, Inc. v. McEvoy, 300 F. Supp. 2d 352, 365 (D. Md. 2004)* .

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CHAPTER 27 The Pretrial Conference
G. Enforcing Pretrial Conference Orders and Other Pretrial Conference Obligations

3-27 Federal Litigation Guide §§ 27.83 through 27.99

[Reserved]

§§ 27.83[Reserved]

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CHAPTER 27 The Pretrial Conference
H. Forms

3-27 Federal Litigation Guide § 27.100

§ 27.100 Proposed Discovery Plan

[1] FORM

Proposed Discovery Plan

[*Insert caption of action and title of document pursuant to local rule requirements*]

1. Description of Case:

(a) Plaintiff's claims are as follows: [*describe plaintiff's claims*]

(b) Defendant's defenses are as follows: [*describe defendant's defenses*]

2. Counsel:

The name, address and telephone numbers of counsel for the plaintiff is as follows:

The name, address and telephone numbers of counsel for the defendant is as follows:

3. Disclosures:

[*Include if applicable*] The parties request the following changes in the Rule 26(a) disclosure requirements:

Disclosures as required by *Federal Rules of Civil Procedure, Rule 26(a)* [*were/will be*] made on [*date*].

4. Discovery:

The following are subjects on which discovery may be needed: [*list subjects*]

Discovery should be completed by [*date*].

[*use the following as appropriate:*]

Discovery should be conducted in phases because: [*insert reasons*]

Discovery should be limited as follows: [*insert limitations*]

The following modifications should be made to the limitations imposed on discovery by the Federal Rules [*or local rules*]: [*insert modifications*]

Discovery on [*list issues for early discovery*] to be completed by [*date*].

Disclosure or discovery of electronically stored information should be handled as follows: [*brief description of parties' proposals*]

Parties have agreed to an order regarding claims of privilege or of protection as trial-preparation material asserted after production, as follows: [*brief description of provisions of proposed order*]

The following protective orders should be issued: [*list protective orders sought*]

[*continue with the following:*]

5. Settlement Potential:

(a) Counsel for the parties have met in person on [*date*], and participated in settlement discussions as required by *Federal Rules of Civil Procedure, Rule 26(f)* [*and any applicable local rule*].

(b) All parties were promptly informed of all offers of settlement, and, following discussion by all counsel, it appears that there is now [*choose one of the following: a possibility of settlement before discovery, a possibility of settlement after discovery, a possibility of settlement but a conference with the judge is needed, no possibility of settlement*]

(c) Counsel [*do/do not*] intend to hold additional settlement conferences among themselves prior to the close of discovery. *[The proposed date of the next settlement conference is [date].]*

(d) The following specific problems have created a hindrance to settlement of this case: [*specify problems hindering settlement*].

Date: [*insert date*]

PLAINTIFF:

By: [*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local*

rules]

DEFENDANT:

By: [*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local rules*]

[2] Use of Form

This is a form of proposed discovery plan which the parties are required to develop at the initial meeting of parties. n1

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 26(f)*; *see also §§ 27.10*, *27.11*.

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CHAPTER 27 The Pretrial Conference
H. Forms

3-27 Federal Litigation Guide § 27.101

§ 27.101 Report of Parties' Planning Conference

[1] FORM

Report of Parties' Planning Meeting

[*Insert caption of action and title of document pursuant to local rule requirements*]

Date Complaint Filed: [*insert date*]

Date Complaint Served: [*insert date*]

Date of Defendant's Appearance: [*insert date*]

Pursuant to *Fed. R. Civ. P. 16(b), 26(f)* and Local Civil Rule [*insert appropriatelocal rule reference, if any*] a conference was held on [*insert date*] [*date*]. The participants were: [*list participating parties and counsel*]

I. Certification

Undersigned counsel certify that, after consultation with their clients, they have discussed the nature and basis of the parties' claims and defenses and any possibilities for achieving a prompt settlement or other resolution of the case and, in consultation with their clients, have developed the following proposed case management plan. Counsel further certify that they have forwarded a copy to this report to their clients.

II. Jurisdiction

A. Subject Matter Jurisdiction: [*Provide a statement of the basis for subject matter jurisdiction with appropriate statutory citations. If plaintiff's allegation of subject matter jurisdiction is denied, specify the basis for the denial.*]

B. Personal Jurisdiction: [*State whether personal jurisdiction is contested and, if it is, summarize the parties' competing positions.*]

III. Brief Description of Case: [*Briefly summarize the claims and defenses of all parties and describe the relief*

sought.]

A. Claims of Plaintiff/s: [*describe plaintiff's claims*]

B. Defenses and Claims (Counterclaims, Third Party Claims, Cross Claims) of Defendant/s: [*describe defenses and any counterclaims, thirty party claims, or cross claims*]

C. Defenses and Claims of Third Party Defendant/s: [*insert description*]

IV. Statement of Undisputed Facts:

Counsel certify that they have made a good faith attempt to determine whether there are any material facts that are not in dispute. The parties state that the following material facts are undisputed: [*list undisputed material facts*]

V. Case Management Plan:

A. Scheduling Conference with the Court

The parties [*request/do not request*] a pretrial conference with the Court before entry of a scheduling order pursuant to *Fed. R. Civ. P. 16(b)*. The parties prefer a conference [*in person/by telephone*].

B. Early Settlement Conference

1. The parties certify that they have considered the desirability ofattempting to settle the case before undertaking significant discovery or motion practice. Settlement [*is likely/is unlikely at this time/may be enhanced by use of the following procedure*]: [*describe procedure (i.e., meeting with court appointed neutral*]

2. The parties [*request/do not request*] an early settlement conference.

3. The parties prefer a settlement conference with [*the presiding judge/a magistrate judge/a parajudicial officer/ a special master*].

4. The parties [*request/do not request*] a referral for alternative dispute resolution pursuant to Local Rule [*insert appropriate local rule number*].

C. Joinder of Parties and Amendment of Pleadings

1. Plaintiff(s) should be allowed until [*date*] to file motions to join additional parties and until [*date*] to file motions to amend the pleadings.

2. Defendant(s) should be allowed until [*date*] to file motions to join additional parties and until [*date*] to file a response to the complaint.

D. Discovery

1. The parties anticipate that discovery will be needed on the following subjects: [*list each of the principal issues of fact on which discovery will be needed*].

2. All discovery, including depositions of expert witnesses pursuant to *Fed. R. Civ. P.*

26(b)(4), will be commenced by [*date*] and completed by [*date*]

3. Discovery [*will/will not*] be conducted in phases.

4. Discovery on [*issues for early discovery*] will be completed by [*date*].

5. The parties anticipate that the plaintiff(s) will require a total of [*insert number*] depositions of fact witnesses and that the defendant(s) will require a total of [*insert number*] depositions of fact witnesses. The depositions will commence by [*date*] and be completed by [*date*].

6. The parties [*will/will not*] request permission to serve more than 25 interrogatories.

7. Plaintiff/s [*intend/do not intend*] to call expert witnesses at trial. Plaintiff/s will designate all trial experts and provide opposing counsel with reports from retained experts pursuant to *Fed. R. Civ. P. 26(a)(2)* by [*date*]. Depositions of any such experts will be completed by [*date*].

8. Defendant/s [*intend/do not intend*] to call expert witnesses at trial. Defendant/s will designate all trial experts and provide opposing counsel with reports from retained experts pursuant to *Fed. R. Civ. P. 26(a)(2)* by [*date*]. Depositions of such experts will be completed by [*date*].

9. A damages analysis will be provided by any party who has a claim or counterclaim for damages by [*date*].

10. Disclosure or discovery of electronically stored information should be handled as follows: [*brief description of parties' proposals*]

11. Parties have agreed to an order regarding claims of privilege or of protection as trial-preparation material asserted after production, as follows: [*brief description of provisions of proposed order*]

E. Dispositive Motions

Dispositive motions will be filed on or before [*date*].

VI. TRIAL READINESS

The case will be ready for trial by [*date*].

Date: [*insert date*]

PLAINTIFF:

By: [*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local rules*]

DEFENDANT:

By: [*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

[*Attorney's or firm's address, telephone number, and any other identifying information required by local rules*]

[2] Use of Form

This is a sample form of report of the parties' Rule 26(f) planning conference.

Pursuant to Rule 26(f), counsel must confer at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b) to accomplish the following: n1

- Discuss the nature and basis of their claims and defenses
- Discuss the possibilities for a prompt settlement or other resolution of the case
- Make or arrange for the required initial disclosures.
- Develop a proposed discovery plan

Within 14 days after the Rule 26(f) conference, the parties must submit to the court a written report outlining the discovery plan. n2

A discovery plan must state the parties' views and proposals on: n3

- 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;
- 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;
- Any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;
- 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;
- 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
- Any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

For complete discussion of the parties' initial planning meeting, see *§§ 27.10* and *27.11*.

[3] Disagreement of Parties

If the parties cannot agree on deadlines to be included in the form, they should propose their own deadlines to the court in separate paragraphs or subparagraphs, as necessary.

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(f).*

(n2)Footnote 2. *Fed. R. Civ. P. 26(f).*

(n3)Footnote 3. *Fed. R. Civ. P. 26(f)(3).*

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CHAPTER 28 Consolidation and Separate Trials *

3-28 Federal Litigation Guide 28.syn

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§ 28.28 Seeking Appellate Review

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§ 28.101 Notice of Motion for Separate Trial
[2] Use of Form
[3] Time for Seeking Separate Trials
[4] Grounds for Ordering Separate Trials

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CHAPTER 28 Consolidation and Separate Trials *

3-28 Federal Litigation Guide Scope

Scope

SCOPE

This chapter discusses consolidation and separate trials under Rule 42. The decision to make a motion for consolidation or separate trials may arise in all kinds of civil litigation. Consolidation and separate trials each promote convenience and efficiency and provide potential tactical advantages in the isolation or combination of proof. This chapter discusses the legal prerequisites for consolidating or separating trials, as well as strategic decisions that must be made before moving the court for such orders.

The chapter first deals with the consolidation of all or some issues in two or more actions involving common questions. Then it treats the procedure for holding separate trials of claims or issues within a lawsuit.

Consolidation may be sought by the parties or ordered by the court on its own motion to join two or more actions that involve common questions of law or fact. This chapter demonstrates how consolidation can reduce the cost of litigation by coordinating discovery, hearings, or trial and eliminating duplicated effort. It also discusses the strategic reasons for consolidation, such as to take advantage of the strengths of a related case or of another party. In addition, the chapter examines the impact on a case of the appointment of lead counsel. This chapter reviews the factors which should be considered by the court and counsel in dealing with the issue of consolidation and provides checklists for making a motion to consolidate and opposing a motion to consolidate. The chapter discusses the court's broad power of discretion whether to consolidate, and how consolidation orders generally are not subject to immediate appeal.

Separate trials may be requested by the parties or ordered by the court on its own motion if separate trials will promote convenience, avoid prejudice, expedite the matter, or achieve economy. This chapter demonstrates how separate trials can be used to avoid prejudice, and how separate trials can streamline an action by isolating dispositive issues for expedited discovery or trial. Separation of trials under Rule 42 is most frequently used to separate issues of liability and damages. The chapter distinguishes separation of trials from Rule 21 severance, which results in separate cases. The chapter also has a checklist for making a motion for separate trials and a checklist for opposing a motion for separate trials. The chapter also discusses the limitations for appealing Rule 42 orders.

The chapter sets forth sample forms for a motion to consolidate and a motion for separate trials, as well as comments for use of the forms.

For expanded coverage of consolidation and separate trials, ***see*** MOORE'S Federal Practice, Ch. 42, ***Consolidation; Separate Trials*** (Matthew Bender 3d ed.).

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CHAPTER 28 Consolidation and Separate Trials *
A Consolidation

3-28 Federal Litigation Guide § 28.01

§ 28.01 Understanding Consolidation

[1] Defining Consolidation

When two or more cases pending before the court share a common question of law or fact, the court may order "consolidation," that is, order the cases to be combined for joint or shared pretrial or trial on any or all of the issues. The explicit purpose of consolidation is to avoid unnecessary costs or delay. n1

[2] Insuring That Cases Are "Pending Before the Court"

Rule 42(a) requires that cases may be consolidated only if they are "pending before the court." n2 A court may acquire such power through routine assignment or transfer. n3

[3] Ascertaining That Cases Are Related

The threshold determination for consolidation of all or part of cases pending before a court is that the cases share a common question of law or fact. n4

Common questions of law and fact do not have to predominate. All that is required is that the district court find they exist and that consolidation will prove beneficial. n5

[4] Limiting Consolidation

To minimize prejudice and confusion, the trial court's consolidation order will often stop short of full consolidation for all purposes including trial. Full consolidation is generally granted only under compelling circumstances and when attempts to seek other, more conventional, avenues of relief have been exhausted. Courts are more likely to order the following: n6

- Consolidation of some but not all common questions of law or fact.
- Joint or shared discovery.
- Preparation of consolidated pleadings or papers.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedurePretrial MattersConsolidation of Actions

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 42(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 42(a).*

(n3)Footnote 3. *See In re Air Crash Disaster at Detroit Metro. Airport, 737 F. Supp. 391, 392-393 (E.D. Mich. 1989)* ; For a discussion on transfer of cases for purposes of consolidation, *see § 28.06.*

(n4)Footnote 4. *Fed. R. Civ. P. 42(a)*; *Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 292, 12 S. Ct. 909, 36 L. Ed. 706 (1892)* .

(n5)Footnote 5. *See Saudi Basic Indus. Corp. v. ExxonMobil Corp., 194 F. Supp. 2d 378, 416 (D.N.J. 2002)* (citing **Moore's**); *see also Hanes Cos. v. Ronson, 712 F. Supp. 1223, 1230 (M.D.N.C. 1988)* .

(n6)Footnote 6. *See Katz v. Realty Equities Corp., 521 F.2d 1354, 1358-1359 (2d Cir. 1975)* .

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CHAPTER 28 Consolidation and Separate Trials *
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3-28 Federal Litigation Guide § 28.02

§ 28.02 Evaluating Factors that Favor Consolidation

[1] Promoting Interests of Justice

Courts have been most likely to approve consolidation when they find that it serves the interests of justice. Courts have employed a balancing test to determine whether consolidation serves the interests of justice. In weighing the interests of convenience and economy against an ultimate goal of fairness and impartiality at trial, as well as individual justice, courts have found fairness must be paramount. n1

[2] Avoiding Unnecessary Costs or Delay

An explicit purpose of consolidating cases or issues is to avoid unnecessary costs or delay resulting from multiple lawsuits and trials. n2

The savings of time and expense, however, must outweigh the risks of unfairness, prejudice, and confusion resulting from consolidation. n3

[3] Avoiding Inconsistent Results

One of the primary objectives of consolidation is to prevent separate actions from producing conflicting and inconsistent results. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedurePretrial MattersConsolidation of Actions

FOOTNOTES:
(n1)Footnote 1. *Johnson v. Celotex Corp., 899 F.2d 1281, 1285 (2d Cir. 1990)* , *cert. denied*, *498 U.S. 920 (1990)* .

(n2)Footnote 2. *Fed. R. Civ. P. 42(a)*; *Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 292, 12 S. Ct. 909, 36 L. Ed. 706 (1892)* (landmark Supreme Court consolidation case involving dispute over life insurance policies).

(n3)Footnote 3. *See Malcolm v. National Gypsum Co., 995 F.2d 346, 350 (2d Cir. 1993)* .

(n4)Footnote 4. *See Waste Distillation Technology, Inc. v. Pan Am. Resources, Inc., 775 F. Supp. 759, 761 (D. Del. 1991)* .

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3-28 Federal Litigation Guide § 28.03

§ 28.03 Evaluating Factors that Disfavor Consolidation of Cases

[1] Juror Confusion

When multiple lawsuits are tried together, there is always a risk of juror confusion. n1 The risk of confusion has been found in the following circumstances:

- When consolidation produces too large a body of evidence. n2
- When the parties' situations are exceedingly diverse. n3
- When the parties' circumstances are subtly, but significantly, different. n4

Closely drafted, cautionary jury instructions and special verdict forms outlining the claims of each plaintiff and advising the jury to consider each claim individually may minimize the potential for jury confusion in consolidated cases. n5

[2] Delay

When separate trials of two actions will not involve a substantial duplication of effort, their consolidation will often delay rather than expedite resolution of the parties' claims. In such a case, delay becomes a significant factor weighing against consolidation. n6

One of the matters courts focus on when assessing delay is the state of case preparation and discovery in each action. n7 Consolidation may be denied when there is a considerable difference in trial readiness. n8

[3] Prejudice to Party

Consolidation is inappropriate when it will adversely affect the rights of the parties. n9 A party may be prejudiced when the claims or defenses particular to that party are substantially different from the other consolidated claims, and management of the consolidated case is vested in lead counsel, whose efforts are likely to focus on the interests of the majority, thereby depriving the minority of full discovery and preparation. n10

Consolidation may also be damaging to a case if it results in the disclosure of prejudicial information to the jury such

as:

- The extent of insurance coverage. n11
- The existence of other lawsuits. n12
- Offers of settlement. n13

[4] Administrative Difficulties

Consolidation is inappropriate when it results in administrative difficulties that impair the potential for a fair and impartial trial. n14

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedurePretrial MattersConsolidation of ActionsCivil ProcedurePretrial MattersSeparate Trials

FOOTNOTES:
(n1)Footnote 1. *See Johnson v. Celotex Corp., 899 F.2d 1281, 1285 (2d Cir. 1990)* , *cert. denied*, *498 U.S. 920 (1990)* ; *see also Southwest Marine, Inc. v. Triple A Mach. Shop, Inc., 720 F. Supp. 805, 807 (N.D. Cal. 1989)* .

(n2)Footnote 2. *See Molever v. Levenson, 539 F.2d 996, 1003 (4th Cir. 1976)* , *cert. denied*, *429 U.S. 1024 (1976)* .

(n3)Footnote 3. *See King v. General Elec. Co., 960 F.2d 617, 626 (7th Cir. 1992)* .

(n4)Footnote 4. *See Seguro de Servicio de Salud v. McAuto Sys. Group, Inc., 878 F.2d 5, 9 (1st Cir. 1989)* .

(n5)Footnote 5. *Johnson v. Celotex Corp., 899 F.2d 1281, 1285 (2d Cir. 1990)* , *cert. denied*, *498 U.S. 920 (1990)* .

(n6)Footnote 6. *Southwest Marine, Inc. v. Triple A Mach. Shop, Inc., 720 F. Supp. 805, 807 (N.D. Cal. 1989)* .

(n7)Footnote 7. *See Lewis v. Four B Corp., 347 F. Supp. 2d 1017, 1020 (D. Kan. 2004)* .

(n8)Footnote 8. *Mills v. Beech Aircraft Corp., 886 F.2d 758, 762 (5th Cir. 1989)* .

(n9)Footnote 9. *Johnson v. Manhattan R. Co., 289 U.S. 479, 496-497, 53 S. Ct. 721, 77 L. Ed. 1331 (1933)* (in landmark case for consolidation, court held that consolidation does not merge actions and rights of parties should not be substantially affected by it).

(n10)Footnote 10. *Garber v. Randell 477 F.2d 711, 714-716 (2d Cir. 1973)* .

(n11)Footnote 11. *Arnold v. Eastern Air Lines Inc., 712 F.2d 899, 906 (4th Cir. 1983)* , *cert. denied*, *464 U.S. 1040 (1984)* (testimony as to concurrent insurance settlements in front of jury during liability phase of trial found highly prejudicial and abuse of discretion).

(n12)Footnote 12. *Bradley v. Soo Line R.R. Co., 88 F.R.D. 307, 310 (E.D. Wis. 1980)* (denial of consolidation of two cases by plaintiff against his employer, as jury would be prejudiced by learning of second claim).

(n13)Footnote 13. *American Employers' Ins. Co. v. King Resources Co., 545 F.2d 1265, 1269 (10th Cir. 1976)*

(consolidation denied, as judge had participated in settlement discussions with parties).

(n14)Footnote 14. *See In re Repetitive Stress Injury Litig., 11 F.3d 368, 371-373 (2d Cir. 1993)* .

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3-28 Federal Litigation Guide § 28.04

§ 28.04 Identifying Cases Most Amenable to Consolidation

[1] Cases with Like Claims

Consolidation will frequently be permitted when there are causes of a like nature, or relative to the same question pending before a court. n1 Claims are more likely to be consolidated if they arise under the same or similar:

- Property interests. n2
- Legal transactions. n3
- Accidents. n4
- Patterns of conduct. n5

[2] Cases with Overlapping Parties

The presence of overlapping parties in cases enhances the prospects for consolidation, assuming that there are other common issues of law, fact, or both. n6

[3] Cases Involving Single Tort or Identical Torts or Products

Consolidation is often sought in cases where there are multiple tort actions with common factual and legal questions, such as:

- Air crash disasters. n7
- Exposure to the same injurious product. n8
- The pursuit of an illegal scheme or plan. n9

[4] Cases with Discovery Overlap

Discovery in one case that is applicable to discovery in another case is a practical benefit of consolidation, and a court will consider the usefulness of completed and planned discovery when deciding if consolidation will expedite the cases without prejudice to the parties. n10

Cases do not have to be at the same stage of discovery for consolidation to take place, and courts will balance a reasonable amount of delay in the trial of one case against the avoidance of duplicate efforts in the discovery process, as well as conservation of financial resources of the parties as a result of consolidation. n11

[5] Cases at Same Stage of Litigation

Cases at different stages of trial preparedness are generally not good candidates for consolidation if one case is ready for trial and one is not. n12 Although cases at different stages of litigation may be consolidated, courts tend not to disturb the momentum of a case that is ready for trial under local procedural rules. n13

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedurePretrial MattersConsolidation of ActionsCivil ProcedurePretrial MattersSeparate Trials

FOOTNOTES:
(n1)Footnote 1. *Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 292, 12 S. Ct.909, 36 L. Ed. 706 (1892)* ; *see also Howard Gunty Profit Sharing Plan v. CareMatrix Corp., 354 F. Supp. 2d 18, 22 (D. Mass. 2000)* .

(n2)Footnote 2. *Cedars-Sinai Medical Center v. Revlon, Inc., 111 F.R.D. 24, 31-34 (D. Del. 1986)* .

(n3)Footnote 3. *In re Ivan F. Boesky Sec. Litig., 948 F.2d. 1358, 1365 (2d Cir. 1991)* .

(n4)Footnote 4. *In re Air Crash Disaster at Detroit Metro. Airport, 737 F. Supp. 391, 394-395 (E.D. Mich. 1989)* .

(n5)Footnote 5. *In re Wirebound Boxes Antitrust Litig., 128 F.R.D. 256, 259 (D. Minn. 1989)* .

(n6)Footnote 6. *Werner v. Satterlee, Stephens, Burke & Burke, 797 F. Supp. 1196, 1211 (S.D.N.Y. 1992)* ; *Cedars-Sinai Medical Center v. Revlon, Inc., 111 F.R.D. 24, 31-34 (D. Del. 1986)* .

(n7)Footnote 7. *In re Air Crash Disaster at Detroit Metro. Airport, 737 F. Supp. 391, 392 (E.D. Mich. 1989)* (156 individual cases consolidated for trial as result of crash of Northwest Flight 255 on August 16, 1987).

(n8)Footnote 8. *Johnson v. Celotex Corp., 899 F.2d 1281, 1284 (2d Cir. 1990)* , *cert. denied*, *498 U.S. 920 (1990)* (asbestos).

(n9)Footnote 9. *In re Wirebound Boxes Antitrust Litig., 128 F.R.D. 256, 259 (D. Minn. 1989)* (price-fixing).

(n10)Footnote 10. *Werner v. Satterlee, Stephens, Burke & Burke, 797 F. Supp. 1196, 1211-1212 (S.D.N.Y. 1992)* .

(n11)Footnote 11. *Lloyd v. Industrial Bio-Test Lab., Inc., 454 F. Supp. 807, 812 (S.D.N.Y. 1978)* .

(n12)Footnote 12. *Mills v. Beech Aircraft Corp., 886 F.2d 758, 762 (5th Cir. 1989)* .

(n13)Footnote 13. *Mills v. Beech Aircraft Corp., 886 F.2d 758, 762 (5th Cir. 1989)* .

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3-28 Federal Litigation Guide § 28.05

§ 28.05 Considering Class Action as Alternative to Consolidation

A class action may be a better alternative than consolidation when many parties are asserting claims with a common question of law or fact. n1

Class certification, however, requires that the number of plaintiffs be so numerous that joinder of all is impractical. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedurePretrial MattersConsolidation of ActionsCivil ProcedurePretrial MattersSeparate Trials

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 23.*

(n2)Footnote 2. *Fed. R. Civ. P. 23(a).*

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3-28 Federal Litigation Guide § 28.06

§ 28.06 Transferring Cases for Purpose of Consolidation

[1] Consolidation Is Effected by Transferee Court

Although Rule 42(a) does not contain language allowing transfer, actions pending in different district courts may be transferred to other districts and then consolidated by the transferee court "for the convenience of parties and witnesses, in the interest of justice," under *28 U.S.C. § 1404(a)*. n1 Courts may also make such transfers to different divisions within the same district. n2

In order to transfer cases under Section 1404(a), courts must establish that the action could have been brought in the transferee district or court, that it will be in the interests of justice to effect transfer and that it will be a convenience to the parties and witnesses if the transfer is completed. n3

[2] Transfer May Be Made to District Where Action Might Have Been Brought

In its discretion, a court may transfer a civil action to any other district where the case might have originally been brought. n4 To determine where a suit might have been brought, venue must be proper and personal jurisdiction must exist. n5

[3] Transfer in Multidistrict Litigation

Under *28 U.S.C. § 1407(a)*, the Judicial Panel on Multidistrict Litigation may order the temporary transfer to a single district of "civil actions involving one or more common questions of fact" for "coordinated or consolidated pretrial proceedings." Transfer under Section 1407(a) is intended to be a device to manage pretrial procedure. Cases may then be transferred back to their transferor forums for trial. Trials may be consolidated under Section 1404(a) based on common issues of law or fact, as well as the transferee court's familiarity with the pretrial phase of the cases.

In matters involving multidistrict litigation, refer to Manual on Complex Litigation, for direction with respect to transfer and consolidation. n6

[4] Transferring Cases Pending in Other Forums for Consolidation

In addition to interdistrict transfers, a district court may transfer to itself and consolidate cases pending in other forums.

A case pending in bankruptcy court may be transferred to the district court and consolidated with a case pending there, without prior determination of the bankruptcy court. n7 Similarly, a case pending in admiralty may be transferred to the district court and consolidated with a pending case. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMultidistrict LitigationCivil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedurePretrial MattersConsolidation of ActionsCivil ProcedurePretrial MattersSeparate Trials

FOOTNOTES:
(n1)Footnote 1. *In re Storage Technology Corp. Sec. Litig., 630 F. Supp. 1072, 1074 (D. Colo. 1986)* .

(n2)Footnote 2. *Mills v. Beech Aircraft Corp., 886 F.2d 758, 761 (5th Cir. 1989)* .

(n3)Footnote 3. *In re Joint E. & S. Dist. Asbestos Litig., 769 F. Supp. 85, 87-88 (E.D.N.Y. 1991)* .

(n4)Footnote 4. *Waste Distillation Technology, Inc. v. Pan Am. Resources, Inc., 775 F. Supp. 759, 761 (D. Del. 1991)* .

(n5)Footnote 5. *In re Air Crash Disaster at Detroit Metro. Airport, 737 F. Supp. 391, 392-393 (E.D. Mich. 1989)* .

(n6)Footnote 6. *In re Air Crash Disaster at Detroit Metro. Airport, 737 F. Supp. 391, 392 (E.D. Mich. 1989)* .

(n7)Footnote 7. *See In re Macon Uplands Venture, 624 F.2d 26, 27 (5th Cir. 1980)* .

(n8)Footnote 8. *See Blake v. Farrell Lines, Inc., 417 F.2d 264, 265 (3d. Cir. 1969)* .

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§ 28.07 Understanding Court's Power to Consolidate

[1] Discretion to Consolidate Is Broad

There is broad judicial discretion in determining whether consolidation is proper and courts exercising that discretion will seldom be overruled. n1 The decision to consolidate cases will be upheld on appeal unless the court has committed a clear abuse of discretion. n2

Discretion extends to the very form that consolidation takes. The court may limit consolidation to particular issues, pleadings, or proceedings. n3

[2] Broad Discretion Extends to Power to Consolidate Sua Sponte

The broad power of the district court to consolidate extends to the consolidation of cases where no motion has been brought. A trial court has the power sua sponte to hold a hearing to determine whether the actions then pending before it should be consolidated. n4

Even when the parties or issues of law are not identical, courts may, without any motion pending, find a commonality of law or fact and consolidate a case with other pending cases. n5

[3] Abuse of Discretion To Consolidate Exists When There Are Insufficient Common Questions of Law or Fact

However broad, judicial discretion to consolidate actions is not unbounded and a finding of common issues of law, common issues of fact, or both, is a necessary prerequisite for exercise of judicial discretion. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedurePretrial MattersConsolidation of Actions

FOOTNOTES:

(n1)Footnote 1. *See Waste Distillation Tech., Inc. v. Pan Am. Resources, Inc., 775 F. Supp. 759, 761 (D. Del. 1991)* .

(n2)Footnote 2. *See E.E.O.C. v. HBE Corp., 135 F.3d 543, 550-551 (8th Cir. 1998)* ; *see also Chatham Condominium Ass'ns v. Century Village, Inc., 597 F.2d 1002, 1013-1014 (5th Cir. 1979)* .

(n3)Footnote 3. *See In re Air Crash Disaster at Detroit Metro. Airport, 737 F. Supp. 391, 393-395 (E.D. Mich. 1989)* .

(n4)Footnote 4. *See Miller v. United States Postal Serv., 729 F.2d 1033, 1036-1037 (5th Cir. 1984)* ; *see also In re New York Community Bancorp, Inc., Sec. Litig., 448 F. Supp. 2d 466, 475 (E.D.N.Y. 2006)* .

(n5)Footnote 5. *See Capps v. Eggers, 782 F.2d 1341, 1342 (5th Cir. 1986)* .

(n6)Footnote 6. *See Enterprise Bank v. Saettele, 21 F.3d 233, 235-236 (8th Cir. 1994)* ; *see also King v. General Elec. Co. 960 F.2d 617, 626 (7th Cir. 1992)* .

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§ 28.08 Agreeing to Consolidate

As with most matters of procedure, the parties, through their respective counsel, may be able to stipulate and agree that particular cases can be consolidated, provided there are proper grounds for the consolidation. An agreement notwithstanding, the trial judge has the discretion to refuse consolidation. Local rules and judges rules must be consulted for procedural requirements for such stipulations.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedurePretrial MattersConsolidation of Actions

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3-28 Federal Litigation Guide § 28.09

§ 28.09 CHECKLIST: Moving for Consolidation

The following checklist will assist counsel in moving for consolidation. Local rules and judges rules must be consulted for motion procedures. Note that individual judge's rules may require scheduling a pre-motion conference.

☐ A party bringing a motion for consolidation has the burden of showing the commonality of facts, law, or both in the cases sought to be combined.

☐ Unless all related cases are pending before the court, prepare to seek transfer of those filed in another district or jurisdiction. n1

☐ Determine that consolidation would serve tactical purpose, such as:

- ☐ Save time and expense. n2
- ☐ Avoid inconsistent results. n3
- ☐ Aid impression that opposing party committed wrongdoing by larger number of persons harmed or wrongs charged.
- ☐ Make certain that consolidation would not work injustice on any party, such as:
  - ☐ Causing unnecessary delay. n4
  - ☐ Adding unsolvable confusion. n5
  - ☐ Resulting in undue prejudice to a party. n6

- [ ] Prepare motion and memorandum of law to establish: n7
  - [ ] Common question of law or fact exist in designated cases.
  - [ ] Savings of time and expenses attainable by consolidation.
  - [ ] Lack of unfairness or prejudice to any party.
- [ ] Consolidation sought would not create undue complexity or be likely to confuse jury.
- [ ] Extent of consolidation sought and any limitations proposed, such as being limited to discovery and pretrial only.

■ **FORM:** For a motion to consolidate, see *§ 28.100*.

- [ ] File moving papers timely, that is:
  - [ ] When proceedings in all cases clearly indicate existence of common question.
  - [ ] Well before one or more cases are ready for trial.
- [ ] File moving papers in case brought by consolidation movant with copies filed in all other cases to be consolidated.
- [ ] Arrange hearing date.
- [ ] Serve notice and moving papers on all counsel (as well as any pro se parties) in all cases concerned.
- [ ] Prepare and file memorandum in reply to any opposition, as considered necessary and advisable.
- [ ] Appear at hearing on designated date to offer evidence and argument:
  - [ ] To support grounds for motion.
  - [ ] To justify ability of suggested lead counsel.
- [ ] Prepare to provide draft for court's order granting consolidation in accordance with court's decision, including:
  - [ ] Ordering filing of consolidated complaint.
  - [ ] Appointing lead counsel and designating powers.

☐ Describing extent of consolidation, such as consolidation for pretrial purposes only.

☐ If consolidation is denied, consider asking the court to include in the denial order language effective to certify the order to provide a basis for petitioning the Circuit Court for permission to pursue an interlocutory appeal. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedurePretrial MattersConsolidation of Actions

FOOTNOTES:
(n1)Footnote 1. *See § 28.06.*

(n2)Footnote 2. *See § 28.02.*

(n3)Footnote 3. *See § 28.02.*

(n4)Footnote 4. *See § 28.03.*

(n5)Footnote 5. *See § 28.03.*

(n6)Footnote 6. *See § 28.03.*

(n7)Footnote 7. *Fed. R. Civ. P. 42(a).*

(n8)Footnote 8. *28 U.S.C. § 1292(b).*

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3-28 Federal Litigation Guide § 28.10

§ 28.10 CHECKLIST: Opposing Consolidation

The following checklist may assist counsel in opposing a motion for consolidation. Local rules and judges rules must be consulted for motion procedures.

☐ The party seeking consolidation has the burden of convincing the court that consolidation is warranted, meaning not only that common issues exist but that no party would be unduly prejudiced. Typically, a party resisting another's or the court's own attempt to consolidate actions should file a timely memorandum in opposition to consolidation, serving copies on counsel for all parties in each action.

☐ A party opposing consolidation should demonstrate to the court that combining the cases would result in:

- ☐ Prejudice.
- ☐ Confusion.
- ☐ Delay.
- ☐ Inconsistent Judgments.
- ☐ Unfair Consequences.

☐ To demonstrate possible confusion and complexity, consider the following:

- ☐ Differences in actions.

- ☐ Differences in parties.
- ☐ Different evidence required to prove case.

☐ Counsel should also consider the following when drafting an opposition motion to consolidation:

- ☐ Whether one or more cases involved in a consolidation request are ready for or close to trial and would have to be delayed pending completion of pretrial in the other cases.
- ☐ Whether a conflict of interest exists between the plaintiffs (or the defendants) in the separate actions.
- ☐ Whether certain information admissible in one case is privileged or otherwise immaterial in another, resulting in prejudice to the protected party notwithstanding a limiting instruction to the jury. Note that while this situation may mitigate against consolidation for trial, it would not seem to prevent consolidating cases for pretrial and discovery.

☐ Prepare and file memorandum in opposition to motion for consolidation.

☐ Appear at hearing on designated date to offer evidence and argument to oppose motion.

☐ Prepare to provide draft for court's order denying consolidation.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedurePretrial MattersConsolidation of ActionsCivil ProcedurePretrial MattersSeparate Trials

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CHAPTER 28 Consolidation and Separate Trials *
A Consolidation

3-28 Federal Litigation Guide § 28.11

§ 28.11 Dealing With Practical Problems in Consolidated Litigation

[1] Drafting a Consolidated Pleading

The court may and often does order the preparation and filing of a consolidated complaint, answer, or both, when the asserted claims or defenses are essentially the same and arise out of the same or similar transactions. n1

[2] Determining Roles of Counsel

Attorneys in consolidated cases may be appointed or designated by the district court to perform specific functions to facilitate the litigation and cooperation among all counsel and parties. n2

Courts exploring the practical aspects of facilitating multidistrict consolidated litigation have generally looked to the Manual for Complex Litigation (4th ed. 2004), which suggests specific functions for lead, liaison, and trial counsel, as well as committees of counsel or steering committees. n3

General or lead counsel may be appointed to supervise and coordinate the conduct of consolidated cases. n4 Lead counsel may be appointed for plaintiffs or defendants in complex actions to perform a number of substantive and administrative tasks, such as drafting and filing a consolidated complaint, participating in and organizing a discovery plan, deposing principal witnesses and parties, arranging for experts, overseeing litigation deadlines and schedules, keeping individual plaintiffs' counsel informed of settlement negotiations, preparing for trial, and trying the lawsuit. In large, complex, mass tort cases, lead counsel may consist of a committee of attorneys. n5

Appointment of a lead or general counsel is not to substitute that person for the counsel of each party's choice. Rather, the function of general counsel is to supervise and coordinate the conduct of the cases.

[3] Handling Demands for Jury Trial

A number of practical issues arise regarding jury trials when cases are consolidated. The right to trial by jury may be properly demanded in a consolidated lawsuit despite the fact that it may have been waived in one or more of the constituent cases. It has been held that when two cases are consolidated for all purposes, including trial, the right to jury trial attaches to all claims, even those in the lawsuit in which a jury trial was waived. n6

[4] Allocating Peremptory Challenges of Prospective Jurors

When cases are consolidated resulting in multiple parties, the trial court is empowered to apportion peremptory jury challenges ("strikes") to achieve equality and fairness. n7 The general rule is that parties are allowed the same number of peremptory challenges they would have had if there had been no consolidation. n8 What this means in practice is that the number of different pre-consolidation lawsuits involving any party fixes the number by which peremptories should be multiplied to produce the total number of strikes for that party in a consolidation. It should be noted, however, that this number is limited pursuant to *28 U.S.C. § 1870*, which allows each side in an individual lawsuit only three peremptory challenges unless the court allows a larger number. n9

It is, however, within the discretion of the court to set the number of challenges. If consolidation results in two plaintiffs and only one defendant, the court may treat the plaintiffs as one party, assuming their interests were not conflicting, and allow them a party's three challenges, the same number as the defense. On the other hand, the court could allow each of the plaintiffs to exercise three challenges but increase the defendant's strikes to six. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMultidistrict LitigationCivil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedurePretrial MattersConsolidation of ActionsCivil ProcedureTrialsJury TrialsRight to Jury Trial

FOOTNOTES:
(n1)Footnote 1. *See In re Equity Funding Corp. of Am. Sec. Litig., 416 F. Supp. 161, 175 (C.D. Cal. 1976)* .

(n2)Footnote 2. *Vincent v. Hughes Air W., Inc., 557 F.2d 759, 773-775 (9th Cir. 1977)* .

(n3)Footnote 3. *See In re Ivan F. Boesky Sec. Litig., 948 F.2d 1358, 1364-1365 (2d Cir. 1991)* ; *see also Vincent v. Hughes Air West, Inc., 557 F.2d 759, 773-774 (9th Cir. 1977)* (court relied upon second edition).

(n4)Footnote 4. In re Thirteen Appeals Arising out of the *San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295, 309-310 (1st Cir. 1995)* .

(n5)Footnote 5. *In re Air Crash Disaster at Detroit Metro. Airport, 737 F. Supp. 391, 394-395 (E.D. Mich. 1989)* .

(n6)Footnote 6. *Cedars-Sinai Medical Center v. Revlon, Inc., 111 F.R.D. 24, 31-32 (D. Del. 1986)* .

(n7)Footnote 7. *See Fed. R. Civ. P. 47(b)*; *see also 28 U.S.C. § 1870.*

(n8)Footnote 8. *Fedorchick v. Massey-Ferguson, Inc., 577 F.2d 856, 858 (3d Cir. 1978)* (statute allowing a number of jury challenges for single-party cases expanded to include multiple peremptory challenges for multiparty cases).

(n9)Footnote 9. *28 U.S.C. § 1870.*

(n10)Footnote 10. *See* Manual on Complex Litigation, § 22.41 (3d Ed., 1995).

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CHAPTER 28 Consolidation and Separate Trials *
A Consolidation

3-28 Federal Litigation Guide § 28.12

§ 28.12 Obtaining Appellate Review of Consolidation Ruling

[1] Understanding That Ordinary Appeal Not Available

A consolidation order, or an order denying a motion for consolidation, is generally classified as interlocutory in nature and may not be appealed, unless designated for review by certification. n1

An important exception to this rule is the "collateral order doctrine," which allows immediate review of a consolidation order or denial of consolidation. Immediate appeal has been recognized as a necessary response to a consolidation order or denial that may have significant impact on the rights of the parties apart from the consolidation itself. It has been held that parties may petition for immediate review of a "collateral order" that finally determines "claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." n2

[2] Seeking Review by Petition for Mandamus

Consolidation orders may be challenged by writ of mandamus under extraordinary circumstances, or where there is gross abuse of discretion that amounts to action beyond the court's power. n3

[3] Obtaining Review Through Certification

The safest method of putting the consolidation question before the appellate court is to move the trial court to "certify" the order for appeal by ordering or including in the consolidation order that: n4

- There is substantial ground for difference of opinion on the controlling question of law.
- An immediate appeal from the order may materially advance the ultimate termination of the litigation.

A petition for permission to appeal must be filed with the clerk of the court of appeals within 10 days after the entry of such an order. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedurePretrial MattersConsolidation of ActionsCivil ProcedureAppealsReviewabilityGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See 28 U.S.C. § 1291*; *NAACP of La. v. Michot, 480 F.2d 547 (5th Cir. 1973)* ; *Garber v. Randell, 477 F.2d 711, 714-715 (2d Cir. 1973)* (citing **Moore's**).

(n2)Footnote 2. *Garber v. Randell, 477 F.2d 711, 714-715 (2d Cir. 1973)* .

(n3)Footnote 3. *See, e.g.*, *In re Repetitive Stress Injury Litigation, 11 F. 3d 368 (2d. Cir. 1993)* .

(n4)Footnote 4. *28 U.S.C. § 1292(b)*.

(n5)Footnote 5. *Fed. R. App. P. 5(a)*.

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CHAPTER 28 Consolidation and Separate Trials *
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3-28 Federal Litigation Guide §§ 28.13 through 28.19

[Reserved]

§§ 28.13[Reserved]

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CHAPTER 28 Consolidation and Separate Trials *
B. Separate Trials

3-28 Federal Litigation Guide § 28.20

§ 28.20 Understanding Separate Trial Rule

[1] Defining Separate Trial Rule

Any claim, cross-claim, counterclaim, or third-party claim can be a candidate for a separate trial. Moreover, any issue or issues within a claim can be tried separately. To do so, however, the court must be of the opinion that separate trials of a given claim or issue will either: n1

- Further convenience.
- Avoid prejudice.
- Foster expedition and economy of the litigation.

Ordering separate trials of claims or issues is often referred to as "bifurcation." Cases are often bifurcated into separate trials for liability and damages. In some situations, however, there may be more than two resulting trials; for instance, when the court splits the issues into liability, compensatory damages, and punitive damages.

[2] Considering Standard for Separate Trials

[2.--1] Courts Have Broad Authority

Courts have broad authority to try issues and claims separately in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy. n2 If any one of these factors is present, it is sufficient to warrant a district court's order of a separate trial. n3

[2.--2] Furtherance of Convenience

Convenience may justify bifurcation when counterclaims or similar matters (including cross-claims and third party claims) contain substantially different materials from the plaintiff's original allegations, n4 raise new or complex issues for discovery, or would retard preparation for trial. n5 Courts have reasoned that joint trial of original claims and counterclaims may in some cases undermine the focus of the trier of fact, confuse the issues, or cause prejudice. n6

Convenience also may be furthered by bifurcating a single issue for joint trial in a consolidated case, thereby resolving that question for each of the consolidated cases. n7

[2.--3] Avoidance of Prejudice

When a jury's reaction to potentially prejudicial material contained within one claim or issue threatens to injure a litigant, courts are authorized to bifurcate the case and separately try other issues in the action first, so as to minimize the risk of untoward prejudice. n8 The potential inclusion of reference to insurance coverage, for example, has been deemed sufficient to warrant bifurcation in an air crash case. n9 Similarly, reference to an illegal wiretap as the basis for a counterclaim has been found to have sufficient potential for prejudice to warrant bifurcation of that counterclaim. n10

Note,

however, that separate trials to avoid prejudice is rarely if ever necessary when the matter is for trial to the court without a jury. In a bench trial, "the kind of prejudice contemplated by Rule 42(b) does not come into play." n11

[2.--4] Expedition and Economy

Bifurcating the case to first decide a controlling issue can often resolve litigation quickly and at minimal expense to the parties and the court. Not only is separation of liability as a predicate for damages a viable matter for application of the rule, but also bifurcation of issues such as venue, the bar of limitations, res judicata, or other complete defenses may be candidates for separate trial in advance of the case in chief. Nevertheless, it should be noted that bifurcation and separate trials are not the normal course of events, and a single trial usually will be more expedient and efficient. n12

Bifurcation is often employed where the determination of one claim may obviate the need to adjudicate one or more other claims as, for example, where rejection of a claim of insurance coverage renders unnecessary evaluation of a number of claims under the insurance contract. n13

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedurePretrial MattersConsolidation of ActionsCivil ProcedurePretrial MattersSeparate Trials

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 42(b)*; M2 *Software, Inc. v. Madacy Entm't, 421 F.3d 1073, 1088 (9th Cir. 2005)* .

(n2)Footnote 2. *Fed. R. Civ. P. 42(b) Wilson v. Morgan, 477 F.3d 326, 339 (6th Cir. 2007)* ; *Shum v. Intel Corp., 499 F.3d 1272, 1276 (Fed. Cir. 2007)* .

(n3)Footnote 3. *See Sanford v. Johns-Manville Sales Corp., 923 F.2d 1142, 1145-1146 (5th Cir. 1991)* ; *Dollar. Inc. v. Avcar Leasing. Inc., 890 F.2d 165, 170 (9th Cir. 1989)* ; *In re Beverly Hills Fire Litig., 695 F.2d 207, 216 (6th Cir. 1982)* .

(n4)Footnote 4. *See Industrial Equip. & Marine Servs., Inc. v. M/V Mr. Gus, 333 F. Supp. 578, 582 (S.D. Tex. 1971)* .

(n5)Footnote 5. *See Davis & Cox v. Summa Corp., 751 F.2d 1507, 1517 (9th Cir. 1985)* .

(n6)Footnote 6. *See SCFC ILC, Inc. v. Visa U.S.A., Inc., 801 F. Supp. 517, 528-529 (D. Utah 1992)* .

(n7)Footnote 7. *See In re Air Crash Disaster at Detroit Metro. Airport, 737 F. Supp. 391, 395 (E.D. Mich. 1989)* .

(n8)Footnote 8. *See Mattison v. Dallas Carrier Corp., 947 F.2d. 95, 110 (4th Cir. 1991)* .

(n9)Footnote 9. *See Arnold v. Eastern Air Lines, 712 F.2d 899, 906-907 (4th Cir. 1983)* , *cert. denied*, *464 U.S. 1040 (1984)* .

(n10)Footnote 10. *See Sound Video Unlimited, Inc. v. Video Shack, Inc., 700 F. Supp. 127, 146 (S.D.N.Y. 1988)* .

(n11)Footnote 11. *United States v. IBM, 60 F.R.D. 654, 655-658 (S.D.N.Y. 1973)* .

(n12)Footnote 12. *Kos Pharms., Inc. v. Barr Labs., Inc., 218 F.R.D. 387, 391 (S.D.N.Y. 2003)* (citing **Moore's**).

(n13)Footnote 13. *See O'Malley v. United States Fidelity & Guar. Co., 776 F.2d 494, 500-501 (5th Cir. 1985)* .

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CHAPTER 28 Consolidation and Separate Trials *
B. Separate Trials

3-28 Federal Litigation Guide § 28.21

§ 28.21 Evaluating Factors That Favor Separate Trials

[1] Key Issues Which May Determine Outcome of Proceeding

Resolution of a key issue may determine the outcome of an entire proceeding. In such a case, and so long as the issue may reasonably be separated from the remainder of the case, bifurcation of that issue for trial is likely to be conducive to judicial economy and expedition. n1

[2] Liability and Damages

Cases where liability and damages may be effectively separated often have been held to be proper subjects for bifurcation. n2

Even if the district court decides to bifurcate the trial into separate liability and damages phases, it may assign the same jury to decide both phases if doing so serves the interests of judicial economy. n3

[3] Punitive Damages

Rule 42(b) authorizes presentation of evidence relating to punitive damages after the jury's determination of other issues, thereby insulating the jury from considering that evidence while determining liability and compensatory damages. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedurePretrial MattersSeparate TrialsCivil ProcedureRemediesDamagesPunitive Damages

FOOTNOTES:
(n1)Footnote 1. *See In re Bendectin Litig., 857 F.2d 290, 317 (6th Cir. 1988)* .

(n2)Footnote 2. *See Sanford v. Johns-Manville Sales Corp., 923 F.2d 1142, 1145-1146 (5th Cir. 1991)* ; *see also Cherdak v. Stride Rite Corp., 396 F. Supp. 2d 602, 604 (D. Md. 2005)* .

(n3)Footnote 3. *See, TVT Records v. Island Def Jam Music Group, 254 F. Supp. 2d 322, 330 (S.D.N.Y. 2003)* .

(n4)Footnote 4. *See Mattison v. Dallas Carrier Corp., 947 F.2d 95, 110 (4th Cir. 1991)* ; *North Dakota Fair Hous. Council, Inc. v. Allen, 298 F. Supp. 2d 897, 899 (D.N.D. 2004)* .

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CHAPTER 28 Consolidation and Separate Trials *
B. Separate Trials

3-28 Federal Litigation Guide § 28.22

§ 28.22 Evaluating Factors That Disfavor Separate Trials

[1] Prejudice May Result to Party

Bifurcation is improper when separate trials would result in prejudice to a party;for example, by triggering delay in the proceedings, or increasing expense. n1

[2] Important Evidence May Be Excluded

A party may object to bifurcation on the ground that it effectively results in exclusion of important evidence from the jury. n2

[3] Overlapping Issues May Result in Presentation of Same Evidence Twice

Bifurcation is improper where the issues are so closely interwoven that the plaintiff would have to present the same evidence twice in separate trials. In such circumstances, judicial economy is fostered by a single trial. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedurePretrial MattersSeparate Trials

FOOTNOTES:
(n1)Footnote 1. *See Willemijn Houdstermaatschaapij BV v. Apollo Computer, 707 F. Supp. 1429, 1433-1434, (D. Del. 1989)* (citing **Moore's**).

(n2)Footnote 2. *See In re Bendectin Litig., 857 F.2d 290, 309 (6th Cir. 1988)* .

(n3)Footnote 3. *See Willemijn Houdstermaatschaapij BV v. Apollo Computer, 707 F. Supp. 1429, 1433-1434 (D. Del. 1989)* (citing **Moore's**).

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CHAPTER 28 Consolidation and Separate Trials *
B. Separate Trials

3-28 Federal Litigation Guide § 28.23

§ 28.23 Distinguishing Severance Order From Grant of Separate Trial

The Rule 42(b) technique of separately considering certain claims or issues while holding others in abeyance in a single lawsuit is to be contrasted with another procedural response to the problem posed by liberal joinder. The latter approach is embodied in Rule 21, which authorizes the "severance" of claims. Severance leads to the creation of two or more lawsuits where one existed before. n1

Unlike a claim to be tried separately under Rule 42(b), a severed claim effectively becomes an independent lawsuit with a separate docket number. It will result in its own judgment that can be appealed independently of the other claims originally joined. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedurePretrial MattersSeparate Trials

FOOTNOTES:
(n1)Footnote 1. *Gaffney v. Riverboat Servs. of Ind., 451 F.3d 424, 440-444 (7th Cir. 2006)*

(n2)Footnote 2. *See Nolan v. Boeing Co., 919 F.2d 1058, 1067 (5th Cir. 1990) , cert. denied, 499 U.S. 962 (1991)* .

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CHAPTER 28 Consolidation and Separate Trials *
B. Separate Trials

3-28 Federal Litigation Guide § 28.24

§ 28.24 Understanding Court's Power To Order Separate Trials

[1] Court May Act on Motion or Sua Sponte

Not only does the court have discretion to bifurcate claims or issues traditionally considered to be divisible, such as liability and damages, but also to separate for trial virtually any other issue that it thinks proper. n1 In doing so, the court may act on the motion of any party or sua sponte. n2

The determination whether to order separate trials is left to the sound discretion of the trial court, n2.1

[2] Reviewable Only For Abuse of Discretion

The court's power to grant or deny motions to bifurcate claims and order separate trials is subject to appellate reversal only if there has been an abuse of discretion. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedurePretrial MattersSeparate TrialsCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

FOOTNOTES:
(n1)Footnote 1. *In re Beverly Hills Fire Litig., 695 F.2d 207, 216 (6th Cir. 1982)* .

(n2)Footnote 2. *Fidelity & Casualty Co. of N.Y. v. Mills, 319 F.2d 63, 63-64 (5th Cir. 1963)* .

(n3)Footnote 2.1. *See Layman v. Alexander, 343 F. Supp. 2d 483, 495 (W.D.N.C. 2004)* .

(n4)Footnote 3. *E.E.O.C. v. HBE Corp., 135 F.3d 543, 551 (8th Cir. 1998)* ; *Exxon Co. v. Sofec, Inc., 54 F.3d 570, 575 (9th Cir. 1995)* , *aff'd on other grounds*, *517 U.S. 830 (1996)* ; *Layman v. Alexander, 343 F. Supp. 2d 483, 495 (W.D.N.C. 2004)* .

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CHAPTER 28 Consolidation and Separate Trials *
B. Separate Trials

3-28 Federal Litigation Guide § 28.25

§ 28.25 Agreeing to Try Claims or Issues Separately

The parties may stipulate and agree that specified claims or issues are to be tried separately when there are the requisite differences in the claims or issues and doing so could save time and expense for all concerned. Nonetheless, it appears that the trial judge could refuse the joint request as the matter of separate trials rests solely within the court's discretion.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedurePretrial MattersSeparate Trials

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CHAPTER 28 Consolidation and Separate Trials *
B. Separate Trials

3-28 Federal Litigation Guide § 28.26

§ 28.26 CHECKLIST: Moving for Separate Trials

The party seeking bifurcation has the burden of proving that bifurcation will satisfy the expressed objective of the rule including furtherance of convenience, avoidance of prejudice, or enhancement of expedition and economy. The following checklist will assist counsel is moving for separate trials. Counsel should check local rules as well as individual judge's rules for motion procedures. Note that individual judge's rules may require scheduling a pre-motion conference.

☐ Ascertain that there are separable claims or issues with different witnesses and proof.

☐ Consider tactical edge in trying claim separately, such as avoiding multiple or stronger opposing counsel.

☐ Determine that separate trials would serve beneficial purpose, such as:

- ☐ Saving time and expense, by determining whether liability exists before trying damages question or by ascertaining validity of claimed defense. n1
- ☐ Avoiding prejudice to party. n2

☐ Make certain that separate trials would not work injustice on any party, such as: n3

- ☐ Causing unnecessary delay.
- ☐ Unduly prejudicing a party.

☐ Prepare motion and memorandum of law to establish that claim or issues should be separately tried,

clearly pointing out: n4

- ☐ Different evidence that will be offered.
- ☐ Movant's reasonable fears that prejudice will result unless claims or issues separated for trial.

☐ Bifurcation will cause no undue delay or unfairness to any other party.

■ **FORM:** For a notice of motion for separate trials, *see* § 28.102.

☐ File moving papers timely, that is:

- ☐ When pleadings show claims and relationships of parties sufficiently for understanding of need for separate trials.
- ☐ At pretrial or case management conference. n5

☐ Arrange hearing date.

☐ Serve notice and moving papers on all counsel (as well as any pro se parties).

☐ Prepare and file memorandum in reply to any opposition, as considered necessary and advisable.

☐ Appear at hearing on designated date to offer evidence and argument to support grounds for motion.

☐ Prepare to provide draft for court's order granting separate trials.

☐ If the motion is denied, consider asking the court to include in the denial order language effective to certify the order to provide a basis for petitioning the Circuit Court for permission to pursue an for interlocutory appeal. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedurePretrial MattersSeparate Trials

FOOTNOTES:
(n1)Footnote 1. *See § 28.20[2].*

(n2)Footnote 2. *See § 28.20[2].*

(n3)Footnote 3. *See § 28.20[2].*

(n4)Footnote 4. *Fed. R. Civ. P. 42(b).*

(n5)Footnote 5. *Fed. R. Civ. P. 16(a).*

(n6)Footnote 6. *28 U.S.C. § 1292(b).*

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CHAPTER 28 Consolidation and Separate Trials *
B. Separate Trials

3-28 Federal Litigation Guide § 28.27

§ 28.27 CHECKLIST: Opposing Motion for Separate Trials

☐ Although the burden of proof is on the movant to establish that separate trials of certain claims or issues are warranted, the opposing party should file memorandum in opposition, countering as many of the bases for separation as possible. The party opposing a motion should:

- ☐ Show how harm or prejudice will result if case is bifurcated.
- ☐ Show how bifurcation will cause delay and result in added expense.
- ☐ Show that bifurcation motion is premature. A motion for separate trials of issues may be premature if discovery has not progressed sufficiently to fully develop all the issues that may exist among the parties or if one of the claims involved is planned to be the subject of a motion for summary judgment.

☐ Prepare and file memorandum in opposition to motion for separate trials.

☐ Appear at hearing on designated date to offer evidence and argument to oppose motion.

☐ Prepare to provide draft for court's order denying separate trials.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedurePretrial MattersSeparate Trials

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CHAPTER 28 Consolidation and Separate Trials *
B. Separate Trials

3-28 Federal Litigation Guide § 28.28

§ 28.28 Seeking Appellate Review

Appellate jurisdiction requires a final decision, n1 and an order granting or denying separate trials is interlocutory and not immediately reviewable on appeal, as a general rule. n2

Two other procedures should be considered to obtain appellate review of an interlocutory order, although neither offer the complaining party much hope of success:

- Mandamus may be available to correct a clear abuse of discretion or to confine the trial court to a lawful exercise of its authority. n3

- The trial judge might be prevailed upon to certify the order for appeal thus providing the basis for a petition to the Circuit Court for permission to appeal. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedurePretrial MattersSeparate TrialsCivil ProcedureAppealsAppellate JurisdictionInterlocutory OrdersCivil ProcedureAppealsReviewabilityGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1291.*

(n2)Footnote 2. *See In re Repetitive Stress Injury Litig., 11 F.3d 368, 372 (2d Cir. 1993) , aff'd on rehearing, 35 F.3d 637 (2d Cir. 1994) .*

(n3)Footnote 3. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 18, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983) .*

(n4)Footnote 4. *28 U.S.C. § 1292(b).*

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CHAPTER 28 Consolidation and Separate Trials *
B. Separate Trials

3-28 Federal Litigation Guide §§ 28.29 through 28.99

[Reserved]

§§ 28.29[Reserved]

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CHAPTER 28 Consolidation and Separate Trials *
C. Forms

3-28 Federal Litigation Guide § 28.100

§ 28.100 Notice of Motion for Consolidation of Actions

Notice of Motion for Consolidation of Actions

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

NOTICE IS HEREBY GIVEN that on [*date*] at [*time of day (specify a.m. or p.m.)*], or as soon thereafter as counsel may be heard, [*party designation and name of moving party*] will move this Court, at the United States Courthouse located at [*address of Court*], Courtroom [*courtroom number*], for an order:

(a) pursuant to *Fed. R. Civ. P. 42(a)* consolidating this action with the action pending in this district court entitled *identify case to be consolidated by official caption, e.g., XYZ Company, Plaintiff v. John Doe Corporation, Defendant*], Docket No. [*number*], on the ground that [*state basis of motion, e.g., both actions turn upon the validity of the same contract entered into by the defendant, thereby presenting common questions of law and fact*]; and

(b) granting [*moving party*] such other incidental relief as may be appropriate.

This motion is based on this Notice of Motion, the accompanying Declaration (*or other appropriate affidavit substitute*) of [*name of signatory*] sworn to (*or dated*) [*date*], the accompanying Memorandum of Law [*if required*] dated [*date*], and on all of the pleadings and papers on file in this action.

[*Date*]

Respectfully submitted,

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for [*name and designation of party*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local*

district court rules]

[2] Use of Form

This is a form of notice of motion for use by a party in seeking consolidation of two or more actions pending in the same district court under *Fed. R. Civ. P. 42(a)*.

[3] Time for Seeking Consolidation

A motion seeking consolidation of two or more actions pending in the same district court need not be filed within any particular time. n1 However, consolidation is designed to serve judicial economy by permitting joint resolution of the common questions of law or fact presented by the actions. That economy is greater if the motion is made at an early stage of the proceedings.

[4] Consolidation Compared With Joint Trial

The court may order either a joint trial of multiple actions or consolidation of those actions. n2 Consolidation essentially merges the actions into a single action for all but a few purposes. If the actions are consolidated, discovery and other pretrial matters will be handled together. Joint trials of cases, on the other hand, are tried together but every other aspect of the cases remains separate.

[5] LOCAL PRACTICE: Master Docket of Consolidated Actions

When cases are consolidated, one of the cases, generally the oldest on the docket, is designated the "lead" or "master" case. All papers in each of the consolidated actions then are filed under that master docket, with copies filed in the other cases and served on all parties in all cases.

[6] Common Question of Law or Fact Required for Consolidation

Consolidation is appropriate only if the actions pending in the court involve at least one common question of law or fact. n3 If the court orders consolidation without the required common question, the error is reversible, provided some objection to consolidation was lodged.

[7] Date and Time of Hearing

Local rules and the individual judge's rules should be consulted with respect to advance notice requirements for motions and regularly scheduled motion days and times.

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 42(a)*.

(n2)Footnote 2. *Fed. R. Civ. P. 42(a)*.

(n3)Footnote 3. *Fed. R. Civ. P. 42(a)*.

* Chapter 28 was completely revised in 1999 by Peter Kearns, San Francisco, California.

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CHAPTER 28 Consolidation and Separate Trials *
C. Forms

3-28 Federal Litigation Guide § 28.101

§ 28.101 Notice of Motion for Separate Trial

Notice of Motion for Separate Trial

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

NOTICE IS HEREBY GIVEN that on [*date*] at [*time of day (specify a.m. or p.m.*], or as soon thereafter as counsel may be heard, [*party designation and name of moving party*] will move this Court, at the United States Courthouse located at [*address of Court*], Courtroom [*courtroom number*], for an order:

(a) pursuant to *Federal Rules of Civil Procedure, Rule 42(b)* requiring separatetrials in this action of [*identify claims or issues on which separate trial is sought, e.g., the issues of liability and damages*] on the ground that [*state basis of motion, e.g., the resolution of the issue of liability may obviate the necessity of complex and difficult issues of damages*]; and

(b) granting [*moving party*] such other incidental relief as may be appropriate.

This motion is based on this Notice of Motion, the accompanying Declaration (*or other appropriate affidavit substitute*] of [*name of signatory*] sworn to (*or dated*) [*date*], the accompanying Memorandum of Law [*if required; see*] dated [*date*], and on all of the pleadings and papers on file in this action.

[*Date*]

Respectfully submitted,

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for [*name and designation of party*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

TO: [*Name of opposing counsel*], Attorney for [*name of party*]

[2] Use of Form

This is a form of notice of motion for use by a party in seeking separate trials of particular issues or claims in an action. Related, but analytically distinct, is a motion to sever a party or parties, which actually creates a new action in the district court. Separate trials, on the other hand, simply are phases of a single action.

[3] Time for Seeking Separate Trials

Although the Federal Rules of Civil Procedure do not contain any time limitation for seeking separate trials, n1 it is wise to do so as soon as possible. Generally speaking, the motion should be brought at or before any pretrial or case management conference. A request for bifurcation on the eve of trial or during an ongoing trial is not apt to succeed, especially if the potential harm to be avoided could have been anticipated earlier.

[4] Grounds for Ordering Separate Trials

Under *Fed. R. Civ. P. 20(b)*, separate trials may be ordered when parties who are not adverse claimants are joined in an action and the joinder will result in delay, prejudice, expense, or other cost to one of the parties. On the other hand, *Fed. R. Civ. P. 42(b)* authorizes separate trials in virtually any circumstance that appears to warrant such bifurcation, such as convenience of the court or parties, or to prevent prejudice, delay, or expense. Perhaps the most common instance of separate trials is the bifurcation of an action into liability and damages phases.

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 20(b)*; *Fed. R. Civ. P. 42(b)*.

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CHAPTER 29 Trial Briefs *

3-29 Federal Litigation Guide 29.syn

§ 29.syn Synopsis to Chapter 29: Trial Briefs *

§ 29.01 Evaluating the Purpose of Trial Briefs

§ 29.02 Consulting Local Rules and Individual Judge's Rules
[1] Filing May Be Required Under Local Rule
[2] Following Procedural Requirements Under Local Rules

§ 29.03 Considering Pretrial Orders When Drafting Trial Briefs

§ 29.04 Filing Trial Briefs in Both Bench and Jury Trials
[1] Filing Trial Briefs in Bench Trials
[2] Filing Trial Briefs in Jury Trials

§ 29.05 Evaluating the Form of the Brief

§ 29.06 Analyzing Scope of Trial Briefs
[1] Setting the Tone for Trial
[2] Referring to Parties in Trial Briefs
[3] Considering Length of the Brief
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§ 29.07 Organizing Trial Briefs
[1] Table of Contents
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§ 29.08 CHECKLIST: Drafting Trial Briefs

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CHAPTER 29 Trial Briefs *

3-29 Federal Litigation Guide Scope

Scope

SCOPE

This chapter focuses on the use of trial briefs in federal court. Although the federal rules are silent regarding the use of trial briefs, local rules and individual judge's rules often govern the filing and service of such briefs in advance of trial. The chapter covers the following topics:

- The purpose of trial briefs
- The importance of consulting local rules and individual judge's rules
- Consulting pretrial orders before drafting trial briefs
- Filing briefs in bench trials, as well as jury trials
- The form and scope of trial briefs
- Organizing trial briefs

The chapter also includes a checklist for drafting trial briefs. It concludes with a discussion of alternatives to the trial brief for the rare occasion when a trial brief is not submitted.

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CHAPTER 29 Trial Briefs *

3-29 Federal Litigation Guide § 29.01

§ 29.01 Evaluating the Purpose of Trial Briefs

The purpose of the trial brief is to provide the court with full and complete disclosure of the parties' respective theories of the case. The trial brief typically sets forth the theory of the case and statutory or precedential support for the theory together with any unusual evidentiary or legal questions which may be anticipated at trial. Trial briefs provide an opportunity to discuss and forcefully argue in written form the law of the case based on the facts at hand. A trial brief generally should clearly identify and address the following:

- The elements of the relevant claims and/or defenses to be proved at trial
- The law applicable to the relevant claims and/or defenses
- The facts that will be presented at trial to prove the claims and/or defenses

A trial brief is an advocacy tool and should present the facts and the law in the most favorable light that can fairly be argued in support of the case. Even if the court has been presented with a thorough presentation of the case through pretrial motions and pretrial conferences, the trial brief should stand on its own and provide a summary of the case to be presented at trial. Unless the trial is to be bifurcated as to liability and damages or along other lines, the trial brief should be comprehensive, even if that involves repetition of matters covered in briefs filed in support of prior motions. Thus, while the depth of treatment of particular facts or issues may be affected by the fact that those issues have been briefed or discussed in other court papers, the trial brief should address all relevant issues and place them in their proper context.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePretrial MattersGeneral Overview

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CHAPTER 29 Trial Briefs *

3-29 Federal Litigation Guide § 29.02

§ 29.02 Consulting Local Rules and Individual Judge's Rules

[1] Filing May Be Required Under Local Rule

Trial briefs are a critical argumentative tool appropriate in most all cases. If a case is worth trying, it generally justifies the filing of a trial brief which will help focus trial preparation, assist the judge during trial, and serve as a starting point for appeal. While the Federal Rules of Civil Procedure are silent on the subject, local rules and individual judge's rules often contain some sort of provision concerning trial briefs. In some districts, the filing of a trial brief is mandatory. n1 In other districts, while the language of the rule appears to leave the question of filing to counsel's discretion, the specificity of other provisions relating either to trial briefs or to pretrial orders strongly suggests that a trial brief is expected in most, if not all, cases. n2

Often, the specifications in local rules are quite general and do little more than list the commonly recognized functions that are covered in this chapter. n3 Other local rules, however, are quite detailed, and some require inclusion of matters not normally recognized as essential elements of a trial brief such as admissions and stipulations. n4

Consideration should also be given to local rules relating generally to briefs. Such rules typically speak to matters such as content and form of briefs (including length), time and place of filing, and manner of service. n5

[2] Following Procedural Requirements Under Local Rules

Local rules often dictate the following procedural topics regarding trial briefs:

- When trial briefs must be filed n6(a few rules are ambiguous, however, apparently permitting the trial court to exercise its discretion in setting a particular due date for trial briefs) n7
- Where trial briefs must be filed n8
- Page limitations n9
- The number of copies to be filed n10
- Service on adversary counsel n11

At least one district even requires that trial briefs be served on opposing counsel before they are filed. n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial Orders

FOOTNOTES:
(n1)Footnote 1. *See, e.g.,* Northern District of California--Rule 235.

(n2)Footnote 2. *See, e.g.,* Northern District of California--Rule 235.

(n3)Footnote 3. For example, Middle District of Pennsylvania Rule 509 provides:

> The trial brief shall contain a succinct statement of the evidence to be presented and the position of the party filing the same with respect to anticipated legal issues, and the legal authorities relied upon to support the same.

(n4)Footnote 4. *See, e.g.,* Eastern District of California--Rule 285.

(n5)Footnote 5. For example: Southern District of Indiana--Rule 12 (no brief filed or submitted to the court shall exceed 25 pages without permission from the court); Southern District of Mississippi--Rule 5 (all briefs must be submitted directly to the judges and shall not exceed 30 pages without permission from the court); Wyoming--Rule 37 (parties must tender any briefs to the Clerk's Office).

(n6)Footnote 6. *See, e.g.,* Northern District of California--Rule 235.

(n7)Footnote 7. *See, e.g.,* Kansas--Rule 20 (in advance of trial).

(n8)Footnote 8. *See, e.g.,* Eastern District of Louisiana--Rule 5.

(n9)Footnote 9. *See, e.g.,* Central District of California--Rule 3.10.

(n10)Footnote 10. *See, e.g.,* Alaska--Rule 12.

(n11)Footnote 11. *See, e.g.,* Middle District of Pennsylvania--Rule 509.

(n12)Footnote 12. Kansas--Rule 20 (trial brief must be served on opposing counsel at least 3 days prior to its submission to the clerk of the court).

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CHAPTER 29 Trial Briefs *

3-29 Federal Litigation Guide § 29.03

§ 29.03 Considering Pretrial Orders When Drafting Trial Briefs

Comprehensive final pretrial orders generally inform the court of the nature of the case, the issues presented, and many of the details of the evidence which the parties intend to introduce. n1 The final pretrial order not only informs the court about the key aspects of the case before trial, it sometimes even dictates the procedural requirements regarding the contents, filing, and exchanging of trial briefs. Accordingly, the pretrial order must be consulted when deciding what to cover in a trial brief, as well as the manner of filing and service of the brief.

If an exhaustive pretrial order has been filed, the order generally will address the uncontested facts, the contested issues of fact and law, the witnesses to be called, and the documents to be offered. In some pre-trial orders, the parties' position on key jury instructions and evidentiary issues will also be discussed. Although final pretrial orders supplement many of the same functions served by trial briefs, pretrial orders may be drafted in a cooperative effort with opposing counsel. Accordingly, final pretrial orders often suffer from at least the following serious limitations that are not an issue with trial briefs:

- A pretrial order generally does not provide the opportunity to discuss the law of the case in detail
- The typical structure of a pretrial order--uncontested facts, contested facts and issues, witnesses and documents--provides no opportunity, and in many ways interferes with, a coherent, analytical statement of a party's case
- In a pretrial order, contested issues generally are stated in summary form and many other important matters are stated in essentially objective form
- A pretrial order rarely provides an opportunity to discuss important evidentiary and jury instruction issues

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial Orders

FOOTNOTES:

(n1)Footnote 1. Pretrial conferences and orders are discussed in detail in ch. 27.

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CHAPTER 29 Trial Briefs *

3-29 Federal Litigation Guide § 29.04

§ 29.04 Filing Trial Briefs in Both Bench and Jury Trials

[1] Filing Trial Briefs in Bench Trials

In bench trials, a trial brief is an especially effective way to present the case in a cogent and persuasive manner before presenting evidence at trial. n1 A well-drafted trial brief is more likely to positively influence the judge's final decision in the case than one that is formulated with minimal effort. Because the trial judge will be the finder of both the facts and the law, it generally is imperative to file a detailed and persuasive trial brief in all bench trials. Although it is possible that motions in limine and briefs in support of requested instructions can do some of the work of a trial brief, the trial brief plays a unique role in providing the framework for the court's legal and factual analysis of the case. Clearly, this role assumes great importance in the context of a bench trial.

[2] Filing Trial Briefs in Jury Trials

As with bench trials, a trial brief is critical in most jury cases. As the arbiter of all legal issues, some of which may be mixed questions of law and fact, the trial judge in a jury case must rule on the evidence and instruct the jury, and the rulings on those matters will often be influenced by the judge's views on the merits of the case. Tacitly or overtly, the judge may disclose a view of the facts or the law to the jury. Finally, the judge will rule both on motions for judgment as a matter of law and on any post-trial motions which may be filed based on the judge's view of either the facts or the law. For these reasons, even in a jury trial, it is important to use all available tools to persuade the court not only of the correctness of the client's position on the law, but also of the merits of the client's factual case.

It is certainly true that in particularly simple or routine cases, the length and scope of a trial brief may be radically affected by the fact that the case will be tried to a jury. In the most straightforward of cases, the trial brief in a jury case might be confined to a discussion of evidentiary issues and/or legal principles applicable to the instructions. Even in more complex jury cases, the trial brief's discussion of the facts might be greatly abbreviated. In a non-jury case, by contrast, the trial brief is a direct attempt to convince the court that your client's position is supported by the facts and the law.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil

ProcedureTrialsBench TrialsCivil ProcedureTrialsJury TrialsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. Bench trials are discussed in detail in ch. 41.

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CHAPTER 29 Trial Briefs *

3-29 Federal Litigation Guide § 29.05

§ 29.05 Evaluating the Form of the Brief

A comprehensive trial brief generally will include the following:

- **Table of contents.** The table of contents should list the main parts of the brief and must give page references for each part (in the argument section, the point headings for each argument should be set forth in full and separately referenced with page numbers)

- **Table of authorities.** The table of authorities should list the cases (alphabetically arranged), statutes, and other authorities cited, with references to the pages of the brief where they are cited

- **Case statement.** A brief statement outlining the general nature of the case

- **Statement of facts.** A full and complete statement of the facts the party expects the evidence will establish

- **Legal argument.** The party's theory of liability or defense based on those facts, together with argument and authorities in support thereof

- **Damages.** The party's theory of damages or other relief in the event liability is established, together with authorities in support thereof

- **Conclusion.** A brief conclusion stating the precise relief sought

In addition, a trial brief will often cover the following:

- Procedural background

- The party's theory of any anticipated motion for judgment as a matter of law, together with authorities in support thereof

- In jury cases, the party's authorities in support of particular requested jury instructions

- The party's position on any anticipated evidentiary problems

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePretrial MattersGeneral Overview

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CHAPTER 29 Trial Briefs *

3-29 Federal Litigation Guide § 29.06

§ 29.06 Analyzing Scope of Trial Briefs

[1] Setting the Tone for Trial

A trial brief should be written with its three principle functions in mind:

- To tell the court what the case is about
- To explain to the court why the party on whose behalf the brief is filed should prevail
- To set forth the law which compels that result

The first two of these functions are closely related. Indeed, the first purpose is more important than the second. The judge cannot intelligently decide the case in your favor unless he or she understands it. These considerations suggest that organization, clarity and logical development are extremely important elements in a trial brief. The trial brief must be persuasive, but it should be more than a rhetorical device. It must be an integrated document, with internal consistency that compels the court to adopt your client's position.

The third general purpose--to provide the court with the controlling law--is also extremely important. In most jury trials, the trial brief is the only written vehicle by which you can explain the law to the judge in a coherent fashion. Briefs in support of motions or requested instructions, by themselves, present a jumbled view of the case--a series of snapshots, rather than a broad panorama of the entire case. While this is less true in bench trials where post-trial submissions will be made, the opportunity to educate the court on the law before the evidence is received should be fully exploited. Thus, a primary objective of every trial brief will be to inform the court of the law on which your client's case depends.

[2] Referring to Parties in Trial Briefs

In a trial brief, counsel should minimize use of the terms "plaintiff" and "defendant." To make briefs clear, counsel should use the parties' actual names or descriptive terms (such as "the employee," "the injured person," or "the taxpayer"). By addressing the parties by name or descriptive title, the brief will often be more readable and easier for the judge to follow.

[3] Considering Length of the Brief

A trial brief is useless if it is not read, and a short brief is more likely to be read than a long one. Although harder to write, a short brief will be more effective than a long one. The brief must adequately cover those matters essential to achieve its objectives. Its length will necessarily vary from case to case.

Limitations on the length of a brief generally are set by local rule or the individual judge's rules, which must be consulted prior to the drafting of any trial brief. In general, the trial brief should be as short as possible and within the page limit set by the court. However, the case should not be compromised by filing a brief that does not adequately address all of the key facts and legal arguments. Trial briefs should address all of the issues that will be addressed at trial, and provide the factual background necessary to an understanding of those issues.

If the draft brief seems overly long, carefully examine each point and each paragraph to be sure that it is essential to the purposes of the brief. Eliminate marginal points or issues. Emphasize issues on which your client's position is strong but do so succinctly. Counsel should avoid unnecessary exposition. If you have carefully stated the issue and the facts relating to it, and have carefully pruned and organized your authorities, further explanation is unnecessary. An overlong draft may be an indication of faulty organization or unnecessary repetition. If that is the case, revise the draft so that you make your point and then move on.

[4] Discussing Issues Succinctly and Separately

It is difficult to generalize about the subject of the depth of treatment of particular issues within trial briefs. An issue sufficiently important to be dealt with in a trial brief at all should be discussed in the depth necessary to both explain the issue and persuasively argue your client's version of it.

In each section of the brief, be sure that the issue presented is succinctly stated and that multiple issues have not been included under the same heading or in the same discussion. Deal with one issue at a time, under appropriate headings. Use headings and sub-headings as you would in an appellate brief. Rather than showing unnecessary complexity, your effort to write analytically will show that you have thought the issue through. Counsel should also avoid unnecessary repetition of the facts. Factual detail, if appropriate at all, should be set forth only once, either in the general statement of facts or in connection with the legal point to which it relates. Only the most important facts should appear in both places, and then with different emphases.

[5] Stating Governing Case Law

When citing a case for a general proposition, counsel should avoid unnecessary recitation of the facts of the cited case. The facts of a case cited for a proposition of pure law are, by definition, unnecessary. Where the relevancy of a case depends upon the similarity of its facts to the facts of your case, include only those facts necessary to demonstrate the similarity. When dealing with a group of such cases, summarize the facts of the one or two most nearly parallel to your own and confine your explanation of the others to parenthetical references. Likewise, counsel should use only succinct quotations from other cases (they will often be shorter as well as more effective than your summary of them). Avoid long or repetitive quotations. If a long quotation cannot be reduced to manageable length, paraphrase it. In general, counsel should avoid string citations; they are almost always unnecessary, and they waste valuable space. Pick the most persuasive case from the controlling, or most persuasive, court.

[6] Using the Appropriate Tone

Where the facts of your case are ethically neutral--i.e., do not involve claims of intentional fraud, duress or similar matters--the trial brief should generally "argue" those facts subtly and by innuendo rather than by unnecessary and self-serving analysis. The latter approach will not be persuasive to most judges and may have an adverse effect. Above all, facts which you characterize as undisputed should be accurately stated, and your recitation of the expected proof of disputed issues should be realistic.

Issues of law generally should be attacked frontally and in the strongest terms which the authorities will allow. The reason for this distinction in approach between the facts and the law of the case, though subtle, can be stated as follows: The judge's decision on the facts in a bench trial n1 is a subjective one which is properly based on the evidence and his or her perception of it. An overly aggressive presentation of the facts in advance of trial both anticipates the judge's hearing and review of the evidence and prematurely intrudes on the subjective evaluation of that evidence. In contrast, while the judge is also the arbiter of the law, the law is objective and may be determined both in advance and in abstraction from the evidence. You cannot hide from the law and such a tactic is seldom successful. Moreover, if the case is proceeding to trial, it is usually true that you must have at least some law and some facts to support your claim. Use the law to your advantage; do not try to evade it in any way.

In general, the statements or conduct of opposing counsel should normally be referred to only if they constitute an admission or they are both improper and germane to the issue in the case. Remember that opposing counsel is not a party to the case; address your opponent's argument, but not your opponent personally.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePretrial MattersGeneral Overview

FOOTNOTES:
(n1)Footnote 1. In a jury case, the vehement discussions of the facts should almost always be saved for the jury.

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CHAPTER 29 Trial Briefs *

3-29 Federal Litigation Guide § 29.07

§ 29.07 Organizing Trial Briefs

[1] Table of Contents

In all trial briefs, a table of contents will help the court. In a long brief, a table of contents is essential. Subject to any local rules about the format of trial briefs, consider using tabs or other finding aids so that the judge can quickly locate a specific part of the trial brief.

The trial judge may not have the opportunity to read a long brief in one sitting. Accordingly, the judge might be inclined, even on first reading, to skip around, reading first the discussion of points which seem the most important or interesting and leaving others for later review as the trial progresses. Even if the judge reads the brief through in one sitting, he or she will be likely to want to return to particular points as they arise during the trial. A good table of contents will allow the judge to do this quickly.

[2] Topical Headings

A table of contents is only as helpful as the internal structure that it reflects. Again, even the shortest of trial briefs must have some internal structure. Long briefs should, if anything, be over-structured. Long statements of facts should be broken down under topical headings. Legal points should not only have separate headings but should be broken down into any subdivisions which logically exist, and all other reasonable divisions of the brief should be thoughtfully made. Be sure that the headings in the table of contents conform with the corresponding headings in the brief itself.

Subheadings should be as informative as possible. Thus, the subheading for each proposition of law should be a full sentence that states the legal proposition in affirmative terms. Subdivisions of the statement of facts should not be argumentative in form, but they should suggest the nature of the factual matter discussed.

[3] Table of Authorities

A list of the cases and other authorities cited in the trial brief, together with references to the pages of the brief on which they appear, is critical in most briefs. The judge should not have to skim entire sections of the trial brief to determine whether you have discussed an important case.

[4] Procedural Background and Issues

The procedural background should provide a procedural chronology of the case and outline all relevant pretrial motions. The procedural background is especially critical in cases that have multiple parties and claims, as well as in cases where dispositive motions have been filed in advance of trial.

[5] Statement of Facts

The organization of the statement of facts may present more of a problem in complex cases where "common sense" often fails to resolve conflicting organizational or argumentative considerations. Where the case requires a comprehensive preliminary statement of facts and also presents multiple and generally discrete legal issues, the facts may be presented chronologically or on an issue-by-issue basis. Because facts are best absorbed by most readers if they are presented in more or less chronological form, that approach is preferable. On the other hand, it is especially difficult for most readers to simultaneously absorb facts in two contexts--that is, in both their chronological and issue-by-issue contexts. As a result, if an issue-by-issue treatment is necessary or preferred, the overall chronology of the facts should first be set forth, and the detailed issue-by-issue discussion should then follow.

A closely related problem arises in simple as well as complex cases: whether to set forth particular facts in the general factual statement at the beginning of the brief or to state those facts in connection with the legal issue to which they relate. The solution to this problem will usually be a compromise, with the critical facts being stated in detail in one place and either summarized or cross-referenced in the other. Doubts as to which part of the trial brief should be favored should be resolved in favor of a comprehensive preliminary statement of all of the relevant facts. This is true for two reasons. First, in most cases, the judge will want to read--and you will want to provide, in one place--a forceful and comprehensive statement of all of the facts of the case. Second, if the relevant facts are effectively presented at the beginning of the brief, a later, summary of them in connection with particular legal points will likely recall those facts quickly to the judge's mind. Also, if your general statement of facts is well organized, with informative subheadings, later cross-references back to the facts relevant to particular legal points can easily be followed by the court.

Another common problem is the level of detail which any factual discussion should contain. Case-to-case variations make any general statement on this point particularly difficult. Nevertheless, a few overall observations may be made. The primary purpose of the trial brief is to address the law, because the judge will in due course hear the evidence. In many cases, either the pretrial order or previous exposure to the case will give the judge a good general understanding of the facts. Consequently, the trial brief's statement of facts, and particularly its statement of the expected proof, should normally be presented in summary rather than detailed form. The trial brief, should nevertheless, include as much detail as may be necessary to make the brief intelligible and forceful. There are several types of cases where a detailed presentation of at least some facts should be made. Among these are cases:

- Where the facts are essential to overcoming or avoiding an adverse proposition of law
- Where the conduct of the adverse party was illegal or morally or ethically reprehensible
- Where your own client's conduct was questionable and requires careful explanation or justification
- Where the case is logistically complicated because of the presence of multiple parties, an abundance of counterclaims, cross-claims or third party claims, or the assertion of alternative and inconsistent theories of relief
- Where the court's understanding of complicated financial, technical or other evidence will be facilitated by a background discussion of--in essence, an introductory course on--that evidence

[6] Legal Argument

Setting forth and arguing the law of the case is the principal purpose of a trial brief. The legal issues dealt with in the trial brief will often parallel the party's statement of contested issues of law in the pretrial order. The law should be argued in forthright, affirmative terms. However, the discussion of the law should be kept as short as possible. A short, incisive argument is likely to be the most effective. The drafting and revising necessary to reduce the length of a legal argument generally will strengthen it.

[7] Statement of Admissions and Stipulations

Admissions and stipulations are often included in the final pretrial order and some local rules require that trial briefs also list or describe all admissions and stipulations. n1 In those jurisdictions, it will probably be appropriate to list such admissions and stipulations in a separate section of the brief, regardless of whether particular admissions or stipulations are separately discussed elsewhere in the brief. If the adverse party or its counsel has made significant admissions or stipulations, you should emphasize them; if you or your client have made significant admissions or stipulations, you will want to explain them in order to minimize their significance.

[8] Issues Related to Jury Instructions

For tactical reasons, issues raised by jury instructions may be dealt with in a separate brief or memorandum, or through the parties' proposed jury instructions. Nevertheless, the question sometimes arises as to whether such issues should be dealt with as part of the general treatment of the law or in a separate section of the trial brief.

If the jury instruction issue is substantive and directly related to a legal issue considered in the brief, the treatment of the two issues should be combined. Presentation of the instruction issue will almost always be improved without blunting the effective presentation of the underlying issue itself. Additionally, combining the issues avoids repetition and reduces the length of the brief. If the jury instruction issue is not related to a substantive issue in the case, it is usually best discussed in a separate section even though it is substantive in character. This is particularly true if you must address several such issues. In general, it will be helpful to collect your discussion of jury instructions under one clearly identified heading. Where some instruction issues are discussed in connection with the substantive points to which they relate and others are discussed under a separate heading, the jury instruction section should cross-reference the discussions of instruction issues that appear elsewhere in the brief.

[9] Evidentiary Issues

Unlike jury instruction issues, evidentiary issues are typically unrelated to substantive issues. Even if they are related, a digression from the discussion of the substantive issue to consider a subsidiary evidentiary point is likely to detract from your analysis of the substantive issue. Accordingly, evidentiary issues should almost always be dealt with in a separate section of the trial brief. However, if the evidentiary issue is inseparable from the substantive issue, they should be presented together. For example, if the validity of one cause of action depends entirely on the admissibility of expert testimony on that issue, the evidence becomes the substance.

[10] Statement of Damages

The trial brief should deal with damage issues or other requested relief. If relief other than damages is requested, or if any aspect of the relief question is complex, such issues are usually best discussed in a separate section of the brief. The propriety of permanent injunctive relief or the terms of a desired declaratory judgment should be discussed in detail. The reasons why multiple forms of relief, for example, damages and injunction, are required should also be explained, and supported by citation to authority. If the disputed damage issues are really evidentiary issues--relating, for example, to the admissibility of certain forms of damage proof--those issues should almost always be discussed in a separate section of the brief.

[11] Appendices and Special Aids

Finally, in complex cases, a trial brief should include any special tool that might assist the court in its understanding of the facts and the law. Such tools include charts, graphs, schematic drawings and even photographs. If the cast of characters in the case is large, an alphabetical list of the "players" with a brief description of their background, title or position in the case, may be helpful. If the case involves complex transactions covering a long period of time, a one-page chronology of events will be helpful. This is particularly true if the nature of the case requires that most of the facts be presented in a non-chronological way.

Charts, graphs, and the like may often be physically incorporated into the factual discussion to which they relate and are more likely to be studied by the court if they are presented in that way. Short form chronologies and lists of witnesses are usually best set forth in a separate section of the brief. If appendices are used, for any purpose, they should be informatively tabbed: for example, "App. A--Chronology of Facts," not simply, "App. A." An index to the appendix should also be considered.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePretrial MattersGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See, e.g.,* Eastern District of California--Rule 285.

* Chapter 29 was rewritten in 2002 by Andrew E. Westley, Esq., of San Francisco, California.

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CHAPTER 29 Trial Briefs *

3-29 Federal Litigation Guide § 29.08

§ 29.08 CHECKLIST: Drafting Trial Briefs

The following checklist identifies issues that should be considered when drafting trial briefs.

☐ **Consult local rules and individual judge's rules.** The importance of consulting local rules, as well as individual judge's rules, cannot be overstated. Local rules and individual judge's rules often govern the filing of trial briefs and may address the following issues: n1

☐ **Whether the filing of a trial brief is mandatory.**

☐ **Time and place of filing.**

☐ **Form and contents of the brief.**

☐ **Page limits.**

☐ **Timing of service to opposing counsel.**

☐ **Consult the final pretrial order.** The final pretrial order will include many of the same issues to be addressed in the trial brief and may even dictate the requirements for filing and serving trial briefs n2

☐ **Consider filing a trial brief in every case, even if not mandatory.** Trial briefs are critical in both bench and jury trials and generally should be filed n3

☐ **Form of the brief.** Most trial briefs will include the following sections: n4

☐ **Table of contents.**

☐ **Table of authorities.**

☐ **Statement of the case.**

☐ **Statement of facts.**

☐ **Legal argument.**

☐ **Statement of damages.**

☐ **Conclusion.**

☐ **Scope and tone of the brief.** Consider the following issues when drafting the brief: n5

☐ **Covering all the issues to be presented at trial as succinctly as possible.**

☐ **Referring to parties by name or descriptive title.**

☐ **Citing all relevant case law.**

☐ **Avoiding personal attacks on opposing counsel.**

☐ **Organizing the brief.** Consider the following organizational tools when drafting trial briefs: n6

☐ **Topical headings.** Section headings in the brief allow the judge to locate pertinent sections with ease

☐ **Table of contents.** Even if not mandated, all briefs should include a table of contents that refers to the section headings

☐ **Table of authorities.** The table of authorities allows the reader to quickly locate relevant law in the argument section

☐ **Refer to local rules and individual judge's rules concerning form.** Most briefs will include a statement of facts, the legal argument, a section on damages, and a brief conclusion

☐ **Consider attaching visual aids.** Tables, charts, graphs, and other visual aids are sometimes appropriate to simplify the presentation of issues to the court

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesFinal Pretrial Conferences

FOOTNOTES:

(n1)Footnote 1. *See § 29.02*.

(n2)Footnote 2. *See § 29.03*.

(n3)Footnote 3. *See § 29.04*.

(n4)Footnote 4. *See § 29.05*.

(n5)Footnote 5. *See § 29.06*.

(n6)Footnote 6. *See § 29.07*.

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CHAPTER 29 Trial Briefs *

3-29 Federal Litigation Guide § 29.09

§ 29.09 Considering Alternatives to Trial Briefs

If the filing of a trial brief is not mandated and if the client has requested that one not be filed for financial or other reasons, alternatives to the trial brief should be considered to advance the client's position before trial. No alternative will be completely satisfactory and some may even be unavailable. However, alternatives to consider may include:

- **Pretrial orders.** Draft your portions of the pretrial order to obviate the need for a trial brief, paying particular attention to the statement of contested issues of fact and law and adding citations in support of the more important legal points

- **Post-trial briefs in bench trials.** In a bench trial, it may be appropriate to urge that trial briefs be "waived" in favor of post-trial submissions

- **Previously submitted briefs.** If briefs in support of or in opposition to substantive motions have been filed dealing with most or all of the issues in the case, simply rely on those briefs and remind the court of their contents

- **Case memorandum.** Many cases involve only one critical issue. If that is true of your case, prepare a short memorandum dealing with that issue, explain to the court why you are not filing a full-blown trial brief, and offer to supply similar memoranda dealing with other issues, if the court so desires

- **Memorandum of points and authorities.** Drafting full and effective summaries of the facts and argument of the law accounts for a major part of the time and cost of preparing a conventional trial brief--if cost issues are a significant factor, consider filing a short memorandum of points and authorities

- **Copies of relevant law** If the essence of your position is expounded in one or two cases, advise the trial judge of that fact and provide copies of any authorities which might not be readily available

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil

ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial Orders

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Appendix 29: Appendix to Chapter 29

3-29 Federal Litigation Guide Appendix 29:.syn

§ 29.syn Synopsis to Appendix 29: Appendix to Chapter 29

PART I SAMPLE TRIAL BRIEF
Sample Trial Brief

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Appendix 29: Appendix to Chapter 29

3-29 Federal Litigation Guide PART I

PART I * SAMPLE TRIAL BRIEF

This sample trial brief begins with a table of contents, a table of authorities, and an overview of the argument. The actual argument, which is quite detailed, is followed by a brief conclusion.

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466 F. Supp. 1287 (E.D. Pa. 1979)

Bachelder vs. Communications Satellite Corporation,
837 F.2d 519 (1st Cir. 1988)

Freund vs. Gerson,
610 F. Supp. 69, 71 (D.C. Fla. 1985)

Henne vs. Allis-Chalmers Corporation,
660 F. Supp. 1464 (E.D. Wis. 1987)

Higgins vs. Carpenters Health and Welfare Fund,
524 F. Supp. 601, 607 (E.D. Pa. 1981)

Kolentus vs. Avco Corporation,
798 F.2d 949, 958 (7th Cir. 1986)

O'Brien vs. Sperry Univac,

458 F. Supp. 1179 (D.C. 1978)

Spitznass vs. First National Bank of Oregon,
269 Or. 676, 525 P.2d 1318, 1323 (1974)

Tinsley vs. General Motors Corporation,
622 F. Supp. 1547, 1552 (D.C. Ind. 1985)

Van Orman vs. American Insurance Company,
680 F.2d 301 (3rd Cir. 1982)

Zittrouer vs. Uarco Inc. Group Benefit Plan,
582 F. Supp. 1471 (N.D. Ga. 1984)

STATUTES

29 U.S.C. § 1022(a)(1)

29 U.S.C. § 1132

29 U.S.C. § 1022(b)

Department of Labor Regulations § 2520.102-3

1. OVERVIEW

Plaintiff alleges that the Summary Plan Description Booklets, furnished during his second period of employment by [Employees' Pension Plan], were inconsistent with the formal Plan and mislead him to his detriment into a belief that his Years of Service with [Employer] prior to December 1, 1976, would be reinstated for vesting and benefit accrual purposes. He further alleges that the Summary Plan Description controls over the Plan, and that he is entitled to rely upon it.

Plaintiff's analysis is off the mark.

The Summary Plan Description Booklets at issue herein contain strong disclaimers precluding reliance upon their terms, which are, despite Plaintiff's contentions, consistent with the formal Plan, and case law establishes that the Plan controls over the Summary Plan Description, as the following arguments make clear.

2. INTRODUCTION

In the direct testimony of [Plaintiff], appended as Exhibit A to a document entitled "Direct Testimony of Witnesses in Chief Submitted to this Court", on page 6, lines 7-23, Plaintiff states:

I did review Summary Plan Descriptions [] in an attempt to clarify the situation. I *never found anything in the Summary Plan Descriptions which I felt supported* [[Employer's] position], nor did I find anything in the Summary Plan Descriptions which I felt contradicted what I had previously been told by [a representative of [Employer]].

(Emphasis added.)

These allegations are repeated elsewhere in Plaintiff's Direct Testimony and his Complaint, and are entirely unfounded.

The Plaintiff admits receiving at least three copies of the Summary Plan Description Booklets, identified as trial Exhibits "_____", "_____", "_____", (hereinafter referred to as "SPD's"). In response to interrogatory number 96 of Defendant [Employer's] Third Set of Interrogatories to Plaintiff (see Plaintiff's responses, number 96, page 12, lines 9-13), Plaintiff admits having in his possession the June 1979 edition, as well as the October 1981 edition and the May 1984 edition. The three booklets are virtually identical.

Plaintiff either did not review the SPD's, or he simply missed or failed to notice the numerous provisions contained within the Summary Plan Description Booklets he admits receiving and reading.

...

[Plaintiff's] failure to notice or review the vesting requirements and the provisions of the SPD's regarding Years of Service is particularly perplexing in light of [Plaintiff's] fifteen years experience as an attorney!

Plaintiff further contends that the SPD's provided to Plaintiff by [Employer] contained erroneous and misleading information (see Complaint, page 9, P 41, lines 8-12; page 10, P 45, lines 9-14; and page 15, prayer, lines 1-3). Again, Plaintiff either did not read the SPD's, or he simply failed to comprehend the detailed information set forth therein, since the Booklets contain no erroneous or misleading information such as would support his position.

Plaintiff's allegations that nothing in the SPD's supports Defendants' position denying Plaintiff retirement benefits for his second period of employment and that he was misled by the SPD's will be laid to rest in the following discussion.

A. Issues Relating To Summary Plan Descriptions

To analyze and determine the effect of Plaintiff's allegations, certain issues must be considered. These are:

(1) Do the SPD's adequately inform the participant of the relevant provisions of the Plan?

(2) Does the formal Plan control over the SPD's?

(3) As a matter of law, can the Plaintiff seek to obtain pension plan benefits under ERISA based on the terms of an SPD?

(4) What must the Plaintiff show in order to rely on provisions of the SPD?

(5) Do the SPD's comport with *29 U.S.C. § 1022(b)* and *Department of Labor Regulations* § 2520.102-3?

3. THE SUMMARY PLAN DESCRIPTION ADEQUATELY INFORMED PLAINTIFF OF HIS PENSION RIGHTS UNDER THE PLAN.

As was detailed in the brief which analyzes the terms and conditions of the formal post-ERISA Plan documents, Plaintiff is simply not entitled to reinstate-- count-- his pre-ERISA employment for purposes of vesting and benefit accrual purposes under those Plan documents. The reason is simple: [Plaintiff's] first period of employment was *not* continuous or consecutive through November 30, 1976, and therefore does not constitute "Years of Service" or "Credited Service" as defined by the Plan. Because his pre-ERISA service cannot be counted and because his second period of employment did not last for the required ten-year vesting period, [Plaintiff] is not entitled to a pension benefit for his second period of employment with the company, and his monthly pension benefit, based upon his first period of employment, is $381.43.

The result urged above is based upon an analysis of the post-ERISA Plan documents. As the following analysis will also demonstrate, nothing contained in the SPD's received by Plaintiff is contrary to the terms or conditions contained within the formal Plan documents.

A. Vesting Requirement:

Initially, the SPD's clearly inform the Plaintiff of the Plan's ten-year vesting requirement.

A section or subsection entitled "Benefit for Terminated Employees--Vesting" appears on page 10 of the SPD's received by Plaintiff.

...

B. Normal Retirement Benefits Provisions:

On page 3 of the Summary Plan Description begins a section entitled "Normal Retirement Benefits." That section contains a formula for determining the amount of the monthly pension benefit available at age 65.

...

C. Years Of Service Defined:

Whether the Plaintiff is entitled to either of a vested "Benefit for Terminated Employees" or to "Normal Retirement Benefits" depends entirely upon the definition of "Year of Service," which appears on page 20 of each SPD.

...

The definition unequivocally informs the Plaintiff that his Years of Service *prior to December 1, 1976* cannot be used under the Plan because those Years of Service were not consecutive through November 30, 1976.

Plaintiff's Years of Service after December 1, 1976, for purposes of the current benefit plan, fall under definition (b), since he was employed beginning on July 14, 1979. However, his benefits did not become vested, because he did not have 10 or more years of service on the date of his termination in February of 1987 as required by the Summary Plan Description on page 10 under the heading "Benefit for Terminated Employees-Vesting," as quoted hereinabove.

D. Determining Years Of Credited Service:

The non-applicability of the Plaintiff's service for the Company prior to December 1, 1976 is made even clearer by considering the method of determining Years of Credited Service, which is found on page 2 of the SPD's, under the subheading "Eligibility":

...

Since the Plaintiff herein did not have consecutive years of service through November 30, 1976, the Plaintiff could not begin to accrue credited service until he had returned to his employment with [Employer] in 1979.

Thus, the Summary Plan Description Booklet in effect at the time that Plaintiff was reemployed by [Employer], as well as subsequent editions, makes abundantly clear the fact that Plaintiff was not entitled to receive pension credit under the Plan for his years of service for the Company prior to December 1, 1976.

Moreover, by the clear terms of the Summary Plan Description Booklets, Plaintiff is not entitled to benefits under the Plan for his second period of employment, since he must have 10 years of Credited Service in order to obtain benefits, and his second period of employment from July 14, 1979 to February of 1987 does not total 10 years of Credited Service.

E. Entitlement To Participation:

Yet another provision of the SPD's is directly on point. Page 1 of the SPD's contains the heading, "Employees Entitled to Participate":

...

This provision clearly excludes [Plaintiff's] first period of employment. His second period of employment was of insufficient length for his benefits to vest, as was demonstrated hereinabove.

F. Reemployment:

Page 3 of the Summary Plan Description Booklet issued by [Employees' Pension Plan] in June of 1979 contains a section entitled "Reemployment." A similar provision is contained within the October 1981 and May 1984 editions of the booklets.

...

That section is clearly inapplicable, *vis-a-vis* Plaintiff, since it applies only to those individuals who terminated after December 1, 1976. Plaintiff herein terminated on January 2, 1976-- before December 1, 1976. Because this provision is inapplicable to Plaintiff, he was clearly placed on notice that his case would be determined on an "individual basis."

...

G. Other Provisions Of The Summary Plan Description Booklet:

On page 6 of the June, 1979 Booklet begins another subsection entitled "Early Retirement Benefits--All Participants." The text begins by stating, "You may retire anytime after you reach age 55 and have completed 15 continuous years of employment with the employer company."

Page 7 of the SPD describes "Disability Retirement", which requires that the claimant produce medical evidence of total and permanent disability, which is not at issue in this case.

Pages 8 and 9 deal with death benefits, which are not at issue herein.

The foregoing analysis of the language of the Summary Plan Descriptions furnished to Plaintiff makes it extremely difficult to find credible the Plaintiff's statement, quoted page 3 *supra:*

I never found anything in the Summary Plan Descriptions which I felt supported [Employer's position].

The Plaintiff's position is completely untenable and unpersuasive.

4. THE FORMAL PLAN CONTROLS OVER THE SUMMARY PLAN DESCRIPTION.

The leading case on the effect of a summary plan description in insurance plans controlled by *ERISA is Anthony vs.*

Ryder Truck Lines, Inc., et al., 466 F. Supp. 1287 (E.D. Pa. 1979) , which stated:

Initially, we must determine which is the controlling instrument, the plan or the booklet. *Spitznass vs. First National Bank of Oregon, 269 Or. 676, 525 P.2d 1318, 1323 (1974)* . When, as here, the booklet itself expressly states that it is simply a brief description or outline of the plan, it cannot be said to control the provisions of the plan.

466 F. Supp. at 1292-93 .

The reviewing court held, at *611 F.2d 944, 948 (3rd Cir. 1979)* , that the disclaimer in the summary plan description which stated that the formal plan controlled was valid.

In the instant case, the Plaintiff, upon his being reemployed on or about July 14, 1979, was provided with an SPD by the [Employees' Pension Plan]. (See Declaration of Chuck Adams, page 87, lines 7-21, attached as Exhibit "E" to Declaration of Defendants' Witnesses Offer *In Lieu* of Direct Oral Testimony In Support of Defendants' Case In Chief.) A copy of that Booklet, dated June 1979, is attached hereto as Exhibit "A" and by reference made a part hereof. The second page of that Booklet contains a Forward, and the second paragraph of that Forward states:

As a Participant in the Plan, you are entitled to know what the Plan provides. This Summary will help you understand the Plan's important features. *But remember, this is just a summary. The only complete statement of the terms of the Plan are set forth in the "[Employees' Pension Plan]" document and only the provisions of that Plan govern.*

(Emphasis added.)

The October 1981 and May 1984 SPD's contain identical language.

As the *Anthony* trial court explained, "The introduction of the summary booklet gave Anthony adequate warning that the pamphlet was not designed to supersede the plan but was intended as information and an invitation to all employees to examine the plan itself if they desired more information or had any questions." *466 F. Supp. at 1293* .

Significantly, the Forward of the SPD's involved in the instant case warns the reader to "[r]emember, this is just a summary." Such language puts the reader on notice that the SPD's cannot cover all possible situations.

The June 1979 SPD furnished to Plaintiff (as well as the October 1981 and the May 1984 editions) goes on to inform the reader where the complete statement of the terms can be found.

...

Therefore, the Plaintiff was on notice that only the provisions of the formal plan govern, and was apprised of his right to examine all plan documents in the personnel office or to obtain copies upon written request. Yet the Plaintiff, an experienced attorney for [Employer], never asked anyone associated with the [Employees' Pension Plan] any questions regarding the contents of the SPD, nor did he ever ask to examine or obtain copies of Plan documents. The fact that Plaintiff did not avail himself of the opportunity to review the actual Plan documents is not the fault of Defendant herein.

Anthony has been followed in *Kolentus vs. Avco Corporation, 798 F.2d 949, 958 (7th Cir. 1986)* ; *Tinsley vs. General Motors Corporation, 622 F. Supp. 1547, 1552 (D.C. Ind. 1985)* , and *Higgins vs. Carpenters Health and Welfare Fund, 524 F. Supp. 601, 607 (E.D. Pa. 1981)* . Without relying on *Anthony, Van Orman vs. American Insurance Company, 680 F.2d 301 (3d Cir., 1982)* also held that the formal Plan controls over the Summary Plan Description.

The disclaimer itself need not inform the participant of his right to examine the plan documents and obtain copies of

those documents. In *Higgins,* which likewise dealt with a disclaimer in a Summary Plan Description and followed the reasoning of *Anthony,* the court explained that, "One provision of a writing may not be read in isolation from other provisions. Rather, the writing must be interpreted as a whole." *524 F. Supp. at 607 . See also, 680 F.2d 301, 309 (3d Cir. 1982)* .

Obviously, the provisions dealing with Plaintiff's rights under ERISA on page 13 of the SPD's at issue herein that the Plan documents could be examined at the personnel department would indicate to a reasonable person that such documents could be examined at the personnel department during normal business hours. Certainly, they furnish more information to the employee than was furnished in *Van Orman,* in which employees were not advised of when or where plan documents could be examined.

No Ninth Circuit case has been located which follows the reasoning of *Anthony*. However, the case of *Spitznass vs. First National Bank of Oregon, 269 Or. 676, 525 P.2d 1318 (1974)* , found that the Summary Plan Description is a mere illustration of the controlling plan.

...

From the foregoing, there can be no doubt but that Plaintiff was adequately informed by the disclaimer that the Plan governs over the SPD, and that the courts have upheld such disclaimers in ruling that the formal plan documents control over summary plan descriptions.

5. AS A MATTER OF LAW, PLAINTIFF CANNOT SEEK TO OBTAIN PENSION PLAN BENEFITS UNDER AN ERISA PLAN BASED ON THE TERMS OF A SUMMARY PLAN DISCRIMINATION.

In the case of *O'Brien vs. Sperry Univac, 458 F. Supp. 1179 (D.C. 1978)* , the plaintiff sued to have a part of the plan declared void because the summary plan description appeared to alter the terms of the original plan. The Court held that it was not a claim under the terms of the plan.

...

In the case at bar, to the extent that the Plaintiff seeks to recover Plan benefits through the enforcement of provisions contained within the Summary Plan Description Booklets, this Court has no jurisdiction to award those benefits under the auspices of the ERISA statutes in general and under *29 U.S.C. § 1132* in particular.

6. THE PARTICIPANT MUST SHOW REASONABLE RELIANCE OR PREJUDICE FROM A FAULTY SUMMARY PLAN DESCRIPTION.

From the foregoing, it is evident that the Plaintiff *cannot* reasonably have interpreted any provision of the SPD with which he was provided when he was reemployed by [Employer] in 1979 (or any other SPD) to mean that his years of service prior to December 1, 1976 would be credited toward his pension benefits under the Plan. Moreover, there is ample case authority that not only must Plaintiff have relied to his detriment upon the SPD, but his reliance must have been reasonable.

In *Freund vs. Gerson, 610 F. Supp. 69, 71 (D.C. Fla. 1985)* , the court found:

Although ERISA specifically allows private actions for benefits, injunctions and other appropriate relief, including attorney's fees, *29 U.S.C. § 1132*, this Court is of the opinion that a private action cannot lie for merely a "technical breach of [*29 U.S.C.] § 1022(b)*.' Instead, this Court finds, and case law suggests, that in order to recover damages for the breach, Plaintiff must show some significant reliance upon, or possible prejudice flowing from the faulty Summary Plan description.

Anthony, 611 F.2d 944, at p. 947, held that there would be no recovery for the plaintiff without proof of an estoppel. *Zittrouer vs. Uarco Inc. Group Benefit Plan, 582 F. Supp. 1471 (N.D. Ga. 1984) at p. 1475* , held that the plaintiff must show (1) an *intentional deception* through concealment or inaction, or gross negligence amounting to constructive fraud; (2) justifiable reliance; and (3) damages. Because there is no evidence of intentional deception by Defendant and because the SPD's accurately "summarize" the Plan, Plaintiff cannot possibly demonstrate estoppel in this case.

The issue of reasonableness was considered in *Bachelder vs. Communications Satellite Corporation, 837 F.2d 519 (1st Cir. 1988)* , which was decided partly upon the basis that there was no indication of any *reasonable* or significant reliance on the part of the plaintiffs. *837 F.2d at 523* .

...

And finally, in *Henne vs. Allis-Chalmers Corporation, 660 F. Supp. 1464 (E.D. Wis. 1987)* , it was held that:

[] most decisional law requires a showing of *active concealment* or of some significant reliance upon or possible prejudice flowing from a faulty summary plan description.

660 F. Supp. at 1474. [Emphasis in original.]

Even if Plaintiff could somehow point to some provision of the SPD's in question which are inconsistent with Formal Plan Documents, he must demonstrate that he *reasonably relied* upon the language contained therein to his detriment. Alternatively, he must show intentional deception through concealment or inaction, or gross negligence amounting to constructive fraud.

Plaintiff was quoted page 3 *supra,* stating:

I did review Summary Plan Descriptions [] in an attempt to clarify the situation. *I never found anything in the Summary Plan Descriptions which I felt supported [[Employer's] position*], nor did I find anything in the Summary Plan Descriptions which I felt contradicted what I had been previously been told by [a representative of [Employer]].

(Emphasis added.)

Even a second reading of the SPD's was apparently insufficient to enable Plaintiff to appreciate the Plan's unambiguous provisions, for he states, on page 7 of Plaintiff's Direct Testimony, lines 20-23:

... I again looked at Summary Plan Descriptions, and, again, found nothing in them which I felt supported [[Employer's]] position. I felt the conclusions [[Employer]] had reached were incorrect.

(Emphasis added.)

Even the average reader with a high school education should be capable of understanding the unambiguous provisions of the SPD's quoted hereinabove. However, [Plaintiff] graduated from law school in 1971 and practiced as an attorney for [Employer] from February of 1972 until January of 1976, when he left [Employer] for the first time. He then worked for a private law firm until July of 1979, when he returned to [Employer]. Certainly, as an attorney, [Plaintiff] was routinely required to read, analyze and adopt a legal position regarding the effect of contract language, particularly insurance contract language. In fact, [Plaintiff] was no doubt capable of drafting the very SPD's in which he now claims he can find no language to support the position of Defendant herein.

The patent unreasonableness of Plaintiff's position is made more apparent by the fact that Plaintiff received at least three

editions of the Summary Plan Description Booklets, all containing similar provisions. Plaintiff's response to interrogatory number 96 at page 12, lines 9-13 of Plaintiff's Responses to Defendant's Third Set of Interrogatories admits that Plaintiff received copies from [Employer] of Summary Plan Description Booklets dated June 1979, October 1981, and May 1984, and Plaintiff admits having "reviewed" and "looked at" the booklets, as noted hereinabove.

Plaintiff has failed to show reliance on the Summary Plan Description Booklets, whether it be reasonable or justifiable, and has not shown any intentional concealment or gross negligence on the part of the authors of the Plan. On the contrary, the SPD's clearly elucidate the circumstances under which service prior to December 1, 1976 will be credited toward pension benefits. *Plaintiff simply could not have been reasonably mislead by* the SPD's because he is an experienced attorney, and the SPD's tell the reader exactly how to compute pension benefits, specifically excluding any service prior to December 1, 1976 which was not consecutive through November 30, 1976.

Therefore, any attempt by the Plaintiff to demonstrate that he suffered any detriment as a result of *reasonable* and justifiable reliance upon the Summary Plan Description at issue herein must fail.

7. THE SUBJECT SUMMARY PLAN DESCRIPTION COMPLIES WITH TWE REQUIREMENTS STATED IN LABOR REGULATIONS § 2520.102-3 AND *29 U.S.C. § 1022(b)*.

Title *29 U.S.C. § 1022(b)* and *Department of Labor Regulation* § 2520.102-3 set forth the required contents of the summary plan description. They contain virtually identical requirements, except that item number eleven of D.L.R. § 2520.102-3 is not required by *29 U.S.C. § 1022(b)*. Since the Labor Regulations require an additional item of content of the summary plan description, the following discussion will center on the Labor Regulation requirements.

...

The manner in which the Summary Plan Description booklet meets these requirements is discussed separately and at length hereinbelow.

...

Labor Regulation § 2520.102-3 also prescribes the manner in which the material must be presented:

...

The SPD's in question meets these criteria, especially given the fact that most insurance company employees are well educated, and most probably have college degrees. The booklet contains no technical jargon or long, complex sentences, contains a table of contents, several clarifying examples for computing benefits, and has five pages of typical questions and answers.

Title *29 of the United States Code, § 1022(a)(1)* requires that the summary plan description " ... shall be sufficiently accurate and comprehensive to *reasonably* apprise such participants and beneficiaries of their rights and obligations under the Plan." (Emphasis added.) As demonstrated by the foregoing, the SPD's at issue herein comply with this standard, as well as the Department of Labor regulations.

8. CONCLUSIONS

Based upon the foregoing analysis, Defendants respectfully request that this Court hold that:

1. The Summary Plan Description Booklets at issue herein both adequately and accurately apprise Plaintiff of the relevant provisions of the Plan;

2. Plaintiff may not rely upon the Summary Plan Description Booklets, because the formal Plan controls;

3. Even if relevant provisions of the Summary Plan Description Booklets were contrary to the corresponding provisions of the Plan, this Court has no jurisdiction to award benefits based solely upon the Summary Plan Description;

4. Even if provisions of the Summary Plan Description Booklets were contrary to provisions of the Plan itself, and even if this Court finds jurisdiction, the Plaintiff's reliance on the Summary Plan Description Booklets is wholly unreasonable, and;

5. The Summary Plan Description Booklets at issue herein comply with the requirements of the United States Code and Department of Labor regulations.

Dated: January _____, 1989

Respectfully submitted,

JAMES P. COLLINS, JR., Esq. WILLIAM D. NAEVE, Esq. COTKIN, COLLINS & FRANSCELL

BY: .....

.....

Attorneys for Defendants, [Employer], [Employees' Pension Plan] and [Employees Pension Plan Committee]

Sample Trial Brief

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Plaintiff, Plaintiff vs. [Employees' Pension Plan]; [Employer]; [Employees Pension Plan Committee] and DOES I-IX,inclusive, Defendants.	)))))))))	Case No. TRIAL BRIEF ON ISSUES RELATING TO THE SUMMARY PLAN DESCRIPTION BOOKLETS APPLICABLE TO THE Employees' Pension Plan Trial Date:Time:CtRm:

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* This sample trial brief was furnished courtesy of James P. Collins, Jr. and William D. Naeve, Cotkin, Collins & Franscell, Santa Ana, California. In this sample brief, the names of all parties, witnesses, and opposing counsel have been changed, and the text has been condensed.

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CHAPTER 30 Juries *

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CHAPTER 30 Juries *

3-30 Federal Litigation Guide Scope

Scope

SCOPE

This chapter primarily addresses the considerations relating to jury demands and jury selection. The chapter first focuses on the fundamental right to a jury trial and the procedures for demanding a jury trial under Rule 38, and the following topics are discussed:

- Legal authority for jury trials under the U.S. Constitution and the Federal Rules
- Availability of jury trials in specific types of actions and for specific issues
- Considerations in demanding a jury trial
- Making a proper written demand for jury trial (including specific rules in cases removed to federal court, cases involving amended and supplemental pleadings, and cases involving counterclaims)
- Timing of jury demands
- Waiving the right to trial by jury

The chapter then turns to jury selection and jury conduct, and the following topics are covered:

- The scope of the Federal Jury Selection and Service Act
- The selection of an impartial jury through voir dire
- The court's role in conducting voir dire
- Dealing with problems during voir dire, such as juror untruth
- Challenging potential jurors for cause
- Utilizing peremptory challenges

- Opposing an adversary's challenge of a potential juror
- The judge's role during the jury trial
- Excusing or removing jurors during trial or deliberation
- Reaching verdict with the requisite number of jurors

For expanded coverage of the topics covered in this chapter, *see* Moore's Federal Practice, Ch. 38, *Jury Trial of Right* (Matthew Bender 3d ed.).

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CHAPTER 30 Juries *
A. Asserting the Right to Trial by Jury

3-30 Federal Litigation Guide § 30.01

§ 30.01 Evaluating the Constitutional Right to a Trial by Jury

[1] Preserving the Right to Jury Trial Under the Seventh Amendment

The *Seventh Amendment to the United States Constitution* provides: "In 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." n1

"Suits at common law" refers to suits in which legal rights are to be ascertained and determined, in contradistinction to those where equitable rights alone are recognized, and equitable remedies are administered. The amendment may be construed to embrace all suits which are not of equity or admiralty jurisdiction. n2

If the issue, in its modern context, is such that it would have been heard at common law in 1791, then it is triable by a jury as of right, and that right is constitutionally protected. n3

[2] Construing Seventh Amendment Right Liberally

It has been held that the right to jury trial under the *Seventh Amendment* should be liberally construed, n4 and that when there is doubt, the balance is tilted in favor of a jury trial. n5 The strong federal policy favoring jury trials provides the impetus for finding the right to jury trial in questionable cases. n6 When the court has discretion, it is "very narrowly limited and must, wherever possible, be exercised to preserve jury trial." n7

Since the right to jury trial is a fundamental right, it may not be suspended for lack of funds. n8 Nor may the right be abridged by administrative concerns over the length of the federal docket. n9

[3] Waiving Seventh Amendment Right to Jury Trial

The *Seventh Amendment* does not mandate jury trials but instead preserves an entitlement to a jury trial for parties in particular cases. As such, the jury trial right may be waived. n10

[4] Combining Legal and Equitable Claims

When a plaintiff brings both legal and equitable claims in the same action, the *Seventh Amendment* right to jury trial on

the legal claims must be preserved by trying those claims first, or at least simultaneously with the equitable claims, and the jury's findings on any common questions of fact must be applied when the court decides the equitable claims. n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsActions in EquityCivil ProcedureTrialsJury TrialsRight to Jury TrialConstitutional LawBill of RightsFundamental RightsCriminal ProcessRight to Jury TrialConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil ActionsGovernmentsCourtsCommon Law

FOOTNOTES:
(n1)Footnote 1. *U.S. Const. amend. VII.*

(n2)Footnote 2. *Teamsters v. Terry, 494 U.S. 558, 564, 110 S. Ct. 1339, 108 L. Ed. 2d 519 (1990)* .

(n3)Footnote 3. *See United States v. Jones, 158 F.R.D. 309, 312 (D.N.J. 1994)* .

(n4)Footnote 4. *See In re Beeline Eng'g & Constr., Inc., 139 B.R. 1025, 1027 (Bankr. S.D. Fla. 1992)* .

(n5)Footnote 5. *Deborah Leslie, Ltd. v. Rona, Inc., 630 F. Supp. 1250, 1253 (D.R.I. 1986)* .

(n6)Footnote 6. *See Bower v. Bunker Hill Co., 675 F. Supp. 1254, 1261-1262 (E.D. Wash. 1986)* .

(n7)Footnote 7. *See Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959)* .

(n8)Footnote 8. *Avco Corp. v. PPG Indus., Inc., 867 F. Supp. 84, 97 (D. Mass. 1994)* .

(n9)Footnote 9. *See Reiner v. New Jersey, 732 F. Supp. 530, 533 (D.N.J. 1990)* .

(n10)Footnote 10. *Bellmore v. Mobil Oil Corp., 783 F.2d 300, 306 (2d Cir. 1986)* .

(n11)Footnote 11. *Colorado Visionary Acad. v. Medtronic, Inc., 397 F.3d 867, 875 (10th Cir. 2005)* .

* Chapter 30 was rewritten in 2001 by Andrew E. Westley, Esq., of San Francisco, California.

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CHAPTER 30 Juries *
A. Asserting the Right to Trial by Jury

3-30 Federal Litigation Guide § 30.02

§ 30.02 Evaluating the Right to Jury Trial Under Rule 38

[1] Protecting Actions at Law Pursuant to Constitution

Rule 38(a) preserves the right of jury trial in those cases in which the right is protected by the *Seventh Amendment to the Constitution*. n1

[2] Recognizing Right to Trial by Jury Under Federal Statutes

Many actions created and recognized under federal law provide for the right of a jury trial. Rule 38(a) recognizes the right of jury trial in those cases that allow for a jury under federal statute. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsRight to Jury TrialConstitutional LawBill of RightsFundamental RightsCriminal ProcessRight to Jury TrialConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 38(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 38(a).*

* Chapter 30 was rewritten in 2001 by Andrew E. Westley, Esq., of San Francisco, California.

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CHAPTER 30 Juries *
A. Asserting the Right to Trial by Jury

3-30 Federal Litigation Guide § 30.03

§ 30.03 Distinguishing Between Actions at Law and Suits in Equity

[1] Actions Formerly Cognizable in Equity Do Not Require Jury Trial

Prior to the adoption of the *Seventh Amendment*, a jury trial was customary in suits brought in the English law courts. Under the Federal Rules, a jury trial is required in those suits that are analogous to such "suits at common law." In contrast, those actions that are analogous to 18th-century cases tried in courts of equity do not require a jury trial. n1

While an action seeking a monetary award will frequently be legal in nature, a monetary claim that is made in a context historically allowed in equity rather than at law (certain claims for restitution), will not be triable to a jury. n2

[2] Traditional Actions at Law May Be Tried by a Jury

The following traditional civil actions, when they are not complicated by equitable defenses, may be tried by a jury when timely demand is made:

- A damages action for trespass to property n3
- A damages action for assault, battery, or false imprisonment n4
- A damages action for negligence n5
- A damages action for conversion n6
- An action seeking recovery of contract damages (money due on a contract or recovery of damages for breach of contract) n7
- A damages action alleging fraud or deceit n8
- A damages action for slander, libel, or defamation n9
- A malicious prosecution action n10

- A damages action for nuisance n11
- An ejectment action--to recover possession of land n12
- An action to recover a debt n13

[3] Newly Created Rights That Would Be Enforceable at Common Law Are Triable to Jury

The *Seventh Amendment* is applicable to new causes of action created by congressional enactment if the statute creates legal rights and remedies enforceable in an action for damages in the ordinary courts of law. n14

[4] Traditional Equitable Actions Tried Without a Jury

Parties in an action seeking relief in equity do not have a right to a jury trial. Actions traditionally cognizable in equity include:

- Injunctive actions, including actions: to enjoin enforcement of, or compel compliance with, or enjoin violation of a statute or administrative order; to enjoin patent, copyright or trademark infringement; to enjoin repeated trespasses or injury to property; and to enjoin enforcement of a judgment n15
- An action to foreclose a lien n16
- An action to impose a constructive trust n17
- An action for rescission and cancellation n18
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- An action for restitution n20
- An action for specific performance of a contract n21
- An action to declare or enforce a trust n22
- An action for an accounting of a trust or other equitable accounting n23
- A proceeding to enforce a settlement agreement n24
- A fraudulent conveyance claim n25
- An action to quiet title n26

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsActions in EquityConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:
(n1)Footnote 1. *Tull v. United States, 481 U.S. 412, 417, 107 S. Ct. 1831, 95 L. Ed. 2d 365 (1987)* .

(n2)Footnote 2. *Waldrop v. Southern Co. Servs., Inc., 24 F.3d 152, 157 (11th Cir. 1994)* .

(n3)Footnote 3. *See United States v. Williams, 441 F.2d 637, 643-644 (5th Cir. 1971)* .

(n4)Footnote 4. *See Ross v. Bernhard, 396 U.S. 531, 533, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970)* .

(n5)Footnote 5. *See Ross v. Bernhard, 396 U.S. 531, 533, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970)* .

(n6)Footnote 6. *See In re Beeline Eng'g & Constr., Inc., 139 B.R. 1025, 1027 (Bankr. S.D. Fla. 1992)* .

(n7)Footnote 7. *See Ross v. Bernhard, 396 U.S. 531, 542, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970)* .

(n8)Footnote 8. *See Skippy, Inc. v. CPC Int'l, Inc., 674 F.2d 209, 214 (4th Cir. 1982)* .

(n9)Footnote 9. *See Ross v. Bernhard, 396 U.S. 531, 533, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970)* ; *New York Times Co. v. Sullivan, 376 U.S. 254, 285 n.26, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)* .

(n10)Footnote 10. *See Smoot v. Fox, 353 F.2d 830, 833 (6th Cir. 1965)* , *cert. denied*, *384 U.S. 909 (1966)* .

(n11)Footnote 11. *See In re Acushnet River & New Bedford Harbor Proceedings, 712 F. Supp. 994, 1000-1004 (D. Mass. 1989)* .

(n12)Footnote 12. *See Pernell v. Southall Realty, 416 U.S. 363, 370, 94 S. Ct. 1723, 40 L. Ed. 2d 198 (1974)* .

(n13)Footnote 13. *United States v. Higginbotham, Inc., 722 F. Supp. 283, 284 (N.D. Miss. 1989)* .

(n14)Footnote 14. *Curtis v. Loether, 415 U.S. 189, 193, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974)* .

(n15)Footnote 15. *See NAACP v. Acusport Corp., 226 F. Supp. 2d 391, 397 (E.D.N.Y. 2002)* .

(n16)Footnote 16. *See DeVore v. Fed. Sav. Bank, 822 F. Supp. 31, 35 (D. Me. 1993)* .

(n17)Footnote 17. *See Hauytin v. Grynberg, 52 B.R. 657, 658-661 (Bankr. D. Colo. 1985)* .

(n18)Footnote 18. *See Gorenflo v. Texaco, Inc., 735 F.2d 835, 838 (5th Cir. 1984)* .

(n19)Footnote 19. *See Enserch Corp. v. Shand Morahan & Co., 952 F.2d 1485, 1502 (5th Cir. 1992)* .

(n20)Footnote 20. *See Teamsters v. Terry, 494 U.S. 558, 570, 110 S. Ct. 1339, 108 L. Ed. 2d 519 (1990)* .

(n21)Footnote 21. *See Warner v. Rossignol, 513 F.2d 678, 683-684 (1st Cir. 1975)* .

(n22)Footnote 22. *See Swan Brewery Co. v. United States Trust Co., 143 F.R.D. 36, 41 (S.D.N.Y. 1992)* , *aff'd on reh'g*, *145 F.R.D. 40, 44 (S.D.N.Y. 1992)* .

(n23)Footnote 23. *See Dardovitch v. Haltzman, 190 F.3d 125, 133-134 n.1 (3d Cir. 1999)* .

(n24)Footnote 24. *See Warner v. Rossignol, 513 F.2d 678, 683-684 (1st Cir. 1975)* .

(n25)Footnote 25. *See Hyde Properties v. McCoy, 507 F.2d 301, 305-306 (6th Cir. 1974)* .

(n26)Footnote 26. *See United States v. Williams, 441 F.2d 637, 644 (5th Cir. 1971)* .

* Chapter 30 was rewritten in 2001 by Andrew E. Westley, Esq., of San Francisco, California.

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CHAPTER 30 Juries *
A. Asserting the Right to Trial by Jury

3-30 Federal Litigation Guide § 30.04

§ 30.04 Admiralty Claims Generally Tried Without a Jury

[1] No Constitutional Jury Trial Right in Admiralty Cases

There is no constitutional right of trial by jury in cases that are properly within the admiralty jurisdiction of the federal courts. n1 This is so even when the action is of a type typically tried to a jury, such as an action for personal injury. Actions for personal injury brought in the federal admiralty jurisdiction under general maritime law have not entitled the injured plaintiff to a jury trial, unless the injured party establishes an independent jurisdictional basis for such a trial. n2

[2] Federal Rules Create No Jury Trial Right in Admiralty Cases

Rule 38(e) expressly states that the Rules are not to be construed to create a right to a jury trial of issues in an admiralty or maritime claim within the meaning of Rule 9(h). n3 Thus, when a claimant properly designates a claim as one in admiralty under Rule 9(h), or when the claim is only cognizable in admiralty, whether so identified or not, there is no constitutional jury trial right as to that claim. n4 A Rule 9(h) election by the plaintiff precludes a defendant from obtaining a jury trial on a closely intertwined counterclaim. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPractice & ProcedureConstitutional AuthorityCivil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsActions in EquityConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:
(n1)Footnote 1. *Green v. Ross, 481 F.2d 102, 103 (5th Cir. 1973)* .

(n2)Footnote 2. *Green v. Ross, 481 F.2d 102, 103 (5th Cir. 1973)* .

(n3)Footnote 3. *Fed. R. Civ. P. 38(e)*.

(n4)Footnote 4. *Durden v. Exxon Corp., 803 F.2d 845, 849-850 (5th Cir. 1986)* .

(n5)Footnote 5. *See Windsor Mt. Joy Mut. Ins. Co. v. Johnson, 264 F. Supp. 2d 158, 162 (D.N.J. 2003)* .

* Chapter 30 was rewritten in 2001 by Andrew E. Westley, Esq., of San Francisco, California.

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CHAPTER 30 Juries *
A. Asserting the Right to Trial by Jury

3-30 Federal Litigation Guide § 30.05

§ 30.05 Evaluating Public Rights Exemption to Jury Trial

If a claim that is legal in nature asserts a "public right," then the *Seventh Amendment* does not entitle the parties to a jury trial if Congress assigns its adjudication to an administrative agency or specialized court of equity. n1 The Supreme Court has held that when Congress creates new statutory public rights, it may assign their adjudication to an administrative agency with which jury trials would be incompatible. n2 However, a statutory right must be closely intertwined with a federal regulatory program that Congress has power to enact, before a claim that is legal in nature may be deemed a public right. n3

The fact that a monetary award may be made by the administrative body does not render the case a suit at common law, or the equivalent of such a suit. Thus, an award of back pay made by the National Labor Relations Board, as authorized under the Act, was not a violation of the defendant employer's *Seventh Amendment* rights. n4 Similarly, the Occupational Safety and Health Act was found not to violate the *Seventh Amendment* by providing that a review commission may levy civil penalties against employers violating the Act. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsActions in EquityConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:
(n1)Footnote 1. *Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 50-54, 109 S. Ct. 2782, 106 L. Ed. 2d 26 (1989)* .

(n2)Footnote 2. *Atlas Roofing Co. v. OSHRC, 430 U.S. 442, 456-460, 97 S. Ct. 1261, 51 L. Ed. 2d 464 (1977)* .

(n3)Footnote 3. *Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 50-54, 109 S. Ct. 2782, 106 L. Ed. 2d 26 (1989)* .

(n4)Footnote 4. *NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48-49, 57 S. Ct. 615, 81 L. Ed. 893 (1937)* .

(n5)Footnote 5. *Atlas Roofing Co. v. OSHRC, 430 U.S. 442, 456-457, 97 S. Ct. 1261, 51 L. Ed. 2d 464 (1977)* .

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CHAPTER 30 Juries *
A. Asserting the Right to Trial by Jury

3-30 Federal Litigation Guide § 30.06

§ 30.06 Determining Right to Jury Trial Based On Nature of Action and Remedy Sought

To determine whether the *Seventh Amendment* entitles a particular litigant to a jury trial in a particular case, the court must determine whether that case will resolve legal rights or only equitable rights. This is particularly challenging when newly created causes of action do not fit neatly into traditional molds. The Supreme Court has designed a two-part test to determine the applicability of the *Seventh Amendment* to newly created statutory causes of action.

To determine whether a statutory action is more similar to cases that were tried in courts of law than to suits tried in courts of equity or admiralty, the following factors must be examined: n1

- The nature of the action, and
- The remedy sought

The first prong of the test--analysis of the nature of the action--has been described by the Supreme Court as being obviously difficult to apply, requiring an extensive and possibly "abstruse historical" search for the nearest 18th-century analog. n2 The Court has repeatedly stressed that the second factor--i.e., characterizing the relief sought--is the more important prong of the two-prong test. n3

The Supreme Court has determined that the *Seventh Amendment* guarantees the right to have a jury determine the amount of statutory damages in a copyright infringement action brought under the Copyright Act. n4 The Supreme Court has also held that the *Seventh Amendment* requires courts to grant requests for jury trials in patent infringement cases. However, the particular issue of determining the scope of the patent grant is a legal issue to be resolved by the court. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsActions in EquityCivil ProcedureRemediesGeneral OverviewConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:

(n1)Footnote 1. *Tull v. United States, 481 U.S. 412, 417-418, 107 S. Ct. 1831, 95 L. Ed. 2d 365 (1987)* .

(n2)Footnote 2. *Tull v. United States, 481 U.S. 412, 421, 107 S. Ct. 1831, 95 L. Ed. 2d 365 (1987)* .

(n3)Footnote 3. *Wooddell v. International Bhd. of Elec. Workers, 502 U.S. 93, 97, 112 S. Ct. 494, 116 L. Ed. 2d 419 (1991)* .

(n4)Footnote 4. *Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 353-354, 118 S. Ct. 1279, 140 L. Ed. 2d 438 (1998)* .

(n5)Footnote 5. *Markman v. Westview Instruments, Inc., 517 U.S. 370, 372, 116 S. Ct. 1384, 134 L. Ed. 2d 577 (1996)* .

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CHAPTER 30 Juries *
A. Asserting the Right to Trial by Jury

3-30 Federal Litigation Guide § 30.07

§ 30.07 Evaluating Right to Jury Trial in Diversity Cases

The right to a jury trial in the federal courts is to be determined as a matter of federal law in diversity as well as other actions. In diversity cases, the substantive dimension of the claim asserted finds its source in state law, n1 but the characterization of that state-created claim as legal or equitable for purposes of determining whether a right to jury trial is indicated, must be made under federal law. n2 Thus, even when the source of the substantive claim is in state law, federal law will determine the right to jury trial. n3 Even if the state would grant a jury trial but the federal law would not, federal courts have held that federal law would apply, and a jury trial would be denied. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsActions in EquityCivil ProcedureRemediesGeneral OverviewConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:
(n1)Footnote 1. *Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78-80, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)* .

(n2)Footnote 2. *Simler v. Conner, 372 U.S. 221, 222, 83 S. Ct. 609, 9 L. Ed. 2d 691 (1963)* .

(n3)Footnote 3. *Gallagher v. Wilton Enters., Inc., 962 F.2d 120, 122 (1st Cir. 1992)* .

(n4)Footnote 4. *Phillips v. Kaplus, 764 F.2d 807, 812 (11th Cir. 1985)* .

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CHAPTER 30 Juries *
A. Asserting the Right to Trial by Jury

3-30 Federal Litigation Guide § 30.08

§ 30.08 Deciding Whether to Demand a Jury Trial

[1] Evaluating Whether Facts of Case Have Jury or Bench Appeal

One of the profound decisions litigation counsel must make is whether to demand trial by jury. The outcome of the trial and the likelihood of success on appeal may be affected by the decision. The purpose of a trial is the resolution of disputed issues of fact, and experienced litigation counsel will have some judgment whether the facts in the case will have jury or bench appeal. From the plaintiff's perspective, the action should be shaped before the complaint is filed.

At the threshold, the right to trial by jury is limited by the *Seventh Amendment* to "Suits at common law," n1 by Rule 38 "as given by a statute of the United States," n2 and by the nature of the relief sought at law or in equity. Plaintiff's counsel must consider these issues before the commencement of the action.

The venue of the action is an important factor in deciding on a bench or jury trial. The demography of the location and of the resultant prospective jurors will have a significant effect on the outcome of the case, and must be considered. For example, there are areas of the country in which jurors may not be receptive to the facts of a particular case, but the judge in a bench trial may be more tolerant.

[2] Considering Case and Trial Management Methods of the Court

In most districts in the federal system, a case is assigned to a judge when it is filed. The reputation and known predispositions of the judge must be taken into account, in particular whether judge's history and reputation indicate that the judge would be receptive or antagonistic to cases involving the facts, theory, and relief sought.

The work habits of judicial officers must also be considered. If the case is tried to a jury, counsel should consider whether the judge will actively participate in pretrial preparations, set a realistic work schedule and adhere to it, not permit the trial to be interrupted by other matters, not invite or permit incessant sidebar conferences out of the hearing of the jury and not repeatedly send the jury out of the courtroom. Jurors resent delay and exclusion from the process. Following a bench trial, does the judge promptly prepare findings of fact and conclusions of law pursuant to Rule 52(a) or will the parties wait--sometimes for years--for a decision? Does the judge tend to adopt (with some revisions) findings and conclusions drafted by counsel?

[3] Considering the Duration and Complexity of Trial

The anticipated length and complexity of the trial will also be a factor in deciding whether to demand a jury trial. For example, in a complex and lengthy case, counsel may have to depend on either the jury's recollection or on a judge's recollection refreshed by note taking. In a bench trial, some judges take notes and stay on top of the evidence, while other judges tend to rely on a later-prepared transcript of the testimony in the preparation of findings and conclusions. Alternatively, it must be considered whether a potential group of jurors will be able to follow the technicalities or complexities of a given case.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsActions in EquityCivil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureRemediesGeneral OverviewConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:
(n1)Footnote 1. *U.S. Const. amend. VII.*

(n2)Footnote 2. *Fed. R. Civ. P. 38(a).*

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CHAPTER 30 Juries *
A. Asserting the Right to Trial by Jury

3-30 Federal Litigation Guide § 30.09

§ 30.09 Demanding a Jury Trial Under Rule 38

[1] Making a Proper Jury Demand in Writing

Rule 38(b) provides that any party may demand a jury trial of any issue triable of right by a jury. The demand must be in writing, and must be served on the other parties within 14 days after service of the last pleading addressing that issue. n1 The demanding party must also file the demand, with a certificate of service, within a reasonable time after service as required by Rule 5(d). n2 The demand may be endorsed on a pleading. n3

[2] Specifying the Scope of the Jury Demand

The issues in the action as to which the demand is made may be specified; otherwise the demand is deemed to apply to all issues triable by a jury. If a demand is made as to less than all issues triable by a jury, any other party has 14 days (or less if so ordered) to demand jury trial as to any or all other issues. n4

[3] Any Party May Make Demand

The demand may be made by any party to the action. This includes third-party defendants, n5 intervening parties, n6 and parties to interpleader actions. n7

[4] Failing to Serve and File Demand Results in Waiver

Failure to serve and file the demand as provided constitutes a waiver by the party of the right to trial by jury. A demand, once made, may not be withdrawn without consent of the parties. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury DemandsConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 38(b).*

(n2)Footnote 2. *Fed. R. Civ. P. 5(d).*

(n3)Footnote 3. *Fed. R. Civ. P. 38(b).*

(n4)Footnote 4. *Fed. R. Civ. P. 38(c).*

(n5)Footnote 5. *State Mut. Life Assurance Co. v. Arthur Andersen & Co., 581 F.2d 1045, 1050 (2d Cir. 1978) .*

(n6)Footnote 6. *Campbell v. Plank, 133 F.R.D. 175, 176 (D. Kan. 1990) .*

(n7)Footnote 7. *In re Larsen, 172 B.R. 988, 991 (Bankr. D. Utah 1993) .*

(n8)Footnote 8. *Fed. R. Civ. P. 38(d).*

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CHAPTER 30 Juries *
A. Asserting the Right to Trial by Jury

3-30 Federal Litigation Guide § 30.10

§ 30.10 Timing of Demand

[1] Making Demand Immediately

Under Rule 38(b), the demand for jury trial may be made immediately on the commencement of the action. n1 For example, the plaintiff may indorse the demand on the original complaint.

[2] Demanding Jury Within 14 Days After Service of Last Pleading Directed to Issue

The jury demand must be made not later than 14 days after service of the last pleading directed to the issue as to which jury trial is demanded. n2 The 14-day period begins to run with service of the last pleading directed to the issue. Until the pleading is served, the 14 days does not begin to run. n3 The 14-day provision enables counsel to reflect on the various factors which should be considered in deciding whether to demand a jury.

Although an answer may be served months after service of a complaint, there is no waiver of the jury trial right if the demand is made within 14 days of service of the answer. n4

The "last pleading" within the meaning of the rules generally will be an answer or reply, and is determined on a case-by-case basis. n5 If there are multiple defendants, the fact that one defendant has served its answer does not begin the running of the 14-day period as against the plaintiff with regard to any issues that are also alleged against a second defendant, if the second defendant has not yet served its answer. A jury demand is timely if served within 14 days after the last defendant has served its answer. n6

The same general rule applies when defendants are jointly liable as to a claim containing an issue on which there is a right to a jury trial. That is, when defendants are jointly liable on a cause of action that contains any issue triable by jury, a jury demand as to that issue is timely if served within 14 days after service of the last defendant's answer. n7

[3] Defining Pleadings for Purposes of Rule 38

The plain text of Rule 7(a) defines what constitutes "pleadings" for purposes of Rule 38. n8 Thus, "special reports" filed by a defendant in response to a claim, pursuant to a court order, are not "pleadings" under Rule 38 and do not begin the running of the 14-day period. n9

Similarly, neither a motion to dismiss n10 nor a motion for summary judgment n11 constitutes a pleading within the meaning of Rule 38, which would cause the 14-day limit to commence to run. It also has been held that a memorandum in opposition to a summary judgment motion is not a pleading for these purposes, n12 nor is a notice giving names and addresses of prior users in a patent suit. n13

[4] Answer to Intervenor Complaint Treated as Last Pleading

In a case in which intervention is authorized, the answer to the intervenor complaint, rather than the answer to the original complaint, is considered the last pleading directed to the triable issues under Rule 38(b). Demand made within 14 days of service of such answer entitles the party to a jury trial, even though the right may previously have been waived with respect to the original complaint. n14

[5] Adding Three Days When Service Is by Mail

If service of a pleading is by mail, Rule 6(e) provides that "3 days shall be added to the prescribed period." The additional three days runs in favor of the party being served by mail. n15

[6] Fourteen-Day Period May or May Not Be Deemed Mandatory

The Court of Appeals for the Fifth Circuit has held that waiver may occur only by express action or by passage of the 14-day period. The court held that, in a case in which jury trial would be available of right, absent express waiver, the trial court's advancement of the trial to a date prior to expiration of the 14-day period without addressing the jury question was an improper denial of the parties' right to jury trial. n16

By contrast, the Fourth Circuit Court of Appeals has permitted such advancement, holding that when plaintiff's attorneys were advised of the early trial date and did not request a jury trial, this amounted to a waiver. n17

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury DemandsConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 38(b).*

(n2)Footnote 2. *King v. Patterson, 999 F.2d 351, 353 (8th Cir. 1993) .*

(n3)Footnote 3. *McCarthy v. Bronson, 906 F.2d 835, 840 (2d Cir. 1990) , aff'd, 500 U.S. 136 (1991) .*

(n4)Footnote 4. *In re Texas Gen. Petroleum Corp., 52 F.3d 1330, 1339 (5th Cir. 1995) .*

(n5)Footnote 5. *In re Kaiser Steel Corp., 911 F.2d 380, 388 (10th Cir. 1990) .*

(n6)Footnote 6. *Bentler v. Bank of Am. Nat'l Trust & Sav. Ass'n, 959 F.2d 138, 141 (9th Cir. 1992) .*

(n7)Footnote 7. *Frost v. Agnos, 152 F.3d 1124, 1131 (9th Cir. 1998) .*

(n8)Footnote 8. *Fed. R. Civ. P. 7(a).*

(n9)Footnote 9. *Burns v. Lawther, 53 F.3d 1237, 1241 (11th Cir. 1995) .*

(n10)Footnote 10. *Burns v. Lawther, 53 F.3d 1237, 1241 (11th Cir. 1995) .*

(n11)Footnote 11. *In re Zweibon, 565 F.2d 742, 747 (D.C. Cir. 1977)* .

(n12)Footnote 12. *Molinaro v. Watkins--Johnson CEI Div., 359 F. Supp. 467, 474, 178 U.S.P.Q. 211 (D. Md. 1973)* .

(n13)Footnote 13. *General Tire & Rubber Co. v. Watkins, 331 F.2d 192, 195-196 (4th Cir. 1964)* .

(n14)Footnote 14. *United States v. California Mobile Home Park Mgmt. Co., 107 F.3d 1374, 1378-1379 (9th Cir. 1997)* .

(n15)Footnote 15. *Priest v. Rhodes, 56 F.R.D. 478, 479 (N.D. Miss. 1972)* .

(n16)Footnote 16. *Bowles v. Bennett, 629 F.2d 1092, 1095 (5th Cir. 1980)* .

(n17)Footnote 17. *Bills v. Hodges, 628 F.2d 844, 846 (4th Cir. 1980)* .

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CHAPTER 30 Juries *
A. Asserting the Right to Trial by Jury

3-30 Federal Litigation Guide § 30.11

§ 30.11 Evaluating Form and Sufficiency of Demand

[1] Making Demand in Writing

Rule 38(b) requires that the demand for jury trial be in writing. An oral demand is ineffective. n1

[2] Rule 38 Takes Precedence Over Local Rules as to Adequacy of Demand

The Federal Rules of Civil Procedure take precedence over local rules with regard to the adequacy of a demand for jury trial. Failure to list the demand in the caption of a pleading, as required by a local procedural rule, will not invalidate a demand that meets the requirements of Rule 38. n2

Some local rules specifically acknowledge that a failure to make the demand in the form required by local rule is not, by itself, a waiver of the right to a jury trial. n3 Although the federal rule is controlling, at least 28 district courts still have local rules that require the demand to be in a certain form. n4

Similarly, it has been held that although the federal bankruptcy rules do not specifically incorporate the provision of Rule 38 requiring jury demand within 10 days of the last pleading, the courts should borrow the provisions of the Rule to determine when a valid jury demand has been made in a bankruptcy case. n5

[3] Demanding Jury by Endorsement on Pleading

Rule 38(b) provides that the jury trial demand may be endorsed on a pleading. The simple notation "Jury Demanded" placed beneath the docket number on a complaint has been deemed sufficient to place the opposing party on notice that a jury trial has been requested. n6 In one case, the plaintiff's statements in the prayer of the complaint asking for back pay "as may be found by a jury" and for pain and suffering "in such amount as may be awarded by a jury" were sufficient to demand a jury trial as to damages. n7

Similarly, a demand made on the last page of defendant's answer, although not in the preferred style on the outside of the pleading, was deemed to be in compliance with the requirements of Rule 38(b). n8

[4] Demanding Jury by Endorsement in Pretrial Order

The right to jury trial may properly be invoked by the endorsement of a demand in a pretrial order. n9

[5] Checking Box on Civil Cover Sheet Generally Insufficient, But May Suffice if Served on Other Parties

Checking the "Yes" box on the civil cover sheet next to "Jury Demand" generally is held not to constitute a valid demand for jury trial. n10 Typically the cover sheet will not accompany pleadings served on litigants and therefore would not give opposing parties notice of the jury trial request. n11

This rule has been applied to pro se litigants as well. n12 However, if the cover sheet containing the jury trial notation is served with the summons and complaint, it may be deemed sufficient. n13

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawPractice & ProceedingsJury TrialsCivil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury DemandsConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:
(n1)Footnote 1. *Early v. Bankers Life & Cas. Co., 853 F. Supp. 268, 270 (N.D. Ill. 1994)* .

(n2)Footnote 2. *Partee v. Buch, 28 F.3d 636, 638 (7th Cir. 1994)* .

(n3)Footnote 3. *See, e.g.,* S.D. Ind. LR 38.1; D. Neb. LR 38.1; D. Minn. LR 38.1 (practitioner is advised to consult most recent version of local rules since local rules may change frequently).

(n4)Footnote 4. *See, e.g.,* M.D. Ala. LR 38.1.

(n5)Footnote 5. *In re Andrews, 189 B.R. 380, 381 (Bankr. E.D. Va. 1995)* .

(n6)Footnote 6. *Hupp v. Siroflex of Am., Inc., 159 F.R.D. 29, 30 (S.D. Tex. 1994)* .

(n7)Footnote 7. *Lutz v. Glendale Union High Sch., 403 F.3d 1061, 1065 (9th Cir. 2005)* .

(n8)Footnote 8. *Gargiulo v. Delsole, 769 F.2d 77, 78-79 (2d Cir. 1985)* .

(n9)Footnote 9. *Heri v. Fritz Cos., 841 F. Supp. 1188, 1193 (N.D. Ga. 1993)* .

(n10)Footnote 10. *See DeWitt v. Hutchins, 309 F. Supp. 2d 743, 754 (M.D.N.C. 2004)* .

(n11)Footnote 11. *Moores v. Greenberg, 834 F.2d 1105, 1108 (1st Cir. 1987)* .

(n12)Footnote 12. *See Favors v. Coughlin, 877 F.2d 219, 220 (2d Cir. 1989)* .

(n13)Footnote 13. *Winant v. Carefree Pools, 118 F.R.D. 28, 29 (E.D.N.Y. 1988)* , *aff'd without opinion, 891 F.2d 278 (2d Cir. 1989)* .

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CHAPTER 30 Juries *
A. Asserting the Right to Trial by Jury

3-30 Federal Litigation Guide § 30.12

§ 30.12 Serving and Filing Jury Demand

[1] Serving Demand

Failure to serve the other parties with a jury trial demand waives the right to jury trial. n1

[2] Filing Demand

The party demanding a jury trial must file the demand in court with proof of service. n2 Failure to properly file may constitute a waiver. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury DemandsConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:
(n1)Footnote 1. *Omawale v. WBZ, 610 F.2d 20, 21-22 (1st Cir. 1979)* .

(n2)Footnote 2. *Fed. R. Civ. P. 38(b)*; *Fed. R. Civ. P. 5(d)*.

(n3)Footnote 3. *Early v. Bankers Life & Cas. Co., 853 F. Supp. 268, 271 (N.D. Ill. 1994)* .

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CHAPTER 30 Juries *
A. Asserting the Right to Trial by Jury

3-30 Federal Litigation Guide § 30.13

§ 30.13 Demanding Jury Trial in Removed Actions

[1] Making Timely Demand in Federal Court When Demand Has Not Been Made in State Court

Rule 81(c) requires that when an action is removed from state to federal court, and a jury trial demand has not already been made in state court (if required in state court), a demand for jury trial must be made within 14 days after filing the removal petition, if the party making the demand is the petitioner. n1 If the party making the demand is not the petitioner, the demand must be made within 14 days after service of notice of the removal petition. n2

In at least one district court, a removed action will be placed on the jury list if the removing party includes the word "jury" at the top of the notice of removal, "immediately below the case number," whether or not a jury was requested in state court. n3

If no demand is required in state court, the requirement also is excused in federal court, n4 unless the judge orders otherwise. n5 Failure to make a demand when one is required constitutes a waiver of the jury trial right. n6

[2] Relying on Proper Demand Made Under State Law

If a demand is duly made in state court, it will be honored in federal court, even if it would not have satisfied the federal timing requirements if the action had originally been brought in federal court. n7

Once a demand has been made under state law, other parties may rely on the demand, and need not make their own demand on removal. n8

It has been held that if the necessary pleadings have not yet been filed as of the date of removal of an action to federal court, the time in which to demand a jury is governed by Rule 38, rather than Rule 81(c). n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalProceedingsNoticesCivil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureTrialsJury TrialsRight to Jury Trial

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 81(c)(3)(B).*

(n2)Footnote 2. *Fed. R. Civ. P. 81(c)(3)(B).*

(n3)Footnote 3. *See* E.D. Tex. CV-81 (practitioner is advised to consult most recent version of local rules, since local rules may change frequently).

(n4)Footnote 4. *Clements v. Continental Cas. Ins. Co., 730 F. Supp. 1120, 1122 (N.D. Ga. 1989)* .

(n5)Footnote 5. *Fed. R. Civ. P. 81(c).*

(n6)Footnote 6. *Mills v. Degesch Am., Inc., 835 F. Supp. 923, 924 (E.D. Tex. 1993)* .

(n7)Footnote 7. *Aligheri v. Long Island R.R., 156 F.R.D. 55, 57 (S.D.N.Y. 1994)* .

(n8)Footnote 8. *Marcella v. Brandywine Hosp., 47 F.3d 618, 625 (3d Cir. 1995)* .

(n9)Footnote 9. *Vidal v. American Airlines, Inc., 636 F. Supp. 771, 772 (D.P.R. 1986)* .

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CHAPTER 30 Juries *
A. Asserting the Right to Trial by Jury

3-30 Federal Litigation Guide § 30.14

§ 30.14 Making Demand Based on Amended or Supplemental Pleadings

[1] Raising New Issues In Amended Pleading

When an amended pleading raises new issues, by asserting new facts, a jury trial may be demanded with regard to those new issues, even if the right had been waived with regard to issues raised in the original pleading. n1

[2] Adding or Changing Parties Will Revive the Right if Issues Are Affected

Amendment of a pleading by the addition of new parties may or may not revive the right to jury trial, depending on the circumstances. When the addition of parties alters the claims or nature of relief sought, the right to demand a jury trial should revive. n2 If the right to a jury trial is revived, the practitioner should consult the local rules to assure compliance with any new time limits. On the other hand, when the addition does not alter the claims or add new issues to the case, the right should not be revived. n3

[3] Alleging New Issues Does Not Relieve Waiver as to Original Issues

Assertion of the right to jury trial with regard to new issues raised in an amended pleading does not affect the waiver with respect to the issues raised in the original pleading. n4

[4] Asserting New Theories Provides No New Opportunity to Demand Jury Trial

An amended complaint which merely asserts new theories of recovery, but is based on the same facts as the original complaint, does not reestablish the party's right to demand a jury trial when the right had been waived as to the original complaint. n5 Only new issues asserted in the amended pleading will generate a new right to make the demand. n6

The term "issue" means something more than the evidence offered and the legal theories pursued. One must ask whether the ultimate issue for decision is different. n7 New facts that merely clarify the same general issues raised in the original complaint do not create new issues of fact on which to assert a jury demand, n8 and the mere submission of more detailed statements of previously submitted claims does not confer anew the right to jury trial. n9 Amendments to pleadings thus may contain new facts which do not create new issues triable by a jury.

[5] Demanding Different Relief Insufficient to Relieve Party of Waiver

A pleading which does not raise new issues or change the character of the original pleading, but merely seeks additional relief is insufficient to revive the right to demand a jury trial. n10

[6] Applying 14-Day Rule to Issues Raised in Amended Pleading

Demand for a jury trial with regard to issues raised in an amended pleading must be made within 14 days of service of the last pleading directed at those issues. n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsSupplemental PleadingsCivil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury DemandsConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:
(n1)Footnote 1. *LaMarca v. Turner, 995 F.2d 1526, 1545 (11th Cir. 1993)* .

(n2)Footnote 2. *LaMarca v. Turner, 995 F.2d 1526, 1545-1546 (11th Cir. 1993)* .

(n3)Footnote 3. *Jones v. Boyd, 161 F.R.D. 48, 49 (E.D. Va. 1995)* .

(n4)Footnote 4. *In re Kaiser Steel Corp., 911 F.2d 380, 388 (10th Cir. 1990)* .

(n5)Footnote 5. *See Westchester Day Sch. v. Mamaroneck, 363 F. Supp. 2d 667, 670 (S.D.N.Y. 2005)* .

(n6)Footnote 6. *Swan Brewery Co. v. United States Trust Co., 143 F.R.D. 36, 39 (S.D.N.Y. 1992)* , *aff'd on reh'g, 145 F.R.D. 40, 44 (S.D.N.Y. 1992)* .

(n7)Footnote 7. *Rosen v. Dick, 639 F.2d 82, 94 (2d Cir. 1980)* .

(n8)Footnote 8. *LaMarca v. Turner, 995 F.2d 1526, 1545 (11th Cir. 1993)* .

(n9)Footnote 9. *Clement v. American Greetings Corp., 636 F. Supp. 1326, 1334 (S.D. Cal. 1986)* .

(n10)Footnote 10. *American Home Prods. Corp. v. Johnson & Johnson, 111 F.R.D. 448, 453 (S.D.N.Y. 1986)* .

(n11)Footnote 11. *United States v. Jones, 158 F.R.D. 309, 312 (D.N.J. 1994)* .

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CHAPTER 30 Juries *
A. Asserting the Right to Trial by Jury

3-30 Federal Litigation Guide § 30.15

§ 30.15 Making Demand Based on Counterclaim

[1] Demanding Jury Based on New Issues Raised in Counterclaim

If a jury trial has already been demanded with respect to issues raised in the complaint, that demand will be effective as to those claims raised as counterclaims that are directed at the same issues. n1 As to issues raised for the first time in a counterclaim, a new demand may need to be made. It has been held that the failure to demand a jury trial on new issues raised in the counterclaim waives the right as to those issues, even if a general demand was made with regard to the issues in the complaint. n2 Elsewhere, it has been held that a general demand made with respect to the issues in the complaint will cover all issues raised in the counterclaim, even if they are unrelated. n3

In one case, a plaintiff who failed to demand a jury trial on the complaint, but who requested a jury trial as to a counterclaim, was not entitled to a jury trial on the complaint after the defendants dismissed their counterclaim. The court held that the request for a jury trial as to the counterclaim had not revived the right to a jury trial on the complaint because the issues in the complaint and the counterclaim were not so "interwoven" as to implicitly preserve the right to a jury trial as to the complaint. n4

However, a plaintiff who fails to demand a jury trial on the complaint, but who requests a jury trial as to a counterclaim, may not be entitled to a jury trial on the complaint if the defendant dismisses the counterclaim and the issues in the complaint and the counterclaim are not so "interwoven" as to implicitly preserve the right to a jury trial as to the complaint. n5 If a defendant demands a jury trial on counterclaims that turn on the same matrix of facts as the claims in the complaint, the plaintiff may rely on the defendant's jury demand and is not required to make its own jury demand on the issues raised in the complaint. n6

[2] Making Jury Demand Within 14 Days of Reply to Counterclaim

If a counterclaim raises the same issues as those raised in the answer, a jury demand within 14 days of the reply to the counterclaim will be effective for all issues raised by the answer and counterclaim; however, if the issues raised in the counterclaim are new issues, not those raised in the answer, demand within 14 days of the reply will only be effective as to those new issues, and not as to issues addressed in the complaint and the answer. n7

[3] Making Jury Demand on Compulsory Counterclaim

Rule 13(a) provides for compulsory counterclaims. The Rule generally requires that a pleading state, as a counterclaim, any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim, and does not require the presence of inaccessible third parties.

The test for determining whether a request for a jury on a counterclaim entitles a party to a jury trial on the complaint is whether the counterclaim is compulsory, that is, whether it arises out of the subject matter of the plaintiff's legal claim. Since a compulsory counterclaim, by definition, relates to the issues raised in the complaint, the demand brings those issues before the jury. n8 By contrast, a counterclaim which is not compulsory but permissive, under Rule 13(b), brings new issues before the court. A jury trial demand on such a counterclaim would therefore not relieve a party of its waiver regarding the issues raised in the complaint.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury DemandsConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:
(n1)Footnote 1. *Marvel Entertainment Group, Inc. v. Arp Films, Inc., 116 F.R.D. 86, 89-90 (S.D.N.Y. 1987)* .

(n2)Footnote 2. *Mount Everest Ski Shops, Inc. v. Ski Barn, Inc., 736 F. Supp. 531, 532-533 (D. Vt. 1989)* .

(n3)Footnote 3. *Horwitz v. Alloy Automotive Co., 677 F. Supp. 564, 566 (N.D. Ill. 1988)* .

(n4)Footnote 4. *See Bogosian v. Woloohojian Realty Corp., 323 F.3d 55, 62-63 (1st Cir. 2003)* .

(n5)Footnote 5. *See Bogosian v. Woloohojian Realty Corp., 323 F.3d 55, 62-63 (1st Cir. 2003)* .

(n6)Footnote 6. *See California Scents v. Surco Prods., 406 F.3d 1102, 1108 (9th Cir. 2005)* .

(n7)Footnote 7. *Whirlpool Fin. Corp. v. Sevaux, 866 F. Supp. 1102, 1105 (N.D. Ill. 1994)* .

(n8)Footnote 8. *California Scents v. Surco Prods., 406 F.3d 1102, 1108 (9th Cir. 2005)* ; *Park Club, Inc. v. Resolution Trust Corp., 967 F.2d 1053, 1057 (5th Cir. 1992)* .

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3-30 Federal Litigation Guide § 30.16

§ 30.16 Withdrawing Jury Demand

[1] Seeking Consent for Withdrawal

A demand for jury trial made under the provisions of Rule 38 may not be withdrawn without the consent of the parties. n1 Thus, if a demand is made by a party who later seeks to withdraw it, the adverse party has the opportunity to reflect again on the factors to be considered in making a decision to demand a jury and either consent or object to the withdrawal. Absent written stipulation filed with the court or oral stipulation entered on the record, there can be no withdrawal. n2

[2] Electing Admiralty to Accomplish Withdrawal

Although withdrawal of a jury demand without the consent of all parties affected by the demand is impermissible, at least one Court of Appeals has held that it may nevertheless be accomplished indirectly by the election of a party in a maritime suit, after a jury demand has been made, to pursue a non-jury remedy only under the admiralty jurisdiction of the court. n3

[3] Withdrawing Demand Without Consent of Party Who Objected to Jury Trial Demand

A party that opposed a jury trial demand cannot be said to have relied on that demand, and it has been held that the consent of such a party is not needed for the demand to be validly withdrawn. n4 However, it has been held that this exception ceases to apply once trial has begun. A party may not sit back and allow the jury trial to proceed and then unilaterally withdraw its jury demand, simply because the other party initially opposed the demand. n5

[4] Withdrawing Demand Without Consent of Party Unaffected by Jury Trial Demand

Although Rule 38(d) gives each party an effective veto over the withdrawal of a jury demand, consent is only required to the extent that a particular party would have been entitled to rely on the demand, that is, to the extent the demand covered that party's jury issues. If a party is unaffected by a demand as to certain issues or has already waived its jury trial right as to those issues, its consent to withdrawal is not required. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury DemandsConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 38(d).*

(n2)Footnote 2. *Banff, Ltd. v. Colberts, Inc., 996 F.2d 33, 36 (2d Cir. 1993)* , *cert. denied*, *510 U.S. 1010 (1993)* .

(n3)Footnote 3. *Emerson G.M. Diesel, Inc. v. Alaskan Enter., 732 F.2d 1468, 1471 (9th Cir. 1984)* .

(n4)Footnote 4. *Reid Bros. Logging Co. v. Ketchikan Pulp Co., 699 F.2d 1292, 1304 (9th Cir. 1983)* , *cert. denied*, *464 U.S. 916 (1983)* .

(n5)Footnote 5. *Fuller v. City of Oakland, 47 F.3d 1522, 1531-1532 (9th Cir. 1995)* .

(n6)Footnote 6. *Rosen v. Dick, 639 F.2d 82, 92 (2d Cir. 1980)* .

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3-30 Federal Litigation Guide § 30.17

§ 30.17 Specifying Issues in Jury Demand

[1] Evaluating the Effect of Specification Under Rule 38(c)

In the demand, a party may specify those issues it wishes to have tried by a jury. Issue specification is a desirable practice to follow in cases where there are both legal and equitable issues. Absent specification, the party will be deemed to have demanded jury trial on all issues triable by a jury.

If a party specifies only some issues in the demand, any other party may demand trial by jury of any other or all jury-triable issues in the action. This is done by serving a demand within 14 days after service of the original demand on it, or within such lesser time as the court may order. n1

Although the party making the demand may specify issues to be tried to a jury, a general demand to try all of the issues so triable is advised. The sorting out of the issues may occur later pursuant to Rule 39.

[2] Relying on Another Party's Limited Demand

If issues are specified in a demand, other parties may rely on the demand as to those specified issues, and need not make their own demands for jury trial of those issues. n2 However, a party desiring jury trial of an issue not specified must make its own demand with regard to it. n3

[3] Failing to Specify Constitutes Demand as to All Issues Triable by Jury

When a general demand for jury trial is made without specifying particular issues, the demand is deemed to be a demand for jury trial of all issues in the case that are triable by a jury. n4 A jury demand that does not specify particular issues covers all issues raised in subsequent pleadings affecting the party making the demand. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury DemandsConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 38(c).*

(n2)Footnote 2. In re N-500L *Cases, 691 F.2d 15, 22 (1st Cir. 1982)* .

(n3)Footnote 3. *Rosen v. Dick, 639 F.2d 82, 91-92 (2d Cir. 1980)* .

(n4)Footnote 4. *Fed. R. Civ. P. 38(c).*

(n5)Footnote 5. *YJR Enters., Inc. v. Twin County Grocers, Inc., 709 F. Supp. 499, 501 (S.D.N.Y. 1989)* .

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A. Asserting the Right to Trial by Jury

3-30 Federal Litigation Guide § 30.18

§ 30.18 Filing Jury Demand Triggers Court Response Under Rule 39

When a timely demand for a jury trial has been made under Rule 38, all issues within the demand will be tried to a jury, unless the parties stipulate otherwise, or unless the court, on motion or sua sponte, finds that there is no jury trial right as to some or all of the issues within the demand. n1 But if there is no objection--by a party, or by the court on its own initiative--the jury trial will proceed. n2

Rule 39(b) provides that issues not demanded for trial by jury shall be tried by the court. n3 However, the court in its discretion may, on motion, order a jury trial if the party would have been entitled to demand a jury as of right, but failed to do so. Under Rule 39(c), a jury trial may be ordered on consent of all the parties, even though it is not available as of right. As an alternative, on motion, or on its own initiative, the court may try any issue with an advisory jury. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury DemandsConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 39(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 39(a).*

(n3)Footnote 3. *Fed. R. Civ. P. 39(b).*

(n4)Footnote 4. *Fed. R. Civ. P. 39(c).*

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CHAPTER 30 Juries *
A. Asserting the Right to Trial by Jury

3-30 Federal Litigation Guide § 30.19

§ 30.19 Waiving Right of Jury Trial

[1] Presumption Against Waiver

The right to a trial by jury is a fundamental right, and the courts will indulge every reasonable presumption against waiver of that right. n1

[2] Waiving Right Expressly or Implicitly

Regardless of the presumption, the right to jury trial may be waived as follows: n2

- By agreement or stipulation
- By conduct
- By failure to timely assert the right

The courts have held that the waiver need not be express, but may be implied, n3 as where a contract provision calls for dispute resolution in a nonjury forum. n4 For example, an arbitration agreement constitutes a waiver of jury trial.

[3] Determining if Action Constitutes Waiver

The courts have noted that the test to determine whether a party has waived its right to trial by jury is less stringent than the intentional relinquishment or abandonment of known right or privilege test n5 applicable to other constitutional rights, in that the right may be relinquished by a mere failure to act. n6

[4] Proving Waiver

Although there is no dispute that the right to a jury trial may be waived, the case law is not clear as to who bears the burden of proving waiver. It has been held that the party seeking to enforce the waiver has the burden. n7 However, it has elsewhere been held that the burden is on the party seeking to avoid the waiver. n8 Other courts have expressly avoided the issue. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury DemandsConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil ActionsEvidenceInferences & PresumptionsPresumptionsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393, 57 S. Ct. 809, 811-812, 81 L. Ed. 1177 (1937)* .

(n2)Footnote 2. *United States v. Moore, 340 U.S. 616, 621, 71 S. Ct. 524, 95 L. Ed. 582 (1951)* .

(n3)Footnote 3. *Commodity Futures Trading Com. v. Schor, 478 U.S. 833, 848, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986)* .

(n4)Footnote 4. *Northwest Airlines, Inc. v. Air Line Pilots Ass'n, Int'l, 373 F.2d 136, 142 (8th Cir. 1967)* , *cert. denied*, *389 U.S. 827 (1967)* .

(n5)Footnote 5. *Barber v. Page, 390 U.S. 719, 725, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968)* .

(n6)Footnote 6. *Early v. Bankers Life & Cas. Co., 853 F. Supp. 268, 271 (N.D. Ill. 1994)* .

(n7)Footnote 7. *Cooperative Fin. Ass'n, Inc. v. Garst, 871 F. Supp. 1168, 1172 n.2 (N.D. Iowa 1995)* .

(n8)Footnote 8. *K.M.C. Co. v. Irving Trust Co., 757 F.2d 752, 755-758 (6th Cir. 1985)* .

(n9)Footnote 9. *Whirlpool Fin. Corp. v. Sevaux, 866 F. Supp. 1102, 1105 (N.D. Ill. 1994)* .

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A. Asserting the Right to Trial by Jury

3-30 Federal Litigation Guide § 30.20

§ 30.20 Applying Waiver Rule to Pro Se Litigants

In the interest of fairness and judicial economy, the waiver rule has frequently been applied to pro se litigants in the same manner that it is applied to litigants who are represented by counsel. n1 However, in several cases, courts have held that the sanction is overly harsh, and have found no waiver. n2

An implied waiver of the right to a jury trial by a pro se party is likely to be more closely scrutinized by an appellate court than an implied waiver by a represented party. For example, a party's participation in a bench trial usually is considered to be a waiver of the right to a jury trial.

However, the Fifth Circuit has held that when a trial court disregards an unrepresented party's demand for a jury trial and conducts a bench trial instead, the unrepresented party's mere participation in the bench trial without objection does not constitute an unquestionable knowing and voluntary waiver of the right to a jury trial. Further, the pro se prisoner who participated in the bench trial did not waive the right to jury trial by signing a "Consent to Jurisdiction by a United States Magistrate Judge," which included a waiver of the right to a jury trial, because the language of the form did not unquestionably demonstrate a knowing and voluntary relinquishment. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury DemandsConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:
(n1)Footnote 1. *Lawson v. Kolender, 658 F.2d 1362, 1372 (9th Cir. 1981) , aff'd, 461 U.S. 352 (1983) .*

(n2)Footnote 2. *See Lawson v. Kolender, 658 F.2d 1362, 1372 (9th Cir. 1981) , aff'd, 461 U.S. 352 (1983) .*

(n3)Footnote 3. *Jennings v. McCormick, 154 F.3d 542, 545 (5th Cir. 1998) .*

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CHAPTER 30 Juries *
A. Asserting the Right to Trial by Jury

3-30 Federal Litigation Guide § 30.21

§ 30.21 Failing to Timely Serve and File Demand

[1] Failure Generally Constitutes Waiver

Rule 38(d) provides that the failure to serve and file a demand as required by Rule 38 constitutes a waiver of the right to jury trial. n1 Some judges look with disfavor on motions to file a tardy demand.

[2] Waiver May Not Be Circumvented by Voluntary Dismissal

A plaintiff may not overcome the waiver by voluntarily dismissing the action without prejudice and then refiling and making the demand. n2

[3] Considering Effect of Demands Filed by Other Parties

Once one party files a demand, other parties are entitled to rely on that demand for the issues it covers, and need not file their own demands. n3 The demand may be made by any other party, as long as it is directed to the issue in question. Thus, a defendant may rely on a demand by a cross-claim defendant, or by another defendant who later obtains a dismissal of the claim against it. n4

Whether reliance on another party's jury demand is effective depends on whether issues have been raised beyond those encompassed in the demand. If so, there may be no reliance as to those additional issues. n5 Thus, a third-party plaintiff whose claim raises new issues not addressed in the original complaint may not rely on the demand of the plaintiff with regard to the third-party claim. n6 Similarly, a plaintiff may not rely on the jury demands of some defendants to preserve its jury trial right with respect to its claims against another defendant if that claim deals with factual issues not implicated in the claims against the other defendants. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury DemandsConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:

(n1)Footnote 1. *Jolivet v. Deland, 966 F.2d 573, 577 (10th Cir. 1992)* .

(n2)Footnote 2. *Noonan v. Cunard S.S. Co., 375 F.2d 69, 71-72 (2d Cir. 1967)* .

(n3)Footnote 3. *Fuller v. City of Oakland, 47 F.3d 1522, 1531 (9th Cir. 1995)* .

(n4)Footnote 4. *Mid Kan. Fed. Sav. & Loan Ass'n v. Orpheum Theater Co., 810 F. Supp. 1184, 1190 (D. Kan. 1992)* .

(n5)Footnote 5. *Davidson Pipe Co. v. Laventhol & Horwath, 125 F.R.D. 363, 367 (S.D.N.Y. 1989)* .

(n6)Footnote 6. *Espinosa v. Van Dorn Plastic Mach. Co., 813 F. Supp. 252, 253-254 (S.D.N.Y. 1993)* .

(n7)Footnote 7. *Indeca v. Continental Ill. Nat'l Bank & Trust Co., 675 F. Supp. 1515, 1517-1518 (N.D. Ill. 1987)* , *aff'd, 858 F.2d 1264 (7th Cir. 1988)* .

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3-30 Federal Litigation Guide § 30.22

§ 30.22 Waiving Jury Right by Contract

[1] Voluntarily Waiving Right by Agreement

The parties to a contract may, by prior written agreement, entered into knowingly and voluntarily, waive the right to a jury trial. n1 Such agreements are neither illegal, nor contrary to public policy. n2

[2] Construing Waiver Provisions Strictly

Although contractual waiver of the right to jury trial is not illegal, the jury trial right is a fundamental one, and there is a presumption against its waiver. n3 Therefore, contract provisions waiving the right will be strictly and narrowly construed, n4 and the requirement of knowing, voluntary, intentional waiver strictly applied. n5 Jury trial waivers are common in loan agreements and loan guarantees, and these are regularly enforced. n6

[3] Determining If Waiver Is Voluntary

Factors to be considered in determining whether a contractual waiver of a jury trial right was entered into knowingly and voluntarily include: n7

- Negotiability of contract terms and negotiations between the parties concerning the waiver provision
- Conspicuousness of the provision in the contract
- The relative bargaining power of the parties
- Business acumen of the party opposing waiver
- Whether counsel for the party opposing waiver had an opportunity to review the agreement

Thus, a party seeking to enforce a contractual waiver of the right to jury trial may prepare to meet that burden by carefully drafting the provision waiving the right, presenting the provision conspicuously in the contract, and preparing a record to show that the provision was explained and reviewed, for example by requiring that the provision be initialed. n8

When the criteria outlined above have been met, the waiver has been deemed enforceable. n9 But courts have refused to enforce waivers that have failed to meet these criteria. n10

[4] Consenting to Dispute Resolution in Non-Jury Forum

The acceptance of a contract clause providing for dispute resolution in a forum in which there is no entitlement to jury trial may satisfy the "voluntary and knowing" standard for waiver of the jury trial right. n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury DemandsConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:
(n1)Footnote 1. *Brown v. Cushman & Wakefield, Inc., 235 F. Supp. 2d 291, 294 (S.D.N.Y. 2002)* .

(n2)Footnote 2. *Phoenix Leasing Inc. v. Sure Broad., Inc., 843 F. Supp. 1379, 1384 (D. Nev. 1994)* , *aff'd without opinion, 89 F.3d 846 (9th Cir. 1996)* .

(n3)Footnote 3. *Wauhop v. Allied Humble Bank, 926 F.2d 454, 455 (5th Cir. 1991)* .

(n4)Footnote 4. *Hulsey v. West, 966 F.2d 579, 581-582 (10th Cir. 1992)* .

(n5)Footnote 5. *In re Reggie Packing Co., 671 F. Supp. 571, 573 (N.D. Ill. 1987)* .

(n6)Footnote 6. *Okura & Co. v. Careau Group, 783 F. Supp. 482, 489 (C.D. Cal. 1991)* .

(n7)Footnote 7. *Allyn v. Western United Life Assur. Co., 347 F. Supp. 2d 1246, 1252 (M.D. Fla. 2004)* ; *Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp., 56 F. Supp. 2d 694, 707 (E.D. La. 1999)* .

(n8)Footnote 8. *Cooperative Fin. Ass'n, Inc. v. Garst, 871 F. Supp. 1168, 1172, n.2 (N.D. Iowa 1995)* .

(n9)Footnote 9. *Telum, Inc. v. E.F. Hutton Credit Corp., 859 F.2d 835, 837 (10th Cir. 1988)* , *cert. denied, 490 U.S. 1021 (1989)* .

(n10)Footnote 10. *National Equip. Rental Ltd. v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977)* .

(n11)Footnote 11. *Seaboard Lumber Co. v. United States, 903 F.2d 1560, 1563 (Fed. Cir. 1990)* , *cert. denied, 499 U.S. 919 (1991)* .

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CHAPTER 30 Juries *
A. Asserting the Right to Trial by Jury

3-30 Federal Litigation Guide § 30.23

§ 30.23 Waiving Jury Right by Conduct

[1] Participating in Bench Trial

Knowing participation in a bench trial without objection constitutes a waiver of the right to jury trial despite a previous timely jury demand. Particularly when a party's participation in a bench trial is vigorous, and there is no mention of a jury, it has been held that the omission may not be presumed the result of mere inadvertence, but may only be ascribed to knowledgeable relinquishment of the prior jury demand. n1

[2] Failing to Object to Pre-Trial Order Providing for Bench Trial

It has been held that a litigant may waive its right to jury trial, even after making a timely demand, by failing to object to a district court's pretrial order providing for a bench trial. n2 However, the failure to object to a withdrawal of a jury trial demand, or to an informal direction that the trial is to be held without a jury will not constitute a waiver if circumstances are such that the intent to waive jury trial is not clear. n3

[3] Discharging Jury

Counsel's acquiescence in discharge of the jury will constitute a waiver of the jury trial right. Thus, in one case, a statement by counsel for plaintiff that he was done with the jury and an expression of agreement that the jury may be discharged, combined with counsel's knowledge that the jury was being discharged and a continued colloquy with the court thereafter, and failure to protest until an hour and a half later, was deemed to evince consent sufficient to constitute a waiver. n4

[4] Failing to Submit Issue to Jury

If in submitting the case to the jury the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand, the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict. n5

Thus, when a special verdict is sought, a party waives its right to have a jury trial of any issue if it neglects to request that the issue be submitted to the jury, n6 or fails to object when the issue is not presented. n7 This rule has been applied

to the failure to submit an issue in interrogatories presented to the jury, n8 to the failure to object when interrogatories are submitted that do not contain the particular issue, n9 and when a particular claim is omitted from a general submission made to the jury. n10

[5] Waiving Right by Express Consent of Party or Counsel

Waiver of jury trial may be effectuated by a party's or their counsel's express consent to trial by the bench. n11 It has been held that a jury trial waiver may not be conditioned on a bench trial by a particular judge. n12

[6] Filing Claim Against Debtor in Bankruptcy Constitutes Waiver

It has generally been held that by filing a claim in bankruptcy against a debtor, a creditor waives trial by jury of that claim. Determination of the claim is part and parcel of the process of allowance and disallowance of claims integral to restructuring of the debtor-creditor relationship, which is a public right, triable without a jury by the bankruptcy court. n13

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury DemandsConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:
(n1)Footnote 1. *Cooper v. Loper, 923 F.2d 1045, 1049 (3d Cir. 1991)* .

(n2)Footnote 2. *Fields Eng'g & Equip., Inc. v. Cargill, Inc., 651 F.2d 589, 592 (8th Cir. 1981)* .

(n3)Footnote 3. *Hupp v. Siroflex of Am., Inc., 159 F.R.D. 29, 30-31 (S.D. Tex. 1994)* .

(n4)Footnote 4. *Pope v. Savings Bank of Puget Sound, 850 F.2d 1345, 1355 (9th Cir. 1988)* .

(n5)Footnote 5. *Fed. R. Civ. P. 49(a).*

(n6)Footnote 6. *Rose Confections, Inc. v. Ambrosia Chocolate Co., 816 F.2d 381, 389 (8th Cir. 1987)* .

(n7)Footnote 7. *Kavanaugh v. Greenlee Tool Co., 944 F.2d 7, 11-12 (1st Cir. 1991)* .

(n8)Footnote 8. *Anderson v. Cryovac, Inc., 862 F.2d 910, 915-918 (1st Cir. 1988)* .

(n9)Footnote 9. *Eastern Mountain Platform Tennis v. Sherwin-Williams Co., 40 F.3d 492, 501 (1st Cir. 1994)* , *cert. denied, 515 U.S. 1103 (1995)* .

(n10)Footnote 10. *Preferred RX, Inc. v. American Prescription Plan, Inc., 46 F.3d 535, 548 (6th Cir. 1995)* .

(n11)Footnote 11. *Fuller v. City of Oakland, 47 F.3d 1522, 1530 (9th Cir. 1995)* .

(n12)Footnote 12. *Kahn v. GMC, 865 F. Supp. 210, 214, 33 U.S.P.Q.2d 1660 (S.D.N.Y. 1994)* .

(n13)Footnote 13. *Kahn v. GMC, 865 F. Supp. 210, 214, 33 U.S.P.Q.2d 1660 (S.D.N.Y. 1994)* .

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CHAPTER 30 Juries *
A. Asserting the Right to Trial by Jury

3-30 Federal Litigation Guide § 30.24

§ 30.24 Considering the Effect of Jury Demands on Subsequent Trial

[1] Preserving Demand in Second Related Suit

If a demand for jury trial has been duly made in an action, that demand will be preserved, as to the issues embraced by the demand, if the case is remanded after appeal or consolidated with another case, n1 or if an action is brought for breach of an agreement settling the original action. n2

[2] Introducing New Issue Provides Opportunity for New Demand

When an action is remanded for new trial and an issue not raised in the original action is newly introduced, it has been held that this has the effect of amending the pleadings, thereby providing the parties with an opportunity to demand a jury trial on the newly introduced issue. n3

[3] Ordering of New Trial Does Not Revive Right to Jury Demand

When the right to a jury trial is waived in the original case by failure to timely make the demand, or by affirmative withdrawal of the demand, the right is not revived by the ordering of a new trial. n4 A party who wishes to obtain a jury trial on remand after waiver may move under Rule 39 for relief in the court's discretion. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury DemandsConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:
(n1)Footnote 1. *United States v. Nordbrock, 941 F.2d 947, 949-950 (9th Cir. 1991)* .

(n2)Footnote 2. Carpenter v. Ford Motor Co., 20 Fed. Rules Serv. 3d (Callaghan) 345, 348 (N.D. Ill. 1991).

(n3)Footnote 3. *In re Zweibon, 565 F.2d 742, 746-748 (D.C. Cir. 1977)* .

(n4)Footnote 4. *Hanlon v. Providence College, 615 F.2d 535, 539 (1st Cir. 1980)* .

(n5)Footnote 5. *McGowan v. United States, 296 F.2d 252, 256 (5th Cir. 1961)* .

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CHAPTER 30 Juries *
A. Asserting the Right to Trial by Jury

3-30 Federal Litigation Guide §§ 30.25 through 30.29

[Reserved]

§§ 30.25[Reserved]

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CHAPTER 30 Juries *
B Selecting the Jury and Monitoring Jury Conduct

3-30 Federal Litigation Guide § 30.30

§ 30.30 Evaluating the Policy of Jury Selection and Service Act

[1] Selecting Potential Jurors at Random

In pertinent part, *28 U.S.C. § 1861* declares that "[i]t is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes." n1

Jury selection is the key to successful jury decision making. It starts with random selection of prospective jurors from the registered lists in the district. Volunteer jurors are no longer welcome. Participation by those persons who are summoned is important. Routine excuses because of distance, job, social engagements or travel plans should not be tolerated. The result of liberal excuse from jury service is a skewed cross-section of the community. The demography of the venue is altered when distance of travel is allowed as a ready excuse. Similarly, the venire can be overpopulated with the unemployed or the elderly when employment is a ready excuse.

[2] Disqualifying Potential Juror From Jury Service

The Jury Selection and Service Act specifically prohibits exclusion from service as a juror "on account of race, color, religion, sex, national origin, or economic status." n2

Section 1865 of the Act provides, in pertinent part, that the "chief judge of the district court, or such other district court judge as the plan may provide, ... shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for ... jury service." n3

The Act specifies five grounds for disqualification for service as a juror, and mandates that "any person" shall be qualified to serve as a juror unless the candidate: n4

- Is not a citizen of the United States 18 years old who has resided for a period of one year within the judicial district

- Is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form

- Is unable to speak the English language
- Is incapable, by reason of mental or physical infirmity, to render satisfactory jury service
- Has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored

[3] Selecting and Summoning of Jury Panel by District Court

The Jury Selection and Service Act requires that each United States district court to "devise and place into operation" a plan for random selection of jurors that is consistent with, and is designed to achieve, the objectives of sections 1861 and 1862 of the statute, n5 and provides the courts with guidance with respect to procedures for drawing names of prospective jurors from a master jury wheel, n6 and for the selection and summoning of jury panels. n7 All records of these procedures must be maintained for at least four years, and they must be made available for public inspection. n8

[4] Mandating Daily Juror Attendance Fees

The Jury Selection and Service Act provides that jurors in district courts be paid a daily attendance fee of $40 for "actual attendance" at the place of hearing or trial. n9 The statute also provides for payment of an additional fee, not in excess of $10 more than the attendance fee, for each day "in excess of thirty days" on which the petit juror is required to hear the case. n10 The Act also provides for reimbursement of travel expenses and for a subsistence allowance, when applicable. n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1861.*

(n2)Footnote 2. *28 U.S.C. § 1862.*

(n3)Footnote 3. *28 U.S.C. § 1865(a).*

(n4)Footnote 4. *28 U.S.C. § 1865(b).*

(n5)Footnote 5. *28 U.S.C. § 1863(a).*

(n6)Footnote 6. *28 U.S.C. § 1864.*

(n7)Footnote 7. *28 U.S.C. § 1866.*

(n8)Footnote 8. *28 U.S.C. § 1868.*

(n9)Footnote 9. *28 U.S.C. § 1871(a), (b)(1).*

(n10)Footnote 10. *28 U.S.C. § 1871(b)(2).*

(n11)Footnote 11. *28 U.S.C. § 1871(c), (d).*

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CHAPTER 30 Juries *
B Selecting the Jury and Monitoring Jury Conduct

3-30 Federal Litigation Guide § 30.31

§ 30.31 Challenging Compliance With Statutory Selection Procedures

28 U.S.C. § 1867 provides the "exclusive means" by which a party to a civil case in a federal court may challenge a jury on the ground that the members were not selected in conformity with the provisions of the Act. n1 A statutory challenge to the jury panel must be made "before the voir dire examination begins, or within seven days after the party discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier." n2

Because the remedy is not a new trial, but a stay of proceedings until a new jury can be selected in conformity with the statute, n3 the time period set by the statute is strictly enforced, and a challenge to the panel on the grounds that it was not selected from a fair cross-section of the community must be made prior to voir dire. n4 However, parties are not precluded from "pursuing any other remedy, civil or criminal, which may be available for the vindication or enforcement of any law prohibiting discrimination on account of race, color, religion, sex, national origin or economic status in the selection of persons for service on grand or petit juries." n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1867(e).*

(n2)Footnote 2. *28 U.S.C. § 1867(c).*

(n3)Footnote 3. *28 U.S.C. § 1867(d).*

(n4)Footnote 4. *28 U.S.C. § 1867(c).*

(n5)Footnote 5. *28 U.S.C. § 1867(e)*; *Dawson v. Wal-Mart Stores, Inc., 978 F.2d 205, 209 (5th Cir. 1992)* .

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CHAPTER 30 Juries *
B Selecting the Jury and Monitoring Jury Conduct

3-30 Federal Litigation Guide § 30.32

§ 30.32 Ensuring Selection of Impartial Jury Through Voir Dire

The provisions of the Jury Selection and Service Act, n1 confer on all federal litigants entitled to a jury trial the broad right to a jury selected from a fair cross section of the community or district "wherein the court convenes." n2 Rule 47(a) is designed to ensure that the jury selected to deliberate in a federal case is impartial and free "to the furthest extent practicable" from extraneous influences that "may subvert the fact-finding process." n3

To that end, the examination on voir dire must be sufficient to discover bias. n4 Additionally, the voir dire must provide "essential information so as to allow the intelligent exercise of jury challenges." n5 The notion of an impartial jury is not merely good policy or legislative grace. Rather, the constitution preserves the right to an impartial jury. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsSelectionVoir DireConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1861.*

(n2)Footnote 2. *28 U.S.C. § 1861.*

(n3)Footnote 3. *Waldorf v. Shuta, 3 F.3d 705, 709 (3d Cir. 1993) .*

(n4)Footnote 4. *Swink v. City of Pagedale, 810 F.2d 791, 793-794 (8th Cir. 1987) , cert. denied, 483 U.S. 1025 (1987) .*

(n5)Footnote 5. *Rainey v. Conerly, 973 F.2d 321, 325 (4th Cir. 1992)* (citation omitted).

(n6)Footnote 6. *Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946) .*

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CHAPTER 30 Juries *
B Selecting the Jury and Monitoring Jury Conduct

3-30 Federal Litigation Guide § 30.33

§ 30.33 Conducting of Voir Dire by District Court

[1] Recognizing District Court's Wide Discretion in Conduct of Voir Dire

The "obligation to impanel an impartial jury lies in the first instance with the trial judge," n1 who "has a serious duty to determine the question of actual bias." n2 However, as the text of Rule 47(a) suggests, the trial court has wide discretion both as to the manner in which the voir dire is conducted, and the scope of the questions posed. n3

[2] Introducing Potential Jurors to Voir Dire Process

When the prospective jurors arrive at the courtroom, they know nothing about the case and frequently little about their duties. The judge is responsible for welcoming the jurors, describing the historic function of the jury and its responsibilities, describing the nature of the case (including the plaintiff's claims and the defendant's denials and defenses), introducing the participants in the trial, disclosing the identity of prospective witnesses, and advising the jury of the anticipated length of the trial and working schedule. The judge should make an enthusiastic presentation and emphasize the importance of the case to the parties and to the community.

Virtually every federal judge has his or her own procedure for the selection of jurors. For example, a judge may prepare a brief written address that is read to the jurors. Individual judges may prepare written questionnaires that are distributed to the prospective jurors, and each judge may have a particular approach to questioning the jurors in open court. Counsel must obtain these materials and study them. They can be obtained from the judge's clerk, law clerk or secretary or at the initial status conference from the court itself. It is inexcusable to commence a jury trial and not know the procedure the court will follow in jury selection.

Most judges, after introducing the case to the prospective jurors, will conduct the initial inquiry into the background of each juror. Each juror is asked to give a narrative autobiographical sketch, including such things as place of birth, education, makeup of current family, residence (own or rent), occupation, occupation of persons with whom the prospective juror lives, leisure activities, hobbies, reading, newspaper and television habits. Frequently prospective jurors are asked about prior jury services. Further questions relate to the nature of the particular case.

[3] Examining Potential Jurors

Rule 47(a) grants the court discretion to permit the parties or their attorneys to directly conduct the examination of

prospective jurors. Few federal judges select this option. If counsel is experienced in personal one-on-one jury selection, he or she should request permission to participate in the examination. The rule also provides that the court may conduct the examination. Most federal judges examine the prospective jurors themselves.

Local rules of many district courts specify procedures for the conduct of voir dire. Additionally, local rules in some courts explain particular procedures required of attorneys in exercising their challenges.

Counsel must be attentive during the examination. The jurors' first impression of counsel occurs at this time. A show of boredom with the whole process will be destructive. Moreover, peremptory challenges will be exercised on the basis of what counsel learns during the examination.

There is no requirement that the trial court put questions in any particular form, or ask any particular number of questions simply on a party's request, n4 or allow counsel an unlimited time--or any opportunity at all--to question prospective jurors. n5 Indeed, the trial court need not pursue any specific line of inquiry, and "[a]ny method is sufficient provided it is probative on the issue of impartiality." n6

[4] Supplementing Examination Conducted by Court

When the judge conducts the voir dire examination, Rule 47(a) provides that the parties are entitled to request to supplement the court's examination. n7 Counsel must be prepared to do this, and written supplementation should be submitted to the court in advance of trial.

[5] Posing Questions Designed to Elicit Information Beyond That Which Would Disqualify Juror for Cause

In order to secure litigants a fair and impartial jury, the trial court has an affirmative duty to pose questions designed to elicit information beyond that which would disqualify a juror for cause. n8

Questions on voir dire must be probing enough to reveal a prospective juror's prejudices so that counsel may exercise challenges in a meaningful manner, and the trial court "should at all times be on guard" to propound questions that will assist counsel in the exercise of peremptory challenges and challenges for cause. n9 The inquiry must reasonably assure that bias or prejudice, if present, will be discovered. n10

Where relevant, the trial court must inquire as to possible racial bias of prospective jurors. There is, however, no requirement that those questions be put in any particular form, n11 or that a particular question be asked if the substance of the inquiry is covered by another question. n12 Indeed, the wide latitude afforded the trial court on voir dire demands only that the voir dire not be so general that it fails to probe adequately the possibility of bias and prejudice. n13

In light of the considerable discretion vested in the trial court, it is incumbent on counsel to lay a foundation for proposed questions by showing that the inquiry is reasonably calculated to discover a likely source of prejudice, n14 or to furnish the trial court with a list of questions that delineates the nature and scope of the requested examination. n15

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsSelectionVoir DireConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:
(n1)Footnote 1. *Rosales-Lopez v. United States, 451 U.S. 182, 189, 101 S. Ct. 1629, 68 L. Ed. 2d 22 (1981)* .

(n2)Footnote 2. *Dennis v. United States, 339 U.S. 162, 168, 70 S. Ct. 519, 94 L. Ed. 734 (1950)* ; *Butler v. City of Camden, 352 F.3d 811, 819 (3d Cir. 2003)* .

(n3)Footnote 3. *Real v. Hogan, 828 F.2d 58, 62 (1st Cir. 1987)* .

(n4)Footnote 4. *Swink v. City of Pagedale, 810 F.2d 791, 793 (8th Cir. 1987)* , *cert. denied*, *483 U.S. 1025 (1987)* .

(n5)Footnote 5. *Hicks v. Mickelson, 835 F.2d 721, 725 (8th Cir. 1987)* .

(n6)Footnote 6. *Waldorf v. Shuta, 3 F.3d 705, 710 (3d Cir. 1993)* .

(n7)Footnote 7. *Fed. R. Civ. P. 47(a)*.

(n8)Footnote 8. *Fietzer v. Ford Motor Co., 622 F.2d 281, 285 (7th Cir. 1980)* .

(n9)Footnote 9. *Harold v. Corwin, 846 F.2d 1148, 1150 (8th Cir. 1988)* .

(n10)Footnote 10. *Art Press, Ltd. v. Western Printing Mach. Co., 791 F.2d 616, 618-619 (7th Cir. 1986)* , *aff'd in part, rev'd in part, and remanded*, *852 F.2d 276 (7th Cir. 1988)* .

(n11)Footnote 11. *Swink v. City of Pagedale, 810 F.2d 791, 793 (8th Cir. 1987)* , *cert. denied*, *483 U.S. 1025 (1987)* .

(n12)Footnote 12. *Darbin v. Nourse, 664 F.2d 1109, 1113 (9th Cir. 1981)* .

(n13)Footnote 13. *Waldorf v. Shuta, 3 F.3d 705, 710 (3d Cir. 1993)* .

(n14)Footnote 14. *United States v. Robinson, 475 F.2d 376, 381 (D.C. Cir. 1973)* .

(n15)Footnote 15. *James v. Continental Ins. Co., 424 F.2d 1064, 1065 (3d Cir. 1970)* .

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CHAPTER 30 Juries *
B Selecting the Jury and Monitoring Jury Conduct

3-30 Federal Litigation Guide § 30.34

§ 30.34 Evaluating Standard of Review on Appeal

Given the broad discretion afforded the court on voir dire, the district court's determination on issues concerning the scope of voir dire will be overturned only for an abuse of discretion. n1 In general, a trial court's determination of the scope of voir dire will not be disturbed on appeal unless the voir dire was insufficient to elicit bias n2 or to enable litigants to intelligently exercise their right to challenge prospective jurors, n3 or if the trial court itself injected irrelevant and prejudicial material into the inquiry. n4

In the absence of voir dire limitations that effectively preclude a litigant's ability to assess prospective jurors for partiality, bias, or prejudice, the trial court's determinations with respect to the conduct and scope of the voir dire will not provide a basis for reversal on appeal. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsMisconductCivil ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsSelectionVoir DireCivil ProcedureAppealsReviewabilityGeneral OverviewConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:
(n1)Footnote 1. *Kanekoa v. City of Honolulu, 879 F.2d 607, 614 (9th Cir. 1989)* , *cert. denied*, *500 U.S. 933 (1991)* .

(n2)Footnote 2. *Waldorf v. Shuta, 3 F.3d 705, 712 (3d Cir. 1993)* .

(n3)Footnote 3. *Fietzer v. Ford Motor Co., 622 F.2d 281, 285 (7th Cir. 1980)* .

(n4)Footnote 4. *Scott v. Lawrence, 36 F.3d 871, 874 (9th Cir. 1994)* .

(n5)Footnote 5. *Lewis v. Holden, 821 F.2d 291, 294 (5th Cir. 1987)* .

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CHAPTER 30 Juries *
B Selecting the Jury and Monitoring Jury Conduct

3-30 Federal Litigation Guide § 30.35

§ 30.35 Conducting Voir Dire by Written Questionnaire

Increasingly judges have allowed parties to supplement traditional voir dire with a written questionnaire administered to potential jurors prior to commencement of oral voir dire. n1 This procedure strikes a constructive compromise between attorney-conducted voir dire and the cursory voir dire traditionally conducted by federal judges.

The procedure for assembling and distributing the questionnaire should be discussed no later than the pretrial conference. The parties should agree on, or the court should order, a procedure that allows each party to contribute questions, to object to questions, and to seek final court approval of the questionnaire before it is distributed. That is necessary to ensure that one party does not ask unfair or misleading questions or questions which themselves would prejudice prospective jurors.

Administration of the same questionnaire to all prospective jurors provides each side with identical information that may be used to demonstrate cause for disqualification or to exercise peremptory challenges. Use of a questionnaire makes it feasible to ask each prospective juror individually about a wide range of subjects. There is no need to rely on prospective jurors to remember questions posed to the panel as a whole, and then to volunteer their answers to those remembered questions. Each juror records a specific and direct response to every question posed.

A written questionnaire is not a complete substitute for traditional voir dire. It does eliminate the need for many boilerplate background questions, but the questionnaire should be supplemented with appropriate questions (put by the judge or by the attorneys) to follow up on answers to the questionnaire. Use of the questionnaire technique is especially helpful if jury-selection consultants have been engaged because counsel will ordinarily have the opportunity to consult with the jury consultant before challenges must be exercised.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsSelectionVoir DireConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:

(n1)Footnote 1. *See, e.g.,* Los Angeles Memorial Coliseum Comm'n v. NFL, Civil Docket No. 78-3523-HP (C.D. Cal. 1982), *aff'd, 726 F.2d 1381 (9th Cir. 1984)* , *cert. denied, 469 U.S. 990 (1984)* .

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CHAPTER 30 Juries *
B Selecting the Jury and Monitoring Jury Conduct

3-30 Federal Litigation Guide § 30.36

§ 30.36 Working With Jury Consultants

Well in advance of trial, counsel must consider the jury selection process. In some cases, it may beneficial to hire a jury consultant to assist in selecting a jury that is likely to be more receptive to the client's case.

Jury consultants typically apply the insight and techniques of psychology, sociology and public opinion polling to establish correlations between likely attitudes about issues in a case and facts that may be ascertainable at, or prior to, voir dire. Consultants can also assist during the voir dire itself, primarily by observing body language and speech patterns--psycholinguistic clues that may reveal much more about the jurors than their literal answers. Each consultant or firm has its own methods, but generally they employ one or more of the following techniques:

- **General Polling.** Polls of randomly chosen respondents conducted either by telephone or in person are used to determine general community perceptions and attitudes.

- **Focus Groups.** Focus groups range from 10 to 50 people and are selected to represent the demographic profile of the jury pool. Usually the group is presented with a briefing about the case (typically a video tape presentation by one or more of the lawyers on the case). The group is then asked to complete a questionnaire and invited to participate in a discussion of their reaction to the case.

- **Targeted Polling.**This technique involves targeted polling in neighborhoods where individuals known to be members of a specific jury pool reside. The technique is intended to provide a more refined measurement of likely juror perceptions and attitudes, and also to identify facts ascertainable on voir dire that can be correlated to probable reactions to issues in the particular case.

- **Mock Trials.** Juror surrogates are recruited from the community in which the trial will take place or from a demographic match with the forum community. Some form of summary trial is then conducted, usually consisting of modified summations on behalf of each side. Observers can get reactions to the facts of the case, the effect of instructions, the performance of the lawyers and, where applicable, the effectiveness of witnesses and exhibits.

- **Jury Selection.** Jury consultants may be involved in drafting a jury questionnaire, if such questionnaires will be allowed. With or without a questionnaire, consultants may also advise on the

exercise of peremptory challenges using data compiled before the fact as well as (in some cases) direct observation of the voir dire process.

- **Shadow Juries and Jury Observation.** Some consultants recommend use of a shadow jury. This is a group of people recruited to match as nearly as possible the exact make-up of the trial jury. Shadow jurors sit in the courtroom and observe the actual progress of the trial. They are polled individually for their reactions to proceedings on a day-to-day or session-by-session basis.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsSelectionVoir DireCivil ProcedureTrialsJury TrialsPolling of JuryConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

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CHAPTER 30 Juries *
B Selecting the Jury and Monitoring Jury Conduct

3-30 Federal Litigation Guide § 30.37

§ 30.37 Using Commercially-Prepared Jury Books

In some districts, commercial vendors prepare books for use in voir dire which compile all publicly available information about persons in the jury array, such as the political affiliation of registered voters, property ownership, and participation in lawsuits. These books may also include information about the individual's service on prior juries. These materials, where available, are helpful aids to conducting voir dire and exercising peremptory challenges.

If a commercial jury book is not available, and if the case justifies the expense, substantially the same information may be obtained by an investigator or paralegal. When collecting information about jurors on behalf of a party to the action, however, it is imperative that the investigator take care not to make any prospective juror aware of the inquiry.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsSelectionVoir DireConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

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CHAPTER 30 Juries *
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3-30 Federal Litigation Guide § 30.38

§ 30.38 Dealing With Juror Untruth During Voir Dire Examination

[1] Eliciting Truthful Responses

The purpose of the voir dire examination is to discern potential bias and prejudice in prospective jurors, and to enable litigants to intelligently exercise peremptory challenges and challenges for cause. On occasion, however, that purpose is frustrated because prospective jurors fail to answer honestly a material question posed on voir dire.

A deliberately untruthful response on voir dire may indicate an attempt to conceal bias, which may provide the basis for a cause challenge n1 or provoke a peremptory challenge. n2 Accordingly, the right of challenge includes the incidental right that information elicited on voir dire shall be true. n3 The trial judge should admonish the prospective jurors of the necessity that they be honest in their response to questions asked them.

[2] Waiving Right to Object to Nondisclosure

Once a litigant presents a prima facie case that the right to challenge was impaired by the failure to disclose material information on voir dire, it falls to the trial court to hold an evidentiary hearing to determine the circumstances surrounding the nondisclosure. n4 Because jurors cannot be faulted for failing to disclose information for which they were never asked, a litigant has the burden to show that the voir dire questions, or the responses of other jurors, put the juror on notice that a particular answer was required. n5

Further, if the basis for challenge might have been discovered earlier on voir dire, failure to exercise the challenge at the time the jury is empaneled constitutes waiver of the right to challenge nondisclosure. n6 Similarly, a party who has actual knowledge of undisclosed facts but fails to challenge a juror, choosing to gamble on the outcome of the trial, waives the right to relief. n7

[3] Nondisclosure Must Be Deliberate and Material

A juror's honest but mistaken response to a material question on voir dire does not warrant a new trial. n8

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsMisconductCivil ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsSelectionChallenges for CauseCivil ProcedureTrialsJury TrialsJurorsSelectionVoir DireConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:

(n1)Footnote 1. *Hard v. Burlington N. R. Co., 870 F.2d 1454, 1459 (9th Cir. 1989)* .

(n2)Footnote 2. *McCoy v. Goldston, 652 F.2d 654, 659 (6th Cir. 1981)* .

(n3)Footnote 3. *Photostat Corp. v. Ball, 338 F.2d 783, 786 (10th Cir. 1964)* .

(n4)Footnote 4. *McCoy v. Goldston, 652 F.2d 654, 657 (6th Cir. 1981)* .

(n5)Footnote 5. *McCoy v. Goldston, 652 F.2d 654, 658-659 (6th Cir. 1981)* .

(n6)Footnote 6. *Robinson v. Monsanto Co., 758 F.2d 331, 335 (8th Cir. 1985)* .

(n7)Footnote 7. *Dunn v. Denk, 54 F.3d 248, 251 (5th Cir. 1995)* , *rev'd on other grounds, 79 F.3d 401 (5th Cir. 1996)* , *cert. denied, 519 U.S. 813 (1996)* .

(n8)Footnote 8. *McDonough Power Equip., Inc., v. Greenwood, 464 U.S. 548, 555, 104 S. Ct. 845, 849-850, 78 L. Ed. 2d 663 (1984)* .

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§ 30.39 Challenging a Juror For Cause

[1] Rejecting Juror Based on Partiality

The challenge for cause permits "rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality," n1 and is narrowly confined to instances in which threats to impartiality are admitted or presumed from the relationships, n2 pecuniary interests, n3 or clear biases of a prospective juror. n4 The challenger has the burden of production. n5 Per se rules of disqualification are disfavored. n6

The central inquiry in examining a challenge for cause is whether the prospective juror holds a particular position, belief, or opinion that prevents or substantially impairs the impartial performance of the duties of juror. n7 It should be noted, however, that when a juror falls into one of the narrowly confined circumstances in which partiality is presumed, the juror's assertion of impartiality is irrelevant. n8

In the absence of facts pointing to presumptive bias, a prospective juror is presumed to be impartial. Neither the existence of a preconception n9 nor a particular occupational background will be sufficient to rebut the presumption of impartiality, so long as the prospective juror can render a verdict based solely on the evidence presented at trial. n10

[2] Granting of Challenge Based on Actual Bias

The trial court must grant a challenge for cause if a prospective juror shows actual bias or prejudice. n11 Further, the trial court should resolve doubts about the existence of actual bias against permitting the juror to serve. n12 However, the trial court's determination of impartiality, in the first instance, is "essentially one of credibility and therefore largely one of demeanor," and is entitled to "special deference." n13 Accordingly, a trial court has broad discretion on rulings on challenges for cause, n14 and the court's determination will be reversed only for an abuse of discretion. n15

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsSelectionChallenges for CauseCivil ProcedureTrialsJury TrialsJurorsSelectionVoir DireConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:

(n1)Footnote 1. *Swain v. Alabama, 380 U.S. 202, 220, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965)* .

(n2)Footnote 2. *Bailey v. Board of County Comm'rs of Alachua County, 956 F.2d 1112, 1128 (11th Cir. 1992)* , *cert. denied, 506 U.S. 832 (1992)* .

(n3)Footnote 3. *Getter v. Wal-Mart Stores, Inc., 66 F.3d 1119, 1122 (10th Cir. 1995)* , *cert. denied, 516 U.S. 1146 (1996)* .

(n4)Footnote 4. *Darbin v. Nourse, 664 F.2d 1109, 1113 (9th Cir. 1981)* .

(n5)Footnote 5. *Marks v. Shell Oil Co., 895 F.2d 1128, 1129 (6th Cir. 1990)* .

(n6)Footnote 6. *Depree v. Thomas, 946 F.2d 784, 787-788 (11th Cir. 1991)* .

(n7)Footnote 7. *Bell v. Lynbaugh, 663 F. Supp. 405, 414 (E.D. Tex.)* , *aff'd, 828 F.2d 1085 (5th Cir. 1987)* , *cert. denied, 484 U.S. 933 (1987)* .

(n8)Footnote 8. *Gladhill v. General Motors Corp., 743 F.2d 1049, 1050 (4th Cir. 1984)* .

(n9)Footnote 9. *Poynter v. Ratcliff, 874 F.2d 219, 221 (4th Cir. 1989)* .

(n10)Footnote 10. *Marks v. Shell Oil Co., 895 F.2d 1128, 1130 n.1 (6th Cir. 1990)* .

(n11)Footnote 11. *Walzer v. St. Joseph State Hosp., 231 F.3d 1108, 1112 (8th Cir. 2000)* .

(n12)Footnote 12. *Bailey v. Board of County Comm'rs of Alachua County, 956 F.2d 1112, 1128 (11th Cir. 1992)* , *cert. denied, 506 U.S. 832 (1992)* .

(n13)Footnote 13. *Shattuck v. Kinetic Concepts, Inc., 49 F.3d 1106, 1111 (5th Cir. 1995)* .

(n14)Footnote 14. *Shattuck v. Kinetic Concepts, Inc., 49 F.3d 1106, 1111 (5th Cir. 1995)* .

(n15)Footnote 15. *Kirk v. Raymark Indus., Inc. 61 F.3d 147, 154-155 (3d Cir. 1996)* , *cert. denied, 516 U.S. 1145 (1996)* .

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§ 30.40 Asserting Peremptory Challenges

[1] Removing Jurors Who Have Unacknowledged or Unconscious Bias

The peremptory challenge is considerably more extensive than the challenge for cause, and serves to remove jurors who, in the opinion of a party or counsel, have unacknowledged or unconscious bias. n1

[2] Evaluating Right Under Jury Selection and Service Act

Rule 47(b) provides that the court "shall allow the number of peremptory challenges provided by *28 U.S.C. § 1870*." The text of Rule 47(b) reminds litigants that the source of the right to peremptory challenge is statutory, and not constitutional, a distinction that may have a significant impact on the remedy to which a litigant is entitled if the right to peremptory challenge is impaired or denied. n2

[3] Determining Number of Peremptory Challenges

The Jury Selection and Service Act entitles each party to three peremptory challenges, but also provides that "[s]everal defendants or several plaintiffs may be considered as a single party for the purpose of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly." n3

Courts have interpreted this latter provision to vest the trial court with considerable discretion in the number and assignment of peremptory challenges in cases of multiple litigants. n4

[4] Utilizing Peremptory Challenges

The district court has wide latitude in its management of peremptory challenges, which will be reversed on appeal only if the court's procedure bars a litigant from using the statutorily mandated number of peremptory challenges against a person who becomes a member of the jury. n5

A party may not claim error with respect to the district court's denial of any number of peremptory challenges unless all available peremptories have been exercised. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsSelectionPeremptory ChallengesCivil ProcedureTrialsJury TrialsJurorsSelectionVoir DireConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:

(n1)Footnote 1. *Swain v. Alabama, 380 U.S. 202, 220, 13 L. Ed. 2d 759 (1965)* .

(n2)Footnote 2. *Ross v. Oklahoma, 487 U.S. 81, 88, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988)* .

(n3)Footnote 3. *28 U.S.C. § 1870.*

(n4)Footnote 4. *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp., 73 F.3d 1178, 1219 (2d Cir. 1995)* , *modified on other grounds, 85 F.3d 49 (2d Cir. 1996)* .

(n5)Footnote 5. *Medrano v. City of Los Angeles, 973 F.2d 1499, 1503 (9th Cir. 1992)* , *cert. denied, 508 U.S. 940 (1993)* .

(n6)Footnote 6. *Mills v. GAF Corp., 20 F.3d 678, 680 (6th Cir. 1994)* .

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CHAPTER 30 Juries *
B Selecting the Jury and Monitoring Jury Conduct

3-30 Federal Litigation Guide § 30.41

§ 30.41 Evaluating Whether Peremptory Challenge is Discriminatory

[1] Opposing Peremptory Strikes As Discriminatory

The Supreme Court has established that once a party of a cognizable racial group establishes a prima facie case of discriminatory peremptory challenges, by showing that the adversary's exercise of peremptory challenges has removed members of that racial group from the panel of prospective jurors, the burden shifts to the adversary to come forward with a race-neutral explanation for the challenges. n1 The trial court is then obligated to determine if the explanation for the challenge is merely pretextual, and whether or not the party opposing the peremptory challenge has established purposeful discrimination. n2

Describing the statutory scheme responsible for the establishment of the jury trial system in general, and the peremptory challenge procedure in particular, the Court observed that "without the overt, significant participation of the government, the peremptory challenge system, as well as the jury trial system of which it is a part, simply could not exist." n3

The Supreme Court has further held that a party has standing to object to race-based exclusion of jurors by peremptory challenge whether or not the party and the excluded jurors are members of the same race. Reasoning that racial discrimination in the selection of jurors casts doubt on the integrity of the judicial process and places the fairness of a proceeding in doubt, the Court concluded the race of a litigant challenging the discriminatory exercise of a peremptory challenge was "irrelevant to a defendant's standing to object to discriminatory use of peremptory challenges." n4

The same reasoning has been applied to claims of gender discrimination in the exercise of peremptory challenges, holding that "gender, like race, is an unconstitutional proxy for jury competence and impartiality." n5

[2] Opposing the Peremptory Challenge in Timely Manner

Although the trial court is required to determine whether a party's exercise of peremptory challenges is discriminatory, in the absence of an objection the court does not have a duty, sua sponte, to prevent the discriminatory exclusion of jurors. n6 Accordingly, a litigant wishing to challenge an opponent's use of peremptory challenges as discriminatory must lodge an objection in a timely fashion. n7

If a prima facie showing of discriminatory use of a peremptory challenge has been made, the burden shifts to the party

who has exercised the challenge "to come forward with a neutral explanation for challenging" the prospective juror. n8 The objector then has an opportunity to present rebuttal evidence. n9

It is incumbent on the objecting party to set forth--on the record and before the trial judge--why the proffered reasons are merely pretextual, in order to preserve the issue for appellate review. The burden of persuasion remains on the objector.

[3] Conducting Inquiry on Challenge

On a timely objection that a party's exercise of peremptory challenges is discriminatory, the trial court must inquire as to the reasons for the striking party's challenges, n10 and determine whether, under the circumstances of the case, the proffered reason is neutral, or merely pretextual. And, while it may be the better practice, there is no requirement that the trial court articulate for the record the reasons underlying the ruling, n11 or that the reasons proffered for the peremptory challenge be based on record evidence. n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsSelectionPeremptory ChallengesCivil ProcedureTrialsJury TrialsJurorsSelectionVoir DireConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:
(n1)Footnote 1. *Batson v. Kentucky, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719, 90 L. Ed.2d 69 (1986)* ; *Edmonson v. Leesville Concrete Co., 500 U.S. 614, 622, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991)* .

(n2)Footnote 2. *Edmonson v. Leesville Concrete Co., 500 U.S. 614, 622, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991)* ; *Forrest v. Beloit Corp., 424 F.3d 344, 350 (3d Cir. 2005)* .

(n3)Footnote 3. *Edmonson v. Leesville Concrete Co., 500 U.S. 614, 622, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991)* .

(n4)Footnote 4. *Powers v. Ohio, 499 U.S. 400, 415-416, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)* .

(n5)Footnote 5. *J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 129, 146, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994)* .

(n6)Footnote 6. *Clark v. Newport News Shipbldg. & Dry Dock Co., 937 F.2d 934, 939 (4th Cir. 1991)* .

(n7)Footnote 7. *Dawson v. Wal-Mart Stores, Inc., 978 F.2d 205, 210 (5th Cir. 1992)* .

(n8)Footnote 8. *Batson v. Kentucky, 476 U.S. 79, 97, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)* ; *United States Xpress Enters., Inc. v. J.B. Hunt Transp., Inc., 320 F.3d 809, 812-813 (8th Cir. 2003)* .

(n9)Footnote 9. *United States v. Roan Eagle, 867 F.2d 436, 441 (8th Cir. 1989)* , *cert. denied*, *490 U.S. 1028 (1989)* .

(n10)Footnote 10. *Montiel v. City of Los Angeles, 2 F.3d 335, 340 (9th Cir. 1993)* .

(n11)Footnote 11. *Hopson v. Fredericksen, 961 F.2d 1374, 1377 (8th Cir. 1992)* .

(n12)Footnote 12. *Great Plains Equip. v. Koch Gathering Sys., 45 F.3d 962, 965 (5th Cir. 1995)* .

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CHAPTER 30 Juries *
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§ 30.42 Understanding the Jury's Role at Trial

A jury is a group of individuals selected from a district by the court to be sworn for the purpose of determining by verdict a question of fact. Whereas the court determines questions of law, the jury determines questions of fact. All jurors must participate in the verdict unless excused from service by the court. Unless the parties stipulate otherwise, the verdict must be unanimous. n1 No verdict may be taken from a jury reduced in size to fewer than six members. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsProvince of Court & JuryConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:
(n1)Footnote 1. *Johnson v. Louisiana, 406 U.S. 356, 369-370, 370 n.5, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972)* ; *Murray v. Laborers Union Local No. 324, 55 F.3d 1445, 1451 (9th Cir. 1995)* , *cert. denied, 517 U.S. 1219 (1996)* .

(n2)Footnote 2. *Fed. R. Civ. P. 48.*

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CHAPTER 30 Juries *
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3-30 Federal Litigation Guide § 30.43

§ 30.43 Assuring Requisite Number of Jurors

[1] Seating a Jury Of At Least Six Members

Rule 48 provides that a jury "must begin with at least 6 and no more than 12 members." n1 Local rules of court in some jurisdictions specify a more precise number of jurors within this six-to-twelve person range. For a complete discussion of jury verdicts, see Ch. 40, *Verdicts and Jury Deliberations*.

[2] Stipulating to Verdict From Jury of Fewer Than Six Members

Rule 48 provides that all of the six to 12 jurors "must participate in the verdict unless excused under Rule 47(c)." n2 Rule 48 also provides that unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members. n3 However, stipulations have been found not to be controlling when there has been compliance with the numerical requirements of Rule 48 and the court has proper reason to excuse a juror from service. n4

There is conflicting authority whether courts may disregard local rules pertaining to jury size in the absence of a stipulation by the parties. n5 The integrity of the local rules is advanced by a decision that requires individual district judges to adhere to their local rules.

Difficulties in requirements for jury size have arisen in situations where alternate jurors have been permitted to deliberate with the jury. Allowing alternates to deliberate has been held to be prejudicial. n6 Nonetheless, failure to timely object may constitute a waiver n7 or an express agreement to allow alternates to deliberate. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsRight to Jury TrialConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 48(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 48(a).*

(n3)Footnote 3. *Fed. R. Civ. P. 48(b).*

(n4)Footnote 4. *Bondie v. Bic Corp., 947 F.2d 1531, 1535 (6th Cir. 1991)* .

(n5)Footnote 5. *Compare Kuykendall v. Southern Ry. Co., 652 F.2d 391, 392-393 (4th Cir. 1981)* ; *with Hanson v. Parkside Surgery Ctr., 872 F.2d 745, 749-750 (6th Cir. 1989)* , *cert. denied, 493 U.S. 944 (1989)* .

(n6)Footnote 6. *Cabral v. Sullivan, 961 F.2d 998, 1002 (1st Cir. 1992)* .

(n7)Footnote 7. *Rideau v. Parkem Indus. Servs., Inc., 917 F.2d 892, 896 (5th Cir. 1990)* .

(n8)Footnote 8. *EEOC v. State of Delaware, DHSS, 865 F.2d 1408, 1420-1421 (3d Cir. 1989)* .

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CHAPTER 30 Juries *
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3-30 Federal Litigation Guide § 30.44

§ 30.44 Understanding Judge's Role During Jury Trial

[1] Ruling on Questions of Law

The substance of the right of trial by jury, as guaranteed by the *Seventh Amendment*, means a trial to a jury presided over by a judge with authority to rule on questions of law. n1 The province of the jury is to determine disputed questions of fact. Therefore, the jury trial right does not extend to issues that are matters of law. n2

[2] Managing Juror Conduct

The court has the inherent power to control the proceedings and to ensure an orderly trial. The district court judge, with the aid of the bailiff, is responsible for managing all aspects of jury service including:

- Preinstructing the jury regarding the scope of service, the order of proceedings, and the role of participants (court personnel, litigants, counsel, witnesses)
- Admonishing improper juror conduct during service such as inattentiveness during testimony or improper communications
- Communicating with the court (jurors generally required to submit communications in writing to the court)
- Viewing evidence
- Questioning of witnesses (jurors are typically required to submit proposed questions in writing to the court)
- Notetaking (jurors may be required to leave notebooks with the court when trial is not in session)

[3] Instructing and Aiding Jury

The court, at its election, may instruct the jury before or after argument, or both. n3 In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within the judge's province to assist the jury in arriving at a just

conclusion by explaining and commenting on the evidence, by drawing their attention to the specific evidence; and by expressing opinion on the facts, provided the jury is clearly informed that all matters of fact are submitted to their determination. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsProvince of Court & JuryCivil ProcedureTrialsJury TrialsRight to Jury TrialConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:
(n1)Footnote 1. *DeBry v. Transamerica Corp., 601 F.2d 480, 490 (10th Cir. 1979)* .

(n2)Footnote 2. *Rhea v. Massey-Ferguson, Inc., 767 F.2d 266, 268-269 (6th Cir. 1985)* .

(n3)Footnote 3. *Fed. R. Civ. P. 51.*

(n4)Footnote 4. *Quercia v. United States, 289 U.S. 466, 469, 53 S. Ct. 698, 77 L. Ed. 1321 (1933)* ; *Desjardins v. Van Buren Community Hosp., 969 F.2d 1280, 1281-1282 (1st Cir. 1992)* .

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CHAPTER 30 Juries *
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3-30 Federal Litigation Guide § 30.45

§ 30.45 Evaluating Court's Authority to Enter Judgment Different From Jury Verdict

[1] Granting Judgment as Matter of Law

A motion for judgment as a matter of law under Rule 50(a), generally referred to as a motion for directed verdict, is made at the close of evidence on grounds of lack of pleading or proof of a material issue, or absence of any controverted issues of fact on which reasonable persons could differ. If such a motion is not granted, it may be renewed within 28 days after entry of judgment. The renewal motion, under Rule 50(b), is generally referred to as a motion for judgment n.o.v., that is, a judgment notwithstanding the verdict.

In ruling on the renewal motion, the court may allow the judgment to stand, grant a new trial (if such relief is sought), or direct entry of judgment as a matter of law. n1 The court's setting aside of the verdict and entry of judgment under Rule 50(b) raises a constitutional question, since the *Seventh Amendment* forbids re-examination of any fact tried by a jury "in any court of the United States other than according to the rules of common law." n2

The Rules get around this *Seventh Amendment* violation by structuring the motion for judgment n.o.v. as a renewal of a motion for directed verdict. The directed verdict motion is beyond constitutional challenge (as long as the court properly applies the standards) since it has a long history in the common law, and since it does not involve "re-examination" of a jury verdict. Under Rule 50, the court's decision on the directed verdict motion is automatically reserved if the motion is not granted before submission of the case to the jury; the subsequent motion for judgment n.o.v. is thereby transformed into a renewal of the earlier motion, and the court is not technically setting aside the jury's verdict but is in essence withdrawing the case from the jury's consideration. n3

[2] Granting New Trial

A motion for new trial under Rule 59 may be made on the grounds that the verdict is against the weight of the evidence. The motion is addressed to the sound discretion of the court, which may set aside the verdict and direct a new trial. The granting of a new trial under Rule 59 has survived constitutional challenge. Since the *Seventh Amendment* only prohibits re-examination of facts tried by a jury that is in derogation of the common law, it has been held that the grant of a new trial in accordance with common-law principles is clearly permissible and proper. n4

[3] Granting Remittitur When Option of New Trial Is Offered

When excessive damages have been awarded to a party, the court may order remittitur or new trial, at the option of the party awarded damages. n5 Remittitur is permissible under the *Seventh Amendment* only when the verdict cannot be justified on the evidence, n6 and it has generally been held that remittitur may be granted only if the option of a new trial is offered. n7

[4] Granting Additur Is Impermissible Violation of Seventh Amendment

An order of additur, increasing a damages award when it is deemed insufficient, is a violation of the *Seventh Amendment* and is impermissible. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsProvince of Court & JuryCivil ProcedureTrialsJury TrialsRight to Jury TrialCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 50(b).*

(n2)Footnote 2. *Slocum v. New York Life Ins. Co., 228 U.S. 364, 376-388, 33 S. Ct. 523, 57 L. Ed. 879 (1913) .*

(n3)Footnote 3. *Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 322, 330, 87 S. Ct. 1072, 18 L. Ed. 2d 75 (1966) .*

(n4)Footnote 4. *Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 215-216, 67 S. Ct. 752, 91 L. Ed. 849 (1947) .*

(n5)Footnote 5. *Morgan v. Woessner, 997 F.2d 1244, 1258-1259 (9th Cir. 1993) , cert. dismissed, 510 U.S. 1033 (1994) .*

(n6)Footnote 6. *Boyd v. Bulala, 672 F. Supp. 915, 921 (W.D. Va. 1987) , aff'd in part, rev'd in part and questions certified, 877 F.2d 1191 (4th Cir. 1989) .*

(n7)Footnote 7. *Morgan v. Woessner, 997 F.2d 1244, 1258 (9th Cir. 1993) , cert. dismissed, 510 U.S. 1033 (1994) .*

(n8)Footnote 8. *Hattaway v. McMillian, 903 F.2d 1440, 1451 (11th Cir. 1990) .*

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CHAPTER 30 Juries *
B Selecting the Jury and Monitoring Jury Conduct

3-30 Federal Litigation Guide § 30.46

§ 30.46 Excusing Jurors During Trial or Deliberation

[1] Removing Sitting Jurors From Service During Trial or Deliberation for Good Cause

Recognizing that circumstances sometimes arise during trial that require the dismissal of a juror, Rule 47(c) empowers the district court to excuse a juror from service, during trial or deliberation, for good cause.

Because the right of all parties to the judgment of the jury is a "qualified one," n1 the dismissal of a juror under appropriate circumstances will not cause a mistrial, and the demands of due process are met as long as at least six jurors, or a smaller number if the parties have so stipulated, remain to render a verdict. n2

[2] Grounds Justifying Excuse of Juror

The concept of "good cause" permits the trial court, in its discretion, to excuse a juror for reasons of "[s]ickness, family emergency or juror misconduct that might occasion a mistrial." n3

Rule 47(c) confers wide discretion on the trial court to dismiss a juror "when necessary to preserve the integrity of the judicial process." n4 Courts have exercised their discretion to excuse jurors for the following reasons:

- So that the juror may take an important business trip n5
- Because of the stress felt by the juror during deliberations n6
- Because of a scheduling conflict during protracted deliberations n7
- Because of the juror's planned vacation n8
- Because of the juror's chronic lateness n9

The court may not, however, remove a juror simply because the juror refuses to join with remaining jurors in reaching a unanimous verdict. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsRemovalsCivil ProcedureTrialsJury TrialsRight to Jury TrialConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:

(n1)Footnote 1. *Murray v. Laborers Union Local 324, 55 F.3d 1445, 1451 (9th Cir. 1995)* , *cert. denied*, *517 U.S. 1219 (1996)* .

(n2)Footnote 2. *Ballew v. Georgia, 435 U.S. 223, 245, 98 S. Ct. 1029, 55 L. Ed. 2d 234 (1978)* .

(n3)Footnote 3. *Murray v. Laborers Union Local 324, 55 F.3d 1445, 1451-1452 (9th Cir. 1995)* , *cert. denied*, *517 U.S. 1219 (1996)* .

(n4)Footnote 4. *Fed. R. Civ. P. 47(c).*

(n5)Footnote 5. *Interpool Ltd. v. Patterson, 874 F. Supp. 616, 618 (S.D.N.Y. 1995)* .

(n6)Footnote 6. *Mason v. Texaco, Inc., 948 F.2d 1546, 1558 (10th Cir. 1991)* , *cert. denied*, *504 U.S. 910 (1991)* .

(n7)Footnote 7. *Murray v. Laborers Union Local 324, 55 F.3d 1445, 1451 (9th Cir. 1995)* , *cert. denied*, *517 U.S. 1219 (1996)* .

(n8)Footnote 8. *United States v. McFarland, 34 F.3d 1508 (9th Cir. 1994)* .

(n9)Footnote 9. *Bondie v. Bic Corp., 947 F.2d 1531, 1535 (6th Cir. 1991)* .

(n10)Footnote 10. *Murray v. Laborers Union Local 324, 55 F.3d 1445, 1451-1452 (9th Cir. 1995)* , *cert. denied*, *517 U.S. 1219 (1996)* .

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CHAPTER 30 Juries *
B Selecting the Jury and Monitoring Jury Conduct

3-30 Federal Litigation Guide § 30.47

§ 30.47 Investigating and Removing Sitting Juror for Misconduct

[1] Hearing Ordinarily Required

Although courts may excuse jurors for good cause during trial or deliberation, the Supreme Court has held that, in investigating allegations of juror misconduct, trial courts should not decide and take final action ex parte. Rather, courts should determine the circumstances and their impact on jurors, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate. n1

The issue has arisen in several cases involving proceedings investigating the potential dismissal of a sitting juror who is the lone holdout. Absent exigent circumstances, such proceedings must be conducted in the presence of the parties, and a record of the hearing must be made for the benefit of the parties and the reviewing court. n2

[2] Hearing May Be Waived by Parties

Although the trial judge ordinarily should not conduct any portion of the hearing ex parte, ex parte communications may be upheld when "the circumstances warrant and fundamental fairness is not sacrificed." n3 The Eighth Circuit has found no plain error in conducting a hearing outside the parties' presence to investigate allegations of jury tampering when both parties knew about the hearing in advance, declined to participate, and raised no objection. n4

[3] Voir Dire of Juror Regarding Prejudice From Extrajudicial Information

Good cause encompasses juror misconduct that might occasion a mistrial. Thus, decisions involving granting or denying a mistrial for juror misconduct (misconduct of jury as grounds for new trial) may provide guidance as to the proper method of investigation of juror misconduct. In one such case, the court stated that when a trial court becomes aware that a member of the jury may have learned extrajudicial information that could adversely affect the jury's ability to decide the case impartially on the record evidence alone, the court must determine whether the impartiality of the juror has been compromised. n5

The appropriate method for inquiry into possible prejudice of a juror is voir dire of the juror. n6 The method of conducting the voir dire is in the discretion of the court; any method is sufficient provided it is probative on the issue of impartiality. n7 However, the court's voir dire must be sufficiently thorough to ascertain whether there is a substantial likelihood of prejudice. n8

When the exposure to extrajudicial information has been substantial, the court's determination of partiality should be made based on objective criteria rather than on the juror's own subjective assessment of continued impartiality, since the effect of extrajudicial information may be prejudicial even if not so perceived by the juror. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsMisconductCivil ProcedureTrialsJury TrialsJurorsRemovalsCivil ProcedureTrialsJury TrialsRight to Jury TrialConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:
(n1)Footnote 1. *Remmer v. United States, 347 U.S. 227, 228-229, 74 S. Ct. 450, 98 L. Ed. 654 (1954)* .

(n2)Footnote 2. *Harris v. Folk Constr. Co., 138 F.3d 365, 371-372 (8th Cir. 1998)* .

(n3)Footnote 3. *United States v. Behler, 14 F.3d 1264, 1268 (8th Cir. 1994)* , *cert. denied*, *513 U.S. 960 (1994)* .

(n4)Footnote 4. *United States v. Behler, 14 F.3d 1264, 1267-1268 (8th Cir. 1994)* , *cert. denied*, *513 U.S. 960 (1994)* .

(n5)Footnote 5. *Waldorf v. Shuta, 3 F.3d 705, 709-710 (3d Cir. 1993)* .

(n6)Footnote 6. *Waldorf v. Shuta, 3 F.3d 705, 709 (3d Cir. 1993)* .

(n7)Footnote 7. *Waldorf v. Shuta, 3 F.3d 705, 710 (3d Cir. 1993)* .

(n8)Footnote 8. *Waldorf v. Shuta, 3 F.3d 705, 711, 713 (3d Cir. 1993)* .

(n9)Footnote 9. *Waldorf v. Shuta, 3 F.3d 705, 710-711 (3d Cir. 1993)* .

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CHAPTER 30 Juries *
B Selecting the Jury and Monitoring Jury Conduct

3-30 Federal Litigation Guide § 30.48

§ 30.48 Reaching Unanimous Jury Verdict

[1] Unanimity Provides Greater Certainty in Result

Unlike the procedure in many states, Rule 48 provides that the jury's verdict must be unanimous unless the parties otherwise stipulate. n1 Unanimity provides greater certainty in the result and reinforces each juror's agreement with the verdict. In short, unanimity protects the parties and the jury. Although counsel should be cautious about stipulating to a verdict that is not unanimous, such a stipulation may help avoid a mistrial. For a complete discussion of jury verdicts, see Ch. 40, *Verdicts and Jury Deliberations*.

Prior to the 1991 revision of Rule 48, courts disputed whether a federal jury verdict must be unanimous absent a stipulation by the parties. Revised Rule 48 resolves that dispute by clarifying that "the verdict must be unanimous" unless the parties stipulate to the contrary. n2

[2] Verdict Should Be in Writing and Signed by All Jurors

If it is not the general practice in the district in which the case is being tried, counsel should suggest to the trial judge that the verdict be in writing and signed by all of the jurors. This adds greater certainty and reliability to the verdict.

[3] Counsel Should Remain During Deliberations and Be Advised of Communications With Jury

Counsel should remain in the courtroom during deliberations and should request to be advised of any communication from or with the jury. Jury deliberations are among the most delicate and important parts of the trial.

[4] Conducting Post-Verdict 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. n3

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsJury DeliberationsCivil ProcedureTrialsJury TrialsRight to Jury TrialCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureTrialsJury TrialsVerdictsInconsistent VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial Verdicts

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 48.*

(n2)Footnote 2. *Fed. R. Civ. P. 48.*

(n3)Footnote 3. *Fed. R. Civ. P. 48(c).*

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CHAPTER 30 Juries *
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3-30 Federal Litigation Guide § 30.49

§ 30.49 Conducting Post-Trial Interviews With Jurors

Once the verdict is returned in open court, counsel may decide to request an opportunity to poll the jurors regarding the verdict and the trial. Local rules and the desires of federal judges vary widely on the question of whether, and when, attorneys may speak to jurors after their verdict has been rendered. Some judges specifically advise jurors that they are free, but not obligated, to discuss the case with attorneys or others after their dismissal.

If the custom or preference of a particular judge, or in a particular district, is uncertain, it will always be wise to ask the trial judge for permission to speak with jurors after the trial is over.

Even the most experienced trial lawyer will profit from post-trial interviews with key jurors. In any case where there is a significant chance of retrial, such interviews may be very important. Material questions may include:

- What was the essential rationale of the verdict?
- Which arguments (on each side) did the jury find most and least persuasive and why?
- Which witnesses (from each side) did the jury find most and least persuasive and why?
- Were any particular instructions either controlling in the jury's mind, ambiguous, or otherwise significant?
- How did the jurors react to the personalities and conduct of counsel on each side?
- Was there anything about your case (arguments, witnesses, conduct of counsel, etc.) that the jurors found offensive?
- Regardless of the jury's ultimate decision, were there unexplained or confusing aspects of your case that should have been clarified?

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsPolling of JuryCivil ProcedureTrialsJury TrialsRight to Jury TrialCivil ProcedureTrialsJury TrialsVerdictsGeneral Overview

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CHAPTER 31 Exclusion of Witnesses *

3-31 Federal Litigation Guide 31.syn

§ 31.syn Synopsis to Chapter 31: Exclusion of Witnesses *

§ 31.01 Excluding Witnesses Under the Rules of Evidence

§ 31.02 Court Must Exclude Witnesses on Party's Request

§ 31.03 Witnesses Not Subject to Exclusion
[1] Party Who Is Natural Person May Not Be Excluded
[2] Representative of Party Who Is Not Natural Person May Not Be Excluded
[3] Person Essential to Presentation of Party's Cause May Not Be Excluded
[4] Person Authorized By Statute to be Present May Not Be Excluded

§ 31.04 Claiming Exemption From Exclusion

§ 31.05 Timing Of Request to Exclude

§ 31.06 Court Should Instruct Excluded Witnesses Not to Discuss Case With Each Other

§ 31.07 Considering Consequences of Non-Compliance With Rule

§ 31.08 Evaluating Available Sanctions

§ 31.09 Barring Testimony Based on Violation of Exclusion Order

§ 31.10 Ruling on Effect of Violation Is Within Discretion of Trial Court

§ 31.11 Showing Harm From Violation to Obtain Mistrial, New Trial, or Reversal on Appeal

§ 31.12 Tactical Considerations Involved in the Exclusion of Witnesses

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CHAPTER 31 Exclusion of Witnesses *

3-31 Federal Litigation Guide Scope

Scope

SCOPE

Under *Rule 615 of the Federal Rules of Evidence*, a party may request the trial court to remove most witnesses from the courtroom during the testimony of other witnesses. The chapter explains the purpose of the rule, its mandatory nature, and the instructions that the court should give to the excluded witnesses. It also describes witnesses who may not be excluded, including parties and persons essential to the presentation of a party's case. The consequences of violating an exclusionary order are examined, and the chapter concludes with a discussion of possible sanctions for violating such an order.

For expanded coverage of exclusion of witnesses, ***see*** Weinstein's Federal Evidence, Ch. 615, ***Exclusion of Witnesses*** (Matthew Bender 2d ed.).

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CHAPTER 31 Exclusion of Witnesses *

3-31 Federal Litigation Guide § 31.01

§ 31.01 Excluding Witnesses Under the Rules of Evidence

The exclusion of witnesses from the courtroom is governed by *Rule 615 of the Federal Rules of Evidence*, which provides:

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present. n1

Rule 615 authorizes the trial court to exclude witnesses from the courtroom so that they cannot hear the testimony of the other witnesses. n2 A court order excluding witnesses is sometimes referred to as a sequestration order, and witnesses who have been excluded from the courtroom may be termed "sequestered." n3

Exclusion or sequestration is designed to prevent "the possibility of one witness shaping his testimony to match that given by other witnesses at the trial." n4 Additionally, if witnesses who are questioned separately use language that is very similar, it may be concluded that the similarity results from coaching, memorization, or fabrication. n5

The rule by its own terms applies only during the testimony of witnesses. n6 The rule applies to witnesses even after they have testified, if they might be recalled for further testimony. The concerns of preventing the tailoring of testimony, which gave rise to the rule, are equally valid for rebuttal witnesses. n7

There is some disagreement as to whether witnesses should be excluded at other times during the trial such as during opening arguments n8 and closing arguments. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionEvidenceGeneral OverviewEvidenceTestimonyGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonySequestration

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 77(b)*, which provides that all trials on the merits shall be conducted in open court, appears to be concerned with policy issues unrelated to those presented by the exclusion of witnesses. That rule apparently does not limit the effect of *Federal Rule of Evidence 615*. *See also* Weinstein's Federal Evidence, Ch. 615, *Exclusion of Witnesses* (Matthew Bender 2 ed.).

(n2)Footnote 2. *Fed. R. Evid. 615*.

(n3)Footnote 3. *Opus 3 Ltd. v. Heritage Park, Inc., 91 F.3d 625, 628 (4th Cir. 1996)* .

(n4)Footnote 4. *United States v. Johnston, 578 F.2d 1352, 1355 (10th Cir. 1978)* , *cert. denied, 439 U.S. 931 (1978)* .

(n5)Footnote 5. *United States v. Perry, 815 F.2d 1100, 1105-1106 (7th Cir. 1987)* .

(n6)Footnote 6. *Fed. R. Evid. 615*.

(n7)Footnote 7. *United States v. Ell, 718 F.2d 291, 293 (9th Cir. 1983)* .

(n8)Footnote 8. *Compare Queen v. Washington Metro. Area Transit Authority, 842 F.2d 476, 481-482 (D.C. Cir. 1988)* (application of rule during opening arguments) *with United States v. Brown, 547 F.2d 36, 38 (3d Cir. 1976)* (although *Fed. R. Evid. 615* does not apply during opening arguments, but trial court has discretion to make exclusion order during opening arguments).

(n9)Footnote 9. *Compare United States v. Alvarez, 755 F.2d 830, 860-861 (11th Cir. 1985)* (government agents who had testified at trial could not be excluded from courtroom after close of testimony, since "Rule 615 is inapplicable after all witness testimony has been concluded"), *with United States v. Juarez, 573 F.2d 267, 281 (5th Cir. 1978)* (proper to exclude witnesses during closing arguments which often restate witnesses' testimony, since trial judge could justifiably fear that fairness of a second trial might be jeopardized if witnesses learned the testimony of other witnesses).

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CHAPTER 31 Exclusion of Witnesses *

3-31 Federal Litigation Guide § 31.02

§ 31.02 Court Must Exclude Witnesses on Party's Request

Rule 615 gives a party a right to request the exclusion of witnesses from the courtroom. A court may not deny a request for the exclusion of witnesses, except as to a witness who fits into one of four exempted categories. n1 After an exclusion order is issued, each witness must be excluded from the courtroom both before and after testifying. n2 Although a court may exclude witnesses on its own motion, a party who does not request the exclusion of witnesses waives the right to complain about the trial court's failure to issue an exclusion order. n3

FOOTNOTES:

(n1)Footnote 1. *See United States v. Farnham, 791 F.2d 331, 334-335 (4th Cir. 1986)* .

(n2)Footnote 2. *United States v. Greschner, 802 F.2d 373, 375-376 (10th Cir. 1986)* .

(n3)Footnote 3. *See United States v. Abbott, 30 F.3d 71, 73 (7th Cir. 1994)*.

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CHAPTER 31 Exclusion of Witnesses *

3-31 Federal Litigation Guide § 31.03

§ 31.03 Witnesses Not Subject to Exclusion

[1] Party Who Is Natural Person May Not Be Excluded

A party who is a natural person may not be excluded from the courtroom. This exception addresses constitutional concerns about fundamental fairness and due process, which would arise if a party were excluded from the proceedings. n1

[2] Representative of Party Who Is Not Natural Person May Not Be Excluded

Rule 615 prohibits exclusion of "an officer or employee of a party which is not a natural person designated as its representative by its attorney." n2 To be designated as a party's representative, the officer or employee is not required to be an agent who is empowered to bind the party. n3 However, a person who is not an officer or employee of a party may not be designated as its representative. n4

One issue that may arise, is whether a party has the right to more than one designated representative. Some courts permit only a single representative, n5 some courts permit more than one representative when there is a practical reason justifying the use of more than one representative, n6 and some courts impose no limitation on the number of representatives. n7 In addition, it is the practice of some courts to allow multiple representatives to remain for most testimony but to exclude the other representatives when one representative is testifying. n8

The court has the authority under Rule 611 to order witnesses to testify at an early stage of the trial. n9 When the government designates as its representative an agent in a criminal case who has been in charge of the case and it is anticipated that the agent will be called as a witness, the agent may be called first so as to avoid giving the prosecution unfair advantage or the appearance that the prosecution is being favored. n10 In most instances, however, the court will not interfere with the parties' choice of the order in which evidence will be introduced. n11

[3] Person Essential to Presentation of Party's Cause May Not Be Excluded

Rule 615 prohibits exclusion of "a person whose presence is shown by a party to be essential to the presentation of the party's cause." n12 This category includes persons such as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of the litigation. Although the exemption is phrased in the singular, courts have the discretion to exempt more than one witness as essential to the preparation of the party's case. n13 This practice seems appropriate, since it is not difficult to imagine a complex case in which several witnesses could

reasonably be characterized as essential. Whether a witness is essential and thus should be exempt from an exclusion order is "a matter soundly within the discretion of the trial court." n14 When the trial court exercises its discretion to permit a person asserted to be essential to the presentation of a party's cause to remain in the courtroom, the trial court should fully articulate the basis for the exercise of its discretion. n15 This exception is frequently invoked in the case of expert witnesses, usually on the ground that the expert will base his or her testimony and conclusions on evidence that will be shown at trial. n16

Another type of witness often viewed as essential is a "summary witness," who testifies to summarize voluminous information such as documents, charts, or tapes, to clarify the situation for the jury. Some courts hold that a summary witness is automatically recognized as essential to the presentation of a party's case. n17 However, such witnesses may also qualify independently for exemption from exclusion as expert witnesses, n18 or as designated representatives of a party. n19 The Second Circuit has listed the following factors to guide the trial court's determination whether a witness is essential: n20 (1) how critical is witness's testimony; (2) is that testimony ordinarily subject to tailoring; (3) is the testimony likely to cover the same issues as that of other witnesses; (4) in what order will the witnesses be called; (5) is there any potential bias that could incline the witness to tailor his or her testimony; and (6) is the witness's presence essential or simply desirable?

[4] Person Authorized By Statute to be Present May Not Be Excluded

Rule 615 prohibits exclusion of "a person authorized by statute to be present." n21 This provision is intended both to conform the rule to federal victim's rights acts, and also to account for any other existing or future statutory exceptions. Under the Victims' Rights and Restitution Act of 1990, crime victims have the right "to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial." n22 In this context, the term "victim" means a person who "has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime." n23 If the affected person is an institutional entity, the term "victim" means an authorized representative of the entity. n24 If the victim is "under 18 years of age, incompetent, incapacitated, or deceased," the person with the right to attend is one of the following (in the following order of preference): n25

- A spouse
- A legal guardian
- A parent
- A child
- A sibling
- Another family member
- Another person designated by the court

FOOTNOTES:

(n1)Footnote 1. *See Fed. R. Evid. 615* advisory committee's note. *See Geders v. United States, 425 U.S. 80, 96 S. Ct. 1330, 47 L. Ed. 2d 592 (1976)* ; *Potashnick v. Port City Constr. Co., 609 F.2d 1101 (5th Cir. 1980)* , *cert. denied, 449 U.S. 820, 101 S. Ct. 78, 66 L. Ed. 2d 22 (1980)* .

(n2)Footnote 2. *Fed. R. Evid. 615*; *Nanoski v. General Motors Acceptance Corp., 874 F.2d 529, 531 (8th Cir. 1989)* (witness who "had been designated at trial as [the defendant's] corporate representative" was "not excludable"

under *Fed. R. Evid. 615*).

(n3)Footnote 3. *See Queen v. Washington Metro. Area Transit Authority, 842 F.2d 476, 481-482 (D.C. Cir. 1988)* .

(n4)Footnote 4. *Opus 3 Ltd. v. Heritage Park, Inc., 91 F.3d 625, 630 (4th Cir. 1996)* .

(n5)Footnote 5. *United States v. Pulley, 922 F.2d 1283, 1285-1287 (6th Cir. 1991)* .

(n6)Footnote 6. *See United States v. Jackson, 60 F.3d 128, 134-135 (2d Cir. 1995)* .

(n7)Footnote 7. *United States v. Spina, 654 F. Supp. 94, 95 (S.D. Fla. 1987)* , aff'd, *881 F.2d 1086 (11th Cir. 1989)* .

(n8)Footnote 8. *See, e.g., United States v. Ramirez, 963 F.2d 693, 703-704 (5th Cir. 1992)* .

(n9)Footnote 9. *Fed. R. Evid. 611*.

(n10)Footnote 10. *United States v. Frazier, 417 F.2d 1138, 1139 (4th Cir. 1969)* .

(n11)Footnote 11. *See United States v. Parodi, 703 F.2d 768, 775 (4th Cir. 1983)* .

(n12)Footnote 12. *Fed. R. Evid. 615(3)*.

(n13)Footnote 13. *See United States v. Green, 293 F.3d 886, 892 (5th Cir. 2002)* .

(n14)Footnote 14. *See Polythane Sys., Inc. v. Marina Ventures Int'l, Ltd., 993 F.2d 1201, 1209 (5th Cir. 1993)*.

(n15)Footnote 15. *See Government of Virgin Islands v. Edinborough, 625 F.2d 472, 476 (3d Cir. 1980)* .

(n16)Footnote 16. *See Opus 3 Ltd. v. Heritage Park, Inc., 91 F.3d 625, 629 (4th Cir. 1996)* (party failed to establish that claimed expert needed to hear trial testimony of other witnesses, and so failed to prove that his presence was "essential").

(n17)Footnote 17. *See United States v. Bertoli, 854 F. Supp. 975, 1037-1038 (D.N.J. 1994)* .

(n18)Footnote 18. *See United States v. Mohney, 949 F.2d 1397, 1404-1405 (6th Cir. 1991)* .

(n19)Footnote 19. *See United States v. Strauss, 473 F.2d 1262, 1263 (3d Cir. 1973)* .

(n20)Footnote 20. *Bruneau ex rel. Schofield v. South Kortright Cent. Sch. Dist., 163 F.3d 749, 762 (2d Cir. 1998)* .

(n21)Footnote 21. *Fed. R. Evid. 615(4)*; *see also United States v. Visinaiz, 428 F.3d 1300, 1314-1315 (10th Cir. 2005)*.

(n22)Footnote 22. *42 U.S.C. § 10606(b)(4)*.

(n23)Footnote 23. *42 U.S.C. § 10607(e)(2)*.

(n24)Footnote 24. *42 U.S.C. § 10607(e)(2)(A)*.

(n25)Footnote 25. *42 U.S.C. § 10607(e)(2)(B)*.

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CHAPTER 31 Exclusion of Witnesses *

3-31 Federal Litigation Guide § 31.04

§ 31.04 Claiming Exemption From Exclusion

Under Rule 615, a trial court that issues an exclusion order must exclude all witnesses other than a party or a party's designate unless the party opposing exclusion can convince the court to exercise its discretion to exempt a particular witness from its order. n1 The Rule carries a strong presumption in favor of exclusion. Thus, the party opposing exclusion has the burden to demonstrate why a particular exception applies to the desired witness. n2 If a party is mistakenly excluded and the attorney does not object, the party may find that his or her right to be present has been waived. n3

Similarly, because the decision to exempt a witness as essential to the presentation of a party's cause falls within the discretion of the trial court, it is the burden of that party to ask for an exemption. n4 When a request for sequestration is made, counsel should specifically set forth why the sequestration is needed and specify the parts of the trial during which the order is to apply. n5

FOOTNOTES:

(n1)Footnote 1. *See United States v. Agnes, 753 F.2d 293, 306-307 (3d Cir. 1985)* .

(n2)Footnote 2. *See United States v. Jackson, 60 F.3d 128, 135 (2d Cir. 1995)* .

(n3)Footnote 3. *See Hull v. Merck & Co., 758 F.2d 1474, 1478 (11th Cir. 1985).*

(n4)Footnote 4. *See Polythane Sys, Inc.. v. Marina Ventures Int'l, Ltd., 993 F.2d 1201, 1209 (5th Cir. 1993).*

(n5)Footnote 5. *Government of Virgin Islands v. Edinborough, 625 F.2d 472, 475 (3d Cir. 1980)* .

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CHAPTER 31 Exclusion of Witnesses *

3-31 Federal Litigation Guide § 31.05

§ 31.05 Timing Of Request to Exclude

Rule 615 does not require that the motion to exclude witnesses be made at any particular stage of the trial. The cases imply that it can be made at any time--even if testimony has already been heard. n1 It is probably correct to say that the matter lies within the trial court's discretion. n2

In practice, however, most judges take a strict view of the timeliness requirement on motions to exclude and will refuse to entertain such a motion after even a small part of the evidence has been received. In theory perhaps, Rule 615, which contains no requirement as to timeliness, should have the effect of moderating this rigid attitude. However, most of the decisions of the trial court on these matters are discretionary. Reversals of rulings on the exclusion of witnesses can be obtained, if at all, only upon a showing of both a clear abuse of discretion and substantial prejudice. Accordingly, make all motions and objections under Rule 615 on the record before any evidence is received, and before opening statements, if you want to exclude witnesses during those statements.

You also may wish to exclude witnesses, or designate a party representative or person essential to the presentation of the client's cause, in certain pre-trial proceedings. Rule 615 applies to depositions and may be invoked when necessary. n3 The same requirements for exemption from exclusion apply at this time as during trial. n4

FOOTNOTES:
(n1)Footnote 1. *See Wood v. Southwestern Bell Tel. Co., 637 F.2d 1188, 1194 (8th Cir. 1981) , cert. denied, 454 U.S. 837, 102 S. Ct. 142, 70 L. Ed. 2d 118 (1981)* ; *Sperberg v. Goodyear Tire & Rubber Co., 519 F.2d 708, 713-14 (6th Cir. 1975) , cert. denied, 423 U.S. 987, 96 S. Ct. 395, 46 L. Ed. 2d 303 (1975)* (pre-rule) ("There is no federal rule requiring that a request for separation of witnesses be made at any particular stage of a trial.").

(n2)Footnote 2. *Sperberg v. Goodyear Tire & Rubber Co., 519 F.2d 708 (6th Cir. 1975) .*

(n3)Footnote 3. *See Cox v. Ford Motor Credit Co., 146 B.R. 800 (Bankr. E. D. Ark. 1992) .*

(n4)Footnote 4. *Cox v. Ford Motor Credit Co., 146 B.R. 800 (Bankr. E. D. Ark. 1992) .*

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CHAPTER 31 Exclusion of Witnesses *

3-31 Federal Litigation Guide § 31.06

§ 31.06 Court Should Instruct Excluded Witnesses Not to Discuss Case With Each Other

Rule 615 gives no guidance on what instructions, if any, the court should give the witnesses when they are excluded from the courtroom. n1 However, if the witnesses were free to discuss their testimony with each other, it would defeat the purpose of excluding them from the courtroom. As a result, most cases have indicated that the court should direct the witnesses not to discuss the case with each other. n2 These instructions, however, usually permit the witnesses to discuss their own or other witnesses' testimony with counsel for either side. n3 The court is not required to instruct a witness who has been exempted from a sequestration order not to discuss his testimony with other witnesses, in the absence of a request for such an instruction. n4

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Evid. 615.*

(n2)Footnote 2. *See United States v. Green, 293 F.3d 886, 892 (5th Cir. 2002)* .

(n3)Footnote 3. *See, e.g., United States v. Rhynes, 218 F.3d 310, 317 (4th Cir. 2000)* .

(n4)Footnote 4. *See United States v. Visinaiz, 428 F.3d 1300, 1314-1315 (10th Cir. 2005)* .

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CHAPTER 31 Exclusion of Witnesses *

3-31 Federal Litigation Guide § 31.07

§ 31.07 Considering Consequences of Non-Compliance With Rule

The trial judge violates Rule 615 if he or she does not issue an exclusion order on the request of a party; if the order fails to exempt a natural party, the designee of another type of party, a person essential to the presentation of a party's cause, or a person authorized by statute to be present; or if the order exempts a witness who does not qualify for exemption. n1

A witness violates Rule 615 if he or she remains in the courtroom despite an exclusion order. n2 It is also a violation of the rule if excluded witnesses disobey an instruction not to speak with each other. n3 Some courts take the position that mere contact between excluded witnesses does not violate the rule unless the aggrieved party makes a showing that the witnesses actually spoke about the case to each other after having been instructed not to. n4 It has been found that the rule is violated if a witness who has been excluded from the courtroom reads daily copies of the trial transcript. n5 There are, however, alternative ways in which a witness's recollection can be stimulated other than by hearing fellow witnesses testify, reading their testimony, or discussing their testimony with them. Conferences with an attorney prior to trial, n6 refreshment by pertinent materials at trial or before trial, and reading of the witness's own statements are some of the ways in which the witness's memory can be revived without running undue risks of perjury or suggestion. Rule 612 may minimize the risks of these alternatives by requiring witnesses to divulge what writings they consulted in preparing their testimony if the court, in its discretion, so orders.

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Evid. 615* ; *see also United States v. Ell, 718 F.2d 291, 293 (9th Cir. 1983)* (distinguishing between errors by trial court and violations by witnesses).

(n2)Footnote 2. *Fed. R. Evid. 615*.

(n3)Footnote 3. *See United States v. Eyster, 948 F.2d 1196, 1210-1211 (11th Cir. 1991)* .

(n4)Footnote 4. *See United States v. Solorio, 337 F.3d 580, 593-594 (6th Cir. 2003)* .

(n5)Footnote 5. *See Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1373 (5th Cir. 1981)* .

(n6)Footnote 6. *See United States v. Rhynes, 218 F.3d 310 (4th Cir. 2000)* .

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CHAPTER 31 Exclusion of Witnesses *

3-31 Federal Litigation Guide § 31.08

§ 31.08 Evaluating Available Sanctions

Rule 615 is silent on the consequences of noncompliance with an order of exclusion, and the imposition of sanctions is therefore a matter of case law. n1

A witness who has violated an exclusion order may be cited for contempt. n2

A judge who has excluded the witnesses may permit the opposing counsel to comment on a witness's noncompliance with the order as affecting the witness's credibility. n3 The trial court may allow counsel to cross-examine the affected witnesses about the nature and extent of their violation. This approach simultaneously explores the effect of the violation and reveals its occurrence to the finder of fact. n4 The trial court itself may instruct the jury about the witness's violation of the exclusion order so the jury may assess the witness's credibility in light of the violation. n5An instruction or comment, while useful, may have unwarranted repercussions if the witness remained in the courtroom or had a discussion with another witness but his or her testimony was unaffected. A derogatory comment on the witness's credibility under these circumstances may actually distort the truth.

FOOTNOTES:
(n1)Footnote 1. *See Pickel v. United States, 746 F.2d 176, 182 (3d Cir. 1984)* .

(n2)Footnote 2. *See United States v. McMahon, 104 F.3d 638, 642-643 (4th Cir. 1997)* .

(n3)Footnote 3. *See United States v. Rhynes, 218 F.3d 310 (4th Cir. 2000)* (one available sanction for violation of sequestration order is instructing jury that they may consider the violation as affecting the witness's credibility).

(n4)Footnote 4. *See United States v. Posada-Rios, 158 F.3d 832, 871-872 (5th Cir. 1998)* .

(n5)Footnote 5. *See Dutton v. Brown, 812 F.2d 593, 601 (10th Cir. 1987)* .

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CHAPTER 31 Exclusion of Witnesses *

3-31 Federal Litigation Guide § 31.09

§ 31.09 Barring Testimony Based on Violation of Exclusion Order

In most reported cases dealing with violations of exclusion orders, the opponent of the party who called the offending witness moves to bar the witness from testifying. One strain of authority holds that it is ordinarily an abuse of discretion to disqualify a witness from testifying because of a violation of the rule, because it deprives the party offering the witness of the opportunity to present relevant testimony. n1

On the other hand, barring the witness from testifying may be an appropriate sanction under certain circumstances. n2 In some instances, if the witness has already testified before the violation is discovered, the testimony may be stricken. n3 For example, the trial court may exclude testimony even though the exclusion might have a slight prejudicial effect if the party could have presented the same information through another witness who has not violated the exclusion order. n4 Most courts hold that violating a proper exclusion order is not in itself sufficient to warrant excluding the testimony of the witness who violated the rule. n5 These courts require at least a showing of probable prejudice resulting from the violation before authorizing exclusion of the witness's testimony. n6 Prejudice might be shown, for example, if the party identifies portions of the testimony that may have been tailored as a result of hearing other witnesses' testimony. n7 Prejudice is not shown, however, if the only evidence heard or conversation held in violation of the rule was fully explored in court and did not involve any substantive aspect of the case. n8 Moreover, the purpose of the rule is not offended when a person who has remained in the courtroom is called to the stand to impeach a witness who gave testimony that was contrary to previous statements. A person called to impeach a prior witness would not be tailoring his or her testimony to match prior testimony. n9

Some courts do not authorize the exclusion of testimony, despite a showing of actual prejudice resulting from the violation, unless a witness, counsel, or party deliberately violated the rule. n10 Another approach is to refrain from excluding testimony if imposition of the sanction would make it impossible for the party to present its claims or defenses. n11 Based on similar considerations, a court may favor barring testimony that does not bear directly on a controlling issue in the case n12 or testimony that is largely cumulative to evidence already admitted. n13 It may be possible in some cases for the court to limit the sanction by excluding only testimony that might have been affected by the particular exposure that occurred. n14

FOOTNOTES:

(n1)Footnote 1. *See United States v. Rhynes, 218 F.3d 310 (4th Cir. 2000) .*

(n2)Footnote 2. *Rowan v. Owens, 752 F.2d 1186, 1191 (7th Cir. 1984)* (barring testimony "is a natural sanction

for violation" of witness exclusion order).

(n3)Footnote 3. *Jerry Parks Equip. Co. v. Southeast Equip. Co., 817 F.2d 340, 342 (5th Cir. 1987)* (trial court did not abuse its discretion in striking testimony of defendant's witness for violation of sequestration order).

(n4)Footnote 4. *See United States v. Sanchez, 866 F. Supp. 1542, 1548 (D. Kan. 1994)* .

(n5)Footnote 5. *See T.J. Stevenson & Co., Inc. v. 81,193 Bags of Flour, 629 F.2d 338, 384 (5th Cir. 1980)* .

(n6)Footnote 6. *See United States v. Solorio, 337 F.3d 580, 593-594 (6th Cir. 2003)* .

(n7)Footnote 7. *See United States v. Wylie, 919 F.2d 969, 975-977 (5th Cir. 1990)* .

(n8)Footnote 8. *See United States v. Posada-Rios, 158 F.3d 832, 871-872 (5th Cir. 1998)* .

(n9)Footnote 9. *United States v. Shurn, 849 F.2d 1090, 1094 (8th Cir. 1988)* .

(n10)Footnote 10. *See United States v. Friedman, 854 F.2d 535, 568 (2d Cir. 1988)* .

(n11)Footnote 11. *See Rowan v. Owens, 752 F.2d 1186, 1191 (7th Cir. 1984)* , cert. denied, *476 U.S. 1140 (1984)* .

(n12)Footnote 12. *See, e.g., United States v. Nash, 649 F.2d 369, 371 (5th Cir. 1981)* .

(n13)Footnote 13. *See, e.g., United States v. Sanchez, 866 F. Supp. 1542, 1548 (D. Kan. 1994)* .

(n14)Footnote 14. *See Central Telecommunications v. TCI Cablevision, 610 F. Supp. 891, 905 (W.D. Mo. 1985)* , aff'd, *800 F.2d 711 (8th Cir. 1986)* .

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CHAPTER 31 Exclusion of Witnesses *

3-31 Federal Litigation Guide § 31.10

§ 31.10 Ruling on Effect of Violation Is Within Discretion of Trial Court

When a witness has violated an exclusion order, the determination whether to prohibit the witness from testifying is left to the discretion of the trial judge. n1 Thus, trial court orders barring testimony for a violation of an exclusion order are commonly upheld, n2 especially when the testimony excluded would have been of limited usefulness in establishing the party's claim or defense. n3

On the other hand, since the exclusion of testimony is a serious sanction, a trial court also has discretion to permit a witness to testify even though the witness has violated an exclusion order. n4 Even if there may have been some prejudice after a violation of an exclusion order, the trial court may retain discretion to overlook the violation if the same result would have occurred without it. n5

FOOTNOTES:

(n1)Footnote 1. *United States v. Friedman, 854 F.2d 535, 568 (2d Cir. 1988)* .

(n2)Footnote 2. *See United States v. Montgomery, 262 F.3d 233, 243-244 (4th Cir. 2001)* .

(n3)Footnote 3. *See Matter of Martin, 963 F.2d 809, 814-815 (5th Cir. 1992)* .

(n4)Footnote 4. *See United States v. Rugiero, 20 F.3d 1387, 1394 (6th Cir. 1994)* .

(n5)Footnote 5. *See United States v. Nelson, 603 F.2d 42, 47 (8th Cir. 1979)* .

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CHAPTER 31 Exclusion of Witnesses *

3-31 Federal Litigation Guide § 31.11

§ 31.11 Showing Harm From Violation to Obtain Mistrial, New Trial, or Reversal on Appeal

In determining whether the court's ruling on a Rule 615 issue or a witness's violation of an exclusion order amounts to reversible error, most circuits apply the harmless error standard. Under this standard, there is no reversal unless the party who moved for exclusion of the witnesses was prejudiced by the error. n1

Some courts require the party who moved for exclusion of all witnesses to show that a violation of the rule resulted in prejudice. n2 Another approach is to place the burden to demonstrate lack of prejudice on the party who opposed sequestration. n3

FOOTNOTES:
(n1)Footnote 1. *See United States v. Jackson, 60 F.3d 128, 136 (2d Cir. 1995)* (most circuits apply harmless error test to violations of *Fed. R. Evid. 615*).

(n2)Footnote 2. *Capeway Roofing Systems v. Chao, 391 F.3d 56, 59 (1st Cir. 2004)* (petitioner roofing contractor failed to show prejudice, even though sequestration of witnesses had been ordered, because there was no indication that second witness changed his testimony or that he added any significant new evidence to regulatory agency's case).

(n3)Footnote 3. *See United States v. Jackson, 60 F.3d 128, 136 (2d Cir. 1995)* .

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CHAPTER 31 Exclusion of Witnesses *

3-31 Federal Litigation Guide § 31.12

§ 31.12 Tactical Considerations Involved in the Exclusion of Witnesses

The decision whether to obtain an exclusionary order will depend upon a witness-by-witness analysis of whether your witnesses or your adversary's witnesses will suffer more as a result of being excluded from the courtroom. That decision will also depend, in part, on how important the presence and assistance of particular witnesses in the courtroom will be to you or to your adversary and on whether you believe that you or your adversary will be successful in exempting those witnesses from the operation of the exclusionary order. Although a motion in limine seeking a ruling on exceptions is the most effective way to find out whom the court will exempt, such a motion may cause opposing counsel to think more about trial strategy than might otherwise be the case.

Since plaintiff's witnesses will normally testify early in a trial and will, therefore, normally obtain less benefit from hearing the testimony of other witnesses, plaintiffs generally might be more inclined to invoke the exclusionary rule. From the standpoint of assisting in the conduct of the trial after they have testified, plaintiff's witnesses would also be available earlier in the case than defendant's witnesses. However, if, under the terms of the exclusionary order, witnesses cannot remain in the courtroom after they have testified, or if particular witnesses will have to be recalled later in the case, the plaintiff may prefer not to invoke the rule.

At a more fundamental level, however, the basic decision whether to obtain an exclusionary order should not be resolved on a simplistic plaintiff-versus-defendant analysis. Plaintiff's witnesses may be in particular need of the reassurance that the observation of even a few witnesses or a few hours of court proceedings will provide. Some of plaintiff's more important witnesses may be needed only for rebuttal. Defendant's witnesses, on the other hand, may be so well versed in the facts of the case, or otherwise expert in the litigation process, that hearing some part, or all, of the proceedings will be of no particular advantage to them. In short, each situation must be evaluated based on the particular facts of the case.

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CHAPTER 32 Opening Statement *

3-32 Federal Litigation Guide 32.syn

§ 32.syn Synopsis to Chapter 32: Opening Statement *

§ 32.01 Outlining the Case for the Jury

§ 32.02 Federal Rules are Silent Concerning Opening Statements

§ 32.03 Local Rules of Some Districts Govern Opening Statements

§ 32.04 Understanding the Objectives of Opening Statements

§ 32.05 Drafting Considerations
[1] Outlining the Opening Statement
[2] Presenting the Case Theme
[3] Using Persuasion to Advance the Client's Case
[4] Avoiding Unnecessary Repetition
[5] Considering the Plaintiff's Perspective
[6] Considering the Defendant's Perspective

§ 32.06 Conveying Key Facts to the Jury
[1] Developing a Chronology of Facts
[2] Relying on Specific Facts and Not General Assertions
[3] Dealing with Unfavorable Facts

§ 32.07 Preparing the Jury for Key Witnesses and Their Testimony

§ 32.08 Using Exhibits During Opening Statement
[1] Presenting Exhibits to Organize the Opening Statement and to Engage the Jury
[2] Seeking Leave to Use Exhibits for Opening Statement
[3] Challenging the Use of Misleading Exhibits

§ 32.09 Determining the Proper Length of the Opening Statement
[1] Length of Opening Statements Established by Local Rule or the Trial Judge
[2] Seeking Permission to Exceed Time Limit

§ 32.10 Determining the Order of Opening Statements

[1] Party with Burden of Proof Generally Makes First Statement
[2] Opening Statement Generally Precedes Presentation of Evidence

§ 32.11 Waiving Opportunity for Opening Statement

§§ 32.12through 32.19 [Reserved]

§ 32.20 Argumentation and Discussion of the Law Not Permitted
[1] Avoiding Argument
[2] Discussion of the Law

§ 32.21 Avoiding Overstatements

§ 32.22 Considering the Effect of Admissions Made During Opening Statement

§ 32.23 Objecting to the Content of the Adversary's Opening Statement

§ 32.24 Evaluating the Standard for Mistrial Based on Content of Opening Statement

§ 32.25 Evaluating the Standard of Review for Mistrial Based on Content of Opening Statement

§ 32.26 CHECKLIST: Drafting the Opening Statement

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CHAPTER 32 Opening Statement *

3-32 Federal Litigation Guide Scope

Scope

SCOPE

This chapter provides an in-depth look at one of the most important tools available to trial attorneys--the opening statement.

The relatively few technical rules relating to opening statements are straightforward. In the absence of formal rules, it is essential to understand the informal practices and customs of the particular court and jurisdiction in which your case is being tried. Specific local rules also may be significant and should be consulted.

The chapter discusses the following topics concerning opening statements:

- Objectives and drafting considerations
- Communicating key facts to the jury
- Introduction of key witnesses and documents
- Using exhibits
- Length and order of the opening statement
- Prohibitions against argument, legal discussion, inflammatory statements, and overstatements
- Effect of admissions made during opening statement
- Comments that may be grounds for mistrial

The chapter concludes with a checklist that sets forth objectives and techniques for drafting and presenting the opening statement.

For expanded coverage of opening statements, ***see*** WEINSTEIN'S Federal Evidence, Ch. 611, ***Mode and Order of Interrogation and Presentation*** (Matthew Bender 2d ed.).

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CHAPTER 32 Opening Statement *
A Preparing the Opening Statement

3-32 Federal Litigation Guide § 32.01

§ 32.01 Outlining the Case for the Jury

The purpose of an opening statement is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole. It is not an occasion for argument. n1

A good opening statement paves the way for a successful trial. It represents the attorney's first opportunity to persuade the jury that the case outcome should be in the client's favor. The opening statement should be concise, persuasive, and engaging. The trial attorney should provide a synopsis for the entire case during the opening statement and demonstrate that the evidence will prove the client's case or defense.

The purpose of an opening statement is to outline the case so the jurors can follow and understand the evidence as it unfolds during the trial. It also provides an opportunity to:

- Highlight important witnesses and testimony that will be heard during the trial, and
- Identify important documents and demonstrate what they will prove

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsOpening StatementsGeneral OverviewCivil ProcedureTrialsOpening StatementsImproper Remarks

FOOTNOTES:
(n1)Footnote 1. *See Testa v. Village of Mundelein, Ill, 89 F.3d 443, 445 (7th Cir. 1996) .*

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CHAPTER 32 Opening Statement *
A Preparing the Opening Statement

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§ 32.02 Federal Rules are Silent Concerning Opening Statements

The Federal Rules of Civil Procedure and the Federal Rules of Evidence are silent with respect to the use of opening statements at trial. Except in those relatively few jurisdictions where local rules speak to one or more aspects of the subject, the technical rules relating to opening statements are matters of custom and discretion of the trial court. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsOpening StatementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Puerto Rico Aqueduct and Sewer Authority v. Constructora Lluch, Inc., 169 F.3d 68, 83 (1st Cir. 1999)* .

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CHAPTER 32 Opening Statement *
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§ 32.03 Local Rules of Some Districts Govern Opening Statements

The local rules in some districts allow the option of making an opening statement, n1 while others provide counsel "shall" make an opening statement. n2

Some districts limit the length of opening statements, n3 and still others preclude opening statements altogether, absent leave of court. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsOpening StatementsGeneral OverviewGovernmentsCourtsRule Application & Interpretation

FOOTNOTES:
(n1)Footnote 1. *See* D. Ariz. Loc. R. 2.14(b).

(n2)Footnote 2. *See* E.D.N.C. Civ. R. 39.3

(n3)Footnote 3. *See* N.D. Iowa Loc. R. 83.6(a) (unless the court orders otherwise, an opening statement must not exceed 15 minutes).

(n4)Footnote 4. *See* D. Conn. Loc. R. 12(d) (opening statements by counsel not allowed except upon application of presiding judge out of the hearing of the jury).

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CHAPTER 32 Opening Statement *
A Preparing the Opening Statement

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§ 32.04 Understanding the Objectives of Opening Statements

Some trial attorneys consider the opening statement to be the most important part of a trial because the judge and jury are likely to be most alert, receptive, and responsive at the commencement of the trial. However, evidence of the persuasive effect of opening statements is often exaggerated. n1 Although the opening statement is critical part of the trial, it should not be overplayed. As one court has noted, "[f]irst impressions count, but even in an era of courtroom cameras, short attention spans, and newsworthy sound bites, trial lawyers are well-served when they follow the Broadway adage and save a little for the last act'." n2

The following is a list of objectives to keep in mind while preparing the opening statement:

- **Inform the jury of the facts of your case.** At the end of your opening statement the jury should have a general understanding of what it will ultimately be asked to decide, and of the facts which bear on those decisions.

- **Make the jury understand *your* version or theories of the issues and facts.** Tell the jury not only how they should decide the case, but why.

- **Forewarn the jury of those facts which are unfavorable to your case.** Explain that there will be testimony which allows more than one conclusion because different people saw things differently. Without making admissions, guide the jury into seeing only one logical solution--the one you seek.

- **Educate the jury as to the manner in which the trial will proceed.** Explain difficult terms, diagrams and exhibits, how the witnesses interact, what they will say, and what it means.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawDirected VerdictsCivil ProcedureTrialsOpening StatementsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See, Hydrite Chemical Co. v. Calumet Lubricants Co., 47 F.3d 887, 891 (7th Cir. 1995)* ; *see also* Hans Zeisel, "A Jury Hoax--The Superpower of the Opening Statement," Litigation, Summer 1988, p. 17.

(n2)Footnote 2. *Testa v. Village of Mundelein, Ill, 89 F.3d 443, 446 (7th Cir. 1996)* .

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CHAPTER 32 Opening Statement *
A Preparing the Opening Statement

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§ 32.05 Drafting Considerations

[1] Outlining the Opening Statement

It is essential to prepare your opening statement with great care. It should be outlined in detail far enough in advance of trial so that it can be critically analyzed from a variety of standpoints, such as: completeness, clarity, and persuasive impact.

Do not read or recite the opening statement. Outline the significant portions of the opening and have the outline at the rostrum for guidance. This will help to maintain the mental flexibility necessary to adjust either the order of the presentation or the emphasis which you give to particular subjects to suit the emerging realities of the courtroom situation.

Reduce your notes to one or two note-cards. The use of exhibits and other visual aids is a useful mean of engaging the jury, and visuals help to present the opening statement with less reliance on notes.

[2] Presenting the Case Theme

Let your opening statement tell a story in a logical and well-reasoned manner so the jury is left with the impression that the results you advocate are the only logical conclusion to be reached.

You should begin your opening statement with a general but strong summary of your client's position on all of the major issues in the case and be very candid with the jury as to exactly what you are doing and why. The theme of the case is also the theme of the opening statement. Make sure that the jury can remember your opening statement by the theme that you weave throughout, either by repeating it word for word or by expressing the same theme in different ways.

[3] Using Persuasion to Advance the Client's Case

Persuasion is the most important objective of an opening statement. In essence, everything you say in opening statement, from your initial introduction to your concluding remarks, should be directed to persuading the jurors to your point of view. Even in dealing with matters potentially harmful to your client's position, your objective is to persuade the jury that your client should prevail.

Accordingly, every statement made and every point included in an opening statement should be weighed to ascertain whether the statement advances your client's interest. If it does not, it should be deleted or revised.

[4] Avoiding Unnecessary Repetition

Opening statements should be clear and concise. Even in complex cases, you should not insult the jury's intelligence by belaboring the obvious or by unnecessary repetition. The opening statement should not be so long that, either in its own right or by comparison with the statement made by your adversary, it seems apologetic or defensive. In a particular case, where both the facts and your client's version of them are straightforward, you may want to deliberately "grandstand" by making a statement that is extremely short and in pointed contrast to the opponent's longer statement.

[5] Considering the Plaintiff's Perspective

Plaintiff's counsel must lay out the prima facie case in the opening statement. Plaintiff's counsel should prepare an opening statement that tells the story of why the lawsuit was filed. The goal should be to motivate the jury to right the wrong to which the plaintiff has been subjected. The sense that an injustice has occurred will encourage the jurors to see the facts from the plaintiff's point of view.

[6] Considering the Defendant's Perspective

The defendant's opening statement is of particular importance. Plaintiff will proceed first with its evidence, and in a long trial, it may be days or weeks before the jury hears a cohesive presentation of the defendant's version of the case. Therefore, defense counsel must establish credibility and fairness by way of the opening statement. Counsel should avoid negative statements, apologies to the jurors, and other statements that may undermine the importance of the opening statement. If, however, plaintiff's counsel has overstated plaintiff's case, you may want to remind the jury that what your adversary says is not evidence.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsOpening StatementsGeneral OverviewCivil ProcedureTrialsOpening StatementsImproper Remarks

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CHAPTER 32 Opening Statement *
A Preparing the Opening Statement

3-32 Federal Litigation Guide § 32.06

§ 32.06 Conveying Key Facts to the Jury

[1] Developing a Chronology of Facts

Facts are often best presented in chronological fashion. Use of a sequential time line in the opening statement generally will make it easier for the jury to follow the case. A chronological approach will also make it easier to relate particular facts to particular issues. At the conclusion of the chronological development, it is often useful to recapitulate the issues as illustrated by the central facts.

Although a chronological presentation of the facts is the most straight-forward approach for the opening statement in many cases, the facts in some case are best understood when relayed on an issue-by-issue basis. If the facts of the case are genuinely linked to the separate issues in the case, the facts should be presented in that manner. If certain facts are common to all of the issues in the case, while others are best stated on an issue-by-issue, it may be possible to present a chronological overview of the facts and to then deal with particular facts on an issue-by-issue basis.

[2] Relying on Specific Facts and Not General Assertions

General assertions are rarely as effective as the recitation of specific facts. On the other hand, an opening statement should not bog down the fact finder with too much detail. Accordingly, the opening statement should be a continuing balance of the general and the specific: "The evidence will show that my client was not negligent. It will demonstrate that fact in many ways, some of the most important of which I will now describe to you. ...

[3] Dealing with Unfavorable Facts

Your case will be won in part by advancing those facts which are favorable to your client and in part by explaining or negating those facts which are, or appear to be, adverse. The time to start dealing with those adverse facts is at the beginning, *i.e.,* in opening statement. For plaintiff's counsel, the ideal effect of addressing unfavorable facts will be that when the jurors hear the particular adverse facts mentioned by defendant's counsel, they will also consider the plaintiff's explanation. Moreover, the jurors will not be surprised by the adverse facts, which will lend to the plaintiff's credibility.

Defendant's counsel must also be sure to respond to each significant adverse fact which that's counsel has made reference to in opening statement. Though you should not dwell on the weaknesses of your case, the jury should hear about them from you, not only from your opponent. Indeed, if the adverse point is a serious one, the jury may be most

interested in hearing a response to the harmful material.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsOpening StatementsGeneral OverviewCivil ProcedureTrialsOpening StatementsImproper Remarks

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CHAPTER 32 Opening Statement *
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3-32 Federal Litigation Guide § 32.07

§ 32.07 Preparing the Jury for Key Witnesses and Their Testimony

In certain cases, the principal witnesses in the trial will, as a matter of course, be identified in the opening statements. Even in those cases where this does not happen automatically, if your evidence includes a particularly strong witness, such as an expert or a non-party occurrence witness, it may be wise to identify that witness and the substance of his or her testimony in the opening statement. This will prepare the jury for the testimony.

At times it may also be appropriate to specifically identify one or more of your adversary's witnesses, and to describe the specific defects (such as admissions or earlier contrary statements) to which their testimony will be subject. This sort of anticipation is obviously much more risky than a description of your own witnesses and their testimony. You will be gambling on the success of your cross-examination of the witness, and if the gamble turns out to have been ill-advised, you will have merely heightened the effect of that witness' testimony.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsOpening StatementsGeneral OverviewCivil ProcedureTrialsOpening StatementsImproper Remarks

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CHAPTER 32 Opening Statement *
A Preparing the Opening Statement

3-32 Federal Litigation Guide § 32.08

§ 32.08 Using Exhibits During Opening Statement

[1] Presenting Exhibits to Organize the Opening Statement and to Engage the Jury

It is often desirable to read from or show particular exhibits to the jury during the course of opening statements. Exhibits shown to the jury during opening statement can be very effective and may be remembered more than other exhibits that are first used during presentation of the case-in-chief. Exhibits might include actual exhibits--*i.e.*, those admitted or admissible in evidence for their probative value --or demonstrative exhibits--*i.e.*, charts, diagrams, animations, samples and the like that are used to convey information to the jury. The use of exhibits will help reduce the need to rely on notes in the opening statement, and will help to engage the jury.

Case exhibits are effective during opening statement because they are specific. Key exhibits demonstrate a particular point because they are "real" evidence and they are tangible. They must, however, be used with caution during opening statements, especially since many judges do not favor the practice. In addition, the effect of truly important exhibits can be lost if less important exhibits are also used. Therefore, you should use exhibits sparingly during opening statement and probably should not use any exhibit unless it is determinative or almost determinative of some ultimate issue in the case.

Demonstrative exhibits are also useful during opening statement, both in relatively simple cases, where models, charts, or diagrams can be worth a thousand words, and in more difficult cases where complex technical, financial or accounting background must be explained. Demonstrative exhibits are usually "self-selecting"; they do not come into existence unless you consciously recognize an inability to explain a particular concept or interrelationship of concepts. If your perception is correct, the court is likely to agree. As a result, demonstrative exhibits are far less likely to be over-used than case exhibits.

[2] Seeking Leave to Use Exhibits for Opening Statement

Generally, case exhibits may be shown to the jury only after they have been admitted into evidence. Thus, if pre-trial procedures have not established the admissibility of an exhibit, you must obtain the court's permission to show it to the jury during opening statement.

From a technical standpoint, demonstrative exhibits stand on a somewhat different, and more favored, footing. By definition, demonstrative exhibits are tendered not as evidence but for their expositive or educational value, and are,

therefore, particularly appropriate for opening statement. Despite this difference, unless counsel is confident of the practices of the trial judge, it is advisable to seek leave to use *any* exhibit, demonstrative or otherwise, in opening statement.

Permission to use an exhibit during opening statement should be sought far enough in advance of trial to allow you to revise your strategy in the event that permission is denied. This consideration is more important with regard to demonstrative exhibits than with case exhibits. The substance of case exhibits can be summarized to the jury so that their general import is understood. Demonstrative exhibits, on the other hand, will have been formulated for a specific educational purpose. Accordingly, you will need advance notice of a denial of permission to use the exhibit in order to effectively restructure your opening statement to include verbal explanations, rather than demonstrative exhibits.

[3] Challenging the Use of Misleading Exhibits

It is critical to make sure that all exhibits that opposing counsel intends to use in the opening are free of any bias or argumentative element. As a practical matter, always ask to see any exhibits that your adversary intends to use during opening statement, and challenge the use of any exhibits that are misleading or otherwise unfair.

Since you cannot immediately probe the fairness of an exhibit used by the adversary during an opening statement, an objection to any bias inherent in the exhibit is likely to carry special weight with the court. If a case exhibit is long or otherwise cumbersome you should move the court to exclude its use in the opening, or request that opposing counsel be required to read or show extensive additional portions of the exhibit to limit bias. Demonstrative exhibits may be especially misleading and should be challenged whenever their use may be prejudicial.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsOpening StatementsGeneral OverviewEvidenceDemonstrative EvidenceGeneral OverviewEvidenceDemonstrative EvidenceComputer-Generated EvidenceEvidenceDemonstrative EvidencePhotographs

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CHAPTER 32 Opening Statement *
A Preparing the Opening Statement

3-32 Federal Litigation Guide § 32.09

§ 32.09 Determining the Proper Length of the Opening Statement

[1] Length of Opening Statements Established by Local Rule or the Trial Judge

There is no general federal rule fixing the length of opening statements in either jury or bench trials. The local rules of some districts set time limits for opening statements. n1 In courts that have no local rule on the subject, the length of opening statements is fixed either on a case-by-case basis or by the customary practice of the particular judge. n2 The length of opening statements rests within the sound discretion of the trial court whose rulings will not be disturbed on appeal absent an abuse of discretion. n3

[2] Seeking Permission to Exceed Time Limit

Given the importance of the opening statement, it is critical that you know in advance how much time you will be permitted. Where important objectives demand that your opening statement be longer than that normally permitted by the court it is crucial to obtain permission in advance to exceed the time limit. This issue should be addressed at the pre-trial conference, and may even be the subject of a provision in the pre-trial order.

Arguments for an unusually long opening statement may be predicated on the grounds that:

- The case is extraordinarily complicated
- The factual background is unfamiliar or complex
- A large number of witnesses will testify and that it is necessary to explain the functions of each
- A longer opening statement is necessary to give the jury a comprehensive overview of the case

Generally speaking, the longer and more complex the trial, the greater the amount of time that should be devoted to opening statement. The defendant in a long trial should take pains to obtain the time necessary to make a full exposition of the case and its background. It may be weeks or even months before defense witnesses have an opportunity to testify and before defense counsel has an opportunity to present a coherent version of the defendant's case.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsOpening StatementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See* S. D. Iowa Loc. R. 83.6(a) (15 minutes, unless the court orders otherwise); D. Me. Loc. R. 39(a) (shall not exceed 30 minutes, except by leave of court); D. Md. Civ. R. 107(8)(a) (one hour, unless otherwise ordered).

(n2)Footnote 2. *See, e.g., Glenn v. Cessna Aircraft Co., 32 F.3d 1462, 1465 (10th Cir. 1994)* (court's "Preparation for Trial Checklist" imposed 10-minute limitation on opening statements unless case unusually complex).

(n3)Footnote 3. *Glenn v. Cessna Aircraft Co., 32 F.3d 1462, 1464 (10th Cir. 1994)* (10-minute time limitation on opening statements).

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CHAPTER 32 Opening Statement *
A Preparing the Opening Statement

3-32 Federal Litigation Guide § 32.10

§ 32.10 Determining the Order of Opening Statements

[1] Party with Burden of Proof Generally Makes First Statement

Plaintiff's counsel is usually entitled to speak first in opening statement because the plaintiff normally has the burden of proof on some or all of the issues in the case. n1 If in fact the defendant has the burden on all issues, the defendant should be entitled to speak first. n2 Where there are multiple plaintiffs or defendants, the order of the opening statements and closing arguments as among themselves rests in the sound discretion of the trial court. n3 Though the initiative may be less important in opening statements than in other parts of the trial, it is usually an advantage to proceed first. Accordingly, if you represent a defendant who comes to trial with the burden of proof on all issues (or, for that matter, on all threshold issues), you should normally seek the opportunity to speak first. In some jurisdictions this is established by local rule. n4 Even if no specific authority is available, it is clear that the trial court has broad discretion to regulate the order of both opening statements and closing argument. n5

[2] Opening Statement Generally Precedes Presentation of Evidence

Opening statements are generally given after *voir dire*, but before the presentation of evidence. Some districts permit defendant's counsel to make an opening statement either at the beginning of the trial or immediately before the beginning of defendant's case. n6 Other districts require that defendant's statement be made at the beginning of trial. n7 The custom in almost all districts without a specific rule is that the defendant's counsel should make an opening statement at the beginning of the trial, immediately following the statement of plaintiff's counsel. The timing of opening statements is a matter with which the trial court is vested with broad discretion, however, and it may order the parties to give their opening statements at what might normally be considered an unusual time where the circumstances so dictate. n8

It is difficult to imagine why the defendant would want to defer the entire opening statement until the presentation of its own evidence. Except for cross-examination of plaintiff's witnesses, defendant's only opportunity to make an impression on the jury before presenting its own case is the opening statement. The defendant should carefully consider giving up this opportunity; otherwise, the plaintiff may win the jury over before the defendant has the opportunity to present its case.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsOpening StatementsGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See, e.g.,* M.D.N.C. Civ. R. 43.1(a).

(n2)Footnote 2. *See Ridgeway v. Montana High School Ass'n, 633 F. Supp. 1564, 1569 n.5 (D. Mont. 1986)* , *aff'd, 858 F.2d 579 (9th Cir. 1988)* (in action by high school girls and their parents alleging sex discrimination in high school athletics programs, defendants had burden of proof and right to open first).

(n3)Footnote 3. *Martin v. Chesebrough-Pond's, Inc., 614 F.2d 498, 501 (5th Cir. 1980)* .

(n4)Footnote 4. *See* D. Neb. Loc. R. 39.1(a) ("After the jury is selected and sworn, the party upon whom rests the burden of proof may ... make an opening statement, after which the adverse party ... may make an opening statement."); E.D.N.C. Civ. R. 39.3.

(n5)Footnote 5. *See Ridgeway v. Montana High School Ass'n, 633 F. Supp. 1564, 1569 n.5 (D. Mont. 1986)* , *aff'd, 858 F.2d 579 (9th Cir. 1988)* .

(n6)Footnote 6. *See* D. Ariz. Loc. R. 2.14(a); D. Me. Loc. R. 39(a).

(n7)Footnote 7. *See* D. Neb. Loc. R. 39.1(a); M.D.N.C. Civ. R. 43.1(a).

(n8)Footnote 8. *See, e.g., Matter of Yagman, 796 F.2d 1165* , *amended, 803 F.2d 1085 (9th Cir. 1986)* (no abuse of discretion where court ordered parties to make their opening statements to the entire jury panel before *voir dire* where the court hoped the opening statements would acquaint the panel members with the case so that they could better determine whether they could freely sit as jurors in light of the substantial publicity regarding the events leading to the trial).

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CHAPTER 32 Opening Statement *
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3-32 Federal Litigation Guide § 32.11

§ 32.11 Waiving Opportunity for Opening Statement

Opening statements may be waived entirely. n1 However, since opening statements give the jury an initial sense of who is right and why, the decision to waive opening statement should be made with extreme caution. While, in most instances, neither counsel should willingly waive an opening statement, the defense counsel should be particularly reluctant to do so. The plaintiff will generally proceed first and may, by presenting an opening witness who will lay out the entire case, obviate the need for an opening statement. By contrast, the defendant will not "have the floor" again until after the plaintiff has presented all of its evidence-in-chief. This rule of primacy is inherently detrimental to the defendant. If the defense does not present an opening statement, it may be too late for the defense to recapture the jurors.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsOpening StatementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See, e.g.,* D. Ariz. Loc. R. 2.14(b).

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CHAPTER 32 Opening Statement *
A Preparing the Opening Statement

3-32 Federal Litigation Guide §§ 32.12through 32.19

[Reserved]

§§ 32.12[Reserved]

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CHAPTER 32 Opening Statement *
B Evaluating the Limitations of the Opening Statement

3-32 Federal Litigation Guide § 32.20

§ 32.20 Argumentation and Discussion of the Law Not Permitted

[1] Avoiding Argument

Argument in the opening statement is not permissible. n1 This limitation encompasses any interpretation of facts tending toward an ultimate result. However, almost any declarative statement is likely to have argumentative overtones. Indeed, in the litigation context, it may be more difficult to frame a neutral statement of fact than it is to formulate an argumentative one. The result is that there is a substantial gray area between bare statements of fact and impermissible argument which can be successfully exploited by capable counsel. Your job is to exploit that gray area to the fullest extent possible and to prevent your adversary from utilizing any more of it than necessary.

[2] Discussion of the Law

In general, it is the province of the court to pass upon the law and, thus, not appropriate for discussion during opening statement. n2 This again, however, is an area in which familiarity with the standards and preferences of the judge before whom the case is being tried will be worth more than any amount of abstract guidance.

In general, the need for discussing the law or legal issues in opening statement is usually not of great importance since the jury decides only factual issues. Moreover, the primary purpose of an opening statement is to inform the jury of the facts as you want the jury to see them. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsOpening StatementsGeneral OverviewCivil ProcedureTrialsOpening StatementsImproper RemarksCivil ProcedureTrialsOpening StatementsObjections

FOOTNOTES:
(n1)Footnote 1. *United States v. Dinitz, 424 U.S. 600, 612, 96 S. Ct. 1075, 47 L. Ed. 2d 267 (1976)* (opening statement "is not an occasion for argument"); *Testa v. Village of Mundelein, 89 F.3d 443, 445 (1996)*

(n2)Footnote 2. *See Schwartz v. System Software Assocs., 32 F.3d 284, 288 (7th Cir. 1994)* .

(n3)Footnote 3. *See Central Telecommunications, Inc. v. TCI Cablevision, Inc., 610 F. Supp. 891, 904 (W.D. Mo. 1985)* , *aff'd on other grounds, 800 F.2d 711 (8th Cir. 1986)* , *cert. denied, 480 U.S. 910 (1987)* ("Opening statements afford the parties an opportunity to outline what their evidence will be. Legal arguments offered during the course of an opening statement are improper. Accordingly, the Court had no choice but to direct defendant's attorney to refrain from making references to principles of constitutional jurisprudence during his opening statement, particularly where, as here, his characterization of the law was either erroneous or misleading.").

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CHAPTER 32 Opening Statement *
B Evaluating the Limitations of the Opening Statement

3-32 Federal Litigation Guide § 32.21

§ 32.21 Avoiding Overstatements

It is fundamentally unfair for an attorney to present to the jury statements not susceptible of proof but intended to influence the jury in reaching a verdict. n1 An opening statement should assert your client's claims or defenses in affirmative, even zealous or aggressive terms, but it should avoid demonstrable overstatements. Hyperbole that might work in closing argument will unnecessarily expose you to objections to the opening statement. At a minimum, your adversary will most likely comment in closing argument that your evidence has failed to support one or more claims that you made in your opening statement. Ultimately, overstatements can work to undermine credibility with the jurors. n2 Even if the subjects of your overstatements do not warrant comment in the judge's instructions to the jury, many judges strongly resent the sort of advocacy represented by such overstatements and will, in one way or another, find an opportunity to comment upon them.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsOpening StatementsGeneral OverviewCivil ProcedureTrialsOpening StatementsImproper RemarksCivil ProcedureTrialsOpening StatementsObjections

FOOTNOTES:
(n1)Footnote 1. *United States v. Dinitz, 424 U.S. 600, 612, 96 S. Ct. 1075, 1082, 47 L. Ed. 2d 267, 277 (1976)* (concurring opinion).

(n2)Footnote 2. If overstatements relate to important issues, the judge may advise the jury that the evidence has not supported your version of the facts, or--worst of all--that the jury is instructed to disregard the remarks made on those subjects during your opening statement. Reversal may even occur due to statements unsupported by the evidence where a party is prejudiced by such statements. *See, e.g., Kiefel v. Las Vegas Hacienda, Inc., 404 F.2d 1163, 1165-1167 (7th Cir. 1968) , cert. denied, 395 U.S. 908 (1969) .*

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CHAPTER 32 Opening Statement *
B Evaluating the Limitations of the Opening Statement

3-32 Federal Litigation Guide § 32.22

§ 32.22 Considering the Effect of Admissions Made During Opening Statement

Admissions made by counsel in opening statement may properly be incorporated in the court's instructions to the jury as to those matters that are in issue and those that are not. n1

If admissions made by counsel during opening statement relate to one or more ultimate issues in the case, they can constitute the basis of a motion for judgment as a matter of law. To warrant a directed verdict based on the opening statement, the admission must clearly preclude recovery (or eliminate all defenses), and the party is entitled to the benefit of all favorable inferences that might be drawn from the attorney's statement. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsOpening StatementsGeneral OverviewCivil ProcedureTrialsOpening StatementsDirected Verdicts

FOOTNOTES:
(n1)Footnote 1. *See Herrera v. Valentine, 653 F.2d 1220, 1223 (8th Cir. 1981)* .

(n2)Footnote 2. *See Franchi Constr. Co. v. Combined Ins. Co., 580 F.2d 1, 8 (1st Cir. 1978)* .

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CHAPTER 32 Opening Statement *
B Evaluating the Limitations of the Opening Statement

3-32 Federal Litigation Guide § 32.23

§ 32.23 Objecting to the Content of the Adversary's Opening Statement

In defending against the adversary's opening statement a successful objection will be effective both in undermining the adversary's appearance of credibility and fairness, and in breaking the "trance" of an effective opening. However, counsel must also be judicious in asserting objections. An unsuccessful objection may be as harmful to your cause as a successful objection would be to your opponent's case.

In general, be cautious when making objections during opening statement. Repeated objections, all or most of which are denied, will create an unfavorable impression on the jury. You will appear to be attempting to obstruct your opponent's efforts to tell the jury facts which both opposing counsel and the court apparently believe the jury is entitled to know. The jury may view the repeated objections as harassment of the opposing party or attorney. Moreover, you risk emphasizing those very matters that you feel are objectionable, thereby making them more likely to remain in the minds of the jurors.

Usually, there is no "record" to be made by objections during opening statement. All but the most egregious improprieties are deemed to be cured by the traditional caution to the jury that the attorney's opening statements are not evidence. n1 Nevertheless, failure to make a timely objection to inappropriate statements may be fatal to a finding of prejudice on a motion for mistrial. n2 On appeal, misconduct will be reviewed only for "plain error" where counsel fails to make a timely objection. n3 While "timely" generally means the objection should be made immediately after the objectionable statements have been made, an objection made immediately after the conclusion of the opening statement with a request for a curative instruction has been found sufficient to preserve the issue for purposes of appeal. n4

Unless you are confident that the judge before whom the case is being tried takes a strict attitude concerning the scope of opening statement the best course of action under most circumstances will be to wait until you believe that your adversary has clearly exceeded permissible bounds before objecting.

If the objection is sustained, you will have a clear indication that objections are not unwelcome and, as your adversary's opening statement progresses, you can continue to object, testing the judge with objections to more marginally offensive material. If your first objection is denied, proceed cautiously thereafter, objecting again only if you have an important interest to protect, or if your adversary seems to have committed a more serious or different form of error.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsOpening StatementsGeneral OverviewCivil ProcedureTrialsOpening StatementsImproper RemarksCivil ProcedureTrialsOpening StatementsObjectionsCivil ProcedureAppealsReviewabilityGeneral OverviewCivil ProcedureAppealsReviewabilityPreservation for Review

FOOTNOTES:
(n1)Footnote 1. *See Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1358 (4th Cir. 1995)* (prompt instruction to jury obviated any possible prejudice from counsel's remarks during opening statement); *West v. Carson, 49 F.3d 433, 436 (8th Cir. 1995)* (plaintiff failed to show any prejudice where objections to counsel's comments were sustained and jury admonished).

(n2)Footnote 2. *See Arnold v. Eastern Air Lines Inc., 681 F.2d 186, 200 (4th Cir. 1982)* .

(n3)Footnote 3. *See Glenn v. Cessna Aircraft Co., 32 F.3d 1462, 1464 (10th Cir. 1994)* ; *Doty v. Sewall, 908 F.2d 1053, 1056-1057 (1st Cir. 1990)* .

(n4)Footnote 4. *See Arnold v. Eastern Air Lines Inc., 681 F.2d 186, 200 (4th Cir. 1982)* .

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CHAPTER 32 Opening Statement *
B Evaluating the Limitations of the Opening Statement

3-32 Federal Litigation Guide § 32.24

§ 32.24 Evaluating the Standard for Mistrial Based on Content of Opening Statement

In certain extreme situations, excessive or otherwise improper statements made in the course of an opening statement may be grounds for, or at least the subject of, a motion for a mistrial. This is particularly true of inflammatory statements concerning matters not properly before the jury at all, but it also applies to other excessive statements, including statements with respect to the evidence, that the jury cannot reasonably be expected to disregard. When the conduct of counsel in argument causes prejudice to the opposing party and unfairly influences a jury's verdict, a new trial generally should be granted. n1

A trial judge has particularly broad discretion in determining whether an incident, in the context of an entire trial, is so serious to warrant a mistrial. n2 The exercise of this discretion includes determining whether giving a cautionary instruction, rather than ordering a mistrial, can prevent any possible prejudice. n3

The request to a jury to put themselves in the place of the plaintiff or defendant, the so-called "Golden Rule" argument, has repeatedly been found to be improper. n4 Such an argument is universally condemned because it encourages the jury to "depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." n5

A blatant appeal for sympathy on behalf of the client constitutes an improper and prejudicial comment that may result in mistrial. n6

Derogatory remarks during opening statement about the opposing party, his or her attorney, or his or her witnesses may constitute grounds for a mistrial. n7

Motions for a mistrial should be made at the earliest possible opportunity after the event that provides the basis for the motion. In the case of inflammatory or otherwise excessive statements made during opening statements, object at once in strong terms in the presence of the jury and then ask for a conference with the judge outside the presence of the jury, during which conference you should make the motion for a mistrial.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsOpening StatementsGeneral OverviewCivil ProcedureTrialsOpening StatementsImproper RemarksCivil ProcedureTrialsOpening StatementsObjections

FOOTNOTES:

(n1)Footnote 1. *See Hopson v. Riverbay Corporation, 190 F.R.D. 114, 124 (S.D.N.Y. 1999)* .

(n2)Footnote 2. *See United States v. Schimmel, 943 F.2d 802, 806 (7th Cir. 1991)* .

(n3)Footnote 3. *See United States v. Ferguson, 935 F.2d 1518, 1527 (7th Cir. 1991)* .

(n4)Footnote 4. *See Insurance Co. of N. Am., Inc. v. United States Gypsum Co., Inc., 870 F.2d 148, 154 (4th Cir. 1989)* .

(n5)Footnote 5. *Dole v. USA Waste Servs. Inc., 100 F.3d 1384, 1388 (8th Cir. 1996)* .

(n6)Footnote 6. *Morrissey v. Welsh Co., 821 F.2d 1294, 1303 (8th Cir. 1987)* (new trial on the issue of damages where clear pleas for sympathy were made during plaintiff's opening statement).

(n7)Footnote 7. *See, e.g., Outley v. City of New York, 837 F.2d 587, 592-595 (2d Cir. 1988)* (unfair reference to plaintiff as "perpetual litigant"); *see also Bufford v. Rowan Cos., Inc., 994 F.2d 155, 157-158 (5th Cir. 1993)* (plaintiff's substantial rights to fair trial impaired when defense counsel implied plaintiff's attorneys distorted minor injuries into major ones and prosecuted baseless claims).

* Chapter 32 was rewritten in 2003 by Andrew E. Westley, Esq., of San Francisco, California.

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CHAPTER 32 Opening Statement *
B Evaluating the Limitations of the Opening Statement

3-32 Federal Litigation Guide § 32.25

§ 32.25 Evaluating the Standard of Review for Mistrial Based on Content of Opening Statement

Absent an abuse of discretion, the appellate court will defer to the district court's denial of a motion for a new trial on the basis of improper argument or conduct of counsel. n1 In assessing the effect of improper conduct by counsel, the appellate court will often examine the following factors to determine if the statement at issue was prejudicial: n2

- The totality of the circumstances, including the nature of the comments
- The frequency of the comments
- The possible relevancy of the comments to the real issues before the jury
- The manner in which the parties and the court treated the comments
- The strength of the case
- The verdict itself

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsOpening StatementsGeneral OverviewCivil ProcedureTrialsOpening StatementsObjectionsCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

FOOTNOTES:
(n1)Footnote 1. *See Dole v. USA Waste Servs. Inc., 100 F.3d 1384, 1388 (8th Cir. 1996)* .

(n2)Footnote 2. *Puerto Rico Aqueduct and Sewer Authority v. Constructora Lluch, Inc., and CNA Casualty of Puerto Rico, Inc., 169 F.3d 68, 83 (1st Cir. 1999)* .

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CHAPTER 32 Opening Statement *
B Evaluating the Limitations of the Opening Statement

3-32 Federal Litigation Guide § 32.26

§ 32.26 CHECKLIST: Drafting the Opening Statement

The following checklist includes objectives and techniques for drafting and presenting opening statements:

☐ **Set forth the case theme.** The opening statement should start with a clear statement of the case theme, which should be reiterated near the end of the statement.

☐ **Present the case in a succinct and organized manner.** The opening statement should be clear and organized to limit jury confusion.

☐ **Be persuasive.** Although the opening cannot be argumentative, it should be interesting and persuasive. A successful opening statement should be engaging and should leave the jury feeling that the case should be resolved in favor of the client.

☐ **Highlight key evidence.** Inform the jury about key witnesses and documents, and the significance of each.

☐ **Start strong and end strong.** In organizing the opening statement, remember that jurors tend to remember best what they hear first and last.

☐ **Use rhetorical questions.** Engage the jurors with rhetorical questions that will help them think about the key issues in the case.

☐ **Introduce case weaknesses.** The opening statement should also be used to introduce the weak portions of your case and to defend against your opponent's case. Disclose problems such as damaging evidence which you expect to appear at trial.

☐ **Use authorized exhibits.** The use of case exhibits and demonstrative aids during the opening will greatly increase the jury's understanding of what the evidence will actually show. Moreover, it directs the jury's attention to important

evidence and allows them to recognize it once it is introduced during trial.

☐ **Do not include objectionable material in the opening statement.** In general, counsel should avoid use of the following:

☐ **Argumentation.**

☐ **Discussions of the law.**

☐ **Overstatements.**

☐ **Pleas for sympathy.**

☐ **Relax and move away from the podium.** This will allow you to speak more freely and openly.

☐ **Do not read the opening statement.** Use as few notes as possible and speak to the jury about the case using easy to understand language.

☐ **Use future tense.** Prepare the jury for the case by informing them what they will hear and see at trial.

☐ **Do not rush.** Speak in a manner that is relaxed, easy to understand, and engaging.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsMotions for MistrialCivil ProcedureTrialsOpening StatementsGeneral OverviewCivil ProcedureTrialsOpening StatementsImproper RemarksCivil ProcedureTrialsOpening StatementsObjections

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CHAPTER 33 Direct Examination *

3-33 Federal Litigation Guide 33.syn

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CHAPTER 33 Direct Examination *

3-33 Federal Litigation Guide Scope

Scope

SCOPE

In most trials, the bulk of a party's case is put in through oral testimony. This chapter provides a comprehensive look at the manner in which such testimony is best presented to the trier of fact. Although the chapter's examples assume that the direct examination is taking place in a jury trial, the same principles also ensure a more effective presentation in a bench trial.

The process begins with deciding which witnesses to call, if there is more than one available to testify on a particular point, and in what order. Witness preparation should put the potential witness at ease, familiarize him or her with the trial process and the particular action, and provide instruction on how to provide truthful testimony in a manner that will help your case. A witness should be advised to avoid a number of specific characteristics of witnesses which, unless alleviated, may antagonize juries.

An outline of the anticipated direct testimony is indispensable during preparation and also at trial. Although the outline is often organized as a list of questions and answers, that format has numerous disadvantages, including loss of flexibility and spontaneity. An outline organized on a topical basis is usually preferable. It must be kept in mind that a foundation must be laid for most of the testimony elicited--a proper foundation establishes a witness' ability to provide admissible testimony.

Direct testimony should be presented in a manner that is interesting and will be easy for the jury to understand. In most instances, repetition and presentation of witnesses whose testimony is cumulative should be avoided. Examination of hostile or adverse witnesses generally should be undertaken only when necessary to an essential element of the case and should be as brief as possible. Because the conduct of counsel makes a compelling impression on the jurors, suggestions are made about proper trial demeanor.

After examining how to compel witnesses' attendance and the sanctions for noncompliance, the chapter concludes with a detailed look at using expert witnesses. In addition to discussing whether experts should be used and prepared, general guidelines for selecting a particular expert, as well as a number of sources to assist in locating expert witnesses are provided. Methods for developing expert opinion testimony on direct examination are also discussed.

Finally, to assist the litigator in identifying appropriate experts, the chapter includes a table summarizing various expertise areas.

For expanded coverage of direct examination, ***see*** WEINSTEIN'S Federal Evidence, Ch. 611, ***Mode and Order of Interrogation and Presentation*** .

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CHAPTER 33 Direct Examination *

3-33 Federal Litigation Guide § 33.01

§ 33.01 Present Case Understandably and Persuasively

Most trials are won on the strength of a party's case-in-chief. Oral testimony usually constitutes a critical part of that proof. Ultimate success at trial depends on presenting the case in the most understandable and persuasive way possible. This in turn requires an orderly and interesting presentation of witnesses. The need to "tell a story" at trial does not require that the story be dramatic, much less melodramatic. However, the logical, thorough presentation of a story about how people have acted under certain circumstances always includes elements of drama and sometimes even comedy.

Your primary concern at trial is with adducing legally sufficient evidence to establish a prima facie case. Evidence that is sufficient to defeat a motion for judgment as a matter of law must be presented on each of the essential elements of a claim or defense. In other words, you must make a complete record of all evidence which will support the legal arguments you may want to urge during trial or later on appeal. With a thorough grasp of the legal theories and a complete understanding of the available evidence, you will have little difficulty fashioning direct examination which adequately raises each claim or defense. But evidence that is sufficient to support a claim or defense is not necessarily evidence that will convince the jury of the justice of the client's position. While a prima facie case is an absolute precondition to success, ultimate success depends on developing trial techniques that enable you to present the evidence in a way that enhances its persuasiveness. Consequently, undue concern with presenting a prima facie case may result in missed opportunities to drive points home to the jury. After constructing the bare bones of direct examination necessary to survive the motion for judgment as a matter of law, you should elaborate on the facts in ways that arouse the jurors' sympathies or their outrage at the opposing party's claims or conduct. Even if the jury feels compelled to render a verdict in favor of one party under the court's instructions, the size of the verdict may depend on their feeling that the result is just and fair.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceTestimonyExaminationGeneral OverviewEvidenceTestimonyExaminationDirect ExaminationEvidenceTestimonyLay WitnessesPersonal KnowledgeEvidenceTestimonyPresentation of Evidence

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CHAPTER 33 Direct Examination *

3-33 Federal Litigation Guide § 33.02

§ 33.02 Select Witnesses

[1] Choose Witnesses Who Will Testify Most Credibly and Persuasively

In many respects the trial of a lawsuit resembles a theatrical production. The attorney's outline of proof is the script. All persons with knowledge of the facts and events in controversy are auditioning for parts. As a director casts the characters in a play, the trial lawyer casts the witnesses. He or she must fill every role required by the script and must rely on skill and experience to select those persons who will perform most credibly and persuasively.

Under the Federal Rules of Evidence, every person with personal knowledge is competent to testify as a witness at trial unless excluded by a specific rule. n1 No mental or moral qualifications are specified. Religious belief, conviction of crime and connection with or interest in the litigation are not grounds for excluding a witness. Of course, neither the judge nor a juror may testify at a trial in which he or she is sitting. n2

Not all persons who are competent to testify at trial should be called as witnesses. Witnesses should be chosen for the importance of their testimony, their persuasiveness, and the attorney's perception of how the jury may react if the witness is *not* called to testify. Failure to call a witness about whom other witnesses have testified or about whom the jury is naturally curious will make the case seem weaker even though the particular witness' testimony is not logically required in order to establish a prima facie case.

[2] Rely on Witness Interviews and Depositions in Selecting Trial Witnesses

Before determining trial strategy, you should have interviewed or taken depositions of all persons who have personal knowledge of facts that support or contradict your theory of the case. Through this process, you will have developed a feel for the strengths and weaknesses of the case, and will have formed impressions concerning the extent of each person's knowledge, the accuracy of his or her statements, and the quality of that person as a witness. In other words, you will have formed a picture of how important the person's testimony is to the case and how the jury will perceive the witness.

[3] Select Critical Witnesses for Purpose of Making a Record at Trial

When selecting witnesses, you should keep in mind the need to make a complete record at trial. If no evidence has been adduced at trial on a key aspect of the case, an attorney may not complain later if a motion for judgment as a matter of law is granted against his or her client. Consequently, a person's testimony may be so vital to the case that he or she

must testify no matter how you anticipate the witness will be received by the jury. In these situations, you should concentrate on emphasizing the witness' strengths and minimizing his or her weaknesses--all toward the goal of improving the witness' presentation at trial.

In selecting witnesses, you also must anticipate what opposing counsel is likely to do at trial. Each side will want to have a prepared witness available to contradict the key elements of the opposing case or to defuse certain unfavorable testimony. Even if such a witness will not be called until rebuttal, you should prepare the witness before trial, saving time during the trial for the surprises that invariably crop up.

You should not intentionally fail to call a strong or key witness in the case in chief with the idea that the witness may be called in rebuttal. Opposing counsel may structure his or her case so as to prevent the witness from being presented in rebuttal.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceTestimonyExaminationGeneral OverviewEvidenceTestimonyExaminationDirect ExaminationEvidenceTestimonyLay WitnessesPersonal KnowledgeEvidenceTestimonyPresentation of Evidence

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Evid. 601*, *602*.

(n2)Footnote 2. *Fed. R. Evid. 605*, *606*. Jurors by rule are also precluded from testifying, either orally or by affidavit, about any matter or statement that occurs during deliberations, except that a juror may testify about extraneous prejudicial information affecting the verdict or improper outside influence. *See Fed. R. Evid. 606(b)*; *WEINSTEIN'S Federal Evidence, § 606.04* (Matthew Bender 2d ed.).

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CHAPTER 33 Direct Examination *

3-33 Federal Litigation Guide § 33.03

§ 33.03 Prepare Witnesses

[1] Familiarize Witnesses with Trial Process and Facts of Case

Simply choosing persons to testify who have the capacity or personality to present your case at trial most persuasively and credibly does not insure effective communication to the jury. Before trial you must engage in intensive preparation of your witnesses to familiarize them with the trial process and the case and to minimize the unfavorable and maximize the favorable personality traits of the witnesses. Take full advantage of videotaping a practice direct examination with the witness so he or she can see the mannerisms and speech habits that the jury may find distracting. Most people are surprised at how they come across to others. Videotape is the best way to show them.

The ability to prepare your witnesses will depend on whether their appearance is voluntary. In addition to your client, the client's family, friends, employees, or business associates will likely be cooperative witnesses who will be willing to be prepared and will be motivated to do a good job. Those fact witnesses who are either neutral or hostile will be more difficult to prepare. Your direct examination of them should have more modest goals because you have had less influence on them. Perhaps the most you can do is explain the process to them, assuming they will listen.

All of the following suggestions must somehow be achieved while simultaneously keeping the witnesses reasonably calm and reasonably confident about the prospect of testifying. There is, of course, no magic formula for success, but there are a number of things you can do. In discussing the witness' testimony, emphasize its good *and* its negative aspects. For example, emphasize that the witness has essentially unique information on a given topic or that his or her approach to answering questions is very good. Similarly, potential benefits of cross-examination should be pointed out to the witness: for instance, that inept cross-examination may give the witness the opportunity to repeat and underscore the favorable aspects of his or her direct testimony, or the fact that the witness who responds to an abusive examiner in calm and forthright terms almost always "prevails" in the minds of the finders of fact.

[2] Prepare Each Witness Separately

Prepare each witness separately. When interviews are conducted separately, you have the witness' undivided attention, you will convey the importance of his or her testimony, and you will best be able to work frankly and directly with troublesome personality traits or mannerisms. The presence of other witnesses may be disruptive or embarrassing. Moreover, by preparing each witness separately, you can prevent a witness from learning confusing information or from adopting other witnesses' statements, expressions, opinions, and recollections. When opposing counsel asks on cross-examination what the witness did to prepare for trial, the presence of other witnesses during such sessions will

sound highly suspicious. This may lead to examination regarding conversations that refreshed recollections and may detract from credibility.

[3] Prepare Witnesses Far Enough in Advance of Trial

Prepare each witness far enough in advance of trial to permit adequate time to reconsider the witness, reevaluate his or her areas of testimony, and make further decisions about using alternative witnesses. Whether preparation takes place the week before or many months before trial depends on the complexity of the case, the number of witnesses to be prepared, the timing of other pretrial matters, and your schedule. Each witness should be given a refresher preparation session shortly before that witness testifies. It is best if the lawyer who will conduct the direct examination at trial does the preparation. The witness needs all possible familiarity with and trust in the examining lawyer.

[4] Do Not Assume That Witnesses Are Familiar with Trial Process

Witnesses are generally apprehensive about the prospect of testifying in court. They may be unfamiliar with trial proceedings, concerned that they will forget what to say, or fear being embarrassed or browbeaten at trial. Witnesses often have a mistaken impression about trials resulting from watching television dramas. A brief description of the trial process, including an explanation of the roles of the judge, the jury, the attorneys, and the witnesses will help allay the witness' fears. You should also explain that if opposing counsel begins to treat the witness unfairly, the lawyer will object immediately and the judge will intervene. If the witness has been deposed, he or she may feel slightly more comfortable with the process, although the differences between depositions and trials should be explained.

Also, witnesses should be prepared for the inherent uncertainties of the trial schedule. They should not be told they will definitely testify at a given time when in fact there is some uncertainty on that subject. Witnesses must obviously be prepared to testify when required, but they should be spared unnecessary false alarms. Witnesses who are present in the courtroom during your adversary's case must also understand that, absent unusual procedural limitations, they may be called to the witness stand at any time, even by opposing counsel.

[5] Explain Protocol of Examination and Cross-Examination to Witnesses

Each witness should be informed, for example, that he or she will be sworn before testifying and asked to state his or her name for the record; that questions can, if necessary, be reread by the court reporter; that objections must be ruled on before the witness may answer the question; that the judge may ask questions, and so on. The witness should also be told that you will be permitted to ask more questions on redirect and recross, and that there is a possibility he or she could be recalled as a witness later in the case.

[6] Reassure Witnesses Concerning Possible Adverse Developments During Testimony

Witnesses sometimes make mistakes, and sometimes those mistakes *appear* to be very serious. Usually, however--and the point must be stressed in preparation of the witness--appearances are deceiving. Very often the mistake is not as serious as it may seem. Often it may be corrected or explained, and even if serious, it may be lost in the mass of other more affirmative evidence in the case. Most important of all, whether serious, explainable, remediable or not, mistakes must be kept in perspective and, having been dealt with to the extent that it is possible to do so, they should be set to one side and forgotten. The witness must understand that it would be foolish to make additional mistakes as a result of being preoccupied with ones previously made.

[7] Tell Witnesses about Demeanor and Personality of Judge and Opposing Counsel

If opposing counsel is known to be low-key and gentle or devious and overbearing on cross-examination, the witness should know about it. Similarly, if the judge has particular quirks or idiosyncracies regarding witness demeanor, the witness should be told about them during preparation and not put in jeopardy of reprimand at trial.

[8] Familiarize Witnesses with Physical Characteristics of Courtroom

A general description of the size and layout of the courtroom is sufficient in most cases. More apprehensive witnesses can be shown a courtroom (perhaps even the one in which trial will be held). Such a tour might involve a short visit to a trial heard by the judge assigned to your case. Do not recommend that a witness observe an entire trial. If an apprehensive witness observes a trial in which witnesses are treated harshly, his or her apprehension may grow into fright. In situations where exposure to a trial is necessary, you should investigate pending trials and direct the witness to one that will most closely approximate the circumstances and tone of the trial in your own case.

Also, witnesses should be informed that courthouse halls, restrooms, and elevators have ears and eyes. Jurors, judges, opposing counsel, adverse parties, and other witnesses are present everywhere, and jurors may be particularly observant of conduct outside the courtroom. Witnesses must understand that the manner in which they conduct themselves off the witness stand is as important as their behavior and appearance while testifying.

[9] Provide Witnesses with a Case Overview and Explain Significance of Testimony

Providing witnesses with a case overview and explaining the significance of their testimony should help the witness better understand the questions that will be asked during direct and cross-examination. Witnesses should also be cautioned to answer only questions that they understand. Advise them that if they do not understand a question, they should tell the examiner and ask that the question be rephrased. Caution witnesses that requests to rephrase questions at important points in the testimony may create the impression that they are avoiding difficult questions or trying to hide facts from the jury. Similarly, caution them not to give clever or sly answers or to try to outwit the opposing attorney. All too often this will only result in making the witness look insincere, foolish, or evasive.

Even before the preparation session begins, outline the witness' direct testimony. n1 Review all aspects of your outline with the witness to assure yourself that the witness can testify as anticipated. However, do not prepare a script for the witness. Jurors will know when a witness is testifying from a prepared, memorized text and may conclude that the witness is simply giving testimony that is, at best, partially fabricated.

Some witnesses who do not trust their memory prepare a "cheat sheet" to remind them of key aspects of their testimony. An experienced trial lawyer will ask to review any writing the witness brings to the stand. For this reason, witnesses also should be warned not to take documents, such as notes or copies of correspondence, to the witness stand to aid recall. Convince your witnesses that you are preparing them sufficiently for their testimony.

In the course of preparing the witness, you should actually go through the direct examination and simulate cross-examination so that the witness has some practice in following all of your advice. Videotape these sessions and review them with the witness. During the course of the practice session, you can coach the witness to keep his or her voice up and can suggest more effective ways of providing testimony. When preparation is complete, the witness should feel comfortable and you should know the answer to each question that you will ask on direct.

Finally, tell the witness not to be defensive or reluctant to admit that he or she has discussed testimony with you. If the witness has not been prepared for this question, he or she may answer evasively. If the witness fudges on this point, he or she can be backed into a corner and the credibility of that witness' entire testimony may be questioned. Tell each witness to admit without hesitation that they have discussed their testimony with the attorney who called him or her as a witness. It is not improper for an attorney to have interviewed a witness, and it also is understandable if the witness spoke with other people about his or her testimony.

[10] Assist Witnesses in Advance of Trial to Refresh Memory

You should try to help the witness refresh his or her memory concerning the information that will be sought on direct

and cross-examination. If a description of a location will be involved, the witness can revisit the location. If exhibits memorialize aspects of an event, the exhibits can be reviewed. If you have learned of facts that might refresh the witness' recall, those facts can be shared with the witness.

If a witness does not know the answer to a question, he or she should say so and should not speculate about what might have happened. The response "I don't recall" or "I don't remember" is an acceptable answer. However, witnesses should not be told to use "I don't know" as "an all-purpose life preserver." n2

[11] Review Deposition Testimony with Witnesses

If a witness has been deposed, review the deposition transcript and discuss any inconsistencies with the witness. Cross-examiners generally try to impeach a witness by showing that the witness' trial testimony is inconsistent with a prior statement of the witness. During the preparation you should also ask the witness whether he or she has given any statements in the case. That includes conversations with others about the case, not just formal statements to investigators, insurance adjusters, or lawyers. A barroom conversation with an acquaintance may furnish impeachment through prior inconsistent statements just as well as a deposition. If possible, you should then contact those to whom the witness made oral statements about the case or the facts if there is any chance that opposing counsel would do so. Any prior written statements should be obtained and reviewed. n3 If there is a good and logical explanation for apparent inconsistencies between anticipated trial testimony and prior statements, the witness should be prepared to give the explanation smoothly and convincingly. If, for example, the witness testified at deposition that he or she does not recall a certain event, but at trial the witness will describe the event at length, the witness must be prepared to explain how his or her recollection was refreshed.

[12] Instruct Witnesses to Control Temper at All Times

An angry witness ordinarily makes a very negative impression on the jury and may be easily manipulated by opposing counsel. You may only learn that a witness has an explosive or sarcastic demeanor through a practice cross-examination, perhaps by another attorney in your office. The composed witness who cooperates with your proposed, non-threatening direct examination may come unhinged when his or her veracity is challenged.

Explain that the lawyers are the professional advocates in the courtroom and that the arguing should be left to them. The witness will almost always lose credibility in the eyes of the jury by arguing with opposing counsel. If the witness believes that a question is particularly hostile or argumentative, the witness may pause before answering to give the direct examiner an opportunity to object. The witness should also be told never to argue with the judge about rulings.

[13] Discuss Demeanor, Attire, and Speaking Manner with Each Witness

The location of the trial may affect what advice you give regarding attire. Generally, witnesses should be told to dress in "Sunday clothes" and not to wear loud, flashy, or bizarre clothing. Jewelry should be kept to a minimum. The same witness giving the same testimony while dressed in conservative attire is more credible. One of New York's most effective young lawyers, Ken Nolan, has given this advice:

Appearances count. If you want money from a jury, forget the Rolex, gold chains, and John Gotti look. Don't force a tie and jacket on a truck driver. When in doubt, dress conservatively. Teenagers are trouble, but most juries will understand their craziness. If you're in small-town Indiana, forget the tasseled shoes and double-breasted suits. If your client is in court for weeks, a different outfit each day is revealing. n4

Similarly, witnesses should be told not to put their hands over their mouths when testifying. Each should be told to speak loudly and clearly so that he is easily understood and not to slouch in the witnesses chair because it might create an impression of indifference or disrespect. The witness must be convinced of the importance of looking at the jury

when answering questions and keeping eye contact with them during most of their testimony, especially the key parts. That strikes most witnesses as unnatural because they want to look at the person who asked them the question. If the case is a bench trial, the witness should be advised to look at the judge for the same reasons. Once again, practice will make the difference. During the preparation sessions make sure that the witness looks in the direction where the jury will be seated at trial.

Also, some witnesses, as a habit of speech, tend to qualify each answer. Instead of testifying that "John said it," a witness might state "I believe," or "I think that John said it." If the witness is certain that John said it, he or she should be counseled to give a positive answer, rather than an answer that suggests equivocation. A practice direct examination that is videotaped is the best way to break the witness' habit.

Witnesses also must be cautioned that their persuasive impact on the jury does not end with their last answer. The jury will watch the way witnesses leave the witness stand. Witness' mannerisms should not denote relief, frustration, defeat, or triumph. They should leave the witness stand in a dignified and confident manner.

[14] Avoid Over-Preparing Witnesses

The danger of witness preparation is that witnesses can be overly prepared and sound false to their own style of speech or expression. Do not iron out witness' personalities. Rather, use their natural strengths to strengthen their testimony. Make sure the witness is not open to charges that you told him or her what to say. Witnesses should be repeatedly told that you want them to tell the truth and that the reason for preparation is so they can do a better job stylistically telling the truth. You are trying to improve style, not substance.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceTestimonyExaminationGeneral OverviewEvidenceTestimonyExaminationDirect ExaminationEvidenceTestimonyLay WitnessesGeneral OverviewEvidenceTestimonyPresentation of EvidenceEvidenceTestimonyRefreshing RecollectionGeneral OverviewEvidenceTestimonyRefreshing RecollectionRefreshing Before Testimony

FOOTNOTES:

(n1)Footnote 1. *See § 33.07 infra.*

(n2)Footnote 2. Lutz, *Fudging and Forgetting*, *19 Litigation 10 (Spring 1993).*

(n3)Footnote 3. *Fed. R. Civ. P. 26(b)(3)* provides that:

> A party may obtain without the required showing [of the party's substantial need of the materials] a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person.

(n4)Footnote 4. Nolan, *Direct Examination--For Real*, *19 Litigation 48 (Spring 1993).*

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CHAPTER 33 Direct Examination *

3-33 Federal Litigation Guide § 33.04

§ 33.04 Avoid Problem Characteristics of Witnesses

[1] Evaluate Personality Traits of Witnesses

When selecting witnesses for trial, evaluate the personality of each witness and identify traits that might interfere with his or her effectiveness at trial. Trial lawyers frequently categorize witnesses by personality type. Preparation of witnesses with undesirable characteristics concentrates not on changing a witness' entire personality, but on neutralizing or minimizing unfavorable traits.

[2] Antagonistic Witnesses

Antagonistic witnesses are easily identified as the people who take the lawsuit too personally. They view the other side, including opposing counsel, as people who have deliberately wronged the witness. To this witness, the adversary is the enemy for whom contempt must be shown whenever possible.

The jury may dislike the witness' belligerent attitude, view him or her as too partisan to tell the whole truth, or consider the belligerence as a cover-up for a weak case. A skilled cross-examiner will be able to exploit the hostility and raise serious questions as to the credibility of the witness. This witness' antagonisms may well overcome good sense, and anger may lead the witness to exaggerate or to lie.

Antagonistic witnesses should be used sparingly unless you can overcome their belligerence. Convince the witness that the best way to strike back at the adversary is to win the lawsuit. Explain that the witness will hurt, not help, the case if the jury is turned off by his or her personal, vindictive attitude toward the other party or lawyer. The jury will not share the witness' presumptions against the other side and will not reward belligerence. The way to help win the case is to testify as a reasonable person who was wronged, rather than as a sarcastic or hateful person trying to make someone pay for imagined injuries. While the jury is likely to discount the testimony of the belligerent witness, the greater danger is that they also will take it out on the party who presented the witness--guilt by association. Explain to the witness that his or her attitude will have a negative impact on the entire case and will jeopardize the chances of winning at trial.

[3] Nice-Guy Witnesses

Some people are helpful by nature and want everyone to like them. The eagerness with which this witness responds to your suggestions indicates that you are dealing with the nice-guy witness. When answering questions, the nice-guy witness volunteers information and even tries to anticipate the questions. Perhaps the witness believes that if he or she is

nice, the jury will be sympathetic. While this type of witness is likely to create a favorable first impression with the jury, he or she is also likely to provide unsolicited testimony that may be harmful to the case.

A useful way to prepare this witness is, first, to thoroughly explain trial procedures and the roles of the various players and then simulate a cross-examination in which you demonstrate the consequences of being too helpful or trying too hard to be liked. Explain that the witness will be liked and respected in the courtroom if he or she is honest, straightforward, and direct.

[4] Boring Witnesses

A boring witness may be frustrating, but generally will not be vulnerable. He or she may have excellent recall and may be very intelligent. The only problem is that because the witness lacks enthusiasm, he or she has a tendency to put the jury to sleep.

Sometimes, little can be done to liven up a boring witness' presentation. It is usually best to structure his or her testimony so that the essential aspects of it come first and last, and so that the witness' total time on the stand is as brief as possible. Even if the jury is bored to tears by most of the testimony, the testimony heard first will be best remembered and the testimony heard last will be last remembered. You also should structure your direct examination to elicit relatively short answers.

The boring witness generally is only boring when given the opportunity to provide rambling, narrative answers. Indeed, the boring witness may be boring because the questions you ask are boring. Repetitive questions or those that digress into trivia and fail to advance the story line are boring. Questions that do not emphasize testimony or highlight the importance of the answer to follow compound the boredom. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceTestimonyExaminationGeneral OverviewEvidenceTestimonyExaminationDirect ExaminationEvidenceTestimonyLay WitnessesGeneral OverviewEvidenceTestimonyPresentation of Evidence

FOOTNOTES:
(n1)Footnote 1. *See* Kinrich, *Dull Witnesses*, *19 Litigation 38 (Spring 1993)*.

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CHAPTER 33 Direct Examination *

3-33 Federal Litigation Guide § 33.05

§ 33.05 Strategize Order of Witnesses

[1] Order of Witnesses Should Reflect Principles of Primacy and Recency

Deciding the order in which to call your witnesses to testify is one of the most important decisions you will make. The order should reflect the principles of primacy and recency. In other words, the beginning and the end of your case will be best remembered by the jury. The first impression is normally the most lasting, most important, and hardest to dislodge. The last impression is the easiest to recall. For these reasons, you will want to start and finish strong and try to present any weak or unfavorable evidence in the middle of your case.

Your first witness is usually the most important witness to the your case. He or she must be strong (confident and able to withstand cross-examination) and very credible. Ordinarily, the first witness also should be able to provide an overview of your story. Blending these notions with the need to present your facts in a logical sequence frequently means that the first witness will be your client. Usually, the client can give the most complete and logical presentation of the facts of your case, may be necessary to lay a predicate for other testimony, may be your best and strongest witness, and the jury will be anticipating his or her testimony. n1 Keep in mind, however, that your client should not automatically be called first in every case. You must evaluate your other witnesses and decide the order in a thoughtful and not habitual manner.

[2] Present Witnesses in Logical Sequence

Present your witnesses in a sequence that informs the court of the essential aspects of your proof, but also permits each element of proof to be understood in light of what has gone before. This requires a logical order of witnesses and often suggests that you take a chronological approach to your story. Whether the order is chronological or topical, thought must be given to the best way to tie the testimony of witnesses together so that it is understandable and builds on the evidence that has been introduced before.

[3] Consider Availability and Convenience of Witnesses

Consider the availability and convenience of your witnesses. Because you want your case to proceed at an even pace, you will want to avoid long delays or early adjournments during trial. On the other hand, if your case depends on nonparty witnesses, you will want to be cooperative in accommodating their schedules. Practical considerations often will require variations from your preferred order as well as flexibility to accommodate schedule changes. Therefore, thoughtful advance planning and flexibility regarding the order of your witnesses is necessary.

[4] CHECKLIST: Strategizing Order of Witnesses

The following is a useful checklist of factors to consider when structuring your case:

1. Plan your order of witnesses in advance of trial.

2. Be flexible to accommodate changing conditions.

3. Attempt to present your case in a logical progression, as in a chronological sequence, for example.

4. Start with a strong witness.

5. Finish with a strong witness.

6. Because the jury usually is freshest at the start of a session, begin each morning and afternoon with favorable testimony and an interesting witness.

7. End each trial day on a high note.

8. Do not bore the jury. Intersperse technical elements of your case with more lively evidence. Consider alternating lay and expert witnesses. Rather than relying on transcripts of depositions in lieu of live testimony, play edited videotapes of the deposition. Jurors are accustomed to receiving information from television. If you must read from depositions because of the unexpected absence of a witness, do so creatively with one person reading the witness answers while you read the questions.

9. Do not prolong the case unnecessarily.

10. Consider concluding your case with an expert witness with whom you can summarize all favorable evidence.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceTestimonyExaminationGeneral
OverviewEvidenceTestimonyExaminationDirect ExaminationEvidenceTestimonyLay WitnessesGeneral
OverviewEvidenceTestimonyPresentation of Evidence

FOOTNOTES:
(n1)Footnote 1. At the outset of trial, the judge will introduce the lawyers and the other persons sitting at counsel's table. From this point, the jury becomes interested in the client, or client representative, sitting with you and will almost immediately want to know what he or she has to say about the case.

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CHAPTER 33 Direct Examination *

3-33 Federal Litigation Guide § 33.06

§ 33.06 Maximize Each Trial Day

Jury service may take jurors from their jobs, family, and friends for an extended period of time. You must be prepared to use the full day for trial so that the jurors will not feel that you are wasting their time.

When you have a good case, keep it moving by putting in a full day of evidence. This does not mean you should hurry through a witness, only that you should resist any temptation to string the case out. The longer the trial takes, the more impatient and the less interested the jury will become. You do not want the jury to hold you and your client responsible for wasting time.

You should prepare for more than a single day of trial at a time. Inevitably, testimony takes longer or shorter than anticipated. If direct examination is to the point, the jury will not be troubled with long testimony from a witness. You will be rewarded for concise direct examination especially when the cross-examination is unnecessarily lengthy, aimless, and exploratory. The real problem arises when one witness takes a much shorter time to complete his or her testimony. You must have another witness ready to testify so that you are not compelled to request a recess or waste time. The only danger from being ready with one more witness is that the "spare" witness will resent the imposition.

While you will have prepared each witness before trial actually begins, you should not call the witness to testify until you have had a refresher session. The refresher session will be brief, reminding the witness of the major points from earlier sessions, and often is held over the telephone at night after your day in court. To guard against the eventuality of a short trial day, you should "refresh" at least one more witness than you anticipate calling on the next trial day. In that way, you will keep the continuity of your case and will not have alienated the jury through persistent delays.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceTestimonyExaminationGeneral OverviewEvidenceTestimonyExaminationDirect ExaminationEvidenceTestimonyLay WitnessesGeneral OverviewEvidenceTestimonyPresentation of Evidence

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CHAPTER 33 Direct Examination *

3-33 Federal Litigation Guide § 33.07

§ 33.07 Prepare Outlines for Direct Examination of Lay Witnesses

[1] Outlines Enhance Control over Direct Examination and Minimize Risk of Oversight

Most trials are won on the strengths of your case-in-chief than on the weaknesses of your opponent's case. Consequently, effective direct examination that clearly, logically, and forcefully presents the facts of your case will have a decisive effect on the outcome of the case.

Direct examination is an important, but potentially frustrating, part of the case. No matter how much time you spend preparing witnesses, you will not be in control of what the witness says on the witness stand. You may not lead your witness or cut off narrative answers. You must rely on your witness to be persuasive, direct, and credible. The best way to have some degree of control over direct examination is to thoroughly prepare each witness for direct examination. You should know the answer to each question before you ask it. There should be no surprises in direct examination. Consequently, prepare your witnesses by asking the same questions that you will ask at trial. To facilitate preparation and enhance your control over the direct examination, prepare an outline of the direct testimony of each of your witnesses.

Outlines of all direct testimony serve another important function at trial. They provide you with a checklist to avoid inadvertently failing to cover an important aspect of testimony. If you forget to ask certain questions on direct, you may not be able to resurrect that area of inquiry on redirect. Compare your outlines with the pre-trial brief to ensure that all elements of each of your claims or defenses are covered in direct examination. By actually checking off subjects on your outlines as the testimony is given, you will know whether you have overlooked any desired testimony.

[2] Start with Skeleton Outline

Sometimes getting started is the hardest part of the outline. When you prepared your outline of proof, you already had consciously given thought to who would say what to prove your case. Your witness outlines are simply detailed blowups of various parts of your outline of proof.

An outline should evolve. Many lawyers start with an outline that does little more than block out general areas of testimony that immediately come to mind in the context of what must be proven at trial. A first draft outline of a witness who will testify about a relevant product and geographic market might look like this:

Jones Outline

I. Background

A. Education

B. Work Experience

II. Duties and Responsibilities

III. Product Definition

A. Appearance

B. Function or uses

C. Customers

D. Competitors

E. Similar Products
1. Prices

2. Vendors

IV. Geographic Market

A. Location of sales offices

B. Location of competitors

C. Area serviced by plaintiff

[3] Outline Should Include Key Points as to Which Witness Will Testify

There is no standard form for a final witness outline. Most outlines are either a question-and-answer or topical format. Any outline, however, should include at least a summary of the key points to which the witness will testify at trial. For example, assume that your witness will testify that his or her company had five reasons for terminating a distributor. You should note all five reasons on your outline so that skillful questioning can remind the witness of any reason that he or forgets to mention at trial. Do not trust your memory to store the reasons for instant recall at the appropriate time. Given the emotions, emergencies, number of witnesses, and number of tasks involved in a trial, you almost certainly will not remember every answer that each of your witnesses is expected to give.

[4] Outline Should List All Exhibits to Be Used with Particular Witness

Your outline should set forth the "choreography" of your direct examination, and conspicuously list the exhibits to be used. A good practice is to list all exhibits to be used with a particular witness at the beginning of the outline so that you can collect all of them easily before examination commences. You should also note on the outline when they will be marked, shown to the witness, and offered into evidence.

[5] Outline Should Include Detailed Questions

For every important witness, questions should be written out in enough detail to ensure consistency between the questions asked in pre-trial preparation of the witness and those asked at trial. In addition, phrasing questions extemporaneously at trial is also more likely to lead to awkward or objectional questions. It is not that much more work to prepare the questions in a detailed fashion. Having a detailed outline does not mean that you cannot ask new questions at trial.

On the other hand, questions should not be written out word-for-word. You may become tied to your outline for fear that if you deviate from the script you will never get back on track and might omit vital areas of inquiry. If that happens, you will lose the flexibility and spontaneity that make for the most effective trial presentations. Never let the jury think that you are reading from a script and that you have prepared and orchestrated the entire direct testimony.

[6] Consider Using Topical Outlines

For witnesses whose part in the story is minor or mechanical, consider using topical outlines. One type of topical outline lists the essential elements of what the witness will say. Another lists topics to be covered, followed by a brief narrative statement of what you expect the witness to say. Your questions are structured at trial to cover all topics on your list and elicit the desired responses. Trial lawyers who use this technique usually appear natural and have greater flexibility.

Assume that you will call Ms. Jones to offer testimony on a relevant market issue in a merger case. Your outline of a portion of her testimony might appear as follows:

Click here to view image.

With this form of outline, your topics are listed in a column on the left side of the page. The right side is left open for reminders, such as when to use an exhibit and how to respond to objections. In this example, ID DX1 would be used in connection with testimony involving the description of the product. The right side of the outline also should include the drafts of the few questions you may want to write out in full before trial. Some attorneys will also use the right side to note at trial the significant aspects of the testimony. Voluminous notes, however, will clutter up the reminders. For this reason, if you tend to take voluminous notes, you may want to consider a three-column approach.

[7] Do Not Provide Witness with Copy of Outline

Generally, you should not provide your witness with a copy of your outline. On cross-examination your adversary may ask if the witness was shown an outline of his or her testimony. If the outline is in a question format, the jury will have the impression that a script was prepared and that the witness is simply filling a role at trial. If the outline is a topical format, the jury still may get the idea that you have suggested or provided answers to the witness. The witness also may adopt language and descriptions appearing in the outline or may even try to memorize the outline. You want the witness to be prepared, not programmed.

[8] Anticipate Objections

Before trial, you should have a game plan for introducing all evidence that will prove your case. To assure the smoothest possible trial presentation, try to anticipate your adversary's objections to the testimony or documents to be offered into evidence. When you have identified likely objections to significant evidence, you may ask the court to deal with them in advance of trial by filing a motion in limine. That will give the parties and the court the advantage of dealing with the legal issue in a relatively unpressured atmosphere, with the advantage of full briefing. If you have chosen not to raise the potential objection before trial, you may deal with it in two ways.

First, you can try to work around the problem. For example, if you had planned to call X to testify about what Y said during a meeting, you might seek to avoid any hearsay problem by calling Y to testify. If you have a chain of custody

problem, you can arrange to have all necessary persons available to testify to preempt the objection.

Second, you can prepare to argue against the objection. Even though you have chosen not to file a motion *in limine*, you should have a brief memorandum of law to submit to the court on the legal issue raised by the evidence and the objection to it. That level of preparation for foreseeable problems will make your extemporaneous objections during trial more credible. Of course, if the judge nonetheless sustains the objection you will have to proceed in a different way than you planned. A good trial lawyer will always have an alternate path worked out before trial. The alternate may consist of a different series of questions, alternate witnesses, or a different document, but it is important that you formulate a plan in advance.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceTestimonyExaminationGeneral OverviewEvidenceTestimonyExaminationDirect ExaminationEvidenceTestimonyLay WitnessesGeneral OverviewEvidenceTestimonyPresentation of Evidence

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CHAPTER 33 Direct Examination *

3-33 Federal Litigation Guide § 33.08

§ 33.08 Lay a Foundation

[1] Connect Evidence to Case

In a general sense, all evidence needs a foundation. The testimony of a witness who seeks to describe an event is not admissible unless it first is shown that the witness was present and saw what was happening. Similarly, a gun found at the scene of the crime can hardly constitute relevant evidence against the defendant unless it is somehow linked to him or her through ownership or possession. Laying a foundation is your way of connecting the evidence to the case--showing that it is relevant. What follows are specific examples of laying foundations for witness testimony that may easily be adapted for a variety of situations.

[2] Occurrence Witness

An occurrence witness is a common and important witness. Before you ask about the occurrence, that is, what the witness saw, heard, or experienced, you must lay a foundation that places the witness at the scene of the events in a position to see what happened.

Example:

Q:

Mr. Jones, where were you on July 20, 1990, at 1 P.M.?

A:

I was at the corner of Jackson and Clark Streets in downtown Chicago.

Q:

In which direction does Jackson go?

A:

Jackson is one-way going east.

Q:

In which direction does Clark go?

A:

Clark is one-way going south.

Q:

Where exactly were you?

A:

I was standing on the southeast corner, the corner right by the X Bank parking garage, waiting for the traffic light to change.

Q:

What was the weather like at the time?

A:

Hot, sunny and very clear.

Q:

In which direction were you looking?

A:

I was looking north, straight at the federal building across the street.

[3] Ordinary Conversations

Conversations are commonly introduced at trial. Before putting the conversation in evidence, however, you should review its evidentiary basis. Keep in mind that a conversation is an out-of-court statement and thus may be hearsay if offered to prove the truth of the matter asserted. n1 To determine if you have a hearsay problem, you first should decide if the statement is being offered to prove the truth of what was asserted. If it is not, you may not have a hearsay problem. Suppose a witness, Mary, states that Bob told her that Frank was driving a stolen car at ninety miles an hour. If you are trying to prove through this testimony that Frank stole a car and was driving it at ninety miles per hour, the statement probably is inadmissible hearsay. But if you intend to offer it for a completely different purpose, such as to show that Bob knows Frank or to show that Bob made defamatory statements about Frank, the statement may be admitted for either purpose. Even if the statement is hearsay, it may be admissible if it constitutes an admission of a party-opponent or if it satisfies any other exceptions to the hearsay rule. n2

Example:

Q:

Mr. Jones, do you know Mr. Smith?

A:

Yes.

Q:

Who is he?

A:

The president of Company X.

Q:

How long have you known him?

A:

For about five years.

Q:

Have you ever had lunch with Mr. Smith?

A:

Yes.

Q:

When?

A:

The first of November 1992.

Q:

At what time?

A:

I recall it was a late lunch, we met at about 1:30 P.M.

Q:

How long did lunch last?

A:

About two hours.

Q:

Where did you have this lunch?

A:

At the Cathedral Hall dining room of the University Club.

Q:

Was anyone else present at this lunch?

A:

No.

Q:

Was anything said at this lunch about the price of widgets?

A:

Yes.

Q:

Please tell us what you said and what Mr. Smith said at this lunch on the subject of widget prices.

[4] Telephone Communications

Laying a foundation for a telephone conversation requires identifying the participants either by familiarity with the speaker's voice or extrinsic facts that circumstantially demonstrate the identification. When the witnesses know each other and recognize each other's voice, the foundation is similar to that of an ordinary conversation with the addition of testimony regarding voice recognition.

Example:

Q:

Ms. Jones, on July 20, 1992, did you call Mr. Smith?

A:

Yes.

Q:

What time did you place the call?

A:

About 2 P.M.

Q:

Where did you call him from?

A:

My office.

Q:

Do you know Mr. Smith?

A:

Yes.

Q:

How long have you known him?

A:

About five years.

Q:

Did you talk with Mr. Smith on this occasion?

A:

Yes.

Q:

How do you know you were talking with Mr. Smith?

A:

I recognized his voice.

Q:

How did you recognize his voice?

A:

I have spoken with him numerous times over the five years I have known him, both in person and on the telephone.

Q:

Did anyone else take part in the conversation?

A:

No.

Q:

Please tell the court and the jury what you said and what Mr. Smith said during this phone conversation.

Although this example shows previous telephone contact between the participants, it is not necessary to show that the other voice may be recognized because of previous telephone conversations. *Federal Rule of Evidence 901(b)(5)* provides that voice identification may be made by an opinion based on hearing the voice *at any time* under circumstances connecting it with the alleged speaker.

If your witness may not have been familiar with the other party to a phone conversation at the time it took place but later becomes familiar with the other party, no substantial foundation problem exists. Because *Federal Rule of Evidence 901(b)(5)* provides that voice identification may be based on familiarity with the voice gained *at any time*; questions need only be added regarding the subsequent conversations.

Example:

Q:

Mr. Smith, where were you at approximately 2 P.M. on July 20, 1992?

A:

I was at home watching T.V.

Q:

What happened at that time?

A:

The phone rang.

Q:

Did you answer it?

A:

Yes.

Q:

Did you recognize the voice of the person calling?

A:

No, not at the time.

Q:

Since 2 P.M. on July 20, 1992, have you had any meetings or conversations with Ms. Jones?

A:

Yes.

Q:

When?

A:

I met with her in her office on July 21, 1992, and I have had at least 20 telephone conversations with her since that date.

Q:

After July 20, 1992, did you become familiar with Ms. Jones' voice?

A:

Yes.

Q:

Mr. Smith, regarding the phone call you received on July 20, 1992, can you now state whether you recognized the voice of the person with whom you spoke?

A:

Yes.

Q:

Whose voice was it?

A:

Ms. Jones.

Q:

Did anyone else take part in the phone conversation?

A:

No.

Q:

As best you can recall, please tell the court and jury what you said and what Ms. Jones said during this phone conversation.

Federal Rule of Evidence 901(b)(6)(B) provides that a foundation for a phone call to a business may be established by showing that the phone call was (1) made to a business, (2) placed to the number that had been assigned to the business by the telephone company at the time of the call, and (3) the conversation related to business reasonably transacted over the telephone.

Example:

Q:

Mr. Smith, where were you on July 20, 1992, at about 2 P.M.?

A:

At home.

Q:

What did you do at that time?

A:

I got out my phone directory to look up the phone number of X Company.

Q:

Was the phone number listed?

A:

Yes.

Q:

What did you do then?

A:

I called X Company.

Q:

Then what happened?

A:

Someone picked up the phone and said "X Company."

Q:

Did you ask for anyone in particular at X Company?

A:

No.

Q:

Did anyone else take part in the conversation?

A:

No.

Q:

What was said during the conversation?

If you wish to show that the conversation was held with a certain person at the business, you also should show that a certain person was asked for by name, title, or description and that the call was connected to such person.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceHearsayGeneral OverviewEvidenceTestimonyExaminationGeneral OverviewEvidenceTestimonyExaminationDirect ExaminationEvidenceTestimonyLay WitnessesGeneral OverviewEvidenceTestimonyPresentation of Evidence

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Evid. 801(c).*

(n2)Footnote 2. *Fed. R. Evid. 801(d)*, *803*, *804*.

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CHAPTER 33 Direct Examination *

3-33 Federal Litigation Guide § 33.09

§ 33.09 Present Effective Direct Examination

[1] Acquaint Jury with Witness

Allow the jury to become acquainted with your witnesses. The jurors have no information concerning who a witness is and how he or she fits into the case until you (or the witness) tell them. For certain vital witnesses, you may make a brief introduction during your opening statement. For many witnesses, however, the jury will first meet the witness when he or she takes the stand for direct examination. You want the witness to be believed, so you want the jury to get to know the witness and get a sense of who he or she is.

[2] Keep Direct Examination Brief and Simple

Do not bury important facts in masses of detail or the jury will not be able to decipher what is and what is not important. Minimize or avoid entirely the use of unimportant facts, and dwell on the important. If you rush too quickly through critical facts, the jury will not fully comprehend them. In short, you should determine in advance what the critical part of the witness' testimony will be, get to it quickly, develop it fully, then stop.

Ask clear, succinct questions. As one commentator pointed out, "This is the age of the television sound bite. People are used to hearing thoughts expressed in simple, catchy phrases. Asking stilted, convoluted questions is going to get you in trouble." n1

Ask questions in a conversational manner. Fancy words are likely to confuse the jury and create the impression that you are showing off. Your questions should be asked in a conversational manner without resort to hyperbole, crescendo, or metaphors. How you phrase a question affects the answer and the impact of the answer on the jury. Therefore, you should choose simple words that advance the theme of your case and avoid stiff formal questions that smack of jargon or legalese. Consider whether you should ask if the bottle was half full or half empty, how fast or how slow a vehicle was travelling, or how light or how dark it was. Keep it simple. It is far better to ask "What happened after you left the party?" than "What events transpired when you terminated your participation in the festivities?"

[3] Phrase Questions to Elicit a Narrative Response

Narrative responses are typically more effective than a rapid succession of specific fact questions that are answered by a "yes" or "no". The more expansive response makes it appear that the facts are originating with the witness, rather than with the lawyer. It also helps minimize your presence during direct examination. The goal during the direct examination

is to create the impression that the witness is speaking directly to the jury, telling his or her own story. If the witness has a good memory, is personable and articulate, and has been appropriately prepared to avoid hearsay and other mistakes, his or her seemingly spontaneous story may be interesting and believable. Typically, the best answers are usually elicited by open-ended questions, such as "Then what happened?" However, you must be prepared to interrupt the narrative to ask about critical facts that were glossed over or omitted or simply to break up the testimony when the narrative takes too long.

[4] Use Leading Questions on Direct Examination in Certain Circumstances

Federal Rule of Evidence 611 prohibits leading questions on direct examination of a witness "except as may be necessary to develop his testimony" or with respect to a "hostile witness, an adverse party, or a witness identified with an adverse party." n2 The "necessary to develop testimony" exception permits deviation from the general rule for the sake of convenience, efficiency or necessity. Consequently, leading questions may be asked of a non-adverse, non-hostile witness in any of the following cirucmstances n3

- Questions are directed to preliminary matters that are necessary foundations or set the stage for questions regarding the material matters in controversy (*e.g.,* the name and address of the witness).
- They are directed to undisputed matters.
- They are used to connect up testimony.
- The witness has limited or impaired understanding, as when the witness is a young child.
- A witness is being asked to contradict statements made at trial by other witnesses.
- The witness needs his or her recollection refreshed.

As a tactical matter you should avoid leading questions on critical issues in the case because responses to leading questions may be ignored or discounted by the jury. Not only will the testimony elicited by the leading question be suspect, but the credibility of the witness, his or her entire testimony, and perhaps even your entire case will be questioned. Moreover, persistent leading questions can lead to repeated, sustained objections, and consequently, repeated interruptions in the direct testimony. They also contribute to an overall impression that you do not know what you are doing or are trying to buttress a weak case by improper methods. Finally, persistent use of leading questions may lead to a reprimand from the court.

You may be tempted to use a leading question, fully aware that an objection to it will be sustained, to signal the witness about what you want him or her to say. Even when an objection to the question is sustained, the signal cannot be erased from the witness' mind and you may then obtain the vital information by a proper question. n4

[5] Control Speed of Direct Examination

When you have a good case, you will want to keep the direct examination moving but not so rapidly that the jury will overlook a crucial aspect of the testimony. Despite advance planning, the exigencies of trial can cause the train to speed up. If you ask a key question and the answer produces the desired response, but the crucial testimony either is hidden in a long answer or the witness has gone over it too quickly for the jury to grasp its significance, what can you do? A number of different techniques may be used. First, you may simply ask the witness to repeat the answer, saying, "Ms. Jones, I'm sorry, I didn't hear what you said regarding Y." Second, you may break apart the answer by asking a more specific question about the crucial evidence. Third, you may repeat the crucial testimony as a part of your next question. Finally, you may interrupt the answer at the crucial time and emphasize the evidence through a follow-up question.

Generally, you should put on as much evidence as possible each day, resisting any temptation to string out the case. Your planned, concise presentation may contrast sharply with opposing counsel's more typical rambling and unfocused approach. The longer the trial takes, the more likely are the jurors to lose interest, forget testimony, and even daydream. It is best to have the jury decide the case as quickly as possible while evidence is still fresh in their minds. It is also best that they not resent you for wasting their time.

[6] Handling Cumulative or Corroboration Witnesses on Direct Examination

Calling cumulative or corroborative witnesses may hurt your case. The jury has a short attention span and wants the trial to end as soon as possible. Calling a number of cumulative witnesses will bore the jury and create the impression that you lack confidence in certain testimony or certain witnesses. Keep in mind that the fewer witnesses you call, the less exposure you create for yourself. When you have sufficiently made a point through one witness, leave the point alone. Do not call another witness just because you have one available. Unless corroboration is required by law, proceed cautiously in calling corroboration witnesses and then only after painstaking pretrial preparation.

However, sometimes you may be compelled by other testimony or the circumstances of the case to call corroboration witnesses. This usually happens with occurrence witnesses; the jury will want to hear from everyone who witnessed the crucial events. In certain cases, a negative inference may be drawn from your failure to call a person to the stand who is available as a witness. When a witness is not available to the other side, for example, the opposing party may be entitled to an instruction, called a "missing witness" instruction, to the effect that the witness did not appear because his or her testimony was not helpful to you.

If you call two or more witnesses with similar testimony, the substance of their testimony should be as consistent as possible. Any doubt you create in your own case will be magnified and exploited by your adversary. On the other hand, it is the common experience of jurors that two people rarely agree totally on what they both witnessed or experienced. Again, you should launch a preemptive strike during opening statements: "You will notice during the trial that the testimony of witnesses almost never totally agrees even though they both saw the same thing. As you know, we all see and remember somewhat differently. However, the testimony will show that, on all important points, the witnesses tell a consistent story."

A technique to use with corroborating witnesses is to keep their testimony brief and simple. When you put the corroborating witness on the stand, focus on only the essential points. Provide the necessary corroboration and then stop. The jury will appreciate the fact that you did not belabor the point. You also will limit the witness' vulnerability on cross-examination. To create the impression that the corroborating witness would testify fully consistent with the primary witness, you may consider introducing your direct examination with a statement like: "Ms. Franks, Ms. Smith already has testified fully about the meeting of January 10, 1992. Rather than go through it all again, let me ask you these few questions." By leading with your strongest witness and keeping the testimony of the corroborating witness very short, you will effectively minimize the usual dangers of calling a cumulative or corroborating witness.

[7] Utilizing Opinions by Lay Witnesses

The federal rules require a witness to testify from personal knowledge. n5 Hence, an occurrence witness must actually have observed the event at issue. This general rule has led to the popular belief that a lay person may not provide opinion testimony. Because a lay person usually has no special qualifications or training to reach the conclusions that may be offered, at trial many lawyers object to opinions by lay witnesses as being nothing more than guesswork, surmise or speculation.

Federal Rule of Evidence 701 permits opinion testimony by a lay witness when the opinions (or inferences) are:

(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Common subjects on which lay opinions may be offered include kinship, handwriting or voice identification, age, speed, and lighting conditions. When obtaining such opinion testimony you should lay a foundation that shows that the witness has a basis for rendering the opinion.

Because opinions by lay persons are susceptible to attack on cross-examination, and may even be excluded as being speculative, you should not rely solely on such testimony for a crucial aspect of your proof. Unless financial constraints exist, opt for an expert opinion. An expert witness is better trained to draw the crucial opinion and is more likely to stick with that opinion on cross-examination. The jury also may consider an expert to be more detached, and less emotional and altogether more credible. n6

[8] Refreshing a Witness' Recollection and Utilizing Past Recollection Recorded

[8.--1] Refreshed Recollection

Often during the course of a trial, a witness will forget aspects of his or her anticipated testimony. When that happens, you may hand the witness a document or even an object to inspect for the purpose of refreshing his or her recollection. Virtually any writing may be used, n7 and the document then need not be admitted into evidence because the witness will proceed to testify from his or her refreshed memory. The fundamental preconditions to refreshing the witness' memory while he or she is testifying at trial is showing a lapse of memory and the existence of something that will refresh the witness' recollection.

Example:

Q:

Tell us what you said and what Mr. Smith said during your meeting on July 20, 1992.

A:

[Witness relates what he recalls.]

Q:

Do you recall anything being said on the subject of widget prices?

A:

I can't recall anything else at the moment.

Q:

Did you take notes at this meeting?

A:

Yes, I did.

(NOTE: you may simply ask if the witness knows of any writing that would refresh his recollection about the

meeting.)

Q:

Ms. Jones, I hand you defendant's Exhibit A for identification and ask if you recognize it?

A:

Yes, it's my notes of that meeting.

Q:

Please take a moment to review your notes. Have you completed your review?

A:

Yes.

Q:

Does defendant's Exhibit A refresh your recollection concerning the meeting?

A:

Yes, it does.

Q:

May I have the exhibit back, please. Now, please tell us what else you recall being said at the meeting on the subject of widget prices.

The witness testifies from his or her memory after it has been refreshed; the witness does not simply read his or her notes to the jury. If the witness cannot testify from memory after reviewing the writing, you may be able to introduce the writing into evidence as a past recollection recorded.

[8.--2] Past Recollection Recorded

Federal Rule of Evidence 803(5) authorizes the admission into evidence of a recorded recollection:

A memorandum, or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

If thus properly qualified, the writing may be admitted and read into evidence. It may not go to the jury, however, unless offered by an adverse party.

Example:

Q:

Ms. Jones, how many people attended X Company's stockholders' meeting on July 20, 1992?

A:

About 75 to 100--I can't recall.

Q:

Who was there?

A:

I can't recall.

Q:

Ms. Jones, did you take notes during that meeting?

A:

Yes, I did.

Q:

Do those notes disclose who was present?

A:

Yes, they do.

Q:

And those notes were taken during the course of the meeting?

A:

Yes, they were.

Q:

Do those notes correctly show who was present?

A:

Yes, they do.

Q:

Would your notes refresh your recollection as to who was present at the meeting?

A:

No, there were just too many people there.

Q:

I show you what has been marked as defendant's exhibit No. 1 for identification and ask whether you recognize it?

A:

Yes, I do.

Q:

What is it?

A:

These are my notes of that meeting.

Q:

Are the notes in the same condition now as when you made them?

A:

Yes.

Direct the witness to read the document to the jury right when it is introduced into evidence.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceTestimonyExaminationGeneral OverviewEvidenceTestimonyExaminationDirect ExaminationEvidenceTestimonyExaminationLeading QuestionsEvidenceTestimonyLay WitnessesGeneral OverviewEvidenceTestimonyLay WitnessesOpinion TestimonyPersonal PerceptionsEvidenceTestimonyPresentation of Evidence

FOOTNOTES:
(n1)Footnote 1. Williams, *What to Do When Your Witness Goes Haywire*, 29 Trial 118, 122 (May 1993).

(n2)Footnote 2. *Fed. R. Evid. 611(c). See Weinstein's Federal Evidence, § 611.06* (Matthew Bender 2d ed.).

(n3)Footnote 3. *See Weinstein's Federal Evidence, § 611.06[2][b]* (Matthew Bender 2d ed.).

(n4)Footnote 4. The ABA Model Rules of Professional Conduct and Code of Judicial Conduct deals with this aspect of coaching the witness only indirectly through general rules. *See* DR7-106, EC 7-25.

(n5)Footnote 5. *See Kaczmarek v. Allied Chem. Corp., 836 F.2d 1055, 1061 (7th Cir. 1987)* (witness may state an inference drawn from facts within witness' personal knowledge); *Fed. R. Evid. 602*.

(n6)Footnote 6. Experts are discussed in *§ 33.16 infra*.

(n7)Footnote 7. *See Fed. R. Evid. 612. See also* Applegate, *Preparing for Rule 612, 19 Litigation 17 (Spring 1993)*.

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CHAPTER 33 Direct Examination *

3-33 Federal Litigation Guide § 33.10

§ 33.10 Anticipate Problem Testimony

To be an effective advocate, you must not only present favorable evidence but you must also anticipate weaknesses and potentially damaging evidence. Jurors do not expect a person to be right all of the time. If you have a weakness in your case, face it squarely, put it into proper perspective, and take steps to minimize the impact it likely will have on the jury. The process of minimizing the weak points begins in the opening statement when you have a chance to prevent the damage that a weakness does when it surprises the jury.

One tactic to consider is addressing the harmful evidence on direct examination, rather than waiting for your opponent to exploit it dramatically on cross-examination. There is no easy answer as to when you should use this tactic and the answer necessarily must differ from case to case. You should consider the following in reaching your decision:

1. Does your opponent know of the harmful evidence?

2. Does your opponent have the necessary skills to exploit the harmful evience on cross-examination?

3. Just how damaging is the harmful evidence and what mitigating factors exist? Should those mitigating factors be presented before your adversary can exploit the weakness?

4. Does the harmful evidence relate to a crucial element of the case or just an incidental matter?

5. Can you present the harmful evidence to the jury gracefully in direct examination?

6. What effect will introduction of the harmful evidence during direct examination have on the scope of cross-examination?

7. Will you gain credibility with the jury by introducing the harmful evidence, thereby demonstrating that you are being candid and fair?

A corollary of this general consideration is that when you decide to disclose a weakness in your case, you must do so in the way that is most effective. Jurors know that people rarely behave as if they were expecting litigation or planned to be called as a witness years later. Memories fade or are wrong. Documents are destroyed or misplaced. This is not shocking. Just explain the weakness honestly. If the explanation is particularly weak, it may be better to offer no

explanation at all and simply structure the testimony to say "I'm sorry." Jurors understand that everyone makes mistakes and will generally admire a witness for his or her honesty and frankness in admitting an error. The witness who says "I'm sorry" will obtain more understanding and sympathy from the jury than the witness who says "I'm sorry, but ..." followed by an implausible explanation.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceTestimonyExaminationGeneral OverviewEvidenceTestimonyExaminationDirect ExaminationEvidenceTestimonyLay WitnessesGeneral OverviewEvidenceTestimonyPresentation of Evidence

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3-33 Federal Litigation Guide § 33.11

§ 33.11 Deal with Adverse and Hostile Witnesses

[1] Adverse Witnesses

An adverse witness may be any witness who is a party or has a special relationship to a party. Adverse witnesses include witnesses who are officers, directors, and managing agents of parties. *Federal Rule of Evidence 611(c)* broadens the definition of an adverse witness to include any witness "identified with an adverse party." Because adverse witnesses are motivated to weaken your case, you should call them sparingly and limit their testimony.

An adverse witness should be called only when necessary to establish an essential element of your case, and then only when you cannot obtain the desired evidence from a safer source. If you must call an adverse witness, you should conduct your examination by leading questions so as to control as much as possible the answers you will receive. n1

The only other time you should consider calling an adverse witness is when you are convinced the witness will make a poor impression on the jury. Again, this is a risky practice because your evaluation of the witness may have been incorrect.

Before calling an adverse witness, you should be satisfied that the court will in fact find the witness to be "adverse." If any doubt exists on this issue, you should have the issue resolved in limine before calling the witness to testify. Even if the judge finds that a witness is not adverse in a legal sense, your perception of the witness and his or her antagonisms to your case may be well-founded. You do not want to be placed in the position before the jury of either excusing the witness after he or she takes the stand or conducting your examination without resort to leading questions. If you find yourself in this predicament at trial, you may choose to cut your losses and excuse the witness almost immediately, even though you run the risk of leaving the jury wondering or creating a negative impression with them. The harm such a witness may inflict on your case may be far more damaging.

[2] Hostile Witnesses

Hostile witnesses should be handled in the same manner as adverse witnesses. A hostile witness is a witness who you thought was on your side, but who turns against you at trial. You will have prepared the witness to testify and you will be proceeding at trial through non-leading, open-ended questions when you find yourself surprised by the hostility of his or her testimony. If this happens, you may interrogate the witness as if on cross-examination under *Federal Rule of Evidence 611(c)*.

Assume the worst about all nonparty witnesses. Every trial lawyer who has had the unpleasant experience of having a witness become hostile at trial knows not to be complacent about the testimony of nonparty witnesses who appear cooperative. When preparing your outline, include references to deposition testimony or exhibits that may be used to impeach the witness should the need arise.

You must avoid becoming involved in colloquy with the court or opposing counsel about the hostility of a witness in the presence of the jury. *Federal Rule of Evidence 607* allows you to attack the credibility of a witness you have called to testify. You may impeach the witness without seeking leave from the court to do so. However, you may want to continue your examination and have the benefit of leading questions. If it is not obvious to the court that the witness is hostile, you may either ask a few additional questions to develop the hostility more fully or ask for a side bar in which you explain to the judge the reasons why you consider the witness hostile.

As with an adverse witness, you will want to keep your examination of a hostile witness as short as possible. Lead the witness to the point quickly, elicit the essential information you need, then stop.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyExaminationGeneral OverviewEvidenceTestimonyExaminationDirect ExaminationEvidenceTestimonyExaminationLeading QuestionsEvidenceTestimonyLay WitnessesGeneral OverviewEvidenceTestimonyPresentation of Evidence

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Evid. 611(c).*

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CHAPTER 33 Direct Examination *

3-33 Federal Litigation Guide § 33.12

§ 33.12 Trial Counsel Should Control Conduct and Demeanor

[1] Counsel's Conduct and Demeanor Plays a Critical Role in Jury's Perception of Case

The importance of trial counsel to the art of persuasion should not be underestimated. While the trial of a lawsuit clearly is directed at developing the facts, it is not "just the facts" that determine the eventual winner. A host of intangibles directly affect how the jury will view the facts of each case and the impression trial counsel makes on the jury is perhaps one of the most important of these intangibles.

You are within sight and sound of the jury throughout the proceedings. The jury's impression of you will be affected by your actions in corridors, on elevators, and during recess. You are never *not* on display. Some lawyers act as if they become invisible when they are not speaking. Your nonverbal conduct is more important than the words you say. What you do and what you say will color the jury's impression of your case. Your conduct, style, sense of confidence, preparedness, and professional abilities will be scrutinized at all times. Remember that jurors are ordinary people who rely on their everyday experiences to decide the case. The matters that persuade them in the courtroom are essentially no different from those that confront them in business and social settings.

[2] Trial Counsel Should Always Be Sincere

Jurors react favorably to a lawyer who is sincere. Sincerity impresses on the jury the feeling that you are fighting a battle you believe in, that you have a solid case, and that you are sharing accurate and complete information with the jury. The sincere advocate may be trusted not to mislead.

Some young lawyers believe that entertaining the jury is the route to ultimate success. The jury will be most responsive if the evidence is presented in a way that captures and maintains the jury's interest. The jury is instructed by the court as to their duty and most jurors take their job as a juror quite seriously. Because they want to reach the correct result, they look to you as vehicles of assistance, *not* as court jesters. Do not confuse the clear, precise direct examination that maintains interest with entertainment that detracts from your message. While your case should be made interesting, you should not strive to entertain the jury at the expense of a sincere, orderly, and credible presentation of evidence. If you assume an unnatural demeanor at trial for the sake of entertaining or overly impressing the jury, you may succeed only in convincing the jury that you are not to be believed. Few people who are not trained actors have the ability to assume a number of roles, and jurors have an uncanny knack of recognizing an imposter. If the jury concludes that you are not being sincere, they may conclude that you are a fraud who is not to be believed and who is attempting to put something over on them. Be natural, be sincere, and be yourself.

Sincerity also requires that you maintain a consistent attitude towards your opposing counsel. Certainly, all lawyers must cooperate to facilitate the trial of the lawsuit, but cooperation does not require you to fraternize with opposing counsel during a recess. If the jurors see you battling during trial and then socializing at recesses, they may conclude that the trial is nothing more than a game or a big show. Any conduct that may suggest that the courtroom is a special private club for you and your opposing counsel must be avoided. If your personality or the strategy in a particular case requires that you be cordial to opposing counsel in the courtroom, the jury will not find any hypocrisy if they see you being cordial with opposing counsel in the hallway.

[3] Counsel Should Strategically Position Himself or Herself

Usually, you should conduct your examination from one place. Pacing around only distracts the jury from what should be the object of their attention--the witness. Most examinations are conducted from the podium, counsel's table, or the edge of the jury box. You may find that the need to record your questions as a back-up for the court reporter requires that you stand behind or beside the podium which cannot be moved because the microphone is wired into the floor. If you have any flexibility, consider the following schematic drawing of a courtroom:

Click here to view image.

Positions A, B, C and D represent likely places from which you can conduct your examination. Position A, nearest the witness box, generally should be used only when handing the witness an exhibit and asking a few brief foundation questions about it. It is otherwise an undesirable location for direct examination because it places you too close to the witness, creating the impression that you and the witness are having a private conversation. From this point it is very difficult to direct your witness' attention to the jury and the witness may not keep his or her voice up to be heard by the jury. Also, it may be difficult to shield your notes from the witness and the jury may feel that you are collaborating with or coaching the witness from a prepared text. Avoid position A-1. This position blocks the jury's view of the witness and also puts you in the position where your back is to the jury.

Position B represents the podium, which is the usual place for conducting examination in most federal courts. The podium is usually placed in the middle of the courtroom a suitable distance from the witness, judge, and jury. Some federal judges insist that all questioning be conducted from the podium. The location is satisfactory, but you may have some difficulty directing the witness' attention to the jury when answering and the jury may be able to observe the written notes from which you are conducting the examination. Advance planning may minimize these problems. The remaining problem with the podium is that the jury may not be able to see most of your body. Communication theory suggests that you will be more credible if you are standing in the open where all your body language is visible. If possible, stand beside or in front of the podium at least some of the time. Vary your position slightly even if the microphone problem means that you cannot stray far.

Some federal judges may allow you to conduct your examination from your table, position C. *Don't*. The benefits of this position derive from the proximity to co-counsel, the opportunity to use notes without the jury being actively aware of them, and the freedom to spread out notes and exhibits. This position, however, is not conducive to directing the witness to the jury and usually is a less desirable place than the podium for conducting direct examination. You will do a better job communicating with both the witness and the jury if you are standing up. You will be more visible and give a greater impression of being in command if you are standing. If you decide to conduct your direct examination from counsel's table, you should generally stand when doing so. If you must sit, be sure to sit up straight and do not cross your legs or position yourself in any way that might suggest disrespect, laxity, or disinterest.

Position D is perhaps the optimal location for conducting your direct examination. Because the position is relatively near the jury, you should first ensure that the judge will permit you to conduct your examination from that point. This position allows you to remove yourself from the jury's line of sight to the witness, forces the witness to make eye

contact with the jury, and also will require the witness to speak loudly enough for the jury to hear his or her testimony. If your adversary is conducting direct examination from this position, watch what he or she is doing closely. The proximity to the jury may allow opposing counsel to display exhibits that are not in evidence or to adopt a style that might curry favor with certain jurors.

[4] Counsel Should Never Show Irritation With His or Her Own Witnesses

During the course of a trial, one of your witnesses may forget or ignore one of the instructions you gave during pretrial preparation. Perhaps the witness will give a long, rambling answer, make an unsuccessful effort at humor, or act overly antagonistic. You might be inclined to show displeasure or irritation so that the witness recalls your preparation session and does not make the mistake a second time. You must resist this temptation. Your irritation with your own witnesses may rub off on the jurors and cause the witness to become even less effective than he otherwise might be. Your irritation may only highlight the unpleasant characteristics of the witness and may even make you a less effective advocate.

If you fail to project an image of confidence, the jury may sense that something has gone wrong with your case. Your attitude will play a prominent role in persuading the jury of the strength of your case. Thus, if a witness becomes a problem, and you think you can correct the problem by a few brief reminders to the witness, consider requesting a short recess, if other circumstances make it appropriate. If a recess is inappropriate, get the witness off of the stand as quickly as possible, but continue to project the image of a competent lawyer who is confident of a favorable outcome.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewEvidenceTestimonyExaminationGeneral OverviewEvidenceTestimonyExaminationDirect ExaminationEvidenceTestimonyLay WitnessesGeneral OverviewEvidenceTestimonyPresentation of Evidence

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CHAPTER 33 Direct Examination *

3-33 Federal Litigation Guide § 33.13

§ 33.13 Direct Examination By Defense Counsel

Direct examination by defense counsel involves some special considerations that derive from the nature, extent, and strength of the plaintiff's proof and the nature of the defenses. For example, in situations where the plaintiff has put in a strong case that appears to have favorably impressed the jury, defense counsel will have to mount a defense that squarely and persuasively controverts the plaintiff's case. The relevant cliche is: "The best defense is a good offense." To be effective, defense counsel must affirmatively contradict the plaintiff's case and may not rest only on a series of denials.

Using a chronological presentation or having a first witness who can provide an overview of the case is not as important a consideration for the defendant as it is for the plaintiff. Instead, defense counsel should go for the jugular, focusing attention on a major weakness of the plaintiff's case or on a major strength of the defendant's own case. By doing so, defense counsel gains credibility, rekindles the jury's interest, and paves the way for additional favorable evidence.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceTestimonyExaminationGeneral OverviewEvidenceTestimonyExaminationDirect ExaminationEvidenceTestimonyLay WitnessesGeneral Overview

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CHAPTER 33 Direct Examination *

3-33 Federal Litigation Guide § 33.14

§ 33.14 Compelling Witness Attendance

[1] Counsel Should Subpoena All Witnesses He or She Intends to Call at Trial

Any person who is not your client whom you intend to call at trial should be subpoenaed. While you may be completely comfortable and confident that a nonparty witness will appear as promised, he or she is not compelled to do so, and without the subpoena you will have no way to command the witness' appearance. n1

A subpoena also protects the witness. For example, it provides proof to the witness' employer of the need to be absent from work on a particular day. The subpoena also gives the witness someone to blame for his or her testimony. If a witness is confronted by a friend or customer, for example, who says "What's this I hear about you testifying against Joe?" the witness may blame the court. Moreover, some lawyers on cross-examination make it their practice to ask whether the witness was subpoenaed to appear. If a witness has not been subpoenaed, your adversary may attempt to create the impression that the witness is biased and in consort with your client.

[2] Issuing and Serving Trial Subopenas

Subpoenas are issued either by court clerks or attorneys. n2 If the clerk is requested to issue the subpoena, the subpoena is issued in blank, but for the signature. n3 No showing of materiality or relevance need be made to obtain a subpoena, and leave of court is unnecessary. Issues of materiality and relevance are raised by a motion to quash filed before the date of the appearance stated in the subpoena.

Attorneys may issue subpoenas for courts in which they are authorized to practice. n4 In addition, attorneys may issue subpoenas for courts in the district where the subpoena is compelling a deposition or production, if that deposition pertains to an action pending in a court where the attorney is authorized to practice. Therefore, if an attorney to an action in one district needs to subpoena a witness for a deposition in another district, the attorney may issue the subpoena on behalf of the latter court even though the attorney is not authorized to practice law in that court. In addition to the provisions of *Federal Rule of Civil Procedure 45(a)(3)*, local rules of court may give magistrate judges authority to issue subpoenas. n5

A subpoena with witness fees may be served by any person who is not a party and is not less than 18 years of age. n6 As a practical matter, you should have the subpoena served by a special process server who satisfies the requirements of this rule. A special process server provides you with control over when and in what manner the subpoenas will be served.

The rule does not provide any time period in advance of trial by which the subpoena must be issued and served, but you should see to it that all necessary subpoenas are served a reasonable time before the witness is required to appear. Generally, service two weeks in advance will be found to be reasonable. As the trial date approaches, you should know where to find your witnesses. Discovering that a key witness is out of the country and will not return until after your trial would be utter disaster. While not many nonparty witnesses will be so cooperative as to rush back to the United States to offer testimony, you may seek to avail yourself of the "interest of justice" provision of section 1783 of the Judicial Code n7 to compel witness attendance. However, it is unlikely that the judge will be persuaded or that your tactics will endear the witness to you and your case.

[3] Territorial Limitations of Subpoenas

All subpoenas may be served: n8

- Anywhere in the district of the court from which it is issued
- Any place within 100 miles of the place of the trial, hearing, deposition, production, or inspection specified in the subpoena
- Anywhere in the state where a state statute or rule would permit service of a subpoena issued by a state court sitting in the place of the trial, hearing, deposition, production, or inspection

These territorial limitations on the service of subpoenas are meant to prevent "undue inconvenience" to witnesses. n9 The Rule uses a state court's subpoena reach as a yardstick for the reach of a subpoena issuing from a district court in that state so that the district court subpoena will be "at least as extensive as that of the state courts." n10 If the state court rules would allow service of a subpoena for a greater distance than the "100 mile" or "within the district" distance of the federal rule, n11 the state-sanctioned distance will be adhered to, since it is "likely to reflect the varying degrees of difficulty and expense attendant on local travel." n12 In addition, a subpoena may be served at any other place when authorized by a United States statute. n13 The circumstances and procedure for serving a subpoena on a United States national or resident who is in a foreign country are governed by *28 U.S.C. § 1783*. n14

[4] Witness Fee Must Be Tendered with Subpoena

Witness fees must be tendered with the subpoena unless it is issued on behalf of the United States or any agency thereof. n15 Under *28 U.S.C. § 1821*, the witness must be paid an attendance fee of $40 per day for each day's attendance at trial, including time spent in travel. A witness is entitled to his or her actual transportation expenses when traveling by common carrier so long as the witness uses "the most economical rate reasonably available." n16 Otherwise, mileage expenses for witnesses are set based on the current allowance for federal employees on official business. n17 If the witness' home is too far to permit commuting, he is allowed a per diem as subsistence, also based on the per diem paid to federal employees on official business away from home. n18 As a practical matter, you will want to pay in full for your witness' travel, hotel, and meals. Exceeding the statutory rates affects only the amount you may claim as costs if you prevail in the case.

All witnesses are entitled to the fees specified in *28 U.S.C. § 1821*, whether or not they are subpoenaed to give testimony.

[5] Ignoring Trial Subpoena Subjects Witness to Contempt

A witness may not ignore a subpoena without subjecting himself or herself to contempt. *Federal Rule of Civil Procedure 45(f)* provides:

Failure by any person without adequate excuse to obey a subpoena served on that person may be deemed a contempt of the court from which the subpoena issued.

If a motion to quash is pending, the witness may refuse to comply with the subpoena until the motion is decided. n19 The decision whether there is an adequate excuse for failure to obey a subpoena is within the court's discretion. n20

If you suspect that a witness you would like to call at trial will move to quash the subpoena, you should make the subpoena returnable before you anticipate calling the witness so that any motion to quash can be decided without affecting the order of proof you have developed. If no motion to quash is filed, you may ask the judge to continue the subpoena in force until the desired date. You are under no ethical prohibitions in contacting a nonparty witness, and as the trial progresses you can advise the witness of the exact date on which he or she should appear.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSubpoenasCivil ProcedureTrialsGeneral OverviewEvidenceTestimonyExaminationDirect ExaminationEvidenceTestimonyLay WitnessesGeneral Overview

FOOTNOTES:

(n1)Footnote 1. Where an unsubpoenaed witness who cooperated throughout the proceeding does become unavoidably absent, it is an abuse of discretion for the district judge to deny a continuance requested by the party calling that witness. *Grochal v. Aeration Processes, Inc., 797 F.2d 1093, 1097 (D.C. Cir. 1986)* , *vacated on other grounds, 812 F.2d 745 (1987)* ; *see Trakas v. Quality Brands, Inc., 759 F.2d 185, 187-188 (D.C. Cir. 1985)* .

(n2)Footnote 2. *Fed. R. Civ. P. 45(a)(3).*

(n3)Footnote 3. *See McGill v. Duckworth, 944 F.2d 344, 353 (7th Cir. 1991)* , *cert. denied, 503 U.S. 907 (1992)* .

(n4)Footnote 4. *See Kupritz v. Savannah Coll. of Art & Design, 155 F.R.D. 84, 86-87 (E.D. Pa. 1994)* .

(n5)Footnote 5. *28 U.S.C. § 636(b)(3).*

(n6)Footnote 6. *Fed. R. Civ. P. 45(b)(1).*

(n7)Footnote 7. *28 U.S.C. § 1783(a)* provides:

> (a) A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, or requiring the production of a specified document or other thing by him, if the court finds that particular testimony or the production of the document or other thing by him is necessary in the interest of justice, and, in other than a criminal action or proceeding, if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance or to obtain the production of the document or other thing in any other matter.

(n8)Footnote 8. *Fed. R. Civ. P. 45(b)(2).*

(n9)Footnote 9. Committee Note of 1980 Amendment to *Fed. R. Civ. P. 45.*

(n10)Footnote 10. Committee Note of 1980 Amendment to *Fed. R. Civ. P. 45.*

(n11)Footnote 11. *Fed. R. Civ. P. 45(b)(2).*

(n12)Footnote 12. Committee Note of 1980 Amendment to *Fed. R. Civ. P. 45*; *Yun Ja Chung v. Chrysler Corp., 903 F. Supp. 160, 164 (D.D.C. 1995)* .

(n13)Footnote 13. Pursuant to *15 U.S.C. § 23*, which pertains to suits by the United States under the antitrust laws, a writ of subpoena may be issued for a distance greater than 100 miles with permission of the court after proper application and cause shown.

(n14)Footnote 14. *28 U.S.C. § 1783.*

(n15)Footnote 15. *Fed. R. Civ. P. 45(b)(1)*; *see also 28 U.S.C. § 1825.*

(n16)Footnote 16. *28 U.S.C. § 1821(c)(1).*

(n17)Footnote 17. *18 U.S.C. § 1821(c)(2).*

(n18)Footnote 18. *18 U.S.C. § 1821(d)(1)-(3).*

(n19)Footnote 19. *See Moore's Federal Practice, § 45.04[3]* (Matthew Bender 3d ed.).

(n20)Footnote 20. Generally, the advice of an attorney is not an adequate excuse. *See MOORE'S FEDERAL PRACTICE, § 45.04[6]* (Matthew Bender 3d ed.).

* Chapter 33 was written by Richardson R. Lynn, Esq. of Nashville, Tennessee; the chapter was revised in 2004 by Andrew E. Westley, Esq. of San Francisco, California.

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CHAPTER 33 Direct Examination *

3-33 Federal Litigation Guide § 33.15

§ 33.15 Using Depositions Affirmatively at Trial

[1] Using Deposition Testimony When Witness Is "Unavailable"

Deposition testimony is inadmissible at trial unless it falls into one of the exceptions set forth in the Federal Rules of Evidence. An unavailable declarant is one exception. n1

Federal Rule of Evidence 804 defines an unavailable witness. In federal court, a witness is "unavailable" when either:

- The witness is exempted from testifying under a claim of privilege
- The witness refuses to testify
- The witness testifies to a lack of memory of the subject matter of his or her statement
- The witness is unable to testify because of death or mental or physical illness
- The witness' attendance at trial may not be compelled by subpoena

The district court may properly exclude a plaintiff's deposition testimony if the plaintiff is responsible for his or her own absence. The fact that a party is more than 100 miles from the court does not require the district court to automatically admit that party's deposition. Rather, the trial court may consider all the circumstances related to the party's absence to determine whether the deposition may be used. n1.1

[2] Deciding Which Portions of Deposition Testimony Should Be Read at Trial

Live testimony is far more interesting to the jury than deposition testimony. Consequently, you normally should not read deposition transcripts at trial. Videotaped depositions are so common that reading depositions at trial seems hopelessly old fashioned. Jurors love videotape. They are accustomed to obtaining information from television. And this without commercials! The extra expense, especially where you anticipate that the witness will be unavailable or you do not intend to pay an expert witness to appear at trial, is nominal. You then edit the videotape and opposing counsel can play his or her edit by way of cross-examination. The process for agreeing on the edits is now part of the pre-trial order in most cases. If there is no videotape, be aware of the need to make it lively.

When you must read deposition testimony, keep in mind that the reading should be like a direct examination. In addition to reading substantive testimony of events, you also should read those sections of the deposition that familiarize the jury with the witness--tell the jury who the witness is and why he or she should be believed. You should also read complete answers to the jury. Since your adversary has the right to insist that the jury hear complete answers, any attempt to pick and choose parts of an answer that take the answer out of context will accomplish little other than to convince the jury that your entire case is suspect.

The most effective way to read depositions into evidence is to place a colleague or someone from your office on the witness stand to read the answers while you read the questions. This approach helps to enliven the transcript and makes the testimony more interesting, easier for the jury to follow, and easier to understand. Keep in mind that whomever you place on the witness stand to play the role of the witness will be evaluated by the jury much like any other witness. The true demeanor of the person who gave the testimony will never be known to the jury. The testimony of a person with numerous undesirable characteristics might be effective and persuasive when read at trial by an "actor" with a personable and convincing demeanor. Remind whoever will read testimony that the presentation should be clear, and statements should be read with conviction. Rehearse the reading before delivering it to the jury.

[3] Advise Court in Advance as to Deposition Testimony to Be Read at Trial

Before trial you should advise the court of which parts of which deposition transcripts you intend to read at trial. n2 Standard pretrial orders of many federal judges require the parties to designate and counterdesignate portions of deposition transcripts expected to be read at trial. One party first will designate by page and line those portions of the transcript he or she intends to read at trial. The other party then has an opportunity to counterdesignate those portions of the transcript that are necessary to clarify, explain, or complete the answers given in the designated portions.

Pretrial designations and counterdesignations will enable you to focus on any objections that were made at the time of the deposition. By seeking a ruling on these objections prior to the time the transcript will be read into evidence, you will be able to read the transcript to the jury without interruption.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsDepositionsEvidenceTestimonyExaminationDirect ExaminationEvidenceTestimonyLay WitnessesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Evid. 804.*

(n2)Footnote 1.1. *Garcia-Martinez v. City & County of Denver, 392 F.3d 1187, 1191 (10th Cir. 2004) .*

(n3)Footnote 2. *See generally* Ch. 27, *Pretrial Conference.*

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CHAPTER 33 Direct Examination *

3-33 Federal Litigation Guide § 33.16

§ 33.16 Using Expert Witnesses

[1] Understanding Rules Governing Expert Testimony

Under the Federal Rules of Evidence, any witness may offer an opinion that is "rationally based on" the witness' perception and helpful to the determination of a fact in issue. n1 Additionally, the Rules permit you to call a witness who has specialized knowledge, skill, experience, training, or education that may assist the jury in understanding the evidence or determining a fact in issue. n2

At trial, the admissibility of expert testimony turns on the court's determination of whether the expert's testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." n3 The barriers that you must overcome in federal court before expert testimony is admissible were set out in *Daubert v. Merrell Dow Pharms.*, n4 wherein the Supreme Court held that the Federal Rules of Evidence restrict the admissibility of expert testimony, and that trial judges have the "gatekeeping" responsibility of screening such evidence.

Under Federal Rule 402 of Evidence, a qualified expert may offer an opinion if "scientific, technical, or other specialized knowledge will assist the trier of fact... ." As the test of Rule 702 is "technical knowledge," an expert opinion must involve a level of certainty beyond speculation or subjective belief, i.e., a standard of "evidentiary reliability" or trustworthiness. The Court in *Daubert* offered general observations concerning some of the pertinent factors bearing on the admissibility of expert testimony: whether the theory has been reliably tested; whether the theory has been published or otherwise subjected to review in the scientific community; the known or potential rate of error of a particular technique; whether the theory has "general acceptance" in the scientific community, or has garnered little support; whether the opinion is based on facts reasonably relied on by experts in the particular field; and whether the probative value of the testimony is outweighed by any of the factors enumerated in *Federal Rule of Evidence 403*, such as prejudice or waste of time. These considerations are merely factors to be considered by a judge.

A witness is qualified as an expert by his or her training, experience, skill, or knowledge. n5 The subject matter of his or her testimony must be capable of assisting the trier of fact in reaching its decision, but must not supplant the factfinder's obligation to make the decision. Under *Federal Rule of Evidence 704*, however, expert testimony "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

[2] Assessing Whether Experts Should Be Retained

An expert's utility in litigation goes beyond merely offering testimony. Experts, whether retained merely as consultants

or to testify at trial, may educate and assist you with respect to technical aspects of a case. Therefore, to maximize the value of the experts you retain, you should quickly identify those issues that are appropriate for expert assistance.

A consulting expert may be able to assist you in preparing for client and witness interviews and depositions; he or she may suggest questions to ask, areas to explore and documents to request. Some thought should be given to having the expert attend interviews and depositions. The expert may be able to assist you in formulating and structuring discovery. He or she may draft or suggest interrogatories or answers to interrogatories. The expert also may be used to analyze documents produced, prepare summaries of voluminous documents, and prepare demonstrative evidence for use at trial. Finally, the expert may assist trial counsel in undermining an adverse expert. The expert may collect prior writings of the adverse expert and generally recognized industry treatises that may impeach the adverse expert. And, of course, your expert should be able to identify the weaknesses in the adverse expert's analysis and opinions. Note, however, that if a testifying expert performs any of these tasks, the results will be discoverable. n6

Once you have identified the issues on which expert testimony would be useful, you must consider the economic aspects of the case. If the case presents minimal damage exposure or your client is relatively impecunious, you may decide to forego an expert. This may be risky. In some cases, expert analysis and opinion is essential to success. In those cases, you should consider whether any of your potential witnesses could qualify as an expert on the "expert" issues in the case. An in-house expert may be better than no expert at all. Use both the opening statement and preliminary questions on direct examination to raise and deflate the issues of bias or prejudice on the part of the in-house expert.

[3] Locating Appropriate Experts

Once you have decided to use an expert, either as a consultant or as a witness, you must begin the selection process. The first step is to identify the particular field of expertise most suited to the issues to be resolved. The table that appears as the appendix to this chapter may also be of assistance. Consider the following sources as well:

- **Client suggestions.** For example, if you are defending a case for a major bank which requires expert testimony about economic projections, you may want to consult with your client's chief economist who may know experts in that field.

- **Internet Searches.** Many witnesses who testify regularly as experts have websites setting forth their background, areas of expertise, and prior cases in which they have participated as an expert witness.

- **Local colleges or universities.** Home grown experts are more persuasive with jurors than experts from distant places, even if the local expert may have a less impressive resume or be testifying for the first time. (If the expert is less experienced as a witness, you will need to spend more time in pretrial preparation.) While a university is unlikely to have a formal referral system, the chairperson of the appropriate department may provide names of faculty members and alumni or may have a specific recommendation for you. Even if the names produce no candidates with the requisite skills, those contacts may be able to steer you to other sources.

- **Trade associations and professional organizations.** Many of these groups have referral systems and they usually are quite helpful in identifying members with particular expertise. These groups also may be able to provide you with directories or handbooks that may identify potential candidates.

- **Attorneys who have handled similar cases.** Not only may these attorneys supply the names of experts within the pertinent field, but they also may furnish information on the performance of various experts at trial, and their helpfulness, cooperation, and thoroughness in trial preparation.

- **The Association of Trial Lawyers of America (ATLA).** ATLA will provide members with a list of attorneys who have handled cases regarding a particular topic within the last ten years. These attorneys then may be contacted to find out which experts they have used.

[4] Assess Vulnerability of Potential Experts

You should try to assess each potential expert's vulnerability to attack by your adversary. Inevitably, the type of person you are considering for the job of expert witness has written books or articles, or has given a number of speeches. During your preliminary interview, you should ascertain whether the candidate has ever expressed an opinion contrary to your position in the case. If you cannot distinguish your case from the expert's prior, contrary opinions, or if there is no good explanation for the expert's change in attitude, the candidate should be dropped from consideration. You do not want an expert witness who creates the impression that he or she can be "bought" for the right price. Moreover, such a witness may lack the conviction to stand up to cross-examination. An expert who agrees with your adversary is obviously worse than no expert at all.

[5] Exercise Caution as to In-House Experts

On many occasions you will find an employee of your client who has all of the characteristics necessary to be an outstanding expert witness. The only real problem is that he or she is an employee of a party. Expert witnesses should have the aura of objectivity. Even though they receive compensation for testifying, they are third parties who are more likely to be believed than a person who owes his or her livelihood to one of the litigants. Consequently, unless financial constraints preclude you from hiring an outside expert, you should be reluctant to use an in-house person as an expert who will testify at trial in the case. n7

That is not to say that an in-house expert never should be used. Given the size of the claim involved or the client's financial condition, an employee may be the only realistic alternative. If you decide to use an in-house expert, the person chosen should not have had any personal involvement in the matters in controversy. Personal involvement may cloud objectivity and judgment; an in-house expert with such personal involvement may try to win the case to vindicate himself or herself at all costs and will be extremely vulnerable to cross-examination. Your in-house expert should belong to professional associations and be a person who is recognized in the industry. For example, an employee who chairs a trade association committee on developing adequate warning signs may be a better expert than a bright and knowledgeable assistant.

Furthermore, in-house experts may be used in conjunction with outside experts to reduce costs. The in-house expert can work closely with the outside expert in analyzing documents, preparing summaries, and digging for information the outside expert needs to formulate his or her opinion.

In-house experts are especially helpful for pretrial assistance. The in-house expert is familiar with company policies and procedures, filing systems and the internal workings of the company and thus may work rapidly in obtaining desired information. The in-house expert also is likely to know the jobs of his or her fellow employees and may be able to locate quickly the right person to interview. An in-house expert may also be used as a source of information and may provide guidance to you as the case progresses to trial.

[6] Consider Using More Than One Expert

You should not retain more than one expert simply for the sake of numbers. You are not likely to enhance your chances of success merely by having more experts than your adversary. Indeed, the danger exists that your own experts may contradict one another during their cross-examinations. Moreover, having two experts testify about essentially the same issues may create an unfavorable impression with the jury.

However, there are some circumstances in which there are compelling advantages in retaining more than one expert. For example, it might make sense to retain multiple experts if the experts' fields are limited or highly specialized, and the issues in the case transcend more than one speciality. You may also wish to retain multiple experts in order to prevent them from being hired by your opponent if there are few qualified experts in a field.

[7] Protecting Expert and Client

If you retain an expert to testify, the opposing party is entitled to discover the expert's identity, the subject matter of the expert's testimony, the expert's opinions, and the basis for the expert's opinions. n8 However, the Advisory Committee Notes on *Federal Rule of Civil Procedure 26(b)(4)* state that the identity of an expert who is informally consulted and has not been employed to testify or to assist in trial preparation is not discoverable. n9

The identities of all experts you plan to call at trial may be the subject of an interrogatory early in the case. If you disclose a testifying expert before you determine the nature of the expert's opinions, you may later need to discharge the expert or not use him or her to testify. This will attract your adversary's attention. The safest approach is to discuss potential opinions first and retain the expert as a consultant, leaving the decision on trial testimony for a later time.

Effective December 1, 2010, Rules 26(b)(3)(A) and (B) protect drafts of any expert report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded. n9.1

Additionally, Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any expert 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 do any of the following: n9.2

- Relate to compensation for the expert's study or testimony
- Identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed
- Identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed

[8] CHECKLIST: Preparing Experts

Expert witnesses present many of the same preparation problems as lay witnesses. Generally, an expert should be prepared in the same fashion as any other witness. n10 You should not abbreviate or dispense with preparation of an expert just because he or she is a professional.

In preparing an expert, you should consider the purpose for which you will be calling the expert at trial: to apply his or her specialized knowledge to assist the jury in understanding the case and thus in reaching the proper verdict. The jury may view the expert as the most important part of the case, and the impression that the expert makes on the jurors may improve their appraisal of your other witnesses. The testimony of an expert must proceed smoothly with no surprises. The expert must be confronted with his or her prior opinions and writings in advance of trial, and should be thoroughly prepared for cross-examination by your use of hypothetical questions. Therefore, experts present unique problems and require more extensive preparation than lay witnesses. A number of rules should be followed in preparing an expert to testify.

1. Preparation should begin immediately after selection, and it should be a give-and-take process. The expert likely will have to educate you on technical matters so that you ask the right questions and foresee possible areas for cross-examination. Even though you may have a good grasp of the concepts involved, it is a mistake to conduct witness

preparation without the benefit of the expert's insight regarding your proposed line of questioning, other fertile areas of inquiry, and possible cross-examination. Undoubtedly, your adversary will use his or her expert to find holes in your expert's opinions and to formulate questions for cross-examination. In preparing your expert to testify, you should always ask how other knowledgeable persons in the industry would receive or react to the testimony you plan to offer.

2. You must make a diligent effort to keep your expert objective. You do not want a surrogate advocate who may argue with opposing counsel or take extreme positions in order to win the case. If the expert appears to be an advocate, the jury may feel he or she is biased. The expert should be courteous and respectful to opposing counsel. The expert should be clearly instructed not to argue with opposing counsel or to express personal views regarding the opposing party or counsel.

3. Make sure that your expert is familiar with recent editions of any standard treatises in his or her field. The expert also should review any relevant articles and books he or she has written. You also should assure yourself that your expert's definition of terms coincides with those appearing in technical dictionaries and encyclopedias. These sources certainly will be examined by opposing counsel and opposing experts.

4. Before calling the expert to testify, you also should learn how the expert's peers evaluate him or her. Part of this process entails discovering whether anything derogatory exists about the witness so that you can steer clear of opening the door on such matters. The expert should be told that opposing counsel will thoroughly investigate the expert's past, and the expert should be encouraged to disclose any discrediting information.

5. Provide the expert with a comprehensive and balanced view of the case so the expert understands the relevancy of his or her own testimony. Note, however, that such information is discoverable.

6. Make sure that your expert realizes he or she is not expected to be expert in all fields. If a question outside the expert's areas of expertise is asked on cross-examination, he or she should feel comfortable admitting that the question is outside the expert's area of expertise. The expert's candor in such an admission will bolster his or her credibility.

7. You should make maximum use of visual aids to help the jury understand expert testimony. n11 You should work with your expert in advance of trial to develop demonstrative evidence that is both clear and effective.

8. Be sure that you provide the expert all necessary physical evidence and exhibits to be analyzed or tested by your expert.

9. Determine in advance what qualifying questions you will ask. For example, you do not want to ask at trial whether the witness has written articles in his or her field only to hear a firm "no." By jointly developing the format for qualifying the expert, you can avoid creating doubt about your witness' credentials. The question format for planning direct examination is virtually mandatory for expert witnesses because the each question must be precise.

10. The expert should be advised to use clear, everyday language that may be easily understood by the average juror. The expert should be able to define or explain technical or specialized concepts. Instruct the expert to analogize to everyday life, and do not hesitate to make suggestions.

11. You and your experts should cooperate closely in devising the most persuasive format for your expert's testimony. If you will use a hypothetical question, write it out in advance and review it with your expert. Remember to include all relevant facts in any hypothetical question.

12. Explain what your opinion questions will be and how you will be required to phrase them. You should explain that certain terms may have a different meaning in court than they have in the sciences. For example, legal causation differs from scientific concepts of causation with which he may be familiar.

13. Have the expert review his or her deposition testimony. Go over the deposition with the expert to point out problems or necessary clarifications. Also show the expert any document he or she may be asked about during cross-examination.

14. After the examination format has been developed, you should have one or more practice sessions with the expert.

15. The expert must be thoroughly prepared for cross-examination. He or she should be aware that a common technique is for opposing counsel to offer a hypothetical question, or series of hypothetical questions, containing fact assumptions that differ from those used by the expert in direct examination. Tell the expert to listen carefully to each question and to remain calm and collected during cross-examination. Finally, tell the expert to stick to his or her opinions.

16. Explain to the expert that you will have an opportunity for redirect testimony. The expert should not become frustrated or angry if opposing counsel will not let the expert fully explain an answer. You will be able to fix that on redirect.

17. Advise the expert not to be embarrassed by questions about compensation. The expert should consider testifying that his or her time is valuable, that the fees charges are reasonable for a person with his or her qualifications, and that the fees do not depend on the outcome of the trial. The expert should also admit, if questioned, that he or she has thoroughly discussed his or her trial testimony with you so that the jury could better understand the technical matters involved.

18. Explain to the expert that cross-examination questions properly may be answered "yes" or "no"; not every response by the expert should be a definitive treatise on the subject.

[9] Qualify Witness as an Expert

As a purely legal matter, expert opinion testimony will not be admitted into evidence until the witness is qualified as an expert. Moreover, testimony regarding the qualifications of an expert helps persuade the jury that the expert has the necessary qualifications to render accurate and trustworthy opinions. Therefore, direct examination of an expert should commence with the expert's qualifications. Let the jurors get to know your expert so they can develop confidence in his or her opinions. Fully develop the expert's educational and employment background, experience in the specific industry, professional associations, public or professional offices held, honors received, and articles, books and publications authored. Remember, however, that formal education and honors are not an essential prerequisite to qualifying a witness as an expert. In a given situation, training and experience alone may suffice. In those situations you should downplay the witness' education and highlight his or her on-the-job training and experience. In every case, testimony about the expert's qualifications should be tailored to impress on the jury that the expert is credible.

Be wary of stipulating to the qualifications of your expert. In most cases in which you will use an expert witness, your opponent also will have one. Your goal is for the jury to view your expert as more qualified and reliable than your adversary's expert. The experts' respective qualifications will certainly be considered by the jury in making this assessment. For this reason, you do not want your adversary to stipulate to your expert's qualifications. It is far more effective to have your expert tell the jury just how expert he or she is, than to rely on a dry, terse statement that opposing counsel stipulates to the qualifications of your expert. If you and your adversary stipulate to the qualifications of each other's expert witnesses, the jury will have no basis to differentiate between the qualifications of the witnesses. Let your witness show off his or her credentials to the jury.

In most cases, you should have little difficulty in qualifying your expert. An "expert" is not viewed in a narrow sense. Under *Federal Rule of Evidence 702*, an expert is a person qualified by knowledge, skill, experience, training or education. n12 District courts have broad discretion to admit or exclude offered expert testimony. n13 A court may exclude testimony where the expert lacks training or experience in the field or where the expert appears to be unreliable.

n14

[10] Introducing Expert Opinion Testimony

[10.--1] Three Approaches to Develop Expert Opinion Testimony

Federal Rules of Evidence 703 and *705* control the method by which counsel introduces opinion testimony from his or her expert. Rule 703 provides:

The facts or data in the particular case on which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Under this rule, counsel has three approaches available to develop opinion evidence. n15 First, the expert may provide an opinion based on his or her firsthand knowledge. Second, the expert may provide his or her opinion in response to a hypothetical question. The expert also may provide an opinion based on data presented to the expert outside of court and developed by someone other than the expert. Such data need not be admissible evidence in the case.

The companion rule, *Federal Rule of Evidence 705*, provides:

The expert may testify in terms of opinion or inference and give the reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

This rule obviates the necessity of laying an elaborate foundation for expert opinion testimony. Indeed, this rule eliminates the need to ask a hypothetical question specifying all the facts that the expert knows or assumes in formulating his or her opinion. n16 In most situations, however, the expert should be asked on direct examination to state in detail the basis of any opinions. It must be remembered that the practitioner's goal is to persuade the jury that the expert witness is more believable than the opponent's expert. By asking the expert to provide the basis for his or her opinion, you allow the expert to expand on his or her views, making the opinion more believable and meaningful for the jury. The adversary cannot be counted on to probe the basis for the expert's opinion on cross examination. The opponent's cross examination may relate solely to bias or qualifications, leaving the expert's naked opinion untouched; the jury may then never hear the basis of the expert's opinions. When the adversary then fully develops the factual basis of his or her own expert's opinions during the case, the jury may conclude that the opinion of the opponent's expert is well supported, and is more likely true than counsel's expert's unsupported opinion. The opponent will also likely point out the differences in both experts' opinions in his or her closing argument.

[10.--2] Expert Testimony Based on Firsthand Knowledge

The expert may render an opinion based on firsthand observation. A good example of this situation is an expert who inspects an allegedly defective product and renders an opinion based on that inspection. The questioning should demonstrate what inspection was made, what that inspection revealed, and what opinions the expert formed as a result of his or her inspection and findings.

[10.--3] Expert Testimony Based on Hypothetical Questions

An expert opinion need not be based on facts within the expert's personal knowledge, but may be based on assumed facts. *Federal Rule of Evidence 703* contemplates two types of hypothetical questions. First, the expert witness may listen to the testimony relevant to his or her opinion as it is presented in open court. The expert then is asked to assume as true the facts developed and to render an opinion based on those facts. Second, the examiner may read a prepared question that includes all of the necessary facts that the expert is asked to assume as true. It is not necessary that those

facts be undisputed; they only need be supported by evidence in the case. n17 Some courts will allow the attorney to include in the hypothetical question facts not yet developed on the representation that the facts will be proven by additional witnesses. If those facts are not developed later in the case-in-chief, opposing counsel should move to strike the expert's answer. Generally, the better approach is to call the expert to testify after all necessary facts have been developed. That is the time when the opinion is psychologically most powerful to the jury.

The practitioner has latitude in determining which form of hypothetical question to ask. Although the second type--including all necessary facts in the question--may present a risk of a lengthy and intricate question, it has advantages that outweigh any possibility of jury confusion or unrest. This form of hypothetical question highlights the salient facts. It provides you with an opportunity to make a speech to the jury. It avoids requiring the expert to sit through lengthy testimony. Moreover, the problems of length and possible confusion inherent in this type of question usually may be remedied by careful drafting and a clearly enunciated reading of the question to the expert. A blow-up of the question may be displayed for the jury to see. You could then refer to it in closing argument, going through each part of the question and reminding the jury how that issue was resolved by testimony in the client's favor.

The hypothetical question should be drafted in advance of trial in consultation with the expert. The expert must make sure that the proposed hypothetical question contains sufficient facts to serve as the basis for his or her opinion. n18 You should caution the expert that he or she may be cross-examined on each assumed fact and may be asked whether contrary facts would affect the opinion. For this reason, it is important that the expert understand the evidence of record that supports the assumed facts.

[10.--4] Expert Testimony Based on Secondhand Knowledge

The Advisory Committee Notes to *Federal Rule of Evidence 703* indicate that an expert opinion need not be based only on firsthand knowledge or assumed facts presented to the witness by hypothetical question. It may be impossible for the expert to have firsthand knowledge as, for example, when the allegedly defective product is destroyed when the plaintiff was injured. It is no longer available for inspection or testing. The expert also may base his or her opinion testimony on "presentation of data to the expert outside of court and other than by his own perception," such as scientific evidence. When an expert witness relies on scientific evidence, the evidence is admissible, pursuant to *Federal Rule of Evidence 702*, if relevant and based on a reliable foundation. n19 The trial court's decision to admit or to exclude an expert's testimony based on scientific evidence is discretionary, reversible only for an abuse of such discretion. n20 If an expert is willing to rely on secondhand evidence in making crucial decisions in his or her own practice, he or she should be able to rely on such evidence in rendering an opinion at trial. n21 The Advisory Committee Notes provide the best example:

Thus, a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X-rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance on them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.

The rule recognizes that asking a hypothetical question after a proper foundation is laid in such cases will be expensive and inefficient. And the hypothetical question may be too lengthy and complex to be within the understanding of the jury. In such circumstances, the witness may provide his or her opinion just as if he or she had firsthand knowledge of the underlying facts.

The use of this method of developing expert opinion is not limited to physicians. For example, experts on accounting matters should be able to rely on audited financial statements of a company without the need to introduce all of the underlying documents and the methodology employed in auditing such statements.

[10.--5] Use of Treatises

Because your expert must be believed by the jury, you may consider ways to augment the expert's credibility on direct examination. Sometimes a learned treatise is used in the direct examination of an expert to corroborate the testimony of the expert and thereby add to the expert's aura of trustworthiness. *Federal Rule of Evidence 803(18)* supports such use by providing:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

Nonetheless, you should introduce learned treatises during direct examination only if some need exists to do so beyond mere corroboration. First, the lawyer who does so opens up the door to cross-examination on the basis of those treatises. You should check to determine if conflicting evidence appears elsewhere in the treatise, in which case the expert will have undermined his or her own credibility. Second, you should consider using a treatise only when you anticipate a strong challenge to the witness' opinions. Even then, it may be better to save the treatises for redirect examination. Finally, too frequent reliance on learned treatises to bolster your expert's opinion may create the impression that you are concerned with your expert's testimony--it may be viewed as a sign of weakness or uncertainty. The jury may question the qualifications of your expert or believe that you have hired an expert merely to give an opinion that should have been given by another. The jurors may ask themselves: "Why was this witness called instead of the person who authored the treatise; does this witness really know what he or she is talking about?" Finally, because you must read the portions of the treatise and may not introduce it into evidence, you run the risk of boring the jury.

If you decide to use a learned treatise on direct examination, remember to lay a proper foundation. You must demonstrate that the treatise is reliable authority. For example:

Q:

Expert, are you familiar with Johnson's Textbook of Civil Engineering?

A:

Yes.

Q:

Do civil engineers generally accept that textbook as an authoritative and reliable treatise on civil engineering principles?

A:

Yes.

Q:

Do you consider it authoritative and reliable?

A:

Yes.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceHearsayExceptionsLearned TreatisesExpert Witness RequirementEvidenceScientific EvidenceDaubert StandardEvidenceTestimonyExaminationDirect ExaminationEvidenceTestimonyExpertsGeneral OverviewEvidenceTestimonyExpertsAdmissibilityEvidenceTestimonyExpertsCredibilityGeneral OverviewEvidenceTestimonyExpertsCredibilityImpeachmentEvidenceTestimonyExpertsDaubert Standard

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Evid. 701*; *see Weinstein's Federal Evidence, § 701.02* (Matthew Bender 2d ed.).

(n2)Footnote 2. *See Fed. R. Evid. 702*; *Miami Int'l Realty Co. v. Paynter, 841 F.2d 348 (10th Cir. 1988)* (expert witnesses permitted to testify as to lost profits as an element of damages and as to standard of care required of attorneys); *see also Weinstein's Federal Evidence, § 702.02* (Matthew Bender 2d ed.).

(n3)Footnote 3. *Fed. R. Evid. 702*.

> There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.

See Committee Note to Original *Fed. R. Evid. 702* (1975), *quoting* Ladd, *Expert Testimony, 5 Vand. L. Rev. 414, 418 (1952)*.
It is prejudicial error to admit an expert's testimony as to the cause of an accident where it is insufficient to establish liability under applicable law but, rather, tends to interfere with the jury's independent judgment. *Scott v. Sears, Roebuck & Co., 789 F.2d 1052 (4th Cir. 1986)* .

(n4)Footnote 4. *509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)* .

(n5)Footnote 5. *See Fed. R. Evid. 702*.

(n6)Footnote 6. *See* Ch. 23, *Discovery of Experts*.

(n7)Footnote 7. *In re Montgomery Court Apartments, Ltd., 141 B.R. 324, 337 (S.D. Ohio 1992)* (permitting in-house expert to testify while noting that bias could be explored on cross-examination).

(n8)Footnote 8. *Fed. R. Civ. P. 26(b)(4)*. *See* MOORE'S Federal Practice, § 26.81[1] (Matthew Bender 3d ed.).

(n9)Footnote 9. *See Moore's Federal Practice, § 26.80* (Matthew Bender 3d ed.).

(n10)Footnote 9.1. *Fed. R. Civ. P. 26(b)(4)(B)*.

(n11)Footnote 9.2. *Fed. R. Civ. P. 26(b)(4)(C)*.

(n12)Footnote 10. *See § 33.03*.

(n13)Footnote 11. *See* Ch. 34, *Exhibits*.

(n14)Footnote 12. *See Friendship Heights Assocs. v. Koubek, 785 F.2d 1154, 1162-1163 (4th Cir. 1986)*

(discussing standard for qualifying expert witnesses). *See also Exum v. General Elec. Co., 819 F.2d 1158 (D.C. Cir. 1987)* .

In one case, the district court properly allowed farmers to testify as experts, where their practical experience provided the basis for qualification as experts. *Federal Crop Ins. Corp. v. Hester, 765 F.2d 723, 728 (8th Cir. 1985)* .

In a personal injury action, the district court properly admitted the expert testimony of a biostatistician-epidemiologist who was not a medical doctor. *Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129 (5th Cir. 1985)* . In another case, however, a district court acted properly in refusing to rule a witness an expert as to conditions in a mental hospital where, despite her experience in the area, the witness was neither a physician nor a psychologist. *Doe v. Gaughan, 808 F.2d 871, 876 (1st Cir. 1986)* .

In an accident case, the district court properly permitted a police officer to testify as an expert as to the cause of the accident. *Kelsay v. Consolidated Rail Corp., 749 F.2d 437, 448-449 (7th Cir. 1984)* .

(n15)Footnote 13. *Quinones-Pacheco v. American Airlines, Inc., 979 F.2d 1, 7 (1st Cir. 1992)* .

(n16)Footnote 14. *See, e.g., Broadcort Capital Corp. v. Summa Medical Corp., 972 F.2d 1183 (10th Cir. 1992)* ; *O'Conner v. Commonwealth Edison Co., 13 F.3d 1090, 1106-1107 (7th Cir. 1994)* , *cert. denied, 512 U.S. 1222 (1994)* (for a more detailed discussion, see district court opinion at *807 F. Supp. 1376 (C.D. Ill. 1992))* .

(n17)Footnote 15. Only an opinion based on facts may be expressed; a lawyer may not be called as an expert to offer an opinion on conclusions of law, a matter solely within the court's domain. *Adalman v. Baker, Watts & Co., 807 F.2d 359, 370 (4th Cir. 1986)* . Note, however, that an expert may offer an opinion as to foreign law.

(n18)Footnote 16. *Federal Rule of Evidence 705* was amended in 1993. In its former version, it stated that "[t]he expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data ... . According to the advisory committee note, the revision was necessary "to avoid an arguable conflict with revised *Federal Rules of Civil Procedure 16*, *26(a)(2)(B)* and *26(e)(1)* or with revised *Rule 16 of the Federal Rules of Criminal Procedure*, which require disclosure in advance of trial of the basis and reasons for an expert's opinions."

(n19)Footnote 17. In asking a hypothetical question, the examiner may seek the witness' opinion on "any combination of facts within the tendency of the evidence." *Vermont Food Indus., Inc. v. Ralston Purina Co., 514 F.2d 456, 463 (2d Cir. 1975)* . The sufficiency of the assumptions as well as the soundness of the opinion may be tested on cross-examination.

(n20)Footnote 18.

> The Fourth Circuit has stated:
>
> > A question that assumes any material fact not supported by the evidence is inadmissible. A question that omits any material fact essential to the formation of a rational opinion is likewise incompetent. The facts on which the expert bases his opinion or conclusion must permit reasonably accurate conclusions as distinguished from mere guess or conjecture.
>
> *Kale v. Douthitt, 274 F.2d 476, 482 (4th Cir. 1960)* .
>
> *See Orth v. Emerson Elec. Co., 980 F.2d 632, 636 (10th Cir. 1992)* (expert testimony based on assumptions of known facts admissible).

(n21)Footnote 19. *Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)* (admissibility of scientific evidence is governed by *Fed. R. Evid. 702*; Rule supersedes test of *Frye v. United States, 293 F. 1013, 54 App. D.C. 46 (1923)* , which held that expert opinion testimony was inadmissible unless underlying scientific technique was *generally accepted* as reliable).

(n22)Footnote 20. *GE v. Joiner, 522 U.S. 136, 141-142, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997)* (circuit court erred in applying more stringent standard of review to trial judge's *exclusion* of expert testimony; traditional abuse of discretion standard should have been applied).

(n23)Footnote 21. You should, however, be wary of an expert opinion that is based on the statements of interested witnesses. *Faries v. Atlas Truck Body Mfg. Co., 797 F.2d 619 (8th Cir. 1986)* (police accident report and investigating officer's testimony were not admissible when the officer's factual investigation of the accident was incomplete and depended largely on statements of interested witnesses).

The expert's opinion testimony, when based on secondhand information, should not appear too speculative or it will not withstand a renewed motion for judgment as a matter of law. *Nichols Constr. Corp. v. Cessna Aircraft Co., 808 F.2d 340, 351 (5th Cir. 1985)* (expert testimony was based solely on the conclusions of others that were stated in documents that were never produced or identified).

* Chapter 33 was written by Richardson R. Lynn, Esq. of Nashville, Tennessee; the chapter was revised in 2004 by Andrew E. Westley, Esq. of San Francisco, California.

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CHAPTER 33 Direct Examination *

3-33 Federal Litigation Guide § 33.17

§ 33.17 Table of Expertise Areas

USE OF EXPERTS

AREA OF EXPERTISE	USE DURING LITIGATION
Physical Sciences	
CHEMISTRY (Specialties include: analytical chemistry, chemical engineering, clinical chemistry, environmental chemistry, industrial chemistry, radiochemistry serology, and toxicology.)	Analysis or explanation of natural and man-made products; discussion of safety factors; analysis of animal and plant serums; explanation of environmental pollution; industry safety and production factors.
PHYSICS	Explanation of processes involving mechanics, acoustics, heat, electricity, magnetism, radiation, atomic and nuclear structures and energy production.
GEOLOGY (Specialties include: economic & mineral	Analysis or explanation of earth formations, rocks, minerals and water bodies.

geology, environmental geology, geotechnical engineering, and hydrology.)		
GEOGRAPHY		Description of land (terrain), sea and air features of specific geographic area, including plant and animal life.
MATERIAL SCIENCES		Analysis of abrasives, brick & clay, ceramics, glass, metals, plastics, rubber and biomaterials.
METEOROLOGY		Weather forecasting and other atmospheric analyses.
Life Sciences		
AGRICULTURAL SCIENCES (Specialties include: agricultural engineering, fibers, textile technology, forestry, arboriculture, wood science and technology.)		Analysis of agricultural products, especially wood, as well as explanation of farming and wood cultivating processes.
BIOLOGICAL SCIENCES (Specialties include: aquatic & marine biology, biochemistry, botany & plant pathology, environmental microbiology, food science & food microbiology, physiology, and zoology.)		Analysis of food products, explanation of animal functions; explanation of plant processes and environmental pollution.

PHARMACOLOGY (Specialties include: drug research & development, drug manufacture, medicinal chemistry, and pharmaceutical science.)		Detection, analysis and identification of drugs and poisons; drug production; adverse drug and cosmetic reactions.
TOXICOLOGY		Analysis of poisons and explanation of their effect.
MATHEMATICS & STATISTICS		Explanation or application of statistics, actuarial methods, polls & surveys; operations research.
COMPUTER SCIENCES		Use or explanation of computers and other information systems; collation and analysis of voluminous data.
INTELLECTUAL PROPERTY		Technical analysis and consultation regarding patents and trademarks.
Social Sciences		
ANTHROPOLOGY		Explanation of human beings' relations to race, origin, culture, environmental and physical characteristics.
ECONOMICS		Application of economic analysis to solve valuation and damage issues and explain market performance in areas such as antitrust, labor, industrial relations, tax, public finance, public policy.

EDUCATION		Explanation of methods at all levels of educational institutions.
GENEALOGY		Explanation of a person's or family's descent from an ancestor.
LAW		Proof of foreign or international law.
SOCIOLOGY		Explanation of social behavior and social norms; criminology and criminal justice theories.
URBAN PLANNING		Application of social science theories to populated areas.
Humanities		
FINE ARTS		Conservation and authentication of art; valuation; illustration.
LANGUAGE		Explanation of the principles of linguistics; translations.
Medicine		
FORENSIC PATHOLOGY		Diagnosis or explanation of environmental injuries and diseases; radiation injuries; industrial and traffic accidents; autopsies.
PHYSICAL HEALTH (Specialties include: dentistry, health care		Analysis of specific injuries, diseases or medical problems; explanation of standard methods and procedures.

delivery systems, injury bio-mechanics, medical devices, medical research, medicinal chemistry, medicine & surgery occupational medicine, pharmacology, podiatry, radiation & radiology.)		
PSYCHIATRY		Diagnosis or explanation of mental, emotional or behavioral disorders of a group or an individual.
PSYCHOLOGY (Specialties include: child and juvenile psychology, criminal behavior, community psychology, family psychology, rehabilitation and disability assessment, sex offenses, and suicidology.)		Diagnosis or explanation of mental or behavioral characteristics of a group or an individual.
Technology		
ARCHITECTURE		Building structure examination and explanation.
AERONAUTICAL ENGINEERING		Explanation of air travel and planes; aviation accidents. Analysis of manufactured products.
CIVIL ENGINEERING	>	Explanation of airport engineering, dredging, land surveying, sanitary methods, structural engineering, highway design and

	safety.
ELECTRICAL ENGINEERING	Analysis and explanation of electrical systems.
INDUSTRIAL AND MANUFACTURING ENGINEERING (Specialties include: human factors effect, safety engineering, fire protection, quality control, industrial hygiene, and occupational health and safety.)	Explanation of accident prevention; manufacturing methods.
MECHANICAL ENGINEERING	Explanation of the areas of automotive engineering, design engineering, instrumentation and controls.
METALLURGY	Analysis or use of metals and their products.
MINING AND PETROLEUM ENGINEERING	Analysis or explanation of natural resources exploration.
Business	
BUSINESS MANAGEMENT	Application of managerial theories; explanation of standard practices, corporate structures, and business performance.
ACCOUNTING	Analysis of financial reports; valuation.

INSURANCE	Analysis of risks.
MARKETING AND DISTRIBUTION	Analysis of product and industry markets.
BANKING/FINANCE	Explanation of banking and other investment practices, valuation of tangible and intangible corporate property.
Other	
CONSULTANTS in accident reconstruction, corrosion, dangerous materials, design, electrical incidents, failure analysis, fire and explosions, security and emergency planning.	Development of a causation theory.
VALUATION SPECIALISTS	Determination of damages suffered by individuals or businesses; appraisal of personal and real property.
LITIGATION SUPPORT SPECIALISTS	Assistance with questioned documents; identification; investigations; photography; laboratory testing; jury selection; exhibits and models.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceTestimonyExaminationDirect ExaminationEvidenceTestimonyExpertsGeneral Overview

* Chapter 33 was written by Richardson R. Lynn, Esq. of Nashville, Tennessee; the chapter was revised in 2004 by Andrew E. Westley, Esq. of San Francisco, California.

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CHAPTER 34 Exhibits *

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§ 34.syn Synopsis to Chapter 34: Exhibits *

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[1] Documentary Evidence.
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CHAPTER 34 Exhibits *

3-34 Federal Litigation Guide Scope

Scope

SCOPE

This chapter addresses the selection, introduction and use of documentary and other tangible evidence.

An exhibit is any object that facilitates juror understanding. The selection of trial exhibits begins as early as discovery and continues throughout the litigation process. Once you have selected and created evidentiary and demonstrative exhibits that will help the jury visualize specific issues in the trial, the proper foundation for their admission must be prepared and integrated into the trial plan. In addition to the mechanics of introducing exhibits into evidence, this chapter discusses how to keep possibly harmful exhibits out of your opponent's case, and how to use demonstrative exhibits to help your presentation.

For expanded coverage of exhibits, ***see*** WEINSTEIN'S Federal Evidence, Ch. 103, ***Rulings on Evidence*** (Matthew Bender 2d ed.).

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CHAPTER 34 Exhibits *

3-34 Federal Litigation Guide § 34.01

§ 34.01 Definition of "Exhibit".

An exhibit is a tangible item which has been admitted into evidence during the course of a judicial proceeding. This tangible item may be a suspected murder weapon, or it may be the contract which is the subject of the litigation. Thus, a narrow discussion of exhibits deals with those items that are virtually essential for presentation to the trier of fact in order to prevail in the case. For example, the prosecution wants the jury to know that this gun, registered to the defendant, was the gun used to kill the victim. Just as importantly, the plaintiff suing on a claimed breach of contract wants the judge or jury to know that this was the contract signed by the defendant.

Yet exhibits have no life of their own. Thus, for each proffered exhibit there must be a foundation by stipulation or witness testimony. n1 Exhibits and testimony are as symbionic as the interrelationship among them and the rules of evidence. While this chapter focuses on exhibits, trial counsel should not forget that the successful use of exhibits depends upon their integration into oral testimony and a complete knowledge of the rules of evidence.

So too, trial counsel should not forget that today's juror is visually oriented. The morning newspaper has been supplanted by television's morning and evening news program. The great presidential debates of the last century have been replaced by sound bites on the network television news. Our public officials attempt to sway public opinion by 30-second or one minute television commercials. Even battles and wars are the subject of television presentation, description, and analysis, in well under ten minutes. Given this preconditioning, no trial attorney can expect a jury to listen to droning witnesses for hours on end, day after day, without a visual break. The winning trial attorney does not expect to prevail by "out boring" the other side. While exhibit presentation will not overcome bad facts, it will put your best foot forward.

Given this reality about the nature of jurors--and please remember that a judge is but a juror with legal training and decision making authority--the narrow definition of "exhibit" should be expanded to encompass the whole range of sights and sounds that may be presented to the trier of fact to facilitate the fact-finding process. Today's jurors are also conditioned to believe that anything on television is true, or, at least, accustomed to obtaining information through television. Therefore, video exhibits will be especially credible. Included in the term "exhibits" are those items that are essential to prove your case, as well as those things that will make your case more credible and that will help the trier of fact conclude that your client should prevail. Exhibits should not be viewed as hurdles with difficult foundations causing admissibility problems. Rather, you should view exhibits as the strongest part of your case.

An example may help to illustrate this concept: If you are representing a plaintiff injured by an intoxicated driver, you

may be suing that driver, as well as one or more liquor establishments that allegedly served alcoholic beverages to the defendant. Initially, your case may consist of the testimony of your client to establish his safe driving, as well as the negligent conduct of the defendant. The arresting police officer can testify as to the apparent intoxicated state of the defendant shortly after the accident, and the passenger in the defendant's car will testify as to the three bars visited by the defendant prior to the accident. These three witnesses will establish a bare bones, boring, probably sufficient case-in-chief.

But now this case will be transformed by the wonder of trial exhibits to a visual presentation wrapped around this basic testimony which is more consistent with the visual media experience of a trier of fact. Admitted into evidence are the following:

- 11 x 14 color photographs of the exterior of each liquor establishment;
- credit card receipts establishing how much money the defendant spent for alcoholic beverages at each establishment;
- photographs of the accident scene and the damage to both vehicles;
- photographs of the injuries suffered by your client; and
- the police department video tape of the defendant taking the field sobriety test.
- a "day-in-the-life" video of your client if crippling injuries are received and/or extraordinary daily nursing or rehabilitative care is required.

Also used during the trial is a large poster containing a map of the area which tracked the defendant's travels from bar to bar, and eventually brought him to the intersection where he slammed his vehicle into the car being driven by your client.

Will the use of a wider range of exhibits result in a victory? Only the trier of fact can answer that. However, a broader range of exhibits will help the trier of fact understand the case, and understanding may well help your case.

Thus, this chapter uses a broad definition of "exhibits." They include evidentiary items essential for the proof of your case, as well as any item, either historical or prepared specifically for the litigation, that assists the trier of fact in understanding a fact or circumstance at issue in the litigation.

As you prepare for trial, consider not only those existing items of evidence, documentary or otherwise, that may be introduced into evidence. Consider also the entire range of demonstrative and corroborative things that are available to the creative mind of the trial attorney. To that end, you should consult with graphic artists, computer animation experts, and model makers who are professionals at portraying events in visual and tangible forms.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceDemonstrative EvidenceGeneral OverviewEvidenceDemonstrative EvidenceAdmissibilityEvidenceDemonstrative EvidencePhotographsEvidenceDocumentary EvidenceGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See § 34.03* discussing the introduction of exhibits.

* Chapter 34 revised in 1993 by Richardson R. Lynn, Nimmo, Baker & Lynn, Nashville, Tennessee; Assistant Dean of Academic Affairs, Pepperdine University School of Law, Malibu, California.

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CHAPTER 34 Exhibits *

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§ 34.02 Selection of Exhibits.

[1] Documentary Evidence.

The final selection of documentary evidence to submit during the course of your case should come after the preliminary motions and the discovery process. As plaintiff's counsel, the causes of action may have been limited. Certain factual issues may have been stipulated to by opposing counsel, or are no longer controverted. Your own understanding of what it will take to prove your client's case has also been enhanced. Representing the defendant, you are more aware of the plaintiff's weaknesses and how to exploit them. Following is a broad overview of a methodology to assure that all possible documentary exhibits have been marshalled.

First, determine what elements exist for each cause of action you are pursuing or defending. Thus, if the issue is a breach of contract, the existence of a contract, its terms, the alleged breach, and the resultant damages are specific elements at issue. If the issue is one of tort, the time-worn trilogy of duty, breach, and damages will be your touchstone. Each cause of action may include unique twists, such as affirmative defenses that may have been pleaded. For example, our contract claim may involve a lack of consideration issue, while the tort litigation includes a comparative negligence claim. Having thus highlighted the legal issues that must be proved or refuted, the litigation attorney can then begin to marshal the facts that will inevitably lead the trier of fact to the desired conclusion.

Second, after you have established the legal issues, the potential witnesses should be considered and reviewed. Documents do not go into evidence except by witness or agreement; therefore, you should use a witness-by-witness planning schedule for all but the most involved cases. (Which witness will offer testimony to establish some evidence of each of the necessary legal elements?) Once you have identified the main witnesses, you may then move into the heart of document selection.

Third, knowing the issues and the witnesses for each, review the documents discussed during that witness's deposition. Not all such documents will become trial exhibits, but all are worthy of review. As each deposition is reviewed, ask whether the admission of this particular document will factually support a necessary legal element you seek to prove. If not, the document is probably not required, unless it assists in making the case more "visual." In reality, the threshold issue when reviewing a document for possible use as a trial exhibit is whether it is relevant. If not, it is unlikely that the judge will allow it into evidence. n1 If the document is relevant and supports your theory of the case, you must determine whether its admission could be damaging. For example, a color photograph of the bar where the defendant consumed alcoholic beverages before ramming the plaintiff generally would be useful. However, if a post-crash

photograph depicted the plaintiff in an obviously intoxicated condition, it would not be useful.

Fourth, after reviewing those documents referred to during depositions of witnesses, review all other existing documents possibly relevant to the litigation. For a variety of reasons, documents that seem irrelevant at the start of a case may well become important immediately before trial. Thus, all documents must be reviewed and considered in light of what the legal issues are, and who the witnesses will be. Again, relevancy is the threshold issue.

Fifth, having reviewed all the documents in the case and selected certain ones for possible use as trial exhibits, you should consider the probable testimony of each witness. The objective is to determine whether documents can be obtained which would support the probable testimony of one or more witnesses. For example, the plaintiff will testify that his automobile had only 2,200 miles on it immediately before the accident, and that he was coming from dinner at a vegetarian restaurant that does not serve alcohol. Upon review, plaintiff's counsel may be able to obtain a recent oil change receipt showing the vehicle's mileage, and a credit card receipt corroborating dinner at that restaurant. These would then become documentary exhibits which, of course, under the rules of most courts, would have to be disclosed to opposing counsel prior to trial. But the impact of having these exhibits is to make the plaintiff more believable. This is one of the most powerful benefits of documentary exhibits. If every time your client makes a statement there is a piece of paper to support that testimony, those instances where there could not be any corroboration may be viewed with more credibility by the trier of fact. After all, every other assertion has been corroborated. (However, make it clear why this fact cannot be supported by documentary evidence.)

Sixth, after selecting those documents that are potential trial exhibits, each should be subjected to the following scrutiny:

1. Is the exhibit repetitive of other exhibits? If so, select the single most effective exhibit rather than repetitive exhibits.

2. Are the exhibits consistent with each other and with potential trial testimony? If not, the inconsistencies must be addressed prior to trial.

3. What is the likely impact of each exhibit? If its likely impact is not supportive of your theory, it should not be used.

Documentary exhibits will not save a fatally flawed case; yet some claims could have been successfully proved had available exhibits been offered. Every trial lawyer should believe that any case worth trying is worth trying well, including the thoroughly effective use of exhibits. Do not be intimidated by what at first blush may appear to be complex foundational requirements. During the course of trial preparation, select those documents that will help you establish each legal element of your claim, and that will help make your presentation more visual. Offer and use them with confidence; your opponent will.

[2] Other Physical Exhibits.

Having been through the selection process for documents, the same basic concepts apply to the selection of other physical objects to use as trial exhibits. While documents tend to dominate as trial exhibits, you should not forget other physical objects. Certainly when such items are real evidence, they are not easily forgotten. (The murder weapon will be offered into evidence in all trials.) But what of the metal plate and screws which were used to hold bone together while it healed? These are relevant and dramatic exhibits.

The point is that *creativity should not end with documents*. The entire experience of the trier of fact is visual, and your trial presentation should be consistent with this experience. Show them, photographically or preferably by color video, the locations or items at issue. n2 Present a model of the accident scene. If a commercial contract was breached, show them the product that was manufactured defectively or never delivered. In other words, help the trier of fact understand your theory of the case and how certain items of evidence support the legal elements of the case. However, be wary of

ghoulish or offensive behavior. Anatomically correct models of human extremities may be better than gruesome photographs of severely damaged limbs. n3 As with many things, a balancing of tastefulness and effectiveness is necessary in the selection and use of trial exhibits.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsEvidenceDemonstrative EvidenceGeneral OverviewEvidenceDemonstrative EvidenceFoundational RequirementsEvidenceDemonstrative EvidencePhotographsEvidenceDocumentary EvidenceGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See generally Fed. R. Evid. 401* which provides that "[r]elevant evidence' means evidence having *any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." (Emphasis added.) *See also Fed. R. Evid. 402* which states that irrelevant evidence is not admissible during trial.

(n2)Footnote 2. *See* Boddren and Winter, *The Case for a Visual Presentation,* 15 Trial Diplomacy J. 125 (1992).

(n3)Footnote 3. *See* the discussion of demonstrative exhibits *infra §§ 34.09*, *34.10*.

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CHAPTER 34 Exhibits *

3-34 Federal Litigation Guide § 34.03

§ 34.03 Introduction of Exhibits.

Once you have determined which exhibits you would like to offer into evidence, it is essential that you ascertain whether a legally sufficient foundation for each proffered exhibit can be established. This section will address that issue and provide suggestions on how to facilitate the process. In general, introduction may occur by stipulation of the parties, by court rule, or by establishing an evidentiary foundation through a witness.

[1] Introduction by Stipulation.

The reality of litigation is that all trial courts are under pressure to manage their dockets. This means that judges are pressured to try cases as quickly and efficiently as possible. This translates into pressure placed upon trial counsel to stipulate to the admissibility of trial exhibits wherever possible. Before adopting a singular position on this point, some discussion is in order. First, it makes a difference as to what type of case you are handling. In criminal cases, the only defense may be that the prosecution cannot prove its case. Criminal cases have been won because of prosecutorial mistakes with exhibits. Thus, in criminal cases there may be matters which preclude the stipulation to any exhibits. In the civil arena, there may be a blood feud between the parties. In such instances, your client may say that there will be no stipulations. However, your client may never again appear before this judge, or be required to ever again litigate against opposing counsel. Generally, a balanced approach is more productive.

Also, consider that if you decline to stipulate to the admissibility of any exhibits, your opponent is unlikely to stipulate to any of your exhibits. This may needlessly prolong a trial and increase the costs to all litigants. A better guide is to consider whether the proposed exhibit will hurt your case at trial. If it will not hurt your case, what is the harm in expediting the case by stipulating to the exhibit? If it will hurt your case, but there is really no evidentiary basis upon which to claim exclusion, what is the benefit to not stipulating? If you can think of no benefit to not stipulating, a stipulation may be in order. Of course, evidentiary stipulations should be met with reciprocity by your opponent.

On the issue of stipulation, be sure to check the applicable rules of court. Many federal district courts, n1 as well as certain state trial courts, require the parties to file a pretrial memorandum which includes a list of all proposed trial exhibits. The parties also set forth any objections which may be interposed to the admissibility of any exhibit. A common practice is to stipulate as to the authenticity of the exhibits, but reserve until the exhibit is offered substantive objections such as hearsay or relevancy. Of course, you should not stipulate to authenticity if you doubt that an exhibit is authentic.

Mechanically, stipulations as to exhibits should be made in writing. Each exhibit should be listed separately, and a specific statement set forth after each as to the limit of the stipulation (for example, authentication or admissibility). This written stipulation should be signed by counsel for all parties and presented to the court prior to the start of trial. Whether the written stipulation will be presented to the jury, read to the jury, or not mentioned at all to them, will be a matter of local rules and practice. n2

It may be appropriate to mention to the jury in opening statement and closing argument that the opposition agreed that your important exhibits were admissible. The jurors, or a few of them, may think that a stipulation means that the opponent thinks that the exhibits are true. On the other hand, if you have stipulated to admissibility, be sure to tell the jury that stipulations are about technical questions of evidence, not whether you agree with the exhibit or even think that it is important to their decision.

[2] Introduction Pursuant to Rule.

Certain documents are self-authenticating. That means that they may be admitted into evidence without authentication by a witness. The underlying theory for the admissibility of this class of documents is that certain public and other records are inherently trustworthy and do not require the normal process of authentication. However, self-authentication does not end the evidentiary inquiry. Even though a document is self-authenticating, it may not be relevant. The class of self-authenticating documents is established by statute or court rule. n3

Basically, in federal courts certain evidence does not require "extrinsic evidence of authenticity as a condition precedent to admissibility." n4 The evidence not requiring authentication is grouped as follows:

1. public documents under seal;

2. domestic public documents not under seal;

3. foreign public documents;

4. certified copies of public records;

5. official publications;

6. newspapers and periodicals;

7. trade inscriptions and the like;

8. acknowledged documents;

9. commercial paper and related documents; and

10. presumptions under Acts of Congress.

[3] Introduction by Sponsoring Witness.

Absent a stipulation or applicable rule, exhibits may be admitted only after the establishment of a proper foundation by one or more witnesses. This foundation is established by taking the witness through a series of somewhat standard questions. n5 This testimony should be quick and smooth so as to not detract from the main impact of that witness' substantive testimony. For, while the exhibit is important and its admissibility crucial, the foundational process may be quite boring to the jury, and could prove fatal if counsel demonstrates his inability to establish a proper foundation.

In deciding which witness to use in establishing a foundation for a particular exhibit, the applicable evidentiary rules should be considered. Basic evidentiary concepts apply to exhibits, just as they do to testimony; thus, in order to authenticate an exhibit, a witness must have personal knowledge concerning that exhibit. n6 Therefore, in selecting a witness to authenticate an exhibit, be sure that the selected witness will not testify based upon hearsay. Whether a witness has met the requirement of establishing personal knowledge is a question for the jury, unless the judge finds that no reasonable juror could conclude that the witness had personal knowledge concerning the exhibit. n7 If the judge so finds, the exhibit should be excluded. An example of a common error in the context of business records will clarify this point:

Q:

Please state your name and position.

A:

I am Jane Jackson, the vice-president of finance for XYZ, Inc.

Q:

To your knowledge, is Exhibit A a business record of the company? n8

A:

Of course!

Cross-examination:

Q:

As vice-president, do you actually prepare these forms?

A:

Of course not.

Q:

Do you supervise the preparation of these forms?

A:

No.

Q:

Have you ever read or seen any of the procedures that relate to the preparation of this form?

A:

No.

Q:

How do you know that this form is kept in the ordinary course of XYZ, Inc.'s business?

A:

The accounting supervisor, Mr. Cant, told me.

At times there is a common assumption that a certain title carries with it the ability to authenticate certain business records. Rather than be confronted with that situation at trial, be sure to review the foundational questions with each witness prior to trial. Be sure that the answers are based on personal knowledge, rather than a title or hearsay. Conduct that review of the basis for the witness' testimony in time to secure a better witness if needed. Foundational requirements should never be taken for granted or overshadowed by a desire to prepare only the substantive areas.

Beyond the "personal knowledge" requirement of the Rules, n9 there is the specific requirement of authentication. n10 Under the federal rules, authentication or identification is satisfied by offering evidence, in most cases testimonial, to establish that the proposed exhibit is what it purports to be. n11 Simply put, you cannot offer into evidence a letter from Pam to Fred unless somebody establishes that the letter is in fact a letter from Pam to Fred. This can easily be accomplished by, for example, Fred's testimony that he received the letter and recognizes the signature as that of Pam. Lay testimony is sufficient to authenticate handwriting. n12 Authenticity may also be established by circumstantial evidence. n13 For example, the authentication requirement was met in one case where the document appeared to be that which it was claimed to be and was produced by the defendant in response to a discovery request. n14

While you must have one witness to authenticate most exhibits, sometimes the problem is having several potential witnesses who could authenticate the same exhibit, as when a single memorandum is sent to several people. In deciding which of the many should be selected, the following considerations may help facilitate the choice:

1. Who is the better witness, *i.e.,* makes the best presentation?

2. Who has the most knowledge about the exhibit and the subject matter?

3. Which witness could injure the case if put on the stand?

4. Can several exhibits be authenticated by a single witness to speed the trial?

5. Are some potential witnesses confused about the exhibit?

In sum, authentication of exhibits by a witness is not difficult so long as the basic requirement of personal knowledge is kept in mind. The objective is to establish the requisite technical foundation as smoothly as possible. n15

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsEvidenceAuthenticationGeneral OverviewEvidenceDemonstrative EvidenceGeneral OverviewEvidenceDemonstrative EvidenceFoundational RequirementsEvidenceDocumentary EvidenceGeneral OverviewEvidenceTestimonyGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See, e.g.,* Local Rule 5.00(a), N.D. Ill.

(n2)Footnote 2. Of course, regardless of practice, trial counsel should assure that any stipulation becomes part of

the court record in case there is an appeal.

(n3)Footnote 3. *Fed. R. Evid. 902. See § 34.06[6].*

(n4)Footnote 4. *Id.*

(n5)Footnote 5. *See § 34.06[6] infra.*

(n6)Footnote 6. *Fed. R. Evid. 602.*

(n7)Footnote 7. *See United States v. Owens, 699 F. Supp. 815 (C.D. Cal. 1988)* .

(n8)Footnote 8. For purposes of this example, please ignore the obvious objection to the nature of the question.

(n9)Footnote 9. *Fed. R. Evid. 602.*

(n10)Footnote 10. *Fed. R. Evid. 901.*

(n11)Footnote 11. *Id.*; *United States v. Long, 857 F.2d 436 (8th Cir. 1988)* (proponent need only have a rational basis for the claim that a document is authentic).

(n12)Footnote 12. *Fed. R. Evid. 901(b)(2).*

(n13)Footnote 13. *Fed. R. Evid. 903.*

(n14)Footnote 14. *McQueeney v. Wilmington Trust Co., 779 F.2d 916 (3d Cir. 1985)* .

(n15)Footnote 15. *See § 34.06[6].*

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CHAPTER 34 Exhibits *

3-34 Federal Litigation Guide § 34.04

§ 34.04 Timing the Introduction of Exhibits.

General concepts of trial strategy apply with equal force to trial exhibits. n1 The same is true regarding the general psychological concept of primacy, which dictates that the first exhibit seen, or testimony heard, is the most likely to be retained. Also, the last seen or heard is likely to be retained. Thus, in planning your overall trial strategy, the placement of exhibits is more a function of that strategy than a function of a particular exhibit. Of course, if you have a very powerful exhibit, it will have the most impact if used first or last during your case in chief. Additionally, the doldrums of mid-trial can be enhanced by the use of exhibits or demonstrative evidence.

Keep in mind, however, that in any trial there will be a theme--a thread that inevitably leads to the conclusion of the party offering the theme. The theme begins with the opening statement and should provide the structure for the rest of the case. All evidence, by way of testimony or exhibit, must support and conform with this theme. The exhibits must also support the legal elements of the operative cause of action or defense. Without this framework, exhibits should be offered when they fit, *i.e.,* when their introduction flows logically from the ongoing order of proof.

The trier of fact should be made comfortable with your presentation. Do not lull the jurors to sleep, but by the same token do not give the impression that you are guiding them on a tour of a haunted house with unguarded pits interspersed among vast wastelands of darkness. Refer to the key exhibits during the opening statement so the jury will be expecting them to explain and support the case. You can actually use the exhibits during closing argument, after they have been admitted into evidence, to reinforce the theme you have developed all along. In other words, help the jury understand and follow your theme. Certainly you want to open strong, and close with a flourish. But make sure that these flurries of brilliance do not conceal a deficient trial, and be certain that they do not appear staged or contrived.

Demonstrative exhibits should be used to help the judge or jury understand the case. Especially where financial records or directions are involved, demonstrative exhibits may be essential. They should be used when dictated by the presentation of the witnesses. Thus, when the accountant testifies, a summary chart concerning the calculations is called for. And when witnesses speak about direction of travel of vehicles, a diagram or map should be in place and being used.

In short, use exhibits when they make sense, not merely because an exhibit is more likely to be remembered if used first or last. If an exhibit is used out of logical sequence for effect only, it may well be remembered, but not because it had any relevance to the issues of the case.

[1] Use During Direct Examination.

Exhibits should normally be introduced when first mentioned during examination of the witness. The foundation necessary in order to admit an exhibit is not burdensome and can be covered in a few moments. Once the foundation has been established, the exhibit may then be used throughout the remainder of the trial. Do not refer even once more than necessary to "Plaintiff's Exhibit 1 for Identification," rather than "Plaintiff's Exhibit 1." *Promptly* move for the admission of the exhibit into evidence.

To the extent that the foundation process involves a physical object (such as our proverbial murder weapon), the questioning of a witness concerning an evidentiary foundation provides a natural break for the trier of fact to be alerted that something new is about to happen. The trier's interest can be heightened by holding this new exhibit during the foundation process. Once the exhibit is admitted, you have a window of opportunity of enhanced interest within which your critical testimony can be adduced.

If you are dealing with documentary exhibits, you may consider providing each juror with his or her own punched binder with appropriate tabs to hold documentary exhibits admitted into evidence. During the process of direct examination and the admission of documentary exhibits, copies of these exhibits can be furnished to the jurors. Where the exhibits are stipulated to or their admission into evidence will be routine, an even better practice is to hand the jury the completed notebook in advance. Your opponent can only object to the inclusion of truly disputed items in the notebook. This procedure assures, to the extent possible, that the jurors will view your exhibits. Also, the process of distributing copies is more likely to stimulate juror interest, or at least indicate some minimal level of attention.

Of course, this process must be conducted in a way that is not disruptive of the trial. The danger in this practice is that the jurors may pay less attention to witness' testimony while they thumb through the exhibits or try to read ahead. Therefore, pause in the questioning to allow the jurors to find the relevant documents in order to minimize the distractions. You may even request that the court allow the jurors a few minutes to read documents in their evidence notebooks.

[2] Use at the Close of Direct Examination.

Some trial attorneys prefer to wait until the completion of all testimony of a witness before proceeding to use the witness as a foundation for documentary or other exhibits. The theory is that the attorneys may repeat some testimony by discussing topics covered by exhibits, and that this procedure keeps the flow of direct examination smoother.

There are drawbacks to this approach. Remember that after the first witness, the jurors will be aware that the presentation of the first exhibit means a period of highly technical foundational questions. In short, you will have marked the place in each witness' presentation when they may stop listening. Also, waiting until the end of direct examination to establish the foundation for all exhibits may necessitate that certain exhibits are dealt with out of order. You may need to recall foundation witnesses in response to an objection and discuss an exhibit out of order. This may confuse the jurors. On balance, unless a specific purpose is sought to be accomplished, exhibits should be dealt with as they logically occur in the presentation, rather than at a single predetermined time.

[3] Use During Cross-Examination.

Cross-examination is not the taking of a deposition. It should be crisp and focused. Know why you are asking a particular question and how the expected answer will benefit your case. Debating points alone do not count. During cross-examination use only those exhibits that advance the narrow, limited scope of the questioning. Do not use an exhibit during cross-examination unless you have a reason. For Example:

Q:

Sir, when your lawyer asked you about the Jones agreement, you said that you didn't know anything about it until January or February 1993, isn't that true?

A:

Well, I think so.

Q:

So you didn't know what a Jones agreement was at anytime during 1992, did you?

A:

Well now, I really want to make sure that I'm as accurate as I can be. So, it is just possible that I may have heard something about it in 1992.

Q:

But you don't remember a specific conversation about it in 1992, do you?

A:

No, but I'm just trying to be as accurate as I can.

Q:

Now the Jones agreement is very important isn't it?

A:

Of course, it involves the sale of the entire company.

Q:

So you would remember if you discussed the Jones deal, wouldn't you?

A:

I certainly would ... now I'm sure I knew about it in early 1993--I could have known about it in late 1992, but I don't have a specific recollection about it that early.

Q:

Sir, I show you what has previously been marked as Defendant's Exhibit Q, do you recognize it?

A:

Well ... I'm ... I'm ... not sure.

Q:

But isn't that your signature on the second page?

A:

Yes.

Q:

And you wrote this letter didn't you?

A:

I guess I did.

Q:

And Exhibit Q is a two page letter outlining the entire Jones deal, isn't it?

A:

Yes.

Q:

What is the date on the front page of Exhibit Q?

Q:

March 3, 1992.

A:

Why did you tell the ladies and gentlemen of the jury, while you were under oath, that you didn't find out about the Jones deal until some 9 months later?

The use of exhibits during cross-examination cannot be done in isolation. They must be part of an overall plan with a specific objective in mind. Once the objective is formulated, the exhibit can help you reach that objective.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsEvidenceDemonstrative EvidenceGeneral OverviewEvidenceDocumentary EvidenceGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyExaminationDirect Examination

FOOTNOTES:
(n1)Footnote 1. *See, e.g., § 25.04 supra,* discussing an outline of the trial order of proof

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CHAPTER 34 Exhibits *

3-34 Federal Litigation Guide § 34.05

§ 34.05 Pretrial Organization of Exhibits.

It is essential for your trial exhibits to be organized and readily retrievable before you utter your first word at trial. Many attorneys have lost credibility before a jury, and drawn the wrath of the judge, due to fumbling and disorganization. More importantly, a lack of organization may result in missing an opportunity to help your case by utilizing the proper exhibit for cross-examination. Sufficient organization is needed to avoid embarrassment and enhance the likelihood of a favorable verdict. Have sufficient copies of each exhibit for the court, jury, and adversary counsel; keep them in neat, uncluttered files which add to your appearance as a polished professional.

At the outset, you should highlight your witness outlines with references to exhibits that you anticipate using during your examination. The outline should be flagged so as to remind you to introduce the exhibits at the appropriate times. Another good practice is to append a sequential list of the exhibits a witness will sponsor to the outline of his testimony. This list will provide a ready checklist at trial to safeguard against an inadvertent failure to introduce an exhibit.

The actual organization of trial exhibits should be done in a way so that you can comfortably locate and retrieve the exhibits during the course of trial. A good practice is to have essentially two files of exhibits at trial. One should be organized sequentially to serve as a control file. When a particular exhibit is mentioned during the course of the trial, you can go to this file for almost immediate access.

A second, "witness" file also should be created. Organize by witness the exhibits that you will use and that you anticipate your adversary will use with each witness. You can use one large expandable folder in which separate folders for each exhibit are placed. Each exhibit folder usually contains the "original" exhibit and three or four copies, depending upon the ground rules you have worked out for handling exhibits. On many occasions, you will want one copy for your use, one copy for your adversary, one copy for the judge, and perhaps one or more copies for the jury, if you want the jurors to view an exhibit simultaneously or they are compiling an evidence notebook.

A personal computer can be a useful tool for organizing your trial exhibits. All that is required is a personal computer with appropriate software and a printer. A summary of each document is entered into the computer database once. This information may then be sorted by witness, date, topic, or any other field established before data entry began. Common topics entered for each document are:

1. author;

2. recipient;

3. names mentioned;

4. date;

5. topic of document;

6. number of pages;

7. summary; and

8. document number.

This information can then be used for deposition preparation, trial preparation, or the printing of a trial exhibit list. Such a list is expanded as trial preparation proceeds and will also be useful when seeking stipulations, preparing Pre-trial Orders, and disclosing exhibits to opposing counsel. The software used can be one of several programs developed specifically for litigation support, or may be a more generic type of relational database software program.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsEvidenceDemonstrative EvidenceGeneral OverviewEvidenceDocumentary EvidenceGeneral Overview

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CHAPTER 34 Exhibits *

3-34 Federal Litigation Guide § 34.06

§ 34.06 Getting Exhibits Into Evidence.

Before trial you should anticipate evidentiary problems with exhibits and prepare your foundational questioning of witnesses. If you anticipate a complex legal argument on an evidentiary point, consider preparing and submitting in advance a trial brief on that issue. You should also be comfortable with the particular judge and courtroom involved. If you have not tried a case in that setting, consider observing a trial conducted by the same judge before your case begins.

[1] The Best Evidence Rule.

Essentially, the best evidence rule requires the introduction of an original document rather than a copy in order to establish the contents of such writing. n1 While the best evidence rule varies from state to state, the federal version provides a good example of its scope and application.

Rule 1002 of the Federal Rules of Evidence provides that:

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

The Rule is limited to those instances where the contents of a document are sought to be proved. n2 However, where a fact is sought to be proven by nondocumentary evidence, *i.e.*, by testimony, the best evidence rule is inapplicable even though there may be some documents which relate to, or otherwise establish the existence of the same fact. n3 It is only when the writing is used to establish the existence of the fact that the best evidence rule comes into play. n4

However, the federal rules have limited significantly the scope of the common-law best evidence rule. Rule 1003 states:

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original. n5

The federal rules also expand the situations in which duplicates are admissible. Admissibility of duplicates is permitted in the following circumstances:

1. The originals are lost or stolen other than in bad faith,

2. The original is not obtainable,

3. The original is possessed by the opposing party, or

4. The original at issue is closely tied to a controlling issue. n6

Thus, unless there are exceptional circumstances, the best evidence rule should not preclude the admissibility of documentary exhibits. To successfully oppose introduction of a duplicate under Rule 1004, you must show that the authenticity of the unintroduced original is at issue or that the duplicate is untrustworthy or its introduction would be unfair. n7

[2] Learn Local Trial Procedures.

Learn the local rules and customs of the jurisdiction and judge where you will be trying the case. A copy of the local rules can usually be obtained from the local court clerk for a nominal charge. Read these local rules. Equally important are the customs and practices of the particular trial judge. The only effective way to learn these is by observing a trial in the judge's courtroom. If this cannot be done, be sure to ask the judge's clerk about any idiosyncracies. For example, some judges still require counsel to ask permission from the court before approaching a witness with an exhibit. Also, jurisdictions vary as to the requirement that "for identification" be stricken from exhibits after they are admitted into evidence. A little preparation in this area may save embarrassment before a jury.

[3] Mark the Exhibits.

Unless local rules specifically prevent it, premark your trial exhibits. This forces you to organize before trial and allows you to prepare an exhibit in advance of trial. It also prevents the almost inevitable scolding by the court when you seek to slow down the trial process by asking the court reporter--who is busy enough without an extra task--to mark each trial exhibit.

In premarking exhibits, be familiar with court practices. Some courts, for instance, may require plaintiffs to use letters and defendants to use numbers. Whatever the requirements, be aware of them before you begin marking. Also, be certain that exhibit labels are affixed to a location on the exhibit where nothing is covered or obliterated.

Multiple page exhibits should be numbered with a group number, and each individual page of the group exhibit numbered. Of course, the offering party of the exhibit should be identified. Thus, discussion concerning exhibits would be facilitated by proper numbering.

Example:

Q:

I show you what has been marked as plaintiff's exhibit 14.

Q:

I show you what has been previously admitted as defendant's group exhibit R. Now, calling your attention to page 3 of group exhibit R ...

Premarking exhibits helps facilitate the use of exhibits at trial and is also helpful in case of an appeal. The cold record is unforgiving to the trial attorney who fails to make clear what exhibit is the subject of questioning. Premarking and referring to exhibits as designated always clarifies the record.

[4] Exhibit Logs.

During the course of trial, always track which exhibits have been admitted into evidence in your case, as well as your opponent's case. The most efficient manner of tracking exhibits is to use a document log. For your case, simply include a listing of your premarked exhibits. As to your opponent's case, you may have a complete listing if in a federal jurisdiction that requires a pretrial memorandum. Even if you have no complete listing of your opponent's exhibits from a pretrial memorandum, keep a log of each exhibit your opponent attempts to introduce into evidence. New exhibits that develop during trial can be added to either log in fill in the blanks fashion. The following is a suggested format:

EXHIBIT LOG
PLAINTIFF'S EXHIBITS

Exhibit	Description	Witness	Offer?	Objection?	Admitted?
1	5/2/89 letter cost proposal	Smith	Y	N	Y
2	sample 3-piece silverware set	Robertson	Y	Y	Y
3	Purchase order Intect Inc.	Jackson	Y	Y	Y

[5] Show the Exhibit to Opposing Counsel.

In most instances the exhibit you are about to offer will have already been furnished to opposing counsel in the exhibit book provided to counsel and the court before the trial began. Thus, all you need do is refer to the exhibit by its number. Where exhibits are not exchanged before trial, a copy of the exhibit should be given to your opponent immediately before you begin your examination of the witness concerning that exhibit.

Formerly, a single exhibit was given to opposing counsel for review before giving that same exhibit to the witness to view. That practice was followed even when the opponent was intimately familiar with the document or exhibit and had been for months. In some jurisdictions, the old practice may be the norm. However, the use of multiple copies expedites the trial process and results in much less delay. In those rare instances where an opponent attempts to offer an exhibit which you have not previously seen, you should interpose an objection. You will be given an opportunity to review the exhibit.

[6] Authenticate the Exhibit.

[6.--1] In General.

The technical process of admitting an exhibit into evidence during the course of a trial is known as authentication. It is also referred to as laying foundation for a particular exhibit. This foundational requirement means that there must be sufficient evidence before the judge to establish that the exhibit offered is what it purports to be. n8 In addition to authentication through a witness at trial, exhibits may be authenticated in earlier litigation, n9 as well as by stipulation or self-authentication. n10 The following are authentication considerations that apply to certain types of exhibits.

[6.--2] Physical Objects.

There may exist a substantial difference in the foundation required for a physical object, as compared to that required for a document. This is because an object is usually self-explanatory--what more need be said about a gun or an electric drill? Yet while many physical objects are self-explanatory, others are susceptible to damage or change over time. In the case of a document, the author must be able to tell if his words have been altered, but the document may have deteriorated over the years to the point where it is no longer legible. Expert testimony may be necessary to authenticate such a document. However, to identify a document sufficiently to warrant its admissibility, a witness need not be able to testify as to familiarity with every page. n11

The task is not as obvious with physical objects. Was the handle on the lawn mower bent at the time of the accident, or did that occur while it was in storage after the accident? In order to lay a proper foundation for the admission of a physical object, counsel must establish that the item offered is in substantially the same condition at the time of trial as it was at the time at issue in the lawsuit. This may be accomplished by using a foundation witnesses who can recognize it at both times, or by using chain of custody witnesses. The following are examples of each.

Example--Single Foundation Witness:

Q:

Sir, I call your attention to Exhibit 24. Do you recognize it?

A:

Yes.

Q:

What is it?

A:

It is the lawn mower that I used for cutting my grass before the accident.

Q:

Please tell the ladies and gentlemen of the jury how you are able to recognize it after three years.

A:

Well, the lawn mower I was using at the time of the accident was a green widget model 406. The clips that held the throttle wire to the handle were missing, and I used grey duct tape to hold the wire to the handle. Also, when I fell under the mower the spark plug bent up at a 45 degree angle. This Exhibit 24 is the same model with the tape I put on it and the bent spark plug. It is my old lawn mower.

Q:

And, is the lawn mower, plaintiff's Exhibit 24, in substantially the same condition now as it was immediately after your accident three years ago?

A:

Yes.

That colloquy should be sufficient to establish the admissibility of the lawn mower.

If a single foundation is not possible, a series of foundation witnesses may be necessary to establish that an exhibit has not been tampered with. The term for this foundation is "chain of custody." The test for chain of custody is whether the authentication testimony is sufficiently complete so as to convince the court that it is improbable that the original item has been exchanged with another or otherwise tampered with. n12 Even if a perfect chain cannot be completed, you should note that the trial judge may rule that the imperfect chain goes to weight and sufficiency of the exhibit, not its admissibility. n13

Example--Multiple Foundation Witnesses:

Q:

Officer Smith, I show you Plaintiff's Exhibit D, please describe it.

A:

It is a glass vial, much like the test tubes used in high school chemistry courses. It appears to have a rubber stopper inserted in the top with two pieces of tape across the top of the vial and the stopper. One piece of tape--the top piece--is green with some markings on it. The bottom piece of tape is red and has some printing and writing on it.

Q:

Officer Smith, do you recognize the red tape and the markings on it?

A:

Yes.

Q:

Please identify them.

A:

The red tape has printed on it "APD." That is the initials of my police department. We use it for evidence marking. I also recognize the initials "RJC" printed on the tape and the date "4/6/88." The initials and date were placed on the tape by me on April 6, 1992.

Q:

Officer Smith, what did you place in the vial, Plaintiff's Exhibit D, on April 6, 1992?

A:

While at the accident scene I've previously described, I was administering first aid to the defendant in this case. While attempting to stop a severe blood flow from his arm, I took this vial and filled it partially with blood coming from his wound.

Q:

Was anything else placed in the vial?

A:

No--it was empty when I removed it from our blood-alcohol kit, and the only thing I collected was the defendant's blood.

Q:

What did you do with the vial after sealing it?

Q:

I gave it to Paramedic Jones.

Next Witness:

Q:

Paramedic Jones, do you recognize Plaintiff's Exhibit D?

A:

Yes, it is a vial given to me by the officer at the defendant's accident scene on April 6, 1992.

Q:

How do you know it is the same vial?

A:

I recognize the markings and initials on the label.

Q:

What did you do with it after you received it from Officer Smith?

A:

I placed it in my medical bag until I arrived at the hospital and gave it to Technician Cedric.

Q:

Did you at any time open the vial, put anything in it, or otherwise change the vial?

A:

No.

Next Witness:

Q:

Technician Cedric, do you recognize Plaintiff's Exhibit D?

A:

Yes, it is the vial I received from Paramedic Jones on April 6, 1992.

Q:

How can you be sure of that?

A:

I remember the red tape and markings on the vial when I received it.

Q:

What did you do to the vial?

A:

I cut the red tape, opened the stopper, and withdrew a sample of the fluid in order to conduct a blood alcohol analysis. I then replaced the stopper, covered it with green tape, and placed my initials and date on the green tape.

Q:

Where has the vial been since then?

A:

It has been in the locked vault into which I placed it until two hours ago when I removed it and brought it here to court.

While establishing a foundation involving a chain of custody can appear complicated, recall that it is presented in chronological order, one witness at a time. As the name indicates, each subsequent witness builds on prior testimony. Of course, such chain of custody testimony should be carefully planned in advance of the trial. Also, keep sight of your objective--to establish that the exhibit offered at trial is the same object actually involved in the case. n14

[6.--3] Business Records.

Business records are separately considered because of the hearsay rule. Hearsay is defined as a statement made by someone other than the witness which is offered into evidence to prove the truth of the content of such statement. n15 The statement may be oral, written, or nonverbal conduct. n16 For example, in the normal course of commercial and other types of litigation, a party will attempt to introduce a document which is one of many similar documents generated by a business. A credit card company may generate thousands of billing statements each month, and identifying the person who actually produced a particular statement could be impossible.

Because of the practical problems of establishing an evidentiary foundation in such instances, and the fact that certain types of prepared statements or records are inherently reliable, the business records exception to the hearsay rule was created at common-law and incorporated into the federal rules of evidence. n17 In order to have a business record admitted over a hearsay objection, it is necessary to establish that:

1. The author of the exhibit had knowledge of the information contained in the exhibit.

2. The exhibit was created at or about the time of the activity memorialized in it.

3. It was the regular practice of the business to create such exhibits.

4. The exhibit was kept in the ordinary course of business.

5. There is no demonstrable lack of trustworthiness in connection with the exhibit.

You may be able to combine exceptions to the hearsay rule in order to bolster your argument that certain documents are admissible. For example, a medical social worker's report based on interviews with a party was deemed admissible by combining the party admission exception to the hearsay rule with the business records exception. n18

Clearly excluded from this exception to the hearsay rule are exhibits created specifically for trial. n19 Thus, where a bank generates a loan balance statement each month for each account, these statements would probably qualify as admissible under the business records exception. However, a loan balance statement generated in the middle of the month, which included accrued attorneys fees and court costs, submitted specifically for trial, would not constitute a business record within the meaning of the business record exception.

Also, you should be aware that computer-generated exhibits have some additional foundational requirements. In order to establish a proper foundation for the admission of computer-generated exhibits, counsel must establish that:

1. The exhibit is relevant and material;

2. The input device, central processing unit, and output device are recognized as standard in the industry;

3. The computer hardware was operated properly by fully trained personnel;

4. The source of the input information was trustworthy;

5. The information input into the computer system was put into it in the regular course of business, reasonably close in time to the occurrence of the underlying event;

6. The information was processed by the central processing unit according to a standard, unmodified program operated according to its instructions;

7. The accuracy of the output was verified; and

8. The timing of each step in the process was consistent with its trustworthiness, *i.e.,* there were not excessive delays between any step. n20

Example--Business Record:

Q:

Are you employed by State Bank?

A:

Yes.

Q:

What is your position there?

A:

I am the head cashier.

Q:

Please describe your duties.

A:

I supervise each of the tellers, and also establish training programs for them and assure that each successfully completes that training. In addition, I am responsible for assuring that all of the accounts of each teller balance at the close of each day. Thus, I personally review the teller cage sheets for each day, and also the summary sheets that compare the individual teller entries with the cross-match on an account-by-account basis.

Q:

So, each day you assure that all of these various accounts and reports are in balance?

A:

Yes.

Q:

And what is the process if something is out of balance?

A:

The underlying slips for each transaction are reviewed until the error--the reason for being out of balance--is located and corrected.

Q:

Is there ever a circumstance where things are left out of balance?

A:

No.

Q:

Now, I would like to show you plaintiff's exhibit 14. Do you recognize it?

A:

Yes.

Q:

Please describe it to the ladies and gentlemen of the jury.

A:

It is a daily account summary. It is generated each and every day--manually--by listing all of the account activity for each account for that day. The accounts are sorted numerically, and after the day's activities are recorded, the account balance for the previous day is entered. The new account balance, as of the close of business for that day, is recorded in the space across from the legend "Day Closing Balance."

Q:

When is the daily account summary prepared?

The information is recorded and balanced by 6:

00 p.m. of the day that the activity occurred.

Q:

Is this a special report?

A:

No. The daily account summary is prepared each day by State Bank, and is a document kept by it in the ordinary course of its business.

Q:

Was plaintiff's exhibit 14 prepared as you have just described?

A:

Yes.

Q:

How do you know that?

A:

In the bottom right hand corner are my initials. I put them on each and every daily account summary which has been found to be in balance. Thank you.

A business records foundation is not complicated, but each and every one of the required elements must be covered. This is one area of pretrial preparation where it would be very helpful to write out your questions and anticipate answers in advance, even if you do not generally follow this practice. In addition, the witness should be carefully prepared so as not to jump ahead of the step-by-step ordering of the information you have planned.

[6.--4] Other Documents.

The required foundation for other documents depends upon the specific nature of the document sought to be admitted. Assuming that there has been no stipulation, n21 you should determine whether the author of the document is available to testify. The author is the easiest foundation witness, and can readily identify his or her signature and the circumstances surrounding the creation of the document. This foundation witness will also be able to establish that the proffered document is in substantially the same condition at trial as when it was created and dispatched. Thus, a letter sent by a witness can be authenticated by testimony that the witness authored the letter, recognizes his or her signature on the letter, and that the content of the letter has not been altered.

A common problem occurs when the document offered has some additional writing on it, not authored by the foundation witness. In such an instance, the typed portion of the letter can be admitted, with the handwritten portions subject to further authentication, if possible, by subsequent witnesses. n22 The following is an example of the foundation necessary to admit a letter with several notations:

Q:

I show you plaintiff's exhibit D, do you recognize it?

A:

Yes.

Q:

What is it?

A:

A letter that I sent to Barb Mann.

Q:

And how do you recall that?

A:

Well, that is my signature above where my name is typed, and I remember sending her this letter in response to a telephone conversation we had.

Q:

And did you write everything contained on that single page?

A:

No ... I wrote the typed written portion. I do not know who wrote the red or blue handwritten notes on it.

Q:

Your honor, I move the admission of the typed portions of plaintiff's exhibit D.
Now, Ms. Mann, I show you plaintiff's exhibit D, do you recognize it?

A:

Yes, it is a letter that Bill Smith sent me.

Q:

When you received the letter, was there any handwriting on it?

A:

No. I wrote the red portions ... they were my thoughts on the subject at the time. I do not know who wrote the blue portions.

Q:

Thank you. Your honor, I move the admission of the red handwritten portions of plaintiff's exhibit D. ... [Admitted] Mr. Johnston, do you recognize plaintiff's exhibit D?

A:

Yes.

Q:

What is it?

A:

It is a letter I found in the desk drawer of a desk I bought at a garage sale a year or so ago.

Q:

Do you know who wrote the letter?

A:

I don't know anything about the letter except that it was in the drawer of a desk I bought for $200 at a garage sale.

Q:

Did you write a note on the letter?

A:

Well, I thought the letter might be important to somebody, so I jotted a note on the letter so that I would remember when and where I found it.

Q:

What color ink did you use for your note?

A:

Blue. The blue handwriting is mine.

Q:

What did you do after you wrote the note on the letter?

A:

I called the F.B.I. and they came over and picked it up.

Q:

Thank you. Your honor, I move the admission of the blue handwritten portions of plaintiff's exhibit D. ... [Admitted]

[6.--5] Photographs and Motion Pictures.

Because the judge or jury are accustomed to receiving information visually, where possible, photographs, video tapes, or motion pictures should be used during the course of your trial presentation. Such exhibits may be either demonstrative evidence or real evidence. The foundational requirements for demonstrative visual exhibits is much less stringent than the foundational requirements for real visual exhibits. If the visual exhibit represents facts or circumstances that are witnessed or explained by an occurrence witness, it is generally demonstrative in nature. On the other hand, if no witness observed what is depicted in the visual exhibit, then very stringent requirements may be applied.

The most common type of visual exhibit is a photograph. It may be a photograph of a damaged vehicle, of injuries suffered by the plaintiff, or of an allegedly defective machine. In such instances, the foundational requirement is that a witness be able to testify that the photograph fairly and accurately represents what it portrays at some relevant time period.

Q:

Please describe the damage to your vehicle after the accident.

A:

The right front fender was smashed in. The radiator was leaking. The headlight was broken. There was a piece of the fender shoved into the tire. The hood was sprung. It was a mess.

Q:

Did you take any photographs of the damage?

A:

Yes ... before the tow truck came my neighbor came over with a camera and I took a few pictures of the damage.

Q:

Do you recognize plaintiff's exhibit 3?

A:

Yes, that is one of the photographs that I took.

Q:

Does plaintiff's exhibit 3, the photograph that you took, fairly and accurately portray the damage to your car as it appeared after the accident?

A:

Yes.

In the case of motion pictures or video tapes, courts tend to scrutinize the foundation very closely. Under certain circumstances, the court may require that such evidence be viewed by the court before trial. The court wants to be assured that there has been some evidence asserted as to all of the facts presented in the film or video. For example, if a "Day in the Life" film portrays a plaintiff who cannot walk, or feels pain during every routine movement, prior testimony should have established these facts. Even where the predicate foundation for a motion picture or video tape has been established, some judges believe that such evidence may be too prejudicial or otherwise seeks a verdict based upon sympathy. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." n24 Thus, it is uncertain as to whether such "Day in the Life" films or videos will generally be admitted. The deciding factors will be the quality of the presentation, the ability of plaintiff's attorney, and the discretion of the judge. Any doubt as to the balance between prejudice and probative value should be resolved in favor of admissibility. n25

In those few cases where the photograph or film is itself the real evidence, the foundational requirements are more cumbersome. For example, if a camera is set on a timer, or connected to a trip wire, and the resultant photograph is offered into evidence in circumstances where no witness is available to establish its accuracy, the court will want to be assured that there was no tampering with the proffered result. Thus, a chain of evidence of the unexposed film, as well as the method and nature of its processing, must be established. A sometimes insurmountable problem is establishing the time of the photograph. Unless the photographic equipment records the date and time automatically, there is no witness to establish these elements. Of course, if the photograph recorded an event which probably occurred, the lack of a precise time should not bar its admissibility.

A visual exhibit may also be excluded because of its gruesome nature. The argument for relevancy is that the exhibit actually depicts the injury or harm. However, where the gruesome nature of that depiction is so strong that it may unduly inflame or prejudice a jury, the judge may properly exclude it. n26

[6.--6] Aural Recordings.

The admissibility of sound recordings closely parallels the admission of photographs, motion pictures, and video tapes. Essentially, the foundation should establish that:

1. The recording equipment was of an acceptable quality capable of accurate recording in the conditions as they existed at the time the actual recordings were made.

2. The operator of the recording equipment was trained and qualified to operate it.

3. A witness can establish that the recording accurately sets forth what the witness heard at the time of the recording.

4. The tape has been secure from tampering since the time of the recording.

5. The recorder to be used in court is of an acceptable quality to accurately reproduce the taped recordings.

6. The voices on the tape can be identified.

Problems arise where the tape recordings need to be enhanced in order to hear what was recorded. In such instances, it is necessary to establish that the method of enhancement is scientifically acceptable and performed by a trained operator in such a manner so as to not alter or damage the original recording.

When presenting an aural recording to the judge or to a jury, you should tender in advance a transcript of the taped conversations to facilitate the listening process.

[6.--7] Charts, Graphs and Other Summary Exhibits.

In the context of cases involving voluminous documents, the courts have wholeheartedly embraced the concept of our adversary system. In fact, *Federal Rule of Evidence 1006* is specifically designed to assure that large numbers of documents may be simply presented to the trier of fact by way of summary, with the accuracy of any such summary checked by the ability of opposing counsel to review the underlying documents and successfully cross-examine the author of the summary. n27 Rule 1006 provides that:

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

Thus, if a damage calculation is based upon hundreds or even thousands of individual bills or invoices, these may be presented by a single line entry on a chart, rather than page by page. Opposing counsel must be given access to these underlying documents, and the witness who calculated the summary must be able to testify with certainty as to the accuracy of that calculation. n28

In fact, in those instances where the case involves economic calculations or totals, a summary chart may serve as a basis for your closing argument. It is also the type of exhibit jurors appreciate in complicated cases. Remember to keep each page or chart simple. The purpose of the summary is defeated if a single page looks like the federal budget or an organizational chart for the executive branch of the government. You can always use more than one chart to avoid a confusing presentation.

In summary, you should always seek to simplify the case for the jury, and to use as many visual aids and summary charts as is reasonable for your case. The Rules of Evidence generally allow, and in fact encourage, this use of exhibits.

[6.--8] Diagrams, Drawings, Models and Maps.

Diagrams, drawings, models and maps, like demonstrative photographs, require a foundation. The essence of any such exhibit is that it fairly and accurately represents something relevant being described by a witness with a first-hand basis for the testimony. For example, a witness viewing a drawing of an intersection may establish that such drawing is an accurate representation of the intersection as it appeared at the time of the accident.

Demonstrative exhibits should not mislead or confuse the jury. Thus, where a model of a machine alleged to be defective omits a hand guard on the actual machine, its use should be precluded. Of course, the judge has wide discretion to admit such exhibits subject to limitation, or to exclude them altogether.

[6.--9] Smooth Presentation.

Well before the trial begins, you should determine which exhibits you intend to use, and the order of their use. You should plan the necessary foundation for each, and be certain that you are familiar with the necessary questioning of the foundation witnesses. Do not abbreviate any foundational questioning even though your opponent may not hold you to exacting standards; on appeal, you may find a panel of judges much less forgiving if admission of an exhibit was plain error, even though the opponent failed to object at the time. Trial preparation in a complex case should entail rehearsing the introduction of exhibits with co-counsel or colleagues. In short, be prepared and follow your trial plan in order to instill a feeling of confidence in your presentation.

[7] Move for Admission.

Be certain to move for the admission of each and every exhibit you offered into evidence. This should be done when you have finished the foundational questioning of the witness. Such motion should be framed as follows:

"Your Honor, I offer Plaintiff's Exhibit 4 into evidence."

The court will then ask your opponent if there is an objection and, if so, will probably ask for the basis of that objection. Generally, local custom will determine the amount of argument the court will hear on the issue of admissibility. In most cases, you will have anticipated the objection and offered your legal argument on admissibility to the court in your trial brief. Also, most courts do not appreciate extensive argument before a jury, but rather hear evidentiary issues on the record at a side bar conference. If there is any chance the court might exclude the evidence at trial, raise the issue by a motion in limine to avoid the last minute surprise and disruption in your trial plan.

After you have concluded your case-in-chief, and before resting, you should review your exhibit log n29 to confirm that all of the exhibits offered have been admitted by the court. Before resting, and probably out of the presence of the jury, you should summarize for the court those exhibits your log reflects as having been admitted by the court. Once your log and the court are in agreement, and after you have quickly assured yourself that nothing was omitted from your case-in-chief, you may confidently rest your case.

[8] The Court Must Rule on Your Request.

If the court does not grant your motion to admit a certain exhibit, it is not in evidence. At times a court may reserve its ruling as to admissibility. It is your obligation to be certain that you obtain a ruling from the court as to each exhibit offered. If the evidence is excluded, be sure to mark the exhibit "for identification" so that it will be included in the record for the appellate court's review.

[9] Present the Exhibit to the Jury.

Once an exhibit has been admitted into evidence, you should ask leave of court to present it to the jury. This may be accomplished by having the witness read some or all of the exhibit to the jury. Or the jury may be permitted to step down and view a large exhibit, such as a car chassis or large model. Individual documents or multiple copies may be passed to the jury. Also, depending upon local court rule, you may give each juror a binder in which to insert a set of documentary exhibits. You must persuade the jury with the strength of your exhibits, but not bore them with the length of your exhibits.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceAuthenticationGeneral OverviewEvidenceDemonstrative EvidenceGeneral OverviewEvidenceDemonstrative EvidenceAdmissibilityEvidenceDemonstrative EvidenceFoundational RequirementsEvidenceDocumentary

EvidenceGeneral OverviewEvidenceDocumentary EvidenceBest Evidence RuleEvidenceDocumentary EvidenceCompleteness

FOOTNOTES:

(n1)Footnote 1. *See generally* 6 *WEINSTEIN'S Federal Evidence, § 1002.04* (Matthew Bender 2d ed.).

(n2)Footnote 2. *See* 6 *Weinstein's Federal Evidence, § 1002.05* (Matthew Bender 2d ed.).

(n3)Footnote 3. *See, e.g., United States v. Sliker, 751 F.2d 477 (2d Cir. 1984)* (proof of fact of insurance did not require production of actual insurance policy).

(n4)Footnote 4. *In re Mullins, 125 B.R. 808 (Bankr. E.D. Cal. 1990)* .

(n5)Footnote 5. *United States v. Leight, 818 F.2d 1297 (7th Cir.)* , *cert. denied, 484 U.S. 958, 108 S. Ct. 356, 98 L. Ed. 2d 381 (1987)* ; *In re Bobby Boggs, Inc. 819 F.2d 574 (5th Cir. 1978)* .

(n6)Footnote 6. *Fed. R. Evid. 1004.*

(n7)Footnote 7. *Tyson v. Jones & Laughlin Steel Corp., 958 F.2d 756 (7th Cir. 1992)* ; *United States v. Georgalis, 631 F.2d 1199 (5th Cir. 1980)* .

(n8)Footnote 8. *Fed. R. Evid. 901.*

(n9)Footnote 9. *Cathey v. Johns-Manville Sales Corp., 776 F.2d 1565 (6th Cir. 1986)* .

(n10)Footnote 10. *See § 34.03 supra.*

(n11)Footnote 11. *United States v. Whittington, 783 F.2d 1210 (5th Cir. 1986)* .

(n12)Footnote 12. *United States v. Mendel, 746 F.2d 155, (2nd Cir. 1984)* , *cert. denied, 469 U.S. 1213, 105 S. Ct. 1184, 84 L. Ed. 2d 331 (1985)* .

(n13)Footnote 13. *Hoover v. Thompson, 787 F.2d 449 (8th Cir. 1986)* .

(n14)Footnote 14. *United States v. Harrington, 923 F.2d 1371 (9th Cir. 1991)* .

(n15)Footnote 15. *Fed. R. Evid. 801(c).*

(n16)Footnote 16. *Fed. R. Evid. 801(a).*

(n17)Footnote 17. *Fed. R. Evid. 803(6)* provides that:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation and calling of every kind, whether or not conducted for profit.

(n18)Footnote 18. *Bondie v. Bic Corp., 947 F.2d 1531 (6th Cir. 1991)* .

(n19)Footnote 19. *Paddack v. Dave Christensen, Inc., 745 F.2d 1254 (9th Cir. 1984)* ; *In re Applin, 108 B.R. 253 (Bankr. E.D. Cal. 1989)* .

(n20)Footnote 20. *See, e.g., Grand Liquor Co. v. Department of Revenue, 67 Ill.2d 195, 367 N.E.2d 1238 (1977)* .

(n21)Footnote 21. *See § 34.03[1] supra,* concerning the introduction of exhibits by stipulation.

(n22)Footnote 22. *But see United States v. Caldwell, 776 F.2d 989 (11th Cir. 1985)* (handwritten alterations were at issue).

(n23)Footnote 24. *Fed. R. Evid. 403*. The trial judge has broad discretion to determine whether the prejudice inherent in otherwise relevant evidence outweighs its probative value. *United States v. Poole, 929 F.2d 1476 (10th Cir. 1991)* .

(n24)Footnote 25. *United States v. Terzado-Madruga, 897 F.2d 1099 (11th Cir. 1990) . See generally Bannister v. Town of Noble, Okla., 812 F.2d 1265 (10th Cir.1987)* .

(n25)Footnote 26. *See In re* Air Crash Disaster Near New Orleans, La. on July 9, 1982, *767 F.2d 1151 (5th Cir. 1985)* (photographs of bodies charred by fire).

(n26)Footnote 27. *See United States v. Paulino, 935 F.2d 739 (6th Cir. 1991)* (defendants had full opportunity to cross-examine foundational witnesses to alleviate any inaccuracy or unfair characterizations in the summary and the charts were not substantially inconsistent with the trial testimony).

(n27)Footnote 28. *E.g., United States v. Jennings, 724 F.2d 436 (5th Cir. 1984) , cert. denied, 467 U.S. 1227, 104 S. Ct. 2682, 81 L. Ed. 2d 877 (1985)* (charts summarizing 200 pages of material and substantial amounts of mathematical computations were supported by sufficient evidence).

(n28)Footnote 29. *See § 34.06[4] supra*.

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CHAPTER 34 Exhibits *

3-34 Federal Litigation Guide § 34.07

§ 34.07 Keeping Exhibits Out of Evidence.

If your trial takes place in a court which requires pretrial submission of all exhibits, you will know what your opponent intends to offer. If not, pretrial discovery should have at least identified the most likely exhibits. In any event, this knowledge and basic training in the applicable rules of evidence will provide the framework for keeping the opponent's exhibits out of evidence.

Of course, to be admissible each exhibit must be relevant and material and if hearsay, subject to one of its exceptions. Additionally, there must be a proper foundation to authenticate each exhibit. After reviewing each of your opponent's potential exhibits, you should know which exhibits may not meet the required evidentiary standards. Each potential problem exhibit should be marked with a tag, or somehow flagged so that when the exhibit is offered, you will remember to object to its admissibility. Depending on the complexity of the evidentiary issue raised, you should have completed at least some basic legal research, with the appropriate authorities, for each objectionable exhibit. If the evidence is excluded, be sure to mark the exhibit "for identification" so that it will be included in the record for the appellate court's review.

In some instances, you may not have a basis for an objection until after you have examined your opponent's witness on the exhibit. If that is the case, make your objection as soon as you become aware of the grounds, and ask the court to strike an exhibit that has already been admitted. For example:

Plaintiff's counsel:

Q:

Can you identify the signatures on the loan documents?

A:

Yes. They are the signatures of the borrower's wife.

Q:

Your Honor, I offer these exhibits into evidence.

Defendant's counsel: Your Honor, I ask this court to reserve its ruling until I have had an opportunity to cross-examine this witness.

The Court: I will reserve my ruling.

Defendant's counsel:

Q:

Thank you. Now, did you actually see the borrower's wife sign the loan documents?

A:

No ... but he told us that they were signed by his wife.

Q:

But weren't some of these documents signed before you started working at the bank?

A:

Well yes ... but he told the loan officer that his wife signed the documents.

Q:

So, you personally did not see her sign the loan documents, isn't that true?

A:

That's correct.

Q:

And you never met his wife, did you?

A:

No, I never met her.

Q:

And the borrower never told you personally that his wife signed the documents, did he?

A:

No, he didn't.

Q:

So, isn't true that when you said that the signatures on the loan documents were those of the borrower's wife, you were merely repeating what another bank officer had told you?

A:

Yes.

Q:

Isn't it also true that you can't identify her signature because you never saw her sign anything, isn't that also true?

A:

Yes.

Q:

Your Honor, I ask this court to deny the pending motion to admit these exhibits.

The Court: The motion will be denied; these exhibits are not admitted.

You must also be cognizant of exhibits that, even if excluded, will unduly prejudice your case. For example, if a key witness was convicted of tax fraud ten years ago, merely asking the witness if there was such prior conviction would generate substantial negative jury feelings even if the objection were sustained. n1 No curative instruction can excise what has already been heard by the jury. In such cases, you should consider a motion in limine. n2 Such a motion is made before trial and asks the court to provide an evidentiary ruling before the trial begins. It allows both sides to brief the issue, and gives the court an opportunity to consider the issue before the pressure of trial.

Be sure to make your objections to exhibits at the earliest opportunity; if an objection is not timely made it is waived. *Rule 103(a) of the Federal Rules of Evidence* requires a contemporaneous objection to a motion to introduce an exhibit. In the absence of such objections, only plain error affecting substantial rights will be the basis for appellate reversal. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceDemonstrative EvidenceGeneral OverviewEvidenceDemonstrative EvidenceFoundational RequirementsEvidenceDocumentary EvidenceGeneral OverviewEvidenceDocumentary EvidenceBest Evidence RuleEvidenceDocumentary EvidenceCompletenessEvidenceProcedural ConsiderationsObjections & Offers of ProofObjectionsEvidenceProcedural ConsiderationsRulings on Evidence

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Evid. 405(b)* (use of testimony of past instances of conduct to prove character).

(n2)Footnote 2. For a discussion of motions in limine *see § 37.05[2] infra*.

(n3)Footnote 3. *Fed. R. Evid. 103(d)*.

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CHAPTER 34 Exhibits *

3-34 Federal Litigation Guide § 34.08

§ 34.08 Arrange for All Necessary Equipment Before Trial.

Do not rely upon anyone else to provide you with the necessary tools to try your case; do not rely on court personnel or court equipment. Determine in advance what equipment you will need, arrange for it to be in the courtroom, and personally ensure that it is in good working order. A quick checklist of possible items could include:

1. Chalkboard

2. Easel

3. Poster board

4. Chalk

5. Eraser

6. Markers

7. Pointer

8. Overhead projector

9. Electrical cords

10. Large screen televisions monitor

11. Video tape player.

Be sure that you bring an adequate number of exhibits to the courtroom, as well as sufficient pens and paper. If the unexpected occurs, ask the court for time to correct the problem. For example:

Prosecutor:

Q:

Now tell the jury what they will see when the light is turned on.

A:

Each of the coins has been marked with invisible ink. On each coin has been placed my last initial, "B." So, when the black light is turned on, the jury will see a "B" on each coin.

Q:

And these coins were taken from the defendant when he was arrested?

A:

That is correct.

Q:

Will the bailiff please close the curtains and dim the lights. Thank you. Officer, please turn on the black light.

Defense Attorney: I can't see anything. ... I don't see any "B's." *Prosecutor:*

Q:

Your Honor, may we please have a brief recess? [Whereupon a brief recess was had in order to change the bulb in the black light.]
Officer, what do you see?

A:

A "B" clearly visible on each coin.

Q:

Thank you very much!

Be prepared.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceDemonstrative EvidenceGeneral OverviewEvidenceDemonstrative EvidenceComputer-Generated EvidenceEvidenceDemonstrative EvidenceRecordingsEvidenceDemonstrative EvidenceVisual FormatsEvidenceDocumentary EvidenceGeneral Overview

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CHAPTER 34 Exhibits *

3-34 Federal Litigation Guide § 34.09

§ 34.09 Summary Exhibits.

In the horse and buggy era of litigation, individual documents were introduced into evidence separately. This method is still used and indeed may be the proper way to handle exhibits in certain kinds of uncomplicated cases. As trials become more complex, however, the need for summarization of large volumes of technical data must be considered. Summary exhibits can effectively compile voluminous financial records and other statistical data, or clearly depict a chronological sequence of events appearing in documents. Summaries of voluminous writings, recordings or photographs inevitably make a case more interesting and understandable. n1

As a tactical matter, a summary exhibit should be considered under the following circumstances:

1. The materials are so voluminous that they cannot easily be transported or kept in the courtroom.

2. The separate introduction of the exhibits would require a number of sponsoring witnesses, would unduly disrupt the flow of testimony and would waste the court's time.

3. The documents contain information vital to the case which cannot be understood by the jury unless presented in summary fashion.

4. An accurate method summarizing the documents must be utilized. The person who made, or supervised the preparation of, the summary must be prepared to vouch for its accuracy at trial.

5. The data supporting the summary exhibits must be available for other parties in the case at a reasonable time and place.

Rule 1006 of the Federal Rules of Evidence provides the general rule in federal court:

The contents of voluminous writings, recordings or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at [a] reasonable time and place. The court may order that they be produced in court.

To be admissible, the summary must be based on accurate, nonprejudicial documentary proof. If the summary is of

disputable accuracy, assumes an unproven fact, or is used as an argumentative device, the district court may, in its sound discretion, properly rule the summary inadmissible. n2 A summary is also inadmissible when the underlying information was not provided to the opponent prior to the introduction of the summary. n3

When faced with the possibility that your adversary will present voluminous records through summary exhibits, you should insist that the exhibits be available before trial so that you have an adequate opportunity to review the supporting data to prepare a meaningful cross- examination. n4 A pre-trial conference is a convenient place for making this request. If opposing counsel seeks to surprise you at trial with a summary exhibit, you should request, and must be allowed, an adequate opportunity to review it before it is introduced.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceDemonstrative EvidenceGeneral OverviewEvidenceDocumentary EvidenceGeneral OverviewEvidenceDocumentary EvidenceWritingsGeneral OverviewEvidenceDocumentary EvidenceWritingsSummaries

FOOTNOTES:
(n1)Footnote 1. *See* Note, *Discovery and Use of Computerized Information: Examination of Current Approaches, 13 Pepperdine L. Rev. 405 (1986).*

(n2)Footnote 2. *United States v. Paulino, 935 F.2d 739 (6th Cir. 1991)* ; *Gomez v. Great Lakes Steel Div. Nat'l Steel Corp., 803 F.2d 250 (6th Cir. 1986)* (summary dealt with estimated damages and assumed unproven facts).

(n3)Footnote 3. *United States v. Miller, 771 F.2d 1219 (9th Cir. 1985)* .

(n4)Footnote 4. *See R & R Assoc., Inc. v. Visual Scene, Inc., 726 F.2d 36 (1st Cir. 1984)* (defendant had ample opportunity to view original underlying records in advance of trial).

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CHAPTER 34 Exhibits *

3-34 Federal Litigation Guide § 34.10

§ 34.10 Demonstrative Evidence.

Spoken, and even written, words are often inadequate to create an understanding of the facts in the minds of the jurors. A lawyer can avoid the proverbial "thousand words" by drawing a picture. The picture itself can be drawn orally in the minds of the jurors or sketched on a piece of paper so that the jurors actually "see the testimony."

Verbal demonstrative evidence should pervade the trial. For example, rather than eliciting testimony from the witness that the box involved was about three feet by five feet six inches, the witness could add that the box was about the size of a refrigerator. You should structure virtually all of your testimony in a way which creates an image and stimulates the thought processes of the jurors.

Visual demonstrative evidence is any graphic display which clarifies other evidence. It can be a chart, map, model, photograph, motion picture, or a drawing created by the witness or by counsel during the course of the witness' testimony. Because a visual aid is not substantive evidence but is merely a means of supplementing other evidence, the judge has discretion in determining the manner and circumstances of its use at trial. Even if a judge refuses to admit the visual aid, the immediate effect of the jury viewing it is virtually the same as if it was admitted into evidence. Nonetheless, you should press for the admission of a visual aid because then no question arises as to the propriety of the jury taking it into the jury room during deliberations.

The visual aid should not be displayed to the jury until after you either have received the court's permission to do so or have obtained your adversary's stipulation to use it. If the court deems the visual aid improper, but it already has been seen by the jury, prejudicial error may have been injected into the trial. To avoid this potential problem, you should advise the court and opposing counsel of your intention to use a visual aid either at a pre-trial conference or during trial outside the presence of the jury. Your adversary has the right to inspect it before it is displayed to the jury. If surprise at trial is desired, the exhibit should be stored so that the jury cannot see it until after a foundation for it is established and the judge either admits it into evidence or grants you leave to display it to the jury.

You should develop a comfortable and natural style in using demonstrative evidence. Before trial you should practice handling it and integrating it into the witness' testimony. Once again, rehearsal with co-counsel or colleagues will give you confidence that presentation of the exhibit will go smoothly in the courtroom. Rehearse the use of demonstrative exhibits as part of your pretrial preparation of witnesses or during mock cross-examination of witnesses, using a stand-in for the opponent's expected witness at trial. Demonstrative evidence should be presented in a way that complements and enhances the testimony. A self- conscious or awkward performance with demonstrative evidence may

well confuse rather than clarify matters in the juror's minds.

[1] Charts.

Charts and graphs are useful in translating a mass of statistical data into an easy-to-understand form. Charts will be particularly helpful in:

1. Presenting data in a comparative manner;

2. Describing organizational structures;

3. Depicting trends, sales volumes, profitability or shares.

Assume that your witness will testify that Company X had sales of $1.0 million in 1988, $2.5 million in 1990; $4 million in 1991 and $3.5 million in 1981, and that the sales of Company Y for those same years were $2.5; $4.0; $2.0 and $1.5 million respectively. This testimony can be charted in three ways:

Click here to view image.

Click here to view image.

The alternative chosen will depend upon the purpose of the chart and the impact you want to achieve. If you want to depict the trend of Company X and Company Y, you may choose alternative 1. If you want to emphasize a comparison between the performance of Company X and Company Y for the four year period, you could choose either alternative 2 or alternative 3; and if you want the emphasis to be most dramatic you may opt for alternative 2 over alternative 3.

Assume your witness will testify that Company X is a large conglomerate engaged in the business of banking (50%), shipbuilding (10%), construction (5%), insurance (20%), and computer leasing (25%). Assume further that the case involves residential construction and that Company X's construction business is broken down into residential construction (10%); industrial construction (50%) and commercial construction (40%). These relationships could be displayed to the jury as follows (among other ways):

Click here to view image.

If you want to depict the relative composition of (1) construction to all other lines of business engaged in by Company X, and (2) residential construction to all other construction, you might use pie charts of the sort depicted in alternative 1. If, however, you want to emphasize that construction is only a small part of Company X's overall business and that residential construction is only a small part of Company X's construction business, you might opt for pie charts of the sort depicted in alternative 2.

Relationships between people, or among companies, can become confusing when presented verbally. However, a simple organizational chart, possibly with a few colored connecting lines, can go far to facilitate juror understanding. Again, be sure that your chart is not more confusing than the testimony. Experiment with a few different designs, then select the simplest. Also, use colors if at all possible.

The types and uses of charts and graphs in a case are limited only by your imagination and that of the graphic design consultants whom you employ. Rely on professionals who are trained to think visually. Most lawyers are more verbal than visual and are better at precise language than at spatial relationships. In addition, many computer graphics programs readily available come equipped with alternate comparative formats which can be adapted for litigation purposes. In using such visual aids, you should keep three factors in mind:

1. Be sure that the visual aid is clear and large enough to be seen by the jury;

2. Be sure to label each graphic; and

3. Do not try to show too much in one illustration.

Creative use of colors, diagonal, horizontal and broken lines can solve many problems. At all times you should keep in mind that the charts and graphs must actually clarify testimony for the jury and not look like a confusing swirl of lines or shapes which resemble an impressionistic painting of a pizza.

The chart presented by one party is not inviolate. The opponent or other witnesses may be permitted to mark on the exhibit in order to make a different point or to point out flaws or inconsistencies in the exhibit. Or, they may prepare an identical exhibit and then visually destroy the impression you intended to convey. A transparent overlay may be placed on the exhibit so that another witness can make the marks or comparisons which weaken the exhibit. Prepare charts with those possibilities in mind.

[2] Maps.

One of the quickest ways to confuse a jury is to ask questions about directions or spacial relationships. Do not limit your use of maps to auto accident cases. Rather, anytime there is a spacial relationship, consider using a map. But do not use a street map, for generally all of the roadways and landmarks only serve to add to the confusion. Have a map prepared for the litigation, as large as practical, with the scale as accurate as possible, but which deletes unnecessary detail. You should also consider the use of clear plastic overlays to allow witnesses to mark on the map while they testify.

With a map, a plastic overlay, and a prepared witness, the jury is more likely to understand the evidence. For example:

Q:

Please draw a circle around your home.

A:

(Whereupon the witness drew a circle around a space on plaintiff's exhibit 23.)

Q:

Now please put an "X" over your destination.

A:

We were going to the Baptist Church right over here.

Q:

Now, please trace the route you took right up until the accident.

A:

We went straight up First to Main Street, then left up to Fourth which is where he hit us.

After the testimony, the overlay with the map should be offered into evidence so that the trial court record is preserved.

The inclusion of too much information on a single map or too many tracings and drawings can render a map unintelligible. Proliferation of copies and overlays can be equally confusing. Use separate maps for different issues in the case, rather than one all-purpose map, which will become obliterated by detail.

Maps are admissible when they are relevant and fairly and accurately depict the scene they purport to represent. The sponsoring witness need not be the map maker, but the witness should have first-hand knowledge of the scene or area.

[3] Models.

Because models are three dimensional and have qualities that cannot be matched by other types of demonstrative evidence. They can be of two types: (1) models that simply depict a scene or tangible object, and (2) operational models which simulate events or movements.

Models can give the jury a perspective which is not easily captured by a photograph. A juror can perceive more in one glance at a model than by close scrutiny of most photographs, and can therefore more vividly experience the witness' testimony. Operational models are eye-catching and may be the only effective means of showing jurors how a machine works, for example. When using an operational model, however, extreme care must be taken to guarantee that the model is in working condition. The jury may lose confidence in your whole case if the model fails to operate.

Courts differ widely in their approach to models. Some judges will admit a model only if it is completely accurate to scale. Other courts require only reasonable accuracy. Before proceeding to construct a model, ascertain which view your judge takes.

[4] Photographs and Motion Pictures.

Photographs and motion pictures have a variety of uses in court ranging from the photographic enlargement of a microscope slide to a panoramic view of the Grand Canyon. Unless sufficient planning is done before trial and effective presentation is made at trial, photographs or motion pictures may be ineffective or may be interpreted by jurors as a half-hearted effort to add some color to an otherwise weak case. Accuracy and effectiveness of photographs and motion pictures requires care in selecting a photographer and hard work by both the attorney and photographer.

A photographer with litigation experience should be hired. While photographs taken by a general photographer may be clear, they also may have been taken from an improper angle or may over-dramatize certain aspects of the scene thus rendering the photograph inadmissible. A photographer with experience in taking photographs for use at trial will more easily understand instructions and also may be a source of valuable suggestions concerning how best to present photographic evidence.

Even the most highly skilled photographer cannot prepare persuasive photographic evidence without the cooperation of the attorney. The photographer must be given clear and precise instructions and he must be retained sufficiently in advance of trial so that he has time to prepare photographs which will have the greatest positive effects upon jurors. n1 Use one or two effective photographs rather than ten or twenty casual snapshots.

Photographs and motion pictures should be admitted (1) if relevant, (2) and the sponsoring witness can testify that they fairly and accurately depict the scene as it appeared at the relevant moment. n2 Once the photograph is admitted into evidence you should present it in a way which best focuses the entire jury upon it. Enlargements and use of an overhead projector are preferable to one copy passed among the jurors or multiple copies for each juror. If the witness will have to mark or emphasize portions of the photograph, the overhead projector method is best. If multiple witnesses are to mark on the projection, each should use a different color crayon.

[5] Sketches.

The method of asking a witness to prepare a sketch--or having the lawyer do so while conducting his examination--is a widely accepted practice. A blackboard or large chart mounted on an easel should be placed in the courtroom in easy view of both the jury and the judge. When the courtroom arrangement prevents both judge and jury from seeing the board, position it for the jury and make your apologies to the trial judge. The judge can step down from the bench in order to see the drawing. When using the chart you should prepare your witness, or yourself, to make the drawing from a position that does not interfere with the view of any juror. A blackboard may have to be reused during trial and can be easily erased, and it is difficult to preserve a blackboard drawing for the record; consequently many lawyers opt to use chart paper over a blackboard.

Using a blackboard or chart to sketch aspects of testimony is an effective way of indelibly etching testimony into the minds of the jury. In courts that refuse to allow juror access to trial transcripts, a drawing made on chart paper can be an effective reminder of the highpoints of the witness' testimony. This technique is particularly effective when a witness will provide numerous reasons why certain action was taken. The witness can step down and first list generally all the reasons on the chart, leaving enough room between the statements so that sub-reasons can be added later during the testimony. Once the reasons are all listed, you can take the witness back over each one of them to discuss them in detail, making additions to the chart as the testimony proceeds.

While a hand-drawn chart of statements may be effective, the drawing of a scene by a witness at trial is usually a practice to be avoided. Such drawings are usually misleading and inaccurate. The better practice is to have a map or diagram prepared before trial which the witness can then qualify for admission.

The use of a blackboard or chart during voir dire or opening statement is effective and should facilitate juror understanding of the case's facts and theories. (However, very few cases have discussed the propriety of using a visual aid at those points; those cases facing the issue have generally upheld the discretion of the trial court in allowing counsel to use a blackboard or chart.) n3 The use of a blackboard or chart during closing argument also is within the judge's discretion. n4 During summation, the chart can be used effectively to remind the jury of the vital aspects of the case brought out by the testimony.

As to sketches prepared by witnesses, an issue to be aware of is preservation of the record. Thus, if a witness sketches on a chalk board which is erased at the end of his testimony, the sketches are not preserved for the record. Similarly, drawings on a sketch pad not admitted into evidence will not follow the case to the appellate court. In order to preserve the record, either offer into evidence the sketch pages, or photograph the chalk board prior to its erasure and offer the photograph into evidence.

[6] Computer Graphics

Computer graphic animation was first successfully admitted as substantive evidence in 1989. n5 Although costly in some cases, computer animation has the advantage of presenting highly complex or technical material in a visually clear and understandable manner. However, as with any exhibit, a computer presentation will not be admitted without adequate foundation. It the case of computer graphic animation that includes establishing "the trustworthiness of the original source data, all calculations and assumptions used in analyzing the data, its input into the computer, the operation and capability of the computer and software, the output process used for the graphics, the medium used to reproduce the computer graphics for presentation at trial, and the accuracy of the final presentation itself." n6 Increasingly, jurors who are used to computer games or computer graphics will accept computer generated animation as easily as re-creations on video.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceDemonstrative EvidenceGeneral OverviewEvidenceDemonstrative EvidenceAdmissibilityEvidenceDemonstrative EvidenceFoundational RequirementsEvidenceDemonstrative EvidencePhotographsEvidenceDemonstrative EvidenceVisual Formats

FOOTNOTES:

(n1)Footnote 1. *See generally* Courtney, *Effective Use of the Evidence Photographer, 17 Prac. Law. 33 (April 1971)*; Ehrlich, *Preparing and Using Photographs,* 3 Am. Jur. *Trials* § 43 (1965).

(n2)Footnote 2. *See United States v. Englebrecht, 917 F.2d 376 (8th Cir. 1990)* ; *United States v. Rembert, 863 F.2d 1023 (D.C. Cir. 1988)* (admissibility of photographs taken by camera in automatic teller machine).

(n3)Footnote 3. *See, e.g., United States v. Scales, 594 F.2d 558 (6th Cir. 1978)* , *cert. denied, 441 U.S. 946 (1979)* . *See also* 6 *Weinstein's Federal Evidence, § 1006.08* (Matthew Bender 2d ed.).

(n4)Footnote 4. *See, e.g., United States v. White, 766 F.2d 22 (1st Cir. 1985)* (not abuse of discretion to deny counsel use of blackboard to illustrate arguments during closing); *United States v. Young, 955 F.2d 99 (1st Cir. 1992)* (permissible to use chart during closing to summarize information already in evidence).

(n5)Footnote 5. *In re Air Crash at Dallas/Ft. Worth Airport, 117 F.R.D. 392 (N.D. Tex. 1989)* , *aff'd, 919 F.2d 1079 (5th Cir. 1991)* .

(n6)Footnote 6. Krieger, *Sophisticated Computer Graphics Come of Age--And the Evidence Will Never Be the Same, 78 A.B.A.J. 93, 96*, Dec., 1992.

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CHAPTER 34 Exhibits *

3-34 Federal Litigation Guide § 34.11

§ 34.11 Limited Use of Unadmitted Exhibits.

Reliance at trial upon exhibits not introduced into evidence may undermine the evidentiary base of a favorable decision with two exceptions. First, the court may allow the use of visual aids without requiring that they be admitted into evidence. Second, unadmitted exhibits may be used to refresh the recollection of a witness.

Often during the process of interrogation a witness cannot recall a particular event of conversation. When that happens, any writing, whether made by the witness or another person, can be used to refresh the witness' memory. After the witness reviews the documents--refreshes his memory--he must put it aside, state that his memory is refreshed and proceed to testify to the facts from his own knowledge. The writing is not evidence.

Generally, notes, memoranda, correspondence, reports, depositions, prior statements, computer printouts, photographs and virtually any other document can be used to refresh recollection. The writing need not be written or prepared by the witness; it may be a copy; and, it may even be incomplete. The time when the document was generated is immaterial and its reliability or competency as evidence need not be established before use. n1 The extent to which a witness may refer to a "refreshing" document is within the court's sound discretion. n2

Rule 612 of the Federal Rules of Evidence (Writing Used to Refresh Memory)states the federal rule as follows:

Except as otherwise provided in criminal proceedings by *section 3500 of title 18, United States Code*, if a witness uses a writing to refresh his memory for the purposes of testifying, either (1) while testifying, or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject mater of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

Procedurally, the witness is asked about a particular subject, and cannot recall the answer. A document is then shown to the witness, who recalls the answer based on the document. Refreshing recollection should be distinguished from past

recollection recorded, n3 wherein the actual document itself is admitted into evidence. For example:

Q:

Do you recall when you signed the contract?

A:

No.

Q:

Is there any document which would refresh your recollection as to when you signed the contract?

A:

Yes. If I could see the contract, I remember writing the date above my signature, and I had to look at a calendar to find out what the actual date was.

Q:

I show you what has been marked as plaintiff's exhibit W, and ask you to look at it. ... Having seen and reviewed exhibit W, is your recollection now refreshed as to the date that you signed the contract?

A:

Yes. Now I remember that I signed the contract on March 21, 1991.

Because the adverse party has a right to inspect the "refreshing" document, privileged communications cannot be used to refresh a witness' recollection. n4 If privileged materials or attorney work product is used for the purpose of refreshing recollection, the privilege is lost. n5

When the witness has forgotten the facts and cannot refresh his memory, the document relied upon may be read into evidence as a "past recollection recorded" under certain conditions and subject to certain limitations. Under *Rule 803(5) of the Federal Rules of Evidence*, a memorandum or other record concerning a matter about which a witness once had knowledge is admissible as a recorded recollection if the record was made when the facts were fresh in the witness' mind, the record was accurate when made, and the witness when testifying has insufficient recollection "to enable the witness to testify fully and accurately." Once so qualified, the record may be read into evidence but may not be received as an exhibit unless offered by an adverse party.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceDemonstrative EvidenceGeneral OverviewEvidenceDocumentary EvidenceGeneral OverviewEvidenceHearsayExceptionsRecorded RecollectionGeneral OverviewEvidenceTestimonyRefreshing RecollectionGeneral OverviewEvidenceTestimonyRefreshing RecollectionMemory AidsGeneral OverviewEvidenceTestimonyRefreshing RecollectionRefreshing Before TestimonyEvidenceTestimonyRefreshing RecollectionRefreshing During Testimony

FOOTNOTES:
(n1)Footnote 1. *See, e.g., United States v. Tolbert, 367 F.2d 778, 781 (7th Cir. 1966) . See also* 4 *Weinstein's Federal*

Evidence, § 612.03[3] (Matthew Bender 2d ed.).

(n2)Footnote 2. *See* 4 Weinstein's Federal Evidence, § 612,03[1] (Matthew Bender 2d ed.).

(n3)Footnote 3. *Fed. R. Evid. 803(5).*

(n4)Footnote 4. *See Derderian v. Polaroid Corp., 121 F.R.D. 13 (D. Mass. 1988)* .

(n5)Footnote 5. *Auto Owners Ins. Co. v. Totaltape, Inc., 135 F.R.D. 199 (M.D. Fla. 1990)* .

* Chapter 34 revised in 1993 by Richardson R. Lynn, Nimmo, Baker & Lynn, Nashville, Tennessee; Assistant Dean of Academic Affairs, Pepperdine University School of Law, Malibu, California.

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CHAPTER 34 Exhibits *

3-34 Federal Litigation Guide § 34.12

§ 34.12 Additional Resources.

[1] Federal Litigation Guide Reporter.

Kitch, *Admissibility of "Day in the Life" Films,* 1 Fed. Litigation Guide Rep. 663 (1987).

Lynch, *Use of Video Tape in the Courtroom,* 1 Fed. Litigation Guide Rep. 479 (1987).

McClearn, *Strategies in Developing and Using Demonstrative Exhibits,* 1 Fed. Litigation Guide Rep. 601 (1987).

Reasoner and Owens, *Innovative Judicial Techniques in Managing Complex Litigation,* 2 Fed. Litigation Guide Rep. 603 (1989).

Solovy and Byman, *The Effective Use of Nonusable Evidence,* 1 Fed. Litigation Guide Rep. 415 (1986).

[2] Treatises and Forms.

Federal Trial Guide, §§ 20.21, 30.01, 30.02, 30.10-30.35, 40.54.

Moore's Federal Practice (3d ed.), Ch. 30, *Depositions Upon Oral Examination* .

Weinstein's Federal Evidence (2d ed.), Ch. 612, *Writing Used to Refresh Memory* ; Chs. 1001-1006.

[3] Law Reviews and Periodicals.

Boddren and Winter, *The Case for a Visual Presentation,* 15 Trial Diplomacy J. 125 (1992).

Dombroff, *Effective Demonstrative Evidence, 12 Litigation 44 (Fall 1985).*

Henke, *Admissibility of Computer-Generated Animated Reconstructions and Simulations,* 34 Trial Lawyer's Guide 434 (1992).

Joseph, *Demonstrative Videotape Evidence,* 22 Trial 60 (June 1986).

Krieger, *Sophisticated Computer Graphics Come of Age--And the Evidence Will Never Be the Same, 78 A.B.A.J. 93, 96*, Dec., 1992.

Lederer, *Scientific Evidence--An Introduction, 25 Wm. & Mary L. Rev. 517 (1984).*

McCullough and Underwood, *How To Prepare and Use Demonstrative Evidence in a Civil Trial, 28 Prac. Law. 19 (1982).*

Medina, *The Admissibility of Computer Records as Evidence,* 39 Wash. St. B. News 14 (July 1985).

Mulroy, Jr. and Rychlak, *Use of Real and Demonstrative Evidence at Trial,* 33 Trial Law. Guide 550 (Winter 1990)

Nicastro, *How to Control Documents, 10 Litig. 36 (Summer 1984).*

Note, *Beyond Words: The Evidentiary Status of "Day in the Life" Films, 66 Boston U. L. Rev. 133 (1986).*

Note, *Discovery and Use of Computerized Information: Examination of Current Approaches, 13 Pepperdine L. Rev. 405 (1986).*

Seiden, *Physical Evidence in Criminal Cases,* 28 Trial 106 (Aug. 1992).

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceAuthenticationGeneral OverviewEvidenceDemonstrative EvidenceGeneral OverviewEvidenceDemonstrative EvidenceAdmissibilityEvidenceDemonstrative EvidenceFoundational RequirementsEvidenceDocumentary EvidenceGeneral OverviewEvidenceDocumentary EvidenceBest Evidence Rule

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CHAPTER 35 Cross-Examination *

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§ 35.02 Planning Cross-Examination to Elicit Favorable Testimony or Neutralize Unfavorable Testimony

§ 35.03 Considering the Scope of Cross-Examination

§ 35.04 Determining the Scope of Direct Examination

§ 35.05 Preparing Before Trial for Cross-Examination

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[1] Understanding the Importance of Redirect Examination
[2] Evaluating the Scope of Redirect Examination
[3] Considering Whether to Conduct Redirect Examination

§ 35.51 Offering Rebuttal Evidence
[1] Understanding the Importance of Rebuttal Evidence
[2] Evaluating the Scope of Rebuttal
[3] Considering the Extent of Rebuttal
[4] Selecting Rebuttal Witnesses
[5] Considering Rebuttal Techniques

§ 35.52 Understanding the Importance of Surrebuttal

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CHAPTER 35 Cross-Examination *

3-35 Federal Litigation Guide Scope

Scope

SCOPE

Effective trial advocacy requires a thorough understanding of cross-examination and impeachment of witnesses. A successful trial does not require an extensive cross-examination of every witness. Rather, the first decision is whether to cross-examine at all. After carefully exploring the factors underlying this decision, the chapter considers the conduct and demeanor of counsel during cross-examination. Although cross-examination is an extremely situation-specific litigation tool, certain general stylistic considerations are highlighted. Thereafter, the method of constructing a successful cross-examination is analyzed, including the various techniques that are available for maintaining control of witnesses.

Following the discussion of cross-examination in general, the chapter covers the goals and techniques of successful witness impeachment. While cross-examination that obtains affirmative evidence for the case-in-chief is important, cross-examination also is a valuable way to impeach the veracity of a witness and the reliability of his or her testimony. In this regard, various strategic considerations are set forth, such as who, what, when and how to impeach successfully. Cross-examination of expert witnesses is treated separately. Impeachment by prior inconsistent statement, character, bias, interest and inherent improbability of testimony are all explored in detail. Finally, the goals of redirect, rebuttal and surrebuttal are discussed.

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CHAPTER 35 Cross-Examination *
A Evaluating the Essentials of Cross-Examination

2-35 Federal Litigation Guide § 35.01

§ 35.01 Judicial Control Over Mode and Order of Interrogating Witnesses

The court is responsible for maintaining reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to: n1

- Make the interrogation and presentation effective in ascertaining the truth
- Avoid needless consumption of time
- Protect witnesses from harassment or undue embarrassment

In general, the trial court has the discretion to determine the order and the mode of cross-examination. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationScopeEvidenceTestimonyPresentation of Evidence

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Evid. 611(a).*

(n2)Footnote 2. *Argentine v. United Steelworkers, 287 F.3d 476, 486 (6th Cir. 2002) .*

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CHAPTER 35 Cross-Examination *
A Evaluating the Essentials of Cross-Examination

2-35 Federal Litigation Guide § 35.02

§ 35.02 Planning Cross-Examination to Elicit Favorable Testimony or Neutralize Unfavorable Testimony

Effective cross-examination increases the likelihood of prevailing at trial. Cross-examination serves two essential purposes:

- To elicit additional favorable facts that were not established by prior direct testimony
- To neutralize or discredit unfavorable testimony

Evidence favorable to the cross-examining party is generally more compelling when developed through an adverse, antagonistic, or hostile witness. Similarly, evidence may be far more damaging when elicited on cross than when it is developed through the same witness on direct. Cross-examination also provides the opportunity to bring out facts tending to discredit the witness by showing that the witness' testimony was untrue, biased, or based on faulty memory or perception.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationScopeEvidenceTestimonyPresentation of Evidence

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CHAPTER 35 Cross-Examination *
A Evaluating the Essentials of Cross-Examination

2-35 Federal Litigation Guide § 35.03

§ 35.03 Considering the Scope of Cross-Examination

A party who is adverse to the party initially calling a witness may cross-examine the witness in the sequence that the court directs. Cross-examination is typically limited to: n1

- The subject matter of the witness' direct examination
- Matters affecting the credibility of the witness

However, the court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination. n2 Typically, cross-examination is permitted when reasonably related to the witness' direct testimony. n3 The subject matter of direct examination is generally construed to include all inferences and implications arising from the testimony. n4 When only part of an act, declaration, conversation, or writing is elicited during direct examination, the remainder may be inquired into during cross-examination.

Refusal to permit cross-examination of a witness concerning matters testified to on direct examination constitutes prejudicial error. n5 In general, trial judges have wide latitude in determining the proper scope of cross-examination. n6 A trial court's rulings on the scope of cross-examination will not be reversed except for clear abuse of that discretion. n7

With respect to the allowable scope of cross-examination, a party is guaranteed "only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." n8 In setting the boundaries, the trial court is required to strike a balance between the opportunity to cross-examine and the need to prevent repetitive or abusive cross-examination. n9 In light of the discretion given to the trial judge to determine the scope of cross-examination, counsel should become familiar with the way the judge handles cross-examination.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationScopeEvidenceTestimonyPresentation of Evidence

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Evid. 611(b).*

(n2)Footnote 2. *Fed. R. Evid. 611(b).*

(n3)Footnote 3. *United States v. Lara, 181 F.3d 183, 199 (1st Cir. 1999)* .

(n4)Footnote 4. *U.S. v. Tomblin, 46 F.3d 1369, 1386 (5th Cir. 1995)* .

(n5)Footnote 5. *Francis v. Clark Equipment Co., 993 F.2d 545, 550 (6th Cir. 1993)* .

(n6)Footnote 6. *U.S. v. Easter, 66 F.3d 1018, 1022 (9th Cir. 1995)* ..

(n7)Footnote 7. *Bryan v. Hall Chemical Co., 993 F.2d 831, 836 (11th Cir. 1993)* .

(n8)Footnote 8. *Douglas v. Owens, 50 F.3d 1226, 1230 (3d Cir. 1995)* ; *Kentucky v. Stincer, 482 U.S. 730, 739, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987)* .

(n9)Footnote 9. *Douglas v. Owens, 50 F.3d 1226, 1230 (3d Cir. 1995)* .

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CHAPTER 35 Cross-Examination *
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2-35 Federal Litigation Guide § 35.04

§ 35.04 Determining the Scope of Direct Examination

In general, the scope of cross-examination coincides with the subject matter of direct examination. n1 However, a skillful cross-examiner will not restrict questions to a categorical review of matters, dates, and times covered in the direct examination. His or her cross-examination may be directed toward eliciting any matter that tends to overcome or diminish the effect of the witness' direct examination. The trial court has discretion during cross-examination to permit inquiry about a collateral fact when it is directly connected with a question in dispute and essential to its proper determination, or when it affects the witness' credibility. n2

Thus, if a party opens up a subject on direct examination, there is no basis for objection if the opposing party introduces evidence on the same subject on cross-examination. n3 This principle has two important consequences:

- First, it may allow a party more extensive cross-examination than would have been available had the subject not been raised on direct

- Second, it may allow a party to introduce evidence on cross-examination that would not otherwise be admissible in the action

Under the second consequence, for example, the court may be more inclined to exercise its discretion to permit inquiry into additional matters as if on direct examination. n4 Although a trial court may restrict cross-examination on new matters not raised on direct, the court may not restrict a party's right of cross-examination until that right has been substantially and fairly exercised as to matters introduced on direct. n5 Thus, if a matter appears to be beyond the scope of direct examination, the proponent may attempt to have it received by arguing that the opposing party opened the door to the subject on direct examination. Similarly, a relevancy objection may be defeated by arguing that the door was opened on direct examination. n6

The second consequence mentioned above is particularly important. For example, although evidence of collateral source payments is generally inadmissible, in a case in which the plaintiff testified on direct examination that he retired under disability, the defendant was entitled to impeach the plaintiff by asking whether the plaintiff left with full retirement benefits. n7 Similarly, the Eighth Circuit ruled that evidence of workers' compensation payments was admissible to impeach a plaintiff's statement that he had suffered financial stress after the accident in question. n8 Likewise, evidence of "subsequent remedial measures" (generally inadmissible under *Federal Rules of Evidence 407*) is admissible to

impeach the testimony of a witness. n9 Thus, cross-examining counsel should carefully scrutinize matters elicited on direct examination to see if the "door has been opened" for the admission of potentially damaging information that would otherwise be inadmissible under the rules of evidence.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationScopeEvidenceTestimonyPresentation of Evidence

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Evid. 611(b).*

(n2)Footnote 2. *Fed. R. Evid. 611(b).*

(n3)Footnote 3. *Francis v. Clark Equipment Co., 993 F.2d 545, 550 (6th Cir. 1993) .*

(n4)Footnote 4. *Fed. R. Evid. 611(b).*

(n5)Footnote 5. *Francis v. Clark Equipment Co., 993 F.2d 545, 550 (6th Cir. 1993) .*

(n6)Footnote 6. *E.E.O.C. v. General Dynamics Corp., 999 F.2d 113, 119 (5th Cir. 1993) .*

(n7)Footnote 7. *Brandt v. Vulcan, Inc., 30 F.3d 752, 760 (7th Cir. 1994) .*

(n8)Footnote 8. *Cowens v. Siemens-Elema, AB, 837 F.2d 817, 824-825 (8th Cir. 1988) .*

(n9)Footnote 9. *Trytko v. Hubbell, Inc., 28 F.3d 715, 724 (7th Cir. 1994) .*

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CHAPTER 35 Cross-Examination *
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§ 35.05 Preparing Before Trial for Cross-Examination

Planning for an effective cross-examination begins well before trial. Preparation generally includes reviewing discovery responses, deposition testimony, and other related documents. These materials will often illuminate the potentially adverse testimony of key opposition witnesses, and the materials can often be used to impeach or otherwise cross-examine those witnesses.

It is a rare case in which counsel does not have a reasonably good idea before trial of what each of an adversary's witnesses will testify about. Give advance thought to the potential benefit and harm of each likely witness. Preparation and judgment, and not necessarily eloquence, linguistic dexterity, or clever impromptu impulses, are the touchstones of effective cross-examination.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationScopeEvidenceTestimonyPresentation of Evidence

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CHAPTER 35 Cross-Examination *
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2-35 Federal Litigation Guide § 35.06

§ 35.06 Outlining Questions for Cross-Examination

An outline of areas of inquiry for each potential adverse witness that includes potential cross-examination questions will likely be helpful for use at trial. The outline can be organized based on the key issues that need to be established at trial. Using these key issues, counsel should know where to concentrate during any given cross-examination. From discovery, counsel should generally know the identity of witnesses the opposing party will likely call, their probable testimony on direct examination, and their anticipated responses on cross-examination. In preparing to cross-examine these witnesses, list the strongest points you hope to make during cross-examination.

Depending on the complexity of the case, counsel may want to focus on only three or four major areas during cross-examination of each adverse witness. Questions prepared in advance of trial can be adapted and augmented at the time of trial depending on the actual testimony of the witness on direct examination. Discard any parts of the prepared outline of anticipated cross-examination that now seem irrelevant or marginal in light of the witness' actual testimony. By analyzing and evaluating the witness' testimony on direct examination, counsel may also detect new and unanticipated areas of weakness that can be exploited on cross-examination.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationScopeEvidenceTestimonyPresentation of Evidence

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CHAPTER 35 Cross-Examination *
A Evaluating the Essentials of Cross-Examination

2-35 Federal Litigation Guide § 35.07

§ 35.07 Deciding Whether to Cross-Examine a Witness

During direct examination, it is critical to analyze and evaluate the opposing witness' testimony. The following are examples of issues to consider at that time:

- Has the witness' testimony been harmful?
- Can damaging testimony be rebutted?
- How did the witness relate to the jury and is the witness vulnerable to a credibility challenge?
- Is it possible that the witness will alter his or her testimony under cross-examination?
- Are there inconsistent statements or discovery responses that might be used to induce the witness to change his or her testimony?
- Will cross-examination emphasize damaging testimony?
- Will cross-examination create sympathy for the witness?
- Will cross-examination open new areas for redirect?

Listen attentively to the direct and watch both the witness and the jury for perceptions and reactions. Even though a cross-examination has been prepared, be flexible and mentally prepared to dispense with it if appears unnecessary or counterproductive. For example, the jury may not have gotten the critical point made on direct; a cross may only help drive it home clearly. If the jurors do not like the witness, they may reject what he or she says without cross. It is also possible that the jury will like the witness and resent the attorney for trying to score any points on the witness in cross-examination. The sweet old grandmother, the valiant humble disabled person and the straight-arrow uniformed police officer may be embraced by the jury. If there is another way to contradict or impeach these witnesses, take it. Only if their testimony is critical and there is no other effective way to attack it should such a witness be aggressively cross-examined.

For these reasons, decide whether to cross-examine a witness after direct examination concludes. Although some attorneys may believe that all adverse witnesses should be cross-examined, it is the mark of the experienced trial attorney not to cross-examine a witness who has not harmed that attorney's client.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceTestimonyCredibilityImpeachmentGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationScopeEvidenceTestimonyPresentation of Evidence

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CHAPTER 35 Cross-Examination *
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2-35 Federal Litigation Guide § 35.08

§ 35.08 Assessing the Damage Done on Direct

A primary factor in determining whether to cross-examine is whether the witness provided damaging evidence. If the witness has not hurt the case on direct, consider foregoing cross-examination unless it is highly likely that favorable evidence can be elicited. Cross-examination may provide the witness with a second chance to give unfavorable evidence. Perhaps the witness has forgotten to make a key point and the opponent has failed to direct the witness' attention to it. The witness may recall it during cross and may be able to bring it out either during cross or on redirect. Perhaps the opponent does not realize that a key point was skipped during direct. Cross-examination may raise it and the opponent can hammer it in during redirect.

A surprising number of witnesses, including experts, are passive and uninspired during their direct examination, yet become impassioned advocates when challenged on cross. Moreover, the jury may not have been paying attention to the witness' monotone delivery on direct, and may well have missed a point. If the jury is alerted to the issue through cross-examination, the damage to the case is intensified. In short, cross-examination of a witness who has not provided damaging testimony only gives a harmless witness a chance to become a harmful one.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationScopeEvidenceTestimonyPresentation of Evidence

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CHAPTER 35 Cross-Examination *
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2-35 Federal Litigation Guide § 35.09

§ 35.09 Calculating the Probability of a Successful Cross-Examination

If the witness has been harmful, quickly evaluate the likelihood that cross will be successful. An unsuccessful attempt to defuse unfavorable testimony may only emphasize and increase the damage. If the basic rule is "Don't cross-examine the witness who hasn't harmed you," the corollary is "Don't cross-examine the witness who has harmed you unless you are sure that cross-examination can undo the harm." If the damage is great and the harm is obvious to the jury, there may be so very little to lose that even a slight chance of success would justify a cross-examination. If cross-examination likely will fail, consider whether another witness' direct evidence will refute the damaging testimony. If so, avoid cross-examination of the witness, or limit it to laying a foundation for later introduction of the favorable evidence. For many harmful witnesses, the best way to undo harm is through the testimony of other witnesses or the use of exhibits.

Unfavorable evidence in this context refers to evidence directed to a material issue in the case. If the witness has testified only to incidental or collateral matters, has provided only foundation testimony or is a documents witness, it may be better not to cross-examine. Cross-examination of such a witness may create an atmosphere of needless contentiousness, may cloud the fundamental issues in the case and may cause the jury to lose patience. In turn, such cross-examination may adversely affect how the jury receives cross-examination of an important witness on material issues.

Consider also the witness' credibility. If the witness is not believable or otherwise has made a mess of the direct examination, let that unfavorable impression be the only and last reaction the jury will have to the witness. Cross-examination may provide the witness with an opportunity to rehabilitate himself or herself or to clarify the testimony. On the other hand, if the witness is convincing and credible, the jury will likely take the witness' side, and cross-examination may only make matters worse.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationCollateral MattersEvidenceTestimonyExaminationCross-ExaminationScopeEvidenceTestimonyPresentation of Evidence

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CHAPTER 35 Cross-Examination *
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2-35 Federal Litigation Guide § 35.10

§ 35.10 Considering a Limited Cross-Examination

If the objective is to discredit the witness's credibility, it may not be necessary to cross-examine on all possible points of dispute. Such an exhaustive examination may cause the jury to lose interest or sympathize with the witness. Rather, counsel may be able to reach the objective just as effectively by thoroughly undermining only one or a few key areas of the witness's testimony. From such a focused example of lack of truthfulness, the jury may decide not believe the witness on any point.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationScopeEvidenceTestimonyPresentation of Evidence

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CHAPTER 35 Cross-Examination *
A Evaluating the Essentials of Cross-Examination

2-35 Federal Litigation Guide § 35.11

§ 35.11 Conducting Cross-Examination

[1] Treating the Witness Fairly

While the need to be fair permeates the entire trial, it is most pronounced during cross-examination. The jurors will tend to side, sympathize, and even identify with the witness. The jurors may view counsel as an expert in interrogation who has a decided advantage over the legally unsophisticated lay witness. The jury may believe that the witness is nervous or in awe of the courtroom proceedings and may easily forgive his or her mistakes and inadvertent misstatements. Because the witness is viewed as the underdog, tactics during cross-examination will be scrutinized. Even the slightest hint of unfairness may evoke an unfavorable reaction from the jurors.

Although counsel may be tempted to control a hostile witness with pointed or abrasive remarks, this tactic may have a negative impact on the jury. Further, a witness who comes to dislike the cross-examiner may become more hostile and thus less responsive. Arguing with the witness only gives him or her a chance either to withdraw prior damaging testimony or to explain it away. Either way, the outcome will be harmful if your goal is to undermine the witness' credibility.

[2] Choosing Between a Friendly or Hostile Manner

Cross-examination may be conducted in a friendly or hostile manner. Try to vary the style depending on the witness and the circumstances of the case. Ordinarily a friendly, courteous approach to cross-examination will be well received by jurors. Most jurors will assume that incorrect testimony is unintentional, resulting from faulty observations or mistaken perception. The average juror will presume that a witness is testifying honestly and will in most cases identify with the witness, not with the lawyer. Generally, it is inadvisable to commence cross-examination of a seemingly honest witness by attacking in a hostile tone. This may offend the jurors, causing them to pull for the witness.

Moreover, a friendly attitude may be more conducive to eliciting favorable testimony from the witness. Many witnesses believe that cross-examination is such an inherently antagonistic procedure that even a mild cross-examination will be considered a personal insult to their integrity and honesty. A hostile approach only exacerbates the problem. The witness who is treated with respect and with a friendly tone will be less likely to view cross-examination as a personal attack. The witness may become less defensive in answering and may even let his or her guard down. The witness then may become more cooperative and more disposed to accepting suggestions and may be more easily led. If the witness has been poorly prepared by the opponent, gentle questions may not set off any alarms. Remember that few witnesses

hear the opening statements or the testimony of the witnesses who precede them. Their overview of the case is sketchy at best. Unless counsel's manner makes the witness suspicious, counsel may be able to lead the witness in another direction.

Adopting a friendly style for most witnesses will also make the cross-examination of hostile or overtly lying witnesses more effective. If a hostile approach is used with only a few witnesses, the jury will be better able to discern and appreciate the lawyer's righteous indignation.

[3] Choosing the Appropriate Placement in the Courtroom to Conduct Cross-Examination

To the extent that the court will allow, counsel should consider where to stand in the courtroom for a successful cross-examination. Unlike direct examination, where the witness should be the primary focus of the jury, during cross-examination the attorney should be the center of attention. If the goal is to insert the attorney's personality into the cross and have the jury remember the attorney and not the witness, it is critical to place yourself so that the jury will not be between you and the witness. Choosing a position which puts the jury between the witness and the lawyer will force the jury to divide their attention between the two and ultimately most juries will focus more on the witness. That is precisely the reason why, when possible, counsel should conduct direct examination with the jury between himself or herself and the witness, so that the jury will recall the witness better.

[4] Looking the Witness in the Eye

On cross-examination, attract and hold the eye of the witness. Make the witness fully aware that he or she is being studied. That will make the witness less likely to exaggerate. Moreover, to the extent that counsel can induce the witness to engage in eye contact, the witness will be less credible for the very reason that he or she is not making contact with the jury.

[5] Projecting Confidence to the Jury

The projection of confidence throughout the proceedings is critical. During direct examination the jury's attention is riveted on the witness and the confidence the witness displays can be an effective part of the persuasiveness of the adversary's case. During cross-examination, the jury will concentrate on counsel's questions in much the same way that they concentrated on the answers of the witness during direct. While conducting cross-examination, counsel must display confidence and be prepared to absorb damaging blows with equanimity.

If a question is answered in an unexpected and harmful way, and there is no ready means of impeachment, the safest procedure under most circumstances is to ask another question on a new subject.

The confidence exhibited by counsel should be most notable at the conclusion of the cross-examination. Plan the cross-examination so that it ends with a question or line of questions that emphasize a particularly strong point. Then stop.

If counsel appears to have the witness on the run, he or she should develop what is needed and then stop. Prolonging the examination will reduce the effectiveness of the cross-examination. A continued attack on the witness may elicit sympathy for the witness from the jury. If the same point is hammered over and over again, the witness may finally come up with a plausible explanation. Opposing counsel may try to interrupt the cross to give the witness time to think or perhaps to use an objection to coach the witness. Be prepared to stop the other lawyer from coaching or making a speech.

[6] Pacing Questions on Cross-Examination

As to the speed at which questioning should proceed, the same principles govern both direct examination and

cross-examination. Give the jury enough time to digest each answer. Pause before launching the next question. If the question and answer were complicated, pause longer. The chance is slim that pausing will give the witness time to regroup or to see where the questioning is heading. It is more important to make sure the jury hears and understands. Constantly consider what effect the questions are having on the jury; whether the jury has grasped the significance of a certain point; whether the question was too long to be understood; and whether the jury was distracted. If the question or the answer was complicated because it was poorly asked or confusingly answered, start over: "Ms. Witness, I'm sorry, my question may not have been clear enough. I'll rephrase it." or "Mr. Witness, I'm not sure I followed you on that. Let's try again."

The pace of questioning necessarily will vary from witness to witness based on factors like the witness' age, education, social status and counsel's analysis of the witness' strengths, weaknesses and personality. Although a pause between questions is often helpful for the jury to digest the testimony, rapid-fire questioning can be useful when responses seem particularly planned.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceTestimonyCredibilityImpeachmentGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationScopeEvidenceTestimonyPresentation of Evidence

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CHAPTER 35 Cross-Examination *
A Evaluating the Essentials of Cross-Examination

2-35 Federal Litigation Guide § 35.12

§ 35.12 Considering Interrogation Techniques

[1] Determining the Length of Cross-Examination

The length of cross-examination is even more important than the pace, and knowing when to stop is critical. Since the jury has a fairly limited listening capacity, limit cross-examination to a few key areas. If cross-examination is crisp, clear and short, counsel will have the jury's full attention throughout, and will earn their appreciation for not dragging out the length of trial. While there is no magic number, it is unrealistic to expect the jury to focus on more than three key points in any one witness' cross-examination. Even if there are a dozen powerful points that could be made, select three or four of the most powerful ones, and drive them home. Too much of a good thing diffuses the benefit of a short succinct cross-examination. It may be painful to winnow out winning points, but the result will be better if the examination concentrates on a few clear issues. Make any remaining points through other witnesses or evidence. Prolong cross-examination only if there is no alternative method of making the point.

[2] Asking Simple and Clear Questions

Be sure that questions are understandable so that the answers and their relationship to the case are clear to the jury. Avoid fancy, technical and legal terminology. Long, compound questions will be ineffective. Language above the understanding of the average juror will be misunderstood or resented. It also may appear to the jurors that needlessly complex terminology and questions are designed to confuse the witness rather than to elicit the facts of the case.

In advance of cross-examination prepare clear, simple questions for each important witness. Clear and simple questions have the following advantages:

- They are less confusing for the witness
- They are better understood by the jury
- They are less likely to be objected to by opposing counsel

[3] Avoiding "Why" or "How" Questions

Counsel should strive to limit the witness to the facts called for in the question. "Why" or "how" questions are

particularly dangerous in this regard. They permit a witness to go into a long, narrative answer on subjects regarding which he or she is substantially more knowledgeable than the questioner. The answer to a why question may sound like a self-serving commendation or classroom lecture. The well-prepared witness also may utilize this type of question as a springboard for introducing prejudicial or irrelevant evidence that otherwise may be inadmissible. An articulate, well-informed witness may give such a good answer that the witness seizes the momentum and captures the jury.

As with most rules of trial practice, the rule against open-ended questions is stated in absolute terms, but it can be overridden for a good reason. For example, if counsel is satisfied that the witness has no reasonable explanation for a dogmatic and damaging assertion made on direct, a why question may take the witness by surprise and effectively demonstrate that the witness' assertions have no basis in fact. Or the witness may have such a pompous, arrogant manner that allowing the witness to talk at length without interruption will increase the jury's aversion to the witness.

The rule against open-ended questions is not foolproof. Opposing counsel can still ask the last, fatal question during redirect. This should be considered when preparing for cross-examination.

[4] Asking Leading Questions

The "essential test of a leading question is whether it so suggests to the witness the specific tenor to the reply desired by counsel that such a reply is likely to be given irrespective of an actual memory. The evil to be avoided is that of supplying a false memory for the witness." n1

The ground rules for cross-examination favor the examiner and provide the means for staying in command throughout the entire cross-examination. The Federal Rules of Evidence recognize the difference between questioning one's own witness and confronting an adversary's witness. Rule 611(c) provides that leading questions should not be used on direct examination, except when necessary to develop the witness' testimony. However, leading questions should be permitted on cross-examination, or when a party calls a hostile witness, an adverse party or a witness identified with an adverse party. n2

On cross-examination counsel can and should make extensive use of leading and suggestive questions. Leading questions allow the attorney to control the area of inquiry, and to use his or her own words to describe the facts and limit the witness to responses based on the facts stated in the question. Leading questions also imply to the witness that the questioner has a mastery of the facts, gained through an exhaustive investigation, and will discourage exaggeration or fabrication.

Cross-examination questions should be stated so as to elicit simple "yes" or "no" responses. Typically, make a statement of fact and have the witness agree with it. Grammatically, this can be accomplished in a number of ways. For example, the same question can be phrased in any of the following ways:

Q:

Isn't it true that you called Mr. Smith on January 10, 1983?

or

Q:

You called Mr. Smith on January 10, 1983, didn't you?

or

Q:

You called Mr. Smith on January 10, 1983, isn't that correct?

or

Q:

You called Mr. Smith on January 10, 1983, right?

Slightly varying the terminology from question to question will break up the monotony. Using the proper tone of voice can make a question "leading," without the use of typical phrases, such as "Isn't that right?" Selective use of non-leading questions also makes the cross-examination more interesting. A non-leading question can be asked when the answer is not important. A non-leading question also can be asked safely when the witness is committed to a particular answer by prior statements or when any answer other than the anticipated one would be nonsensical. In such instances, the witness can be impeached if he or she gives an unexpected answer, and such impeachment will fuel the overall effectiveness of the cross-examination. Non-leading questions also can be an effective way to break up monotony and to change the pace of the questioning.

The ability to use leading questions allows counsel to proceed methodically with a series of short, precise, interrelated questions which lead to an inescapable conclusion, with which the witness must agree.

[5] Avoiding the Ultimate Question

Undertake cross-examination with a firm grasp of the points to be developed and the facts that underlie those points. Work up to those points methodically, step by step. An effective cross-examiner must know how far to go with the questions. Avoid asking the witness to agree with the ultimate conclusions. An effective and safe cross-examination develops all facts necessary for the point to be made, but assumes that the jury understands how those facts support the ultimate conclusion.

Ask only enough questions on cross-examination to suggest the ultimate point. Cross-examination should be used to supply the facts; make the point itself during closing argument when the witness cannot provide an unhelpful response. For example, assume that a third-party witness has identified the defendant as the person who assaulted the plaintiff. Defense counsel's questions attacking the witness' ability to observe might proceed as follows:

Q:

You were standing about 100 feet from the altercation, were you not?

Q:

And the altercation took place at about 7 P.M.?

Q:

There were no street lights at the location, were there?

Q:

And it was a rainy, overcast day, wasn't it?

Q:

The persons involved in the altercation were moving around constantly, were they not?

These questions convey the sense to the jury that the witness really could not clearly see the defendant. The ultimate question "Isn't it a fact that you really couldn't see well enough to make a positive identification?" might give the witness an opportunity to make an exculpatory conclusion.

An unplanned cross-examination, even by an experienced trial attorney, is likely to stumble on an ultimate question. If a cross-examination has gone well, the instinct to end on a strong point may prompt one to ask an ultimate question that gives the witness an opportunity to provide an unhelpful explanation. Planning cross-examination helps put that temptation into perspective.

[6] Shifting Areas of Inquiry

Cross-examination should not be haphazard. On the other hand, there can be benefits to shifting among areas of inquiry rather than proceeding in a logical sequence.

Throughout cross-examination the witness will be trying to figure out what the questioner is getting at. Varying topics during cross-examination may help disrupt that effort. During closing argument counsel can weave any disjointed evidence into a logical fabric that supports the client's position.

On the other hand, if counsel is successfully hiding the objective from the witness, the jury might lose sight of the purpose as well. Because the jurors are less familiar with the case than the witness is, they may become confused more easily and sooner. For that reason, a logical approach is usually preferable.

[7] Knowing the Answer

On cross-examination, the witness is more likely to want to hurt than help the cross-examiner's case. Do not give the witness opportunities to inflict that kind of damage. A cardinal rule of cross-examination is that one should not ask any question to which the examiner does not know the answer. Careful preparation, including extensive discovery, will provide guidance regarding the expected answer. Do not take a shot in the dark; the risk of obtaining a harmful answer is too great. Avoid the temptation to satisfy one's curiosity by fishing for information during cross-examination.

[8] Resisting Argumentation

Sometimes, answers received on cross-examination lead to the conclusion that the witness is skillfully hiding the true facts. If counsel cannot expose the witness' deception, the natural tendency is to argue with the witness. Resist the temptation. It will not impress the jury, it is unlikely to lead to helpful information, and it may strengthen the witness' credibility and re-emphasize the witness' testimony. Counsel will also appear unprofessional and may be open to a sustained objection.

[9] Refraining From Opening the Door

The cross-examiner must keep in mind that the adversary will have another chance to examine the witness through redirect. Do not open the door for the admission of harmful or prejudicial matter on redirect that could not have been adduced but for the scope of the cross-examination.

This problem usually can be avoided if the cross-examiner stays within the scope of the witness' direct examination, and sticks to a plan to elicit a few key points from the witness. One of the most frequent "door openers" is the use of a document on cross. If a document is introduced, the opponent probably will be given the opportunity to use the entire document on redirect. If the document was not admissible in the first place, the fact that it was only used for

impeachment does not prevent the other side from using it now in their case-in-chief.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceTestimonyCredibilityImpeachmentGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationScopeEvidenceTestimonyPresentation of Evidence

FOOTNOTES:
(n1)Footnote 1. *United States v. Durham, 319 F.2d 590, 592 (4th Cir. 1963)* .

(n2)Footnote 2. *Fed. R. Evid. 611(c).*

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CHAPTER 35 Cross-Examination *
A Evaluating the Essentials of Cross-Examination

2-35 Federal Litigation Guide § 35.13

§ 35.13 Controlling Deviating Witnesses

Overriding concerns during cross-examination include:

- Keeping the witness on a narrow path
- Preventing the witness from straying into areas that should not be explored
- Seeking straight answers to questions
- Silencing the witness who tries to extemporize in response to pointed, specific questions

Counsel is entitled to clear and direct responses to questions. The use of leading questions tends to control a witness but provides no guarantee that the witness will not launch into a narrative response.

Many witnesses avail themselves of every opportunity to tell their version of the facts. No matter what question is asked, the witness eagerly expounds his or her full version of the facts, thereby frustrating the pace and objectives of the cross-examination. Counsel may be tempted to interrupt that kind of response to limit it to the question asked. This puts counsel in a delicate situation. If counsel fails to interrupt, the witness may repeat damaging testimony, infuse prejudicial matter, or open an area of inquiry for which counsel is unprepared. However, if counsel interrupts, the jury may believe that counsel is being unfair or is afraid to allow the jury to hear the whole truth. If the witness is clearly uncooperative or evasive, consider giving the witness plenty of chances to avoid a simple answer to a simple question. The jury will hold that against the witness. Counsel must continue to be polite and patient until sure that the jury believes that the witness has something to hide or an interest to protect. In some instances, a talkative witness may be reined-in by restating the question and requesting a more responsive answer.

Another tactic to consider is to allow the witness to complete the answer the first few times that he or she strays, and then move to strike the response. After a few such motions are granted, the talkative witness may become more attentive and the jury will get the idea that the witness is trying to evade the question. If the witness persists, ask the court to instruct the witness to respond only to the question asked. However, the judge will give the witness a chance to explain a "yes or no" answer. Because asking the judge for help is an admission that counsel is unable to control the witness, it should be a last resort.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationScopeEvidenceTestimonyExaminationLeading QuestionsEvidenceTestimonyPresentation of Evidence

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CHAPTER 35 Cross-Examination *
A Evaluating the Essentials of Cross-Examination

2-35 Federal Litigation Guide § 35.14

§ 35.14 Persevering Against Evasive Witnesses

A witness may try to avoid answering question altogether. Rather than qualifying or masking the answer with irrelevant facts, the evasive witness purposely avoids answering the question asked.

Although an evasive witness tries to derail cross-examination, such a witness is vulnerable. The witness evades a question when he or she knows the answer may be unfavorable. Continued evasiveness only emphasizes the very evidence the witness hoped to downplay. Therefore, when confronted with an evasive answer, do not promptly ask the court to instruct the witness to answer the question. Keep in mind that one of the objectives of cross-examination is to expose the witness' lack of credibility. That objective is better accomplished by giving the witness the opportunity to continue the evasion, carefully framing questions so that the evasion becomes apparent to the jury. Rather than turning to the court for an instruction, calmly and slowly repeat the question until an answer is received.

One effective method is to ask the court reporter to read the question back. Then say to the witness "Mrs. Smith, would you please answer that question now." Another method is to confront evasive witnesses with their own contradictory testimony.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationScopeEvidenceTestimonyExaminationLeading QuestionsEvidenceTestimonyPresentation of Evidence

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CHAPTER 35 Cross-Examination *
A Evaluating the Essentials of Cross-Examination

2-35 Federal Litigation Guide § 35.15

§ 35.15 Responding to Questioning Witnesses

If a witness asks counsel to explain or clarify a question, counsel should evaluate what is happening before supplying the explanation or clarification. A request for clarification can be a method of evasion or a stall for time to think. Also keep in mind that some questions from a witness may be rhetorical, argumentative or designed to dilute the answer given.

The more questions the witness asks the greater the chance that counsel will lose control of the examination and begin to argue with the witness. Whether to respond to a witness' question depends on the question and the facts of the case. Counsel might answer the question, while using the opportunity to frame the point in the context of the counsel's theory of the case. Keep in mind, however, that this breaks the pace of the cross and invites argument from opposing counsel and the witness. Counsel can simply ignore the question; but the jury may feel that counsel is discourteous or is evading the question because the answer is damaging. Finally, counsel can advise the witness that he or she is not allowed to testify. This type of response is courteous and reminds the jurors that they must decide the case based on the evidence adduced by witnesses, not on statements of counsel. It tends to dispel any inference that counsel is evading an embarrassing question, and it permits counsel to control the cross-examination.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationScopeEvidenceTestimonyPresentation of Evidence

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CHAPTER 35 Cross-Examination *
A Evaluating the Essentials of Cross-Examination

2-35 Federal Litigation Guide § 35.16

§ 35.16 Choosing Language that Favors One's Position

It is critical for counsel to pay attention to the meanings and nuances of words, and their psychological impact. The sophisticated cross-examiner hones his or her vocabulary sharply for effect, and selects with care just the right words to use. For example, a study of the differences in responses to questions using a definite article (the) and an indefinite article (a) showed that questions with an indefinite article (*e.g.,* "Did you see a broken headlight?" as opposed to "Did you see the broken headlight?") led to many more "I don't know" responses. Subjects who were asked questions with an indefinite article were more than twice as likely to respond "I don't know." Asked questions with a definite article, subjects tended to commit themselves to a "yes" or "no" response. n1 The definite article suggests that the word it modifies (the headlight) did exist.

Other word choices also make a difference: people may estimate speed higher when asked about the cars "smashing," rather than "hitting." A defense lawyer asks about an "accident." Plaintiffs are injured in "crashes" and "wrecks." Witnesses may be more apt to estimate that they were further away from something they witnessed if asked how "far away" the incident was, instead of how "close" they were to the incident.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationScopeEvidenceTestimonyPresentation of Evidence

FOOTNOTES:
(n1)Footnote 1. Barnum, Effective Communication: Putting Research to Work in the Courtroom, Trial 42, 43 (Dec. 1984).

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CHAPTER 35 Cross-Examination *
A Evaluating the Essentials of Cross-Examination

2-35 Federal Litigation Guide § 35.17

§ 35.17 Eliciting Helpful Evidence on Cross-Examination

Always consider whether the witness can corroborate or support favorable evidence. If the facts the witness can corroborate are important, or even secondary, get the corroboration. Such admissions or support from an adverse witness on cross capture the jury's attention, and can bolster the case far beyond the immediate significance of the evidence directly corroborated.

Remember that not all witnesses called by the other side are adverse or hostile. They may be called because their testimony is about a critical link in the case. Try to form a good relationship with these witnesses during discovery, and conduct the cross in a friendly manner to elicit favorable testimony.

Consider also whether the witness can be used to help lay the foundation for the subsequent admission, in your case-in-chief, of any exhibits. Demonstrative evidence and exhibits can be powerful tools of persuasion with a jury, particularly when they are supported or authorized by witnesses from the other side.

Cross-examination also may be used to establish what the witness does not know. If the opponent calls a dozen witnesses, but only one of them can testify about a critical fact, emphasize through the cross that no other witness can corroborate that fact.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationScopeEvidenceTestimonyExaminationLeading QuestionsEvidenceTestimonyPresentation of Evidence

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CHAPTER 35 Cross-Examination *
A Evaluating the Essentials of Cross-Examination

2-35 Federal Litigation Guide §§ 35.18through 35.19

[Reserved]

§§ 35.18[Reserved]

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CHAPTER 35 Cross-Examination *
B Impeaching Witnesses on Cross-Examination

2-35 Federal Litigation Guide § 35.20

§ 35.20 Understanding Impeachment in the Context of Cross-Examination

Impeachment is the vehicle by which trial counsel calls into question the veracity of the witness and the reliability of testimony. Impeaching proof is not substantive evidence. n1 However, it is the basis on which counsel will argue at closing either that the jury need not concern itself with a witness' testimony, for they will have been shown that the witness is untrustworthy, or that the evidence from that witness' testimony, when compared to that of other witnesses, falls far short of the mark required to prevail in the case.

Matter used for impeachment is not offered for the truth of what it contains or asserts. Rather, it is used only to impeach the witness' credibility. Thus, proof of a prior inconsistency is received for the limited purpose of affecting the credibility of the witness. However, as a practical matter, experienced litigators recognize that, to the jury, the impeaching matter will corroborate and highlight other evidence that supports their case. n2

For example, assume that immediately after an accident a state trooper interviewed a passenger in plaintiff's car and took down the passenger's statement in the presence of a third-party witness, Smith. The passenger made statements indicating that plaintiff's speed was excessive. After the state trooper read back the statement to the passenger and Smith, Smith remarked that he had just heard what the passenger had said, that that was just what happened and that he couldn't add anything to it. When Smith testifies at trial, the defendants, to challenge Smith's credibility and to contradict Smith's testimony, will be permitted to introduce the testimony of the state trooper as to what the passenger told him in Smith's presence. Such testimony will be admitted solely with respect to the issue of Smith's credibility, and not as affirmative evidence of any facts the passenger related to the state trooper. On the other hand, if Smith were the plaintiff in the case, his prior statements could be admitted into evidence as admissions.

The trial court has considerable discretion in determining whether evidence should be admitted for impeachment purposes. n3 The court should balance the probative value of the evidence against the unfair prejudice that might result from its introduction. n4 Consequently, if the facts developed in impeachment are necessary elements of the cause of action or defense, counsel must prove those facts by other witnesses or exhibits.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyCredibilityImpeachmentGeneral

OverviewEvidenceTestimonyExaminationCross-ExaminationGeneral
OverviewEvidenceTestimonyExaminationLeading QuestionsEvidenceTestimonyPresentation of Evidence

FOOTNOTES:

(n1)Footnote 1. *United States v. Wilson, 930 F.2d 616 (8th Cir. 1991)* .

(n2)Footnote 2. *Fed. R. Evid. 801(d)(2).*

(n3)Footnote 3. *Bobb v. Modern Prods., Inc., 648 F.2d 1051 (5th Cir. 1981)* .

(n4)Footnote 4. *United States v. Weiss, 930 F.2d 185 (2d Cir. 1991)* .

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CHAPTER 35 Cross-Examination *
B Impeaching Witnesses on Cross-Examination

2-35 Federal Litigation Guide § 35.21

§ 35.21 Considering Impeachment Strategies

[1] Determining Who May Be Impeached

The credibility of a witness may be attacked by any party, including the party calling the witness. n1 Significantly, the Federal Rules of Evidence abandon the traditional prohibition against impeaching one's own witness. n2 However, notwithstanding the practice of using otherwise inadmissible evidence for impeachment, a party may not impeach its own witness as a way of putting inadmissible evidence before the jury. n3

[2] Impeaching the Adversary's Witness

Resist the impulse to impeach every witness called by the adversary, even if there is an inconsistency or something unfavorable in the witness' testimony. Before attacking a witness' credibility, consider whether the overall testimony of the witness on direct is favorable or unfavorable, and whether the witness likely will provide favorable evidence during cross-examination. It may be wiser to enhance, rather than undermine, the credibility of a witness called by the adversary who on balance has provided, or will provide, favorable evidence.

If during discovery the witness provided favorable evidence on an essential issue in the case, plan to develop that evidence during cross-examination. If the witness then contradicts himself or herself at trial, the decision regarding whether or not to impeach becomes far easier--impeach the witness regarding that essential point as well as any other material matters about which the witness testified inconsistently during direct. If the witness sticks to deposition testimony and, as expected, substantially helps the case, forego any impeachment, but instead highlight the favorable testimony in closing argument.

Arguing affirmative admissions to the jury generally is more effective than merely arguing that the witness is not to be believed. Moreover, if counsel impeaches the witness after obtaining favorable admissions, the witness' credibility will be in issue and even the favorable evidence may be viewed with suspicion. The jury may not be able to decipher the lies from the truth and may take the easy out of rejecting the entire testimony of the witness.

An unsuccessful attempt at impeachment may have the most harmful consequences when the ground of attack involves the character of the witness. Never imply that the witness has lied deliberately, unless convinced that the attack is justifiable and is essential to the case.

Obviously, instances arise when there is no choice but to impeach. This is particularly true when trial testimony flatly contradicts deposition testimony on an essential aspect of the case. In such situations, the chances of failure are slim. Although the witness may attempt to gratuitously explain away the inconsistency or opposing counsel may attempt to rehabilitate the witness, those efforts will be viewed with suspicion by the jury.

[3] Impeaching One's Own Witness

A party is entitled to impeach its own witness. n4 The rule is not limited to situations where the party calling the witness is surprised or misled, and the rule places no limitation on the manner in which a party may impeach his or her own witness. n5 A party, however, should not be permitted to call a witness for the purpose of impeachment with otherwise inadmissible evidence. n6

Do not rush into impeaching any witness. If the witness has helped overall, it is probably best not to impeach. If the inconsistency goes to a fundamental element of the case, however, counsel will need to set the record straight. Some attorneys try to get around outright impeachment by suggesting that the witness does not recall and then using the prior inconsistent statement to refresh the witness' recollection. Alternatively, start the impeachment by suggesting that the witness' memory was fresher when the prior statement was given and attempt to lead the witness back to endorsing the prior statement. These approaches are effective when it appears that the witness is honest, but forgetful. If the witness appears to have become hostile, however, a more traditional and aggressive manner of impeachment may be appropriate.

[4] Considering the Subject of Impeachment

Counsel generally is granted a wide latitude in testing the credibility and reliability of a witness' testimony. n7 Nonetheless, impeachment should be related to material facts in controversy. n8 This general rule precludes the cross-examiner from impeaching the witness on collateral, insignificant, or trivial matters. The test is whether the impeaching proof relates to a subject which forms the basis of plaintiff's case or defendant's defense--does it relate either to an issue in the case as framed by the pleadings or to some matter, such as bias or corruption, which tends to discredit the witness. While the dividing line between material and collateral matters is not always clear, as a practical matter the judge will allow impeachment regarding any significant or important fact.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyCredibilityImpeachmentGeneral OverviewEvidenceTestimonyCredibilityImpeachmentBad Character for TruthfulnessGeneral OverviewEvidenceTestimonyCredibilityImpeachmentContradictionEvidenceTestimonyCredibilityImpeachmentPrior Inconsistent StatementsEvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyPresentation of Evidence

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Evid. 607.*

(n2)Footnote 2. *United States v. Peterman, 841 F.2d 1474, 1479-81 (10th Cir. 1988) .*

(n3)Footnote 3. *Whitehurst v. Wright, 592 F.2d 834 (5th Cir. 1979) .*

(n4)Footnote 4. *Fed. R. Evid. 607.*

(n5)Footnote 5. *United States v. Schatzle, 901 F.2d 252, 256 (2d Cir. 1990) .*

(n6)Footnote 6. *United States v. Gomez-Gallardo, 915 F.2d 553 (9th Cir. 1990) .*

(n7)Footnote 7. *United States v. Lynch, 800 F.2d 765 (8th Cir. 1986)* .

(n8)Footnote 8. *United States v. Weiss, 930 F.2d 185 (2d Cir. 1991)* .

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CHAPTER 35 Cross-Examination *
B Impeaching Witnesses on Cross-Examination

2-35 Federal Litigation Guide § 35.22

§ 35.22 Evaluating Whether to Impeach a Witness

[1] Strategizing Impeachment

Before deciding to make use of any impeaching matter, consider the alternatives:

- Using the material for impeachment during cross-examination
- Introducing it in the case-in-chief as affirmative proof on an element of the case or defense
- Not using the material at all for impeachment

Consider the following when deciding whether to impeach a witness:

- Is there a basis for impeachment?
- When during cross-examination should impeachment be attempted?
- Should the witness be impeached during cross-examination or should the impeaching matter be introduced as affirmative evidence later?

In answering each of these questions, the goal is to maximize impact on the jury. Consider the witness' personality, his or her relationship to the case, and the strength of the impeaching matter.

[2] Considering the Basis for Impeachment

Counsel should consider the following avenues for impeachment:

- Showing that the witness' testimony at trial is inconsistent with previous statements n1
- Using extrinsic evidence during the case-in-chief by presenting a witness or document that discredits the testimony of the witness n2

- Showing that the testimony is influenced by pecuniary interest, bias or kinship for one party or hostility to another n3

- Challenging the character of the witness n4

- Challenging the ability of the witness to observe, remember or recount the matters testified about

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyCredibilityImpeachmentGeneral
OverviewEvidenceTestimonyCredibilityImpeachmentConvictionsGeneral
OverviewEvidenceTestimonyCredibilityImpeachmentPrior
ConductEvidenceTestimonyCredibilityImpeachmentReligious
BeliefsEvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyPresentation of Evidence

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Evid. 613*; *United States v. Smith, 776 F.2d 892, 897 (10th Cir. 1985)* .

(n2)Footnote 2. *United States v. Tarantino, 846 F.2d 1384, 1409-1410 (D.C. Cir. 1988)* .

(n3)Footnote 3. *Douglas v. Owens, 50 F.3d 1226, 1230 (3d Cir. 1995)* .

(n4)Footnote 4. *Fed. R. Evid. 608, 609.*

(n5)Footnote 5. *Fed. R. Evid. 610.*

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CHAPTER 35 Cross-Examination *
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2-35 Federal Litigation Guide § 35.23

§ 35.23 Impeaching the Witness with a Prior Inconsistent Statement

One method of challenging the credibility of a witness is to show that the witness has previously made a statement that is inconsistent with his or her present testimony. Even if that prior inconsistent statement would otherwise be inadmissible as hearsay, it may be admissible for the limited purpose of impeaching the witness. n1

In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel. n2

Extrinsic evidence of a prior inconsistent statement made by a witness other than a party-opponent is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. n3

A witness' earlier contradictory statement may take many forms, including the following:

- An oral statement made to another person either at the time of or after the events in question n4
- A written statement appearing in a document signed by the witness
- Sworn testimony at prior trials or hearings, administrative hearings or depositions
- Statements in court documents signed or verified by the witness
- An omission in an earlier statement
- A statement by the witness in an article, book or other published documen

Prior inconsistent statements are often found in a transcript of the witness' testimony taken before trial, at a deposition, for example. When such testimony exists, the inconsistent statement is read into the record and the witness is given an opportunity to respond.

To be an effective device for impeachment, the form of the prior inconsistent statement does not matter, nor does it matter what accepted methods of proof are used to establish that the statement was made. A statement can be made in the presence of a court reporter, a secretary or other person who reduces the statement to writing, whether or not the statement is signed. It may be preserved on a recording device, or it can merely be an overheard conversation remembered by another person.

A prior written statement need not have been shown to the witness at the time it was made, although any prior confirmation of the statement, such as a signature, certainly makes it stronger. Proof of the statement can come from the witness, from other persons who claim to have overheard the statement, or by introduction into evidence of the writing which contains the statement. The impeaching evidence must only be competent and admissible. Statements need not be diametrically opposed in order to be inconsistent. n5 The probative value of the proof offered varies with the perceived reliability of that proof. A recorded statement is more probative than testimony of a witness who claims to have overheard the statement; a sworn statement is better than one not under oath.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceHearsayCredibility of DeclarantsImpeachment EvidenceEvidenceHearsayExemptionsPrior Statements by WitnessesInconsistent StatementsEvidenceTestimonyCredibilityImpeachmentGeneral OverviewEvidenceTestimonyCredibilityImpeachmentPrior Inconsistent StatementsEvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyPresentation of Evidence

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Evid. 801(d).*

(n2)Footnote 2. *Fed. R. Evid. 613(a).*

(n3)Footnote 3. *Fed. R. Evid. 613(b).*

(n4)Footnote 4. *Jankins v. TDC Management Corp., Inc., 21 F.3d 436, 442 (D.C. Cir. 1994) .*

(n5)Footnote 5. *United States v. Agajanian, 852 F.2d 56, 58 (2d Cir. 1988) .*

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CHAPTER 35 Cross-Examination *
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2-35 Federal Litigation Guide § 35.24

§ 35.24 Preparing to Impeach With Prior Inconsistent Statement

To satisfy its goal, impeachment must effectively demonstrate and underscore the inconsistent statement of the witness. The contrast between the witness' statements must be clear, and that is best accomplished when the statements are presented one after the other.

To be most effective, counsel should respond to the inconsistent statement quickly. If after receiving unfavorable testimony, counsel muddles through a deposition transcript or pile of exhibits looking for the impeaching matter, it will minimize the effect of the impeachment. The jury may become impatient and lose sight of the testimony counsel is attempting to impeach. A long delay between the witness' testimony at trial and confronting the witness with an inconsistent statement will dull the contrast between the inconsistencies.

If the statement was just made on direct, counsel should consider asking the court reporter to read it back. If it was made several hours or days before, give the court reporter sufficient notice so that the reporter can find that portion of the direct testimony. After the reporter reads the testimony, ask the witness if the statement was correct and whether he or she wishes to modify it in any way.

A detailed pretrial review of a witness' deposition testimony and all documents relating to the witness' story are indispensable to effective impeachment. Prior to the start of trial, isolate all testimony and written material supporting the case. Conspicuously note on the cross-examination outline, by page, those vital areas of deposition testimony counsel wants the witness to verify. Similarly, the cross-examination outline should refer by number to any exhibits that are inconsistent with deposition testimony. These notations will facilitate retrieval of impeaching matter at trial and thereby promote effective impeachment.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyCredibilityImpeachmentGeneral OverviewEvidenceTestimonyCredibilityImpeachmentPrior Inconsistent StatementsEvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyPresentation of Evidence

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CHAPTER 35 Cross-Examination *
B Impeaching Witnesses on Cross-Examination

2-35 Federal Litigation Guide § 35.25

§ 35.25 Evaluating How to Best Utilize Prior Inconsistent Statements

[1] Recommitting the Witness to Prior Testimony

When attempting to recommit the witness, use the witness' own words. The witness will be more likely to agree with his or her own words than with counsel's paraphrase of the answer. Moreover, do not rush too quickly into impeachment. Wait for the witness to fully commit to the statement so that the witness cannot change his or her position without seriously undermining credibility. Do not signal an intention to impeach until the witness is committed to the statement. For this reason, know the details of the prior statement so that the witness can be examined without immediately producing the statement. Then when the statement is produced, the witness may be caught off guard.

If the planned scope of cross-examination of a particular witness is narrowed to three or four major issues, the preparation necessary for impeachment is also minimized. If the possible impeachment concerns a matter about which counsel is not planning to cross-examine the witness, the matter may be collateral or so minor that impeachment will be unproductive.

[2] Using Simple, Direct Questions

Try to phrase cross-examination questions so that simple "yes" or "no" answers will be given. The longer the question, the harder it will be for the jury to perceive the inconsistency, and the easier it will be for the witness to concoct an explanation or further confuse the point by an unintelligible answer. As with other issues to be covered by cross-examination, break each point down into its component parts.

[3] Laying a Foundation Before Impeaching the Witness With a Prior Inconsistent Statement

The cross-examiner generally may not ask the witness about a specific prior inconsistent statement without first calling the witness' attention to the time, place and circumstances of the prior statement. While this requirement is not found in Rule 613, it is the practice of most federal courts as a matter of fairness and is well within the judge's discretion under the Rule. This requirement is intended to guard against unfair cross-examination wherein the cross-examiner takes a statement out of context without giving the witness an opportunity to reflect on the prior statement.

Although there is no requirement that the witness be shown the prior written statement before using it for impeachment purposes, it must be shown to opposing counsel on request. n1

Whenever an adversary's cross-examination suggests that a prior inconsistent statement was made, counsel should immediately ask to review any written statement and should ask for the substance of any oral statement. Of course, the attorney providing the substance of an oral statement should do so out of the hearing of the witness so as not to lose any advantage of surprise.

The trial judge has the discretion to require that the cross-examiner to show the witness the prior inconsistent statement if that approach avoids confusing the witness or the jury. n2 Moreover, a witness has the right to obtain the statement on demand. n3 Rule 613(a) does not defeat the application of Rule 26(b)(3) but its operation "may be suspended temporarily." n4 This means that if the request is made during cross-examination, the trial judge may allow the examination to proceed and direct the statement be delivered to the witness after the examination is completed.

Extrinsic evidence of a prior inconsistent statement by a witness other than a party opponent is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. n5

Surprise is often critical to successful cross-examination. Once a witness is committed to a certain statement, surprise has served its purpose. If extrinsic evidence will be used to contradict the statement, the witness should be afforded an opportunity to admit, deny or explain it. This affords the honest witness with a chance to reconcile differences and also to refresh his or her recollection. For example, counsel does not provide a sufficient foundation for the admission of a letter to impeach a witness if he or she merely elicits the witness' admission to writing the letter but does not establish the significance of the letter or give the witness an opportunity to explain the alleged inconsistency in the letter. n6 If the witness has no explanation for the prior statement even after being shown a copy of it, the jury more likely will believe the prior statement than if it never had been shown to the witness.

[4] Establishing the Reliability of the Prior Inconsistent Statement

Be sure to establish that the prior inconsistent statement was made at a time and under circumstances that ensure its reliability, especially when counsel wants the jury to believe the prior statement, rather than the witness' direct testimony. For example, if the prior statement was made during a deposition, emphasize that the testimony was under oath and that the witness had the opportunity to read and correct the testimony.

Keep in mind that impeachment has many different purposes. For example, counsel may want the jury to accept the prior statement as true or may want to create doubt about the witness' veracity or recall by demonstrating vacillation over time. Counsel should build up the prior statement only if he or she wants the jury to accept that statement as true.

[5] Confronting the Witness With the Prior Inconsistent Statement

Always read the prior inconsistent statement to the witness and ask the witness to admit making it. If the witness does not unequivocally admit to making the statement, complete the impeachment by offering proof of the impeaching matter. If the witness asserts that the prior statement is only partially accurate, that he or she does not remember making the statement at all, or that it was made when the witness was ill or under the influence of drugs or alcohol, impeachment must include rebuttal of those claims, in addition to establishing the existence and content of the prior statement.

[6] Using Prior Testimony for Impeachment

Prior testimony is perhaps the most frequently used form of prior inconsistent statement. The testimony may be from a prior hearing in the case (such as a preliminary injunction hearing), direct examination during trial, or a deposition in the case. It also may be testimony given by the witness in another case, in an administrative hearing, or in a proceeding

before a board or grand jury. If a witness testified in an earlier trial, he or she may also have given a deposition in that case. For this reason, many lawyers routinely ask during deposition whether the witness ever has testified before in any other proceeding. Other attorneys rely on their own investigation to uncover such prior testimony in hopes of surprising the witness with the testimony at trial. Pleadings signed or filed by a witness who was a party in another case may also be a source of inconsistent statements. n7

Preliminary questions should relate to the time, place, and circumstances of the prior testimony. Emphasize the fact that the witness was under oath and that he or she told the truth on the prior occasion.

[7] Using Written Statements for Impeachment

Written statements of all types may be used to impeach a witness. The statement may be one given to an investigator or a lawyer, a report that summarizes events, or a piece of correspondence. A written statement need not be shown to the witness before impeachment on the basis of its contents. n8 Nonetheless, many attorneys still use the traditional method of showing the document to the witness before impeachment because they believe that it is more persuasive with the jury. Counsel might even seek permission to pass copies of the prior statement to the jurors so they can read along. The jury will see a tangible object handed to the witness which may bear his or her signature and the jury will be impressed if the witness is unable to explain the inconsistency even after having a fair chance to review and explain the document.

Remember to ask the witness to acknowledge his or her signature on a signed document. Again, attorneys vary in their approach. Many attorneys routinely hand the document to the witness at the time the impeachment commences and simply ask: "Is that your signature?" Other attorneys, in the belief that the witness may be reluctant to admit the signature once it is clear that the document is being used for impeachment, ask for identification of a signature on an impeaching document at a time when the cross-examination relates to a subject other than the impeaching matter. During impeachment they then remind the witness that of the earlier testimony that the document bears his or her signature. In most civil litigation in federal court, the issue of the authenticity of a signature on a particular document will either be stipulated in the pretrial submission or developed during discovery, and ordinarily will not present a tactical dilemma.

Counsel generally will choose to read the prior inconsistent statement into the record to provide the necessary emphasis, rather than asking the witness to read it.

[8] Using Pleadings for Impeachment

Pleadings are another type of prior written statement. Because they are filed in the lawsuit, the jury will perceive them as important documents and may give them more credence than other written statements of the witness. Prior statements may be found in complaints or filings in proceedings other than traditional lawsuits. For example, a party who sues for breach of an implied employment contract may be impeached by statements in an earlier complaint to a state agency in which the party claimed age discrimination, but did not mention an employment contract.

Statements made in signed or verified pleadings are admissions that may be read and introduced into evidence under the Federal Rules of Evidence. However, under some circumstances a more dramatic effect can be achieved by confronting the witness with the inconsistent pleading during cross-examination than by introducing the statement as evidence.

[9] Using an Omission in a Prior Statement for Impeachment

A witness also may be impeached on the basis of an omission in a prior statement when the prior statement was made under circumstances rendering it incumbent on the witness to state the fact or when it was natural or likely for him or her to have included that fact in the prior report or testimony. n9

Impeachment by omission is a common technique that can be used effectively with respect to written statements and deposition testimony. The technique is essentially the same as that used with respect to prior statements. However, the emphasis obviously is on the fact that the statement made at trial was not made at the time of the previous statement and that, if the statement is as significant as the witness has suggested on direct, why was it not previously disclosed.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyCredibilityImpeachmentGeneral OverviewEvidenceTestimonyCredibilityImpeachmentPrior Inconsistent StatementsEvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyPresentation of EvidenceEvidenceTestimonyRefreshing RecollectionMemory AidsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Evid. 613(a).*

(n2)Footnote 2. *United States v. Marks, 816 F.2d 1207 (7th Cir. 1987) .*

(n3)Footnote 3. *Fed. R. Civ. P. 26(b)(3).*

(n4)Footnote 4. Notes of Advisory Committee, 56 F.R.D. 278-279 (1972).

(n5)Footnote 5. *Fed. R. Evid. 613(b).*

(n6)Footnote 6. *Gong v. Hirsch, 913 F.2d 1269 (7th Cir. 1990) .*

(n7)Footnote 7. *Dugan v. EMS Helicopters, Inc., 915 F.2d 1428 (10th Cir. 1990) .*

(n8)Footnote 8. *Fed. R. Evid. 613(a).*

(n9)Footnote 9. *Fed. R. Evid. 803(7).*

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CHAPTER 35 Cross-Examination *
B Impeaching Witnesses on Cross-Examination

2-35 Federal Litigation Guide § 35.26

§ 35.26 Impeaching a Witness by Highlighting Inconsistency With Other Witnesses

If two witnesses called by the opponent testify inconsistently, there may be no better way to make use of the inconsistency than confronting one of the witnesses with it. This will emphasize the contradiction and create some suspicion as to the adversary's case. Remember to also re-emphasize the inconsistency in closing argument. To be effective, however, this type of impeachment must be directed at significant inconsistencies.

Generally, it is not a good idea to confront an opponent's witness with an inconsistency between his or her testimony and the testimony of a witness favorable to the examiner. The witness likely will say that the favorable witness is mistaken. If the witness being cross-examined offers credible support for his or her version, attempted impeachment may serve only to bolster the adversary's case. This type of impeachment will be effective only if the witness being confronted has made a poor impression with the jury, or if his or her story is inherently improbable or if counsel can later offer strong corroboration for the favorable witness' version. Consequently, the better approach in most cases would be to lay a foundation during cross-examination and later introduce independent evidence showing the falsity of the testimony.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyCredibilityImpeachmentGeneral OverviewEvidenceTestimonyCredibilityImpeachmentPrior Inconsistent StatementsEvidenceTestimonyCredibilityRehabilitationEvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyPresentation of Evidence

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CHAPTER 35 Cross-Examination *
B Impeaching Witnesses on Cross-Examination

2-35 Federal Litigation Guide § 35.27

§ 35.27 Impeaching a Witness by Relying on Bad Character, Bias, or Interest

[1] Using Evidence of Bad Reputation or Character for Impeachment Purposes

Counsel may, for impeachment purposes, use evidence that the witness has a poor reputation for veracity or that the witness has committed acts that put into question his or her veracity. Evidence of bad reputation or character of a witness often has no bearing on the substantive issues in the case and is admissible only to attack the veracity of the witness. If the proof is being admitted only with respect to character or reputation for veracity, n1 that means that the proof itself has no material connection with the trial. As a result, attacking a witness with such proof tends to divert the trial from the issues that are central to the case.

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to both of the following limitations: n2

- The evidence may refer only to character for truthfulness or untruthfulness
- Evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning the following: n3

- The witness' character for truthfulness or untruthfulness
- The character for truthfulness or untruthfulness of another witness as to whose character the witness being cross-examined has testified

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness. n4

There are no fixed rules on the types of conduct that are probative of truthfulness or untruthfulness. Generally, however, acts probative of untruthfulness include forgery, perjury and fraud. n5 On the other hand, seeking discharge in bankruptcy does not show a disregard for truth that would cast doubt on a witness' veracity. n6

Untruthfulness cannot necessarily be inferred from the unethical activities in a business or profession. For example, an accountant's borrowing from clients, while ethically questionable, has been found to be irrelevant to his truthfulness as an expert witness. n7 On the other hand, disbarment because of misappropriation of client funds has been held to be probative of untruthfulness. n8

In deciding whether to permit impeachment through specific instances of the witness' conduct, the court will consider the length of time that has passed since the incident. Acts that are remote in time may be only weakly probative of the witness' current credibility. n9 For example, the Fifth Circuit has held that the probative value of evidence of false statements to immigration officials sixteen years before trial was outweighed by the danger of unfair prejudice. n10 Similarly, the Eleventh Circuit has ruled that the probative value of an accountant's sanction for over reliance on his partner's work 23 years before trial was outweighed by the danger of unfair prejudice. n11

Proceed with caution when trying to prove bad reputation or bad character. The exercise may backfire because the jury may conclude that counsel is mudslinging out of a sense of desperation. If the evidence is of dubious admissibility or questionable relevance, refrain from the attacks. If an evaluation of the jury suggests that evidence of bad character may be ill received, it is better not to resort to such evidence. If the attack fails, the jury may question counsel's ethics, resent the effort and sympathize with the witness.

[2] Using Evidence of Criminal Acts for Impeachment Purposes

It is well-settled that evidence of a prior conviction is admissible in a civil case for impeachment purposes. n12

For the purpose of attacking the credibility of a witness, the following evidence is admissible: n13

- Evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused

- Evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment

The rule protects both civil and criminal litigants from the use of a prior conviction when its prejudicial effect "substantially outweighs its probative value." Therefore, prior felony convictions may be inadmissible if they are of only limited probative value. However, prior convictions for felonies and lesser offenses that involve dishonesty or false statement are admissible without regard to the prejudicial effect on the witness. Clearly, a conviction for perjury would fall under this category. Similarly, a conviction of fraud is generally considered to be probative of a witness' credibility. n14 Counsel should research what else might be a crime of "dishonesty or false statement" in the applicable jurisdiction before seeking to introduce the evidence, because courts have taken varying approaches regarding the same crime. n15

Evidence of a conviction is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. n16 However, evidence of a conviction more than 10 years

old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence. n17

Evidence of a conviction is not admissible if: n18

- The conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or

- The conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence

Impeachment based on prior criminal convictions is fraught with danger. If the judge precludes the evidence in front of the jury, the jury may hold that against counsel. Because this area is complex, and the judge has wide discretion, counsel should consider presenting the matter to the court for a ruling before commencing impeachment.

[3] Using Evidence of Bias or Interest for Impeachment Purposes

The motivation of a witness in testifying, including possible self-interest and any bias or prejudice against a party, is one of the principal subjects for cross-examination. n19 To evaluate a witness properly, a jury must have sufficient information to make a knowledgeable appraisal of a witness' motives and bias. Therefore, it is an abuse of discretion for a trial judge to cut off cross-examination if the opportunity to present this information is not afforded. n20 The rationale for permitting this type of impeachment is to expose possible ulterior motives of the witness and thereby create suspicion as to the testimony.

Extrinsic evidence of specific instances of a witness' conduct generally is not admissible to contradict testimony on collateral matters. However, bias of a witness is not a collateral matter n21 and the cross-examiner is not bound by a witness' denials. n22 Extrinsic evidence of specific acts is admissible if the evidence tends to show bias or motive for the witness to testify untruthfully. n23

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyCredibilityImpeachmentGeneral OverviewEvidenceTestimonyCredibilityImpeachmentBad Character for TruthfulnessGeneral OverviewEvidenceTestimonyCredibilityImpeachmentBad Character for TruthfulnessOpinion & ReputationEvidenceTestimonyCredibilityImpeachmentBad Character for TruthfulnessSpecific InstancesEvidenceTestimonyExaminationCross-ExaminationGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Bastow v. General Motors Corp., 844 F.2d 506, 510-11 (8th Cir. 1988)* .

(n2)Footnote 2. *Fed. R. Evid. 608(a).*

(n3)Footnote 3. *Fed. R. Evid. 608(b).*

(n4)Footnote 4. *Fed. R. Evid. 608(b).*

(n5)Footnote 5. *Ad-Vantage Tel. Dir. Consult. v. GTE Directories, 37 F.3d 1460, 1464 (11th Cir. 1994)* .

(n6)Footnote 6. *Ad-Vantage Tel. Dir. Consult. v. GTE Directories, 37 F.3d 1460, 1464 (11th Cir. 1994)* ; *United States v. Lanza, 790 F.2d 1015, 1020 (2d Cir. 1986)* .

(n7)Footnote 7. *Ad-Vantage Tel. Dir. Consult. v. GTE Directories, 37 F.3d 1460, 1464 (11th Cir. 1994)* .

(n8)Footnote 8. *United States v. Jackson, 882 F.2d 1444, 1448 (9th Cir. 1989)* .

(n9)Footnote 9. *Ad-Vantage Tel. Dir. Consult. v. GTE Directories, 37 F.3d 1460, 1464 (11th Cir. 1994)* .

(n10)Footnote 10. *United States v. Cox, 536 F.2d 65, 72 (5th Cir. 1976)* .

(n11)Footnote 11. *Ad-Vantage Tel. Dir. Consult. v. GTE Directories, 37 F.3d 1460, 1464 (11th Cir. 1994)* .

(n12)Footnote 12. *Wilson v. Groaning, 25 F.3d 581, 586 (7th Cir. 1994)* .

(n13)Footnote 13. *Fed. R. Evid. 609(a).*

(n14)Footnote 14. *American Home Assur. v. American President Lines, 44 F.3d 774, 779 (9th Cir. 1994)* .

(n15)Footnote 15. For example, the Fifth Circuit has admitted evidence of a prior conviction for petit larceny, whereas the Third Circuit has reached a contrary result. *Compare Virgin Islands v. Toto, 529 F.2d 278 (3d Cir. 1976)* , *with United States v. Carden, 529 F.2d 443 (5th Cir. 1976)* ; *See also Altobello v. Borden Confectionary Prods., Inc., 872 F.2d 215 (7th Cir. 1989)* (meter tampering conviction admissible to impeach employee who filed age-discrimination suit).

(n16)Footnote 16. *Fed. R. Evid. 609(b).*

(n17)Footnote 17. *Fed. R. Evid. 609(b).*

(n18)Footnote 18. *Fed. R. Evid. 609(c).*

(n19)Footnote 19. *Henry v. Speckard, 22 F.3d 1209, 1214 (2d Cir. 1994)* .

(n20)Footnote 20. *Douglas v. Owens, 50 F.3d 1226, 1230 (3d Cir. 1995)* .

(n21)Footnote 21. *See Harbor Ins. Co. v. Schnabel Foundation Co., 946 F.2d 930, 935 (D.C. Cir. 1991)* .

(n22)Footnote 22. Although the witness' credibility is a matter left to the jury, the trial court has discretion to limit the types of evidence which will be admitted to show bias, as long as the jury is given sufficient information to appraise the witness' bias. *United States v. Lew, 875 F.2d 219 (9th Cir. 1989)* ; *see also Kasuri v. St. Elizabeth Hosp. Medical Cent., 897 F.2d 845 (6th Cir. 1990)* ; *Lewy v. Southern Pac. Transp. Co., 799 F.2d 1281* (whether a witness actually embezzled funds was properly held inadmissible as impeachment on cross-examination where the issue was irrelevant to the case and the possible bias of the witness had been amply demonstrated).

(n23)Footnote 23. *United States v. Capozzi, 883 F.2d 608 (8th Cir. 1989)* , *cert. denied*, *495 U.S. 918, 110 S. Ct. 1947, 109 L. Ed. 2d 310 (1990)* .

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CHAPTER 35 Cross-Examination *
B Impeaching Witnesses on Cross-Examination

2-35 Federal Litigation Guide § 35.28

§ 35.28 Impeaching Witnesses by Showing Their Version of Events to be Highly Improbable

Testimony relating the details of an occurrence may be impeached by showing that the witness' version of the story is highly improbable, or even impossible. n1 This can be done by showing that conditions were such that the witness could not have observed the events, or heard the conversation. In addition, counsel may attack the personal capacity of the witness to observe or hear.

This type of impeachment likely will fail unless there is independent evidence demonstrating the witness' poor opportunity to observe. However, if there is independent evidence to support the attack, then counsel may be able to induce the witness to insist that he or she had an excellent opportunity to observe and then discredit the witness with the independent evidence.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyCredibilityImpeachmentGeneral OverviewEvidenceTestimonyCredibilityImpeachmentBad Character for TruthfulnessGeneral OverviewEvidenceTestimonyCredibilityImpeachmentMental IncapacityEvidenceTestimonyExaminationCross-ExaminationGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Pennsylvania v. Ritchie, 480 U.S. 39, 51-52, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987)* (the right to cross-examine includes the opportunity to show that testimony is exaggerated or unbelievable).

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CHAPTER 35 Cross-Examination *
B Impeaching Witnesses on Cross-Examination

2-35 Federal Litigation Guide §§ 35.29through 35.39

[Reserved]

§§ 35.29[Reserved]

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CHAPTER 35 Cross-Examination *
C Cross-Examining Expert Witnesses

2-35 Federal Litigation Guide § 35.40

§ 35.40 Evaluating the Importance of Expert Testimony

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if: n1

- The testimony is based on sufficient facts or data
- The testimony is the product of reliable principles and methods
- The witness has applied the principles and methods reliably to the facts of the case

An expert with impressive credentials may influence the jury's verdict in the case. When testimony relates to technical matters beyond the experience of the average juror, the jury will look to the expert for guidance. Litigation often boils down to a battle of the experts. While the testimony of lay fact witnesses remains important, in the complex types of cases that increasingly dominate court dockets, experts' opinions are a critical element of the trial. n2 For example, whether the issue is medical causation in toxic tort causes, statistical discriminatory effects in civil rights and employment cases, market share and predatory pricing in antitrust cases, or misleading statements in securities and corporate takeover cases, the experts' testimony goes to the very heart of the issues that the jury must decide.

Judges are often disinclined to restrict the breadth or depth of experts' testimony, and judicial denial of expert status because of lack of qualifications seldom occurs under today's liberal rules defining who may be an expert. Thus, cross-examination of an expert assumes a pivotal role.

The jury faces a dilemma when each side has an expert. Which expert should the jury believe? Many factors influence the jury's decision, but none is more important than how the witness stands up under cross-examination.

Opening statements alert the jury to the significance of expert testimony in the case. Frequently, when expert witnesses are involved there is little dispute about the underlying facts. Cross-examination provides an opportunity to expose flaws in the expert's qualifications, personality and opinions. In many cases, cross-examination of an expert witness is the most effective way to undermine the jury's confidence in an expert.

Although expert cross-examination is important, counsel may want to consider foregoing cross-examination of an expert witness and to let one's own expert make the rejoinder. The gains from effective cross-examination may be great, but the damage from ineffective cross-examination may be even greater. Do not rush into expert cross-examination. First balance the potential benefits expected from the cross-examination against the likely harm resulting from ineffective cross. The decision regarding whether to cross-examine an expert should be made before trial on the basis of consultation with one's own expert and after thorough preparation. The dangers of a haphazard cross-examination of a witness are accentuated when the witness is an expert. If counsel does not fully understand the subject matter or has not developed a basis for effective cross-examination during trial preparation, the best cross-examination of an expert is no cross-examination at all.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyExpertsGeneral OverviewEvidenceTestimonyExpertsQualificationsEvidenceTestimonyExpertsUltimate Issue

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Evid. 702*.

(n2)Footnote 2. Rothblatt, *Cross-Exam of A Polygraph Expert*, 16 U. West. L.A. L. Rev. 55 (1984).

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CHAPTER 35 Cross-Examination *
C Cross-Examining Expert Witnesses

2-35 Federal Litigation Guide § 35.41

§ 35.41 Considering Topics of Cross-Examination for Expert Witnesses

[1] Challenging the Qualifications of an Expert

At the outset, it is important to consider whether the witness' qualifications as an expert are so deficient that the witness should not be permitted to offer expert opinions. If the witness is not qualified, do not wait until the conclusion of the direct examination to discredit the expert's qualifications. It is better to prevent the jurors from hearing the expert's opinion than to try to erase it from their minds once they have heard it. Accordingly, counsel may choose to challenge the qualifications of the expert in a pretrial motion in limine, possibly eliminating the would-be expert, and perhaps shortening the trial. Or counsel may make the motion during trial outside the presence of the jury.

Another alternative is to wait until trial and voir dire the expert in front of the jury, knowing that in all probability that the expert will be deemed qualified by the court and will be permitted to testify. If the judge rules that the witness is qualified as an expert, the doubts created through the voir dire will linger in the jurors' minds while they listen to the direct testimony. Then, even though the judge allowed the expert to testify, counsel can later argue to the jury the reasons why they should discount that testimony, especially when compared to that of the opposing expert, whose qualifications are well established.

If the last approach is used, after the witness' qualifications are developed on direct examination and before any opinion evidence is offered, ask the court for an opportunity to voir dire the witness as to qualifications. The voir dire will demonstrate whether the witness is incompetent to testify as an expert. Counsel must show that the witness lacks the necessary knowledge, skill, experience, training, or expertise to render an expert opinion regarding scientific, technical, or other specialized knowledge. By demonstrating affirmatively the witness' lack of credentials, the jury may be precluded from ever hearing the opinion testimony. This is tactically superior to mere cross-examination. However, assess carefully whether the proffered expert is likely to be barred from offering opinion testimony before undertaking such a challenge. n1 Nevertheless, the voir dire can effectively lay the foundation for cross-examination and plant a seed of doubt before the opinion evidence is offered.

If the voir dire does not disqualify the witness, or if voir dire will not be used, counsel should exploit the lack or weakness of the expert's qualifications during cross-examination. There are several ways to do this:

- Show that the purported expert lacks experience with the specific subject matter at issue

- Show that the purported expert lacks education or knowledge regarding the specific art or science addressed in the litigation
- Narrow the expert's field of expertise and show that it is inapplicable to the case
- Show that the witness acquired expertise only after being retained for the trial

The approach will obviously vary with the case and the qualifications of the expert. As an example, however, consider a certified public accountant who testifies in an antitrust case involving meat packing accounting.

[2] Probing for Expert Bias or Interest

Normally, the jury will assume that the expert is impartial. Counsel must bring to the jury's attention any matters that may undermine the objectivity of the expert. Those matters include the following:

- Compensation paid to the expert, including whether higher compensation is paid for testifying than for normal consultations
- Relationship with the plaintiff or the defendant
- Relationship with plaintiff's or defendant's industry or other companies in that industry
- Extent to which the expert testifies or consults in litigated matters
- Whether the expert testifies exclusively for plaintiffs or defendants
- Whether the expert offers the same opinion in every case
- Relationship to opposing counsel.
- Interest in the outcome of the case, whether philosophical (an expert who testifies for "causes" he or she supports) or economic (expert's fee is contingent)

An attack on the objectivity of an opposing expert is likely to be returned in kind by opposing counsel. Therefore, counsel should thoroughly prepare his or her own expert to withstand a similar attack.

A common but often ineffective topic of expert cross-examination relates to compensation. Nowadays, the cross-examiner rarely gets to raise that issue for the first time. Most lawyers, on direct, discuss the amount and basis of the expert's pay. The question, "Isn't it true that you are being paid to testify here today," has little impact on the jury. Jurors expect and have been prepared for the fact that experts are entitled to reasonable compensation for their time and effort. But if the compensation is not reasonable or is contingent, then the jury may link it to possible bias, especially if the substance of the expert's testimony is weak.

[3] Asking Hypothetical Questions

Hypothetical questions may be an effective means to test the validity and firmness of the expert's opinions. One approach used by lawyers is to isolate each factor relied on by the expert in rendering an opinion and then remove the factors one by one to determine what effect that would have on the expert's opinion. Alternatively, it may be possible to induce the expert to alter his or her opinion by adding additional facts to the hypothetical question asked during direct

examination.

Another effective way to use hypothetical questions on cross-examination is to vary the facts relied on by the expert. Rephrase the hypothetical question asked during direct examination by using a favorable version of the facts. If the expert's opinion changes and favors the cross-examiner's case, counsel then can argue in summation that his or her own version of the facts is true and that even the opposing expert agrees. If the expert's opinion does not change, argue that the expert is not credible because he or she has a fixed, preconceived opinion.

[4] Corroborating Your Expert's Position

It may be possible to establish the foundation for the direct examination of your expert through cross-examination of the opposing expert. Ask the opposing expert to admit to essential facts on which your expert will rely. Ask the expert if he or she knows your expert or knows your expert's reputation in the field. Experts are typically generous and professional towards each other. Ask the expert if he or she recognizes as authoritative the books or papers on which your expert will rely.

[5] Impeaching Expert Witnesses

An expert who is a prolific writer or professional testifier is vulnerable to impeachment based on prior statements. This requires careful and thorough research of all trials and depositions in which the expert has testified, as well as a search of newspapers, periodicals, journals, and the professional data base wherein the expert is likely to have published, been quoted, or otherwise appeared. One's own expert or another consultant may be a valuable source of suggestions on how to track the previous pronouncements of the opposing expert. Groups such as national and state-wide trial lawyer associations track appearances by professional or industry experts. Ammunition for cross-examination may be found through these sources.

[6] Forcing Equivocation

An expert witness may readily agree that legitimate differences of opinion can and many times do exist between experts in the particular field of expertise. In appropriate cases, go one step further and point out that the expert has had differences of opinions with colleagues in the past--sometimes the expert was right and sometimes the expert was wrong.

[7] Demonstrating Lack of Thoroughness

It may be possible to demonstrate in some cases that the expert failed to do certain things or consider certain evidence needed to form a solid opinion. Thus, for example, if an expert merely inspected a product but did not test or disassemble it, the expert may be vulnerable during cross-examination. For example, in a case involving the alleged forgery of a document by assembling parts of different documents into a new, false one, the paper expert may testify that he or she examined the papers under a microscope, but did not perform a common test to chemically analyze the papers because it was a "destructive" test. The expert's credibility may be damaged if he or she admits that the "destruction" would affect a piece of each paper about the size of a period. Cross-examination regarding thoroughness is likely to be particularly effective in situations in which an expert relied on a report or statement of another person in rendering an opinion.

[8] Questioning the Expert Concerning Learned Treatises

Cross-examination of an expert is permissible on the basis of a learned treatise whether or not the treatise was relied on or is recognized as authoritative by the witness. n2 The technique is to demonstrate that the expert's opinions are inconsistent with statements in a learned treatise and therefore should not be believed. This approach is most effective if the opposing expert first admits that the "impeaching" treatise is authoritative and recognized as such in the pertinent

field of expertise. n3 Some treatises are so generally accepted and widely recognized in particular disciplines that an expert who disputes their authoritativeness will damage his or her credibility by such a denial. Counsel can rely on his or her own experts to qualify the impeaching material as authoritative. If an expert relies on a treatise or paper, the entire work may be a fertile field for cross-examination, especially if another portion of the work supports a favorable theory and contradicts the expert. In a case in which a redacted AMA report was introduced as the learned treatise, the appellate court held that cross-examination must be allowed about the missing portions. n4 It is common for adverse experts in the same case to rely on the same treatises. Counsel may explore on cross-examination why the expert focused on one section, but disregarded another.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyExpertsGeneral OverviewEvidenceTestimonyExpertsCredibilityImpeachmentEvidenceTestimonyExpertsQualificationsEvidenceTestimonyExpertsUltim
Issue

FOOTNOTES:
(n1)Footnote 1. *But see IMPACT, Inc. v. Firestone, 893 F.2d 1189 (11th Cir. 1990)* (district court's decision not to accept testimony of defendant's expert witness on the ground that he was a political scientist and not a statistician or economist was within the court's broad discretion); *United States v. Miller, 874 F.2d 1255 (9th Cir. 1989)* (en banc).

(n2)Footnote 2. *Fed. R. Evid. 803(18).*

(n3)Footnote 3. *Ward v. United States, 838 F.2d 182 (6th Cir. 1988)* (articles written by an expert who did not testify were properly admitted into evidence when a competent expert testified that articles were authoritative, and there was no resulting prejudice to defendant).

(n4)Footnote 4. *Graham v. Wyeth Laboratories, 906 F.2d 1399 (10th Cir. 1990)* .

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CHAPTER 35 Cross-Examination *
C Cross-Examining Expert Witnesses

2-35 Federal Litigation Guide §§ 35.42through 35.49

[Reserved]

§§ 35.42[Reserved]

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CHAPTER 35 Cross-Examination *
D Redirect, Rebuttal, and Surrebuttal

2-35 Federal Litigation Guide § 35.50

§ 35.50 Conducting Redirect Examination

[1] Understanding the Importance of Redirect Examination

The examination of a witness need not, and in many cases should not, conclude with cross-examination. The direct examiner has the opportunity to rehabilitate the witness during a redirect examination. The purpose of redirect examination is to repair any damage done by clarifying and explaining apparent contradictions or admissions against interest brought out during cross-examination. As such, redirect should focus on new matter brought out during cross-examination and should not merely repeat points made during direct examination.

Obviously, counsel will be in no position to conduct redirect examination unless he or she pays careful attention during cross-examination. Beyond that, though, effective redirect examination also requires advance preparation. Know each witness' story and have available any materials that can refresh the witness' recollection or explain any apparent contradiction. n1 Before trial, review all prior statements by the witness. Thoroughly prepare each witness for both direct and cross-examination. If the witness' anticipated trial testimony departs from a prior statement, press the witness for an explanation that can be explored during redirect examination. If the witness is thoroughly prepared for anticipated cross-examination, counsel will be able to refresh the witness' recollection if he or she fails to explain a statement or forgets to mention a distinguishing circumstance.

[2] Evaluating the Scope of Redirect Examination

Redirect examination is normally limited to the scope of cross-examination; however, a trial judge can, in his or her discretion, allow a new line of questioning on redirect. n2 In most situations, redirect examination should be employed to rebut or explain the effect of matters developed during cross-examination. n3 The witness properly may be examined as to all matters which were the subject of cross-examination. Cross-examination regarding a part of a transaction enables the opposing party to elicit evidence of the whole transaction on redirect examination, at least to the extent that it relates to the same subject. n4 Similarly, if opposing counsel opens the door during cross-examination regarding matters not covered during direct, counsel may conduct redirect examination on those matters even if the testimony would not have been admissible during direct examination. n5

Occasionally, counsel may forget to cover a subject during direct examination and realize the omission during the adversary's cross-examination. If the subject is not touched on during cross-examination, counsel may be met with an objection if her or she attempts to go into the forgotten area on redirect-examination. It is better to advise the court of

the omission and ask for permission to inquire into that area during redirect examination. The trial court has discretion to allow such examination, and often will do so. By introducing new matters in the redirect examination, counsel is not foreclosing the adversary from cross-examination regarding them. The court generally will allow adverse parties to recross to test the truthfulness, accuracy and completeness of new matters developed during redirect examination. n6

[3] Considering Whether to Conduct Redirect Examination

As a basic rule, redirect examination should be conducted only when the witness needs rehabilitation after a damaging cross-examination or when certain testimony elicited during cross-examination needs clarification or explanation. For example, assume that a witness testifies at trial that during a meeting on December 2, 2005, Mr. Smith made a certain statement. During his deposition in the case, the witness could not recall what Mr. Smith said during that meeting. If opposing counsel emphasizes the witness' deposition testimony during cross-examination at trial in an attempt to cast suspicion on the trial testimony, counsel may want to conduct a short redirect examination to explain that prior to testifying at trial the witness reviewed certain documents which refreshed his recollection.

Do not redirect simply for the sake of having the last word. Just as the best cross-examination often is no cross-examination, the best redirect often is no redirect. Leave well enough alone; unnecessary redirect examination, even to repeat favorable testimony, may only open the door to damaging testimony. The witness may volunteer something that may either be harmful or provide opposing counsel with a new idea. The better approach is to forego such redirect examination and stress the favorable evidence during the closing argument. If counsel decides to conduct redirect, keep it short to be effective.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionEvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationScopeEvidenceTestimonyPresentation of EvidenceEvidenceTestimonyRefreshing RecollectionGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See* The Lost Art of Redirect, *16 Litigation 27 (Summer 1990).*

(n2)Footnote 2. *United States v. Kroh, 915 F.2d 326 (8th Cir. 1990)* ; *United States v. Komisaruk, 885 F.2d 490 (9th Cir. 1989)* ; *United States v. Wiley, 846 F.2d 150 (2d Cir. 1988)* .

(n3)Footnote 3. *O'Dell v. Hercules, Inc., 687 F. Supp. 450 (E.D. Ark. 1988)* , aff'd, *904 F.2d 1194 (8th Cir. 1990)* ; *United States v. Greybear, 883 F.2d 1382 (8th Cir. 1989)* (redirect may be limited when the subject on cross-examination was collateral).

(n4)Footnote 4. *United States v. Kroh, 915 F.2d 326 (8th Cir. 1990)* (government's questions on redirect concerning witness' guilty plea were invited by defense counsel's line of inquiry during cross-examination); *United States v. Walker, 613 F.2d 1349 (5th Cir. 1980)* ; *United States v. Barrentine, 591 F.2d 1069 (5th Cir. 1979)* .

(n5)Footnote 5. *U.S. v. Catano, 65 F.3d 219, 226 (1st Cir. 1995)* ; *United States v. Mang Sun Wong, 884 F.2d 1537 (2d Cir. 1989)* ; *United States v. Foley, 683 F.2d 273 (5th Cir. 1982)* .

(n6)Footnote 6. *United States v. Eniola, 893 F.2d 383 (D.C. Cir. 1990)* .

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CHAPTER 35 Cross-Examination *
D Redirect, Rebuttal, and Surrebuttal

2-35 Federal Litigation Guide § 35.51

§ 35.51 Offering Rebuttal Evidence

[1] Understanding the Importance of Rebuttal Evidence

Rebuttal evidence by the plaintiff follows the close of the defendant's case. However, there are many opportunities to introduce rebuttal evidence before the rebuttal stage of the trial is reached.

In preparing the case for trial, anticipate the adversary's proof and plan to counter that proof along strategic lines best suited for the case. Counsel may decide to hold rebuttal evidence for the rebuttal (or surrebuttal) stage of the trial or may anticipate the adversary's proof by introducing rebuttal evidence during the case-in-chief in the hope of softening the blow of the adversary's proof. As a general rule, hold rebuttal evidence until a later stage in the trial. First, the anticipated evidence may never materialize or may surface in a favorable manner. Second, if counsel reveals the matter too quickly, it provides the opponent with an opportunity to reevaluate the proof and work around weaknesses in his or her case. Strategically, counsel should permit the adversary to go out on a limb before sawing it off.

[2] Evaluating the Scope of Rebuttal

Either party may introduce rebuttal evidence. Any evidence that explains, counteracts or disproves the adversary's proof is admissible as rebuttal evidence, even if that evidence supports one's own case-in-chief. n1 However, counsel cannot, as a matter of right, offer evidence as rebuttal which should have been introduced as a part of the case-in-chief. n2

Therefore, avoid the temptation to sandbag an adversary by "saving" evidence for rebuttal that properly belongs in the case-in-chief. While the trial court has the discretion to admit rebuttal evidence that properly should have been introduced during the case-in-chief, the court may not allow such evidence without a good cause showing as to why such evidence was not offered at the proper time. Also, the adversary may rest, or present a very limited case, thereby preventing the introduction of the evidence saved for rebuttal. Moreover, from a strategic point of view, the case will be most persuasive if the best and most direct evidence is presented during the case-in-chief.

[3] Considering the Extent of Rebuttal

In a long, complex case, the jurors may grow tired, inattentive, and anxious for the trial to end. An extensive rebuttal may be resented by the jury, or they may not be as attentive as they were during the other parts of the case. Generally, rebuttal should be brief and directed at contradicting new, important matters developed by the opponent. Do not call a

witness in rebuttal merely to repeat points made during the case-in-chief. Moreover, to dispute every point made by the adversary may overload the case with unnecessary issues, overshadow the important issues, and dignify insignificant matters.

On the other hand, do not lightly forego rebuttal. All defensive proof that bears on the fundamental issues in the case should be rebutted if possible. Exercise judgment in selecting those matters that can be effectively rebutted. Keep in mind that rebuttal evidence may be the last evidence heard by the jury. This can work either for or against counsel. Jurors will remember rebuttal evidence better than the middle parts of the trial, but if the attempted rebuttal fails, counsel may simply highlight the strength of the adversary's case.

[4] Selecting Rebuttal Witnesses

Any witness may be used in rebuttal whether or not the witness testified during the case-in-chief. n3 In selecting rebuttal witnesses, consider whether the witnesses, though good for rebuttal, otherwise have information that may be harmful. If a witness is unfavorable on other matters, there is the chance that he or she will do more harm than good. Do not rely on the trial court to limit cross-examination to the subjects brought out during direct.

Witnesses who will be called for the first time in rebuttal should be kept available so that the rebuttal stage of the case begins promptly. During the direct case counsel should anticipate the need for rebuttal witnesses. Do not excuse a witness who has testified during the case-in-chief unless satisfied that he or she will not be needed for rebuttal. If the adversary presents a witness who testifies about the same meeting that was the subject of examination with a favorable witness, ask the court not to excuse the witness. If the witness is excused over objection, make sure that the record reflects the objection and the court's action.

[5] Considering Rebuttal Techniques

A witness who is recalled in rebuttal need not be sworn again. In many courts, the judge or the court clerk will routinely advise the recalled witness that the prior oath is binding. If the judge neglects to do so, consider reminding the witness of that fact with a question such as "Mr. Witness, do you understand that you are still under oath?"

The examination of a rebuttal witness proceeds in the same way as examination of a witness who is part of a direct case. When there is no need to direct the witness' attention to the matters being rebutted, leading questions are as objectionable as during direct examination. Leading questions can and should be used, however, to steer the witness to the precise point of the rebuttal testimony. Moreover, to fix the jury's attention clearly on the point of reference, specifically refer to the matters to be rebutted.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyCredibilityRehabilitationEvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationScopeEvidenceTestimonyPresentation of Evidence

FOOTNOTES:
(n1)Footnote 1. If evidence is truly rebuttal evidence, the fact that it might have been offered in chief does not preclude admission of that evidence as rebuttal. *Datamatic Servs., Inc. v. Barton, 909 F.2d 1029 (7th Cir. 1990)* ; *United States v. Braxton, 877 F.2d 556 (7th Cir. 1989)* .

(n2)Footnote 2. *Bhaya v. Westinghouse Elec. Corp., 922 F.2d 184 (3d Cir. 1990)* , *cert. denied, 501 U.S. 1217 (1991)* .

(n3)Footnote 3. *But see Dave Kolb Grading, Inc. v. Terra Venture Bridgeton Proj., 85 F.3d 351, 354-355 (8th*

Cir. 1996) (court affirmed trial court's exclusion of rebuttal witness when plaintiff had made no offer of proof on the issue about which the witness was to testify, and the defense, which had no prior knowledge of the witness, as he was not listed in pre-trial filings, was prejudiced by the lack of opportunity to depose the witness).

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CHAPTER 35 Cross-Examination *
D Redirect, Rebuttal, and Surrebuttal

2-35 Federal Litigation Guide § 35.52

§ 35.52 Understanding the Importance of Surrebuttal

Defendant's reply to rebuttal is referred to as surrebuttal. The scope of surrebuttal is limited to the plaintiff's rebuttal and defendant's direct case. The defendant has no right to raise matters beyond those necessary to contradict, explain, or qualify the rebuttal evidence. Moreover, the same rules which apply to rebuttal are equally applicable to surrebuttal. Thus, for example, the defendant cannot present matters in surrebuttal which properly should have been introduced in defendant's case-in-chief. If plaintiff in rebuttal has attacked the credibility of one of defendant's witnesses, the defendant can attempt to rehabilitate this witness in surrebuttal. Proof that was not properly admissible in the defendant's direct case may be admissible in surrebuttal. n1

The tactical considerations on surrebuttal track those concerning rebuttal.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyCredibilityImpeachmentGeneral
OverviewEvidenceTestimonyCredibilityRehabilitationEvidenceTestimonyExaminationCross-ExaminationGeneral
OverviewEvidenceTestimonyExaminationCross-ExaminationScopeEvidenceTestimonyPresentation of Evidence

FOOTNOTES:
(n1)Footnote 1. *United States v. Sanchez-Robles, 927 F.2d 1070 (9th Cir. 1991)* .

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CHAPTER 36 Closing Argument *

3-36 Federal Litigation Guide 36.syn

§ 36.syn Synopsis to Chapter 36: Closing Argument *

§ 36.01 Overview of Chapter.

§ 36.02 The Nature of Closing Argument.

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CHAPTER 36 Closing Argument *

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Scope

SCOPE

This chapter examines the structure and style of the closing argument made to the jury. Initially the chapter focuses on the nature and importance of closing argument. It continues with a discussion of the mechanics of the preparation and presentation of the closing argument. Also explored are local court rules in many federal districts which control the length of closing arguments and permissible division of time.

Next the necessary ingredients for an effective closing argument are examined. Among such ingredients are good organization, a central theme, and a recitation of the evidence presented at trial.

Lastly, the chapter deals with limitations on closing argument and their enforcement.

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CHAPTER 36 Closing Argument *

3-36 Federal Litigation Guide § 36.01

§ 36.01 Overview of Chapter.

Closing argument is your second, and last, chance to speak directly to the jury. It is the vehicle by which you must reestablish the framework and momentum of your case, if those qualities have been lost or blurred. It is your best opportunity to address emotional or motivational issues, including the credibility of witnesses, and it is your only opportunity to discuss the law of the case. n1

The best closing argument will reflect careful preparation but it will also speak to the case as it has actually unfolded. In preparing closing argument, you should draw on your opening statement, your day-to-day trial notes and the views of others associated with your case. You must also be sure that all of the exhibits, transcripts and physical materials which you plan to use in closing argument are both available and in proper order. Finally, you must be aware of and resolve any problems that may exist concerning the order, time and division of argument.

Good organization that is effectively communicated to the jury, a clear theme or themes, candid confrontation of the difficult issues in the case, and specific (though selective) discussion of the evidence are all ingredients of an effective closing argument. Comments concerning peripheral matters are usually unnecessary and unwise. This is particularly true of comments concerning adversary counsel or counsel's conduct. Forensic style will vary widely from lawyer to lawyer, but more cases are won with hard facts and quiet fervor than with loud or exaggerated oratory.

The number of formal and substantive limitations on closing argument are relatively few, and many of these can be obviated by the *manner* in which an argument is presented. n2 Improper closing argument rarely leads to a reversal of the case or to a new trial. n3 As a result, your principal weapons against improper argument are objections and requests for cautionary instructions. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsClosing ArgumentsGeneral OverviewCivil ProcedureTrialsClosing ArgumentsImproper RemarksCivil ProcedureTrialsClosing ArgumentsObjectionsCivil ProcedureTrialsJury TrialsJury InstructionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. Although most of the principles applicable to closing argument in a jury case are also relevant to

closing arguments to the court in a bench trial, the primary focus of this chapter is on closing argument to a jury. Special considerations affecting closing argument to the court are considered in *§ 41.04[6] infra* .

(n2)Footnote 2. *See* Carlson, *Arguments to the Jury: Passion, Persuasion, and Legal Controls, 33 St. Louis U. L.J. 787 (1989).*

(n3)Footnote 3. *See Conde v. Starlight I, Inc., 103 F.3d 210, 213 (1st Cir. 1997)* (appellate court normally presumes that jury followed instructions to disregard improper argumentation); *Kehr v. Smith Barney, Harris Upham & Co., Inc., 736 F.2d 1283 (9th Cir. 1984)* ; *Arnold v. Eastern Air Lines, Inc., 681 F.2d 186 (4th Cir. 1982) .But, see Fineman v. Armstrong World Indus., Inc., 980 F.2d 171 (3d Cir. 1992)* ; *Pappas v. Middle Earth Condominium Ass'n, 963 F.2d 534 (2d Cir. 1992)* .

(n4)Footnote 4. *See, e.g., Arnold v. Eastern Air Lines, Inc., 681 F.2d 186 (4th Cir. 1982)* (any improper influence references to settlement may have had adequately corrected and dissipated by reprimand to counsel and curative instruction).

* Chapter 36 revised in 1995 by Prof. Seymour Moskowitz, Valparaiso University School of Law, Valparaiso, Indiana, Linda D. Moskowitz, Esq., Sharon Sowa Vandercoy, Esq.

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CHAPTER 36 Closing Argument *

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§ 36.02 The Nature of Closing Argument.

Closing argument is the vehicle by which you cement a victory already won, wins a case that hangs in the balance, and sometimes retrieves a case otherwise lost. Closing argument is an opportunity to clarify or explain any confusion or adverse developments which have occurred during the trial and to reestablish the basic framework on which your case depends. It is your only meaningful opportunity to discuss such subjective or emotional issues as motivation and suffering. It is also your only opportunity to directly discuss the law of the case and its application to the facts.

An effective closing argument will be a unique blend of the facts, law and background of a particular case and of the style and strengths of the lawyer who delivers the argument. For that reason, of all the subjects dealt with in this volume, closing argument is the most subjective and the least amenable to specific analysis and advice. In addition to profiting from your own experience, study the closing argument technique of lawyers you admire. Read examples of good closing arguments. n1 A number of observations and recommendations can, however, be made, and the discussion contained in the balance of this chapter is best considered in light of the fundamental nature of closing argument.

Perhaps the most common misunderstanding about closing argument is the belief that in it you are to summarize the evidence. It is important to distinguish between "summation" and "final argument." n2 The jury does not need to hear a summary of the evidence or an overview of the trial. The task of persuasion is to focus on the central, disputed issues and resolve problems in the case for the jury.

It is often said that closing argument is less important than opening statement, that juries will almost always have made up their minds before closing arguments are reached, and that cases can be lost but are rarely won in closing argument. While there may be a measure of truth in each of these points, none of them should affect the care and vigor with which closing argument is prepared and given. This is true for a number of reasons.

First, while opening statements are indeed critical in the formation of the jury's first impression of the case and juries in many cases have made up their minds before closing arguments are delivered, it is also true that many cases hang in the balance to the very end.

Second, while, in realistic terms, the ultimate outcome of a majority of cases may have been determined prior to closing argument, both general experience and a number of surveys have shown that most juries are initially divided on at least one of the issues in the case. In the great majority of cases, your job in closing argument is to provide the jurors initially inclined in your favor with the ammunition they will need to resist and ultimately change the opinions of the other

jurors.

Third, even if the jury has resolved the fundamental issues of the case in favor of one party or another, another large majority of cases will include "discretionary" issues (*e.g.*, damages), and closing argument can have a substantial effect on such issues.

Fourth, and in a similar vein, closing argument is the only vehicle by which emotional and motivational issues can be fully addressed and innuendos drawn.

Fifth, closing argument is the trial lawyer's only opportunity to discuss the law and to relate the law to the facts.

Elaboration of several of these points may be helpful. The evidentiary process is a formal one, foreign to the average juror. It often requires that evidence be introduced in a fragmented, non-sequential manner, and often leaves large gaps in the jury's understanding. Opening statements should be logical and coherent and should explain the relationship of the facts to the issues presented. Opening statements should also directly or indirectly forewarn the jury of the more or less haphazard process that will follow. Opening statements should, inshort, provide the jury with the overall framework to which it can relate the evidence as it comes in. n3 This, however, is the ideal, and is seldom the fact. In all but the shortest and simplest of cases, the jury will not have followed all of the evidence and will not have appreciated fully its relevance to the issues. It will also be a rare case which has not had some adverse development or in which some confusion as to the operative facts has not arisen. Closing argument is the vehicle by which you must clarify that confusion, must explain the damaging events, and must in general reestablish the favorable framework on which your case depends.

Opening statements will also have alluded to such subjective matters as pain and suffering and will also have mentioned what the objective facts may suggest or imply concerning issues of motivation or intent. However, the formal "what-I-expect-the-proof-to-show" limitation on opening statements generally precludes detailed discussion of such issues, and the evidentiary process itself will, at best, have given you an opportunity to suggest, not argue, such matters. Only in closing argument can you pose and answer the questions: what does this fact mean; what does it suggest as to the intent or motivation of the parties? Only in closing argument can you cast the case in the broader social or policy terms it may possess. Only in closing argument can you candidly address the human elements of the case.

The importance of closing argument as the only opportunity to directly discuss the law and its relationship to the facts cannot be over-emphasized. The fundamental principles of law and their application to the facts will usually have been identified in opening statement and may, in the course of argument over objections, have been mentioned in the jury's presence. However, they will not have been discussed in depth or in an analytical fashion. Most significantly, when closing arguments are given, the court's instructions on the law will have been settled, and you will, for the first and only time, be able to refer to, and preferably quote from, those instructions which are favorable to your case. Closing argument is also the best chance to address those instructions which appear to favor the opposing party and argue why they do not apply.

In these and other respects, the closing argument is your second, and final, opportunity to speak directly to the jury. It is your last opportunity to win the case that hangs in the balance or to retrieve a case which may, at the moment, be lost. In its most benign form, it is the vehicle by which you must preserve a victory already won.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsClosing ArgumentsGeneral OverviewCivil ProcedureTrialsClosing ArgumentsImproper RemarksCivil ProcedureTrialsClosing ArgumentsObjections

FOOTNOTES:

(n1)Footnote 1. Touhy, *Effective Final Argument for the Plaintiff, 8 Litig. 41 (Spring 1982).*

(n2)Footnote 2. McElhaney, *Trial Notebook: Solving Problems with Final Argument, 9 Litig. 43 (Winter 1983).*

(n3)Footnote 3. *See* Herman, *The Opening Statement: Using it to Maximum Advantage,* 25 Trial 72 (Aug. 1989).

* Chapter 36 revised in 1995 by Prof. Seymour Moskowitz, Valparaiso University School of Law, Valparaiso, Indiana, Linda D. Moskowitz, Esq., Sharon Sowa Vandercoy, Esq.

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CHAPTER 36 Closing Argument *

3-36 Federal Litigation Guide § 36.03

§ 36.03 Mechanics of Preparation and Presentation.

[1] Preparation.

It is seldom practical, and usually unwise, to prepare a complete closing argument in advance of trial. On the other hand, effective closing arguments are rarely if ever "thrown together" the night before they are delivered. They should never be delivered extemporaneously with no special preparation. If the trial ends unexpectedly in the morning or mid-day and the judge is determined to proceed with closing arguments, ask for a recess in order to finalize your argument.

The best closing arguments are usually a product of careful forethought, updated, more or less to the last minute, to reflect the trial as it has actually occurred. Thus, the you should have closing argument in mind from the very earliest stages of the case and may even outline that argument prior to trial. However, you should keep both the details and format of your closing argument flexible, adding nuances and fragments to that argument both during the trial and at the conclusion of all the evidence. Striking a balance between a well organized argument and one that nevertheless speaks, in spontaneous and contemporary terms, to the case and the evidence as they have unfolded requires preparation. Preparation will reduce the likelihood that you will fall back on hackneyed legal jargon in explaining the case. Jargon is more of a crutch when a lawyer is thinking for the first time and speaking about a subject. Some attention to the mechanics of preparation is warranted.

The *structure* of closing argument will rarely be a problem. The basic points to be covered will normally be self-evident and will usually correspond to the legal and factual issues of the case. The sequence in which particular issues should be discussed may change as the trial unfolds but the mechanics of arranging or rearranging the discussion of those issues will normally be limited to a reshuffling of your notes, together with a mental revision of your introductory and transitional remarks.

Moreover, in the rare case when organization is difficult, that problem will normally have been faced and resolved in the preparationof opening statement. Indeed, as noted below, the opening statements of both parties are important starting or reference points in the preparation of every closing argument.

In all cases, you should prepare an outline of your closing argument during your normal trial preparation. The outline can be as sparse or as detailed as the circumstances require; the most important point is that it should remain flexible. In the alternative, you might prepare a checklist of points to be covered in closing argument, especially as to points which

will not be dealt with in opening statement.

Particular portions of a closing argument can be drafted in advance of trial, and that might be advisable if the case presents complex or difficult issues where either a very precise explanation must be made or a narrow line walked between conflicting facts or considerations. And, of course, detailed work on any issue, at any point in the case, may suggest a desirable approach or formulation for closing argument. These thoughts should be noted and filed in your "closing argument file" for later evaluation. In a simple case, that "file" may just be the last page of a legal pad. In a more complex case, you should keep a separate file folder for notes on closing argument. In it you should keep notes you jot down every time you think about the case, including analogies, figures of speech, and other details which may make the closing argument more powerful.

Evaluation is, however, the key word. Almost every case of any complexity evolves, its focus shifting, both in advance of and during trial. Few if any preliminary drafts of a closing argument will adequately address the case as actually tried; a large percentage will be scrapped entirely.

Some parts of the opening statement may be closely paraphrased in closing argument. Also, in many cases, it will be advisable to address the issues in the same sequence as they were discussed in opening statement; the jury will thus hear your evaluation of the evidence and the law in a context with which it is already measurably familiar. One of the most effective ways to organize closing argument is to review for the jury the claims you made in your opening statement, point by point, and relate the proof on those claims to the facts and legal issues that justify a verdict in your favor. At a minimum, you should carefully review your opening statement to be sure that you have not omitted any significant issue or item of evidence.

You should also carefully review your recollection and notes of your adversary's opening statement. That review will remind you of your opponent's emphasis and overall approach to the case. It may also remind you of areas in which statements made by your opponent in opening statement have not been borne out by the evidence. You should be sure to point these out to the jury.

For obvious reasons, you must also carefully review the court's proposed instructions to determine which instructions can or should be used offensively and which will probably be relied upon by your opponent and thus must be dealt with defensively.

If you keep them properly, your day-to-day notes of the trial will be the most fertile source for the real meat--the evidentiary flesh and blood--of your closing argument. Each day of the trial will produce a half dozen or more pieces of evidence--and will also likely suggest as many or more points of advantage or disadvantage not directly related to the evidence--that are candidates for inclusion, exploitation or explanation in closing argument. n1 Many such points will disappear, being neutralized or explained as the trial progresses. Many will, on reflection at the end of the case, seem trivial or even irrelevant. On the other hand, many will remain. In addition, innumerable small but nevertheless important points will be lost if some note of them is not made as the case progresses. If you keep detailed notes of the trial, you should adopt some form of simple notation--*e.g.*, a marginal asterisk--to indicate particular points or pieces of evidence that are candidates for discussion in closing argument. If you do not keep detailed notes of the evidence you should make separate, and contemporaneous, notes of all such points and file them in your "closing argument" folder.

It is not wise to defer these notations until the end of the trial day. Ideally, each night, as you prepare for the next day of trial, you should review the day's notes and modify your on-going outline of closing argument to reflect important developments while they are still fresh in your mind. Too often, however, the time for looking back over the day's events is not taken. Even when it is, many important points will have been lost in the heat--sometimes chaos--of the trial day unless you have made some contemporaneous note of them.

It should also be obvious that all of the lawyers representing a particular party should listen to the evidence, and take

notes, withclosing argument in mind. Indeed, if you are the lawyer who will deliver the closing argument you are most likely to be preoccupied with the day-to-day conduct of the trial and the lawyer or paralegal sitting "second chair" should take special responsibility for noting issues or evidence which should be dealt with in closing argument.

It necessarily follows that you should listen to the suggestions of co-counsel and others on your "trial team" and should give those suggestions considerable weight. You should also seek the views of client representatives and others, laypersons as well as lawyers, who have observed any substantial part of the trial. Those individuals, being removed from the forefront of the case, may have a better perspective as to what evidence has been effective or ineffective and as to what issues require special attention in closing argument. These reliable bystanders can serve as a "shadow jury" and can provide feedback that may suggest a more effective approach to certain difficult areas. n2

The *substance* of closing argument will usually be dictated by the facts and issues of the case and by the more general considerations discussed in a later paragraph. n3 To a certain extent identifying the substantive issues to be considered, and in what depth, is a mechanical process which should include consideration of at least the following questions:

1. *What issues require the most extensive or careful treatment?* These will not necessarily be the most important issues in the case, but rather those which have been the most sharply controverted or the ones on which the jury is most likely to be in doubt. They may also be the issues, large or small, by which the jury decides whether a particular witness or party is "good" or "bad," truthful or untruthful.

2. *What points will your adversary argue most strongly, and to greatest effect?* Your response to those points should be carefully prepared. As plaintiff's counsel you should anticipate the defendant's arguments in your initial presentation; you should do so in depth and as nearly as possible in the terms that the points are likely to be made by the defendant, leaving for rebuttal only such incidental points as may be suggested by the defendant's argument. As defendant's counsel you will have the advantage of hearing the plaintiff's argument before you takes your feet, but your response to the plaintiff's argument will be more effective if it is carefully thought out in advance. Remember that the plaintiff normally will have the last word in rebuttal. As defense counsel you must be able to anticipate every point that the plaintiff may be planning to elaborate on during those final moments before the jury. While it sounds like whining to complain that the plaintiff has the last word, it is a good tactic to ask the jury to look for the plaintiff's response to a certain point or answer to a certain argument in the rebuttal.

3. *What issues in the case are likely to be confusing or troubling either to individual jurors or to the jury as a whole?* This question might also be framed: If I was a juror, what subjects would I want the lawyers to address, and what aspects of the case would I like to have explained? The answers to these questions will often parallel the points which you would cover in any event. Frequently, however, especially if they are provided by non-lawyers on your team, they will suggest a particular approach which should be taken in closing argument. They may also suggest subsidiary points which, though not critical in their own right, may have either a favorable or an adverse effect on more important issues.

4. *What facts or issues in the case have either emotional or unifying value?* In a sense, this question searches for a "theme" for the closing argument, a subject discussed in more detail below. n4 It is also a way to identify the human elements in the case which may have a critical impact on the jury's decision.

5. *How can the case be personalized to the jury?* This does not necessarily mean an appeal to the jury's emotions, though such an appeal may well be proper. On the contrary, it is a question particularly appropriate for commercial or other technical cases that lack human or emotional content. The apt analogy or the down-to-earth explanation that converts complex financial or other issues into ordinary terms may carry great weight in the jury's deliberations. n5 It has already been suggested that the most effective closing argument will be one which is not finally "set" until all of the evidence is in. The peril of this approach of course is that closing argument may not be adequately prepared and will therefore lackorganization, thoroughness, or both. Trials and the work associated with them frequently accelerate as the case nears its conclusion: instructions must be argued; rebuttal evidence must be collected and presented; the court is

frequently impatient with the progress of the trial and "forces" its conclusion. You must anticipate these possibilities. The fundamental outline of the closing argument should be formulated and revised as the case progresses; daily notes of points to be covered in closing argument should be organized and allocated to the portions of the argument to which they relate; at a minimum, a major portion of the evening prior to the day on which closing argument will be delivered should be devoted to polishing and, if necessary, reorganizing the argument.

In a long or complicated case, it is reasonable to ask for a recess of a half or even a full day to prepare for closing argument. Such a request should be made as early as possible and in any event several days before you expect the trial to be completed. Most judges will, in an appropriate case, recognize the need for such a recess and will be more likely to grant it if they have advance notice of the request and are able to schedule matters in other cases, such as motions or pretrial conferences, during the recess.

If you are going to make the closing argument and are assisted by other counsel, you may shift the responsibility for conducting the last few days of the trial to your assistant counsel. In particular, the burden of arguing instructions, renewed motions for directed verdict and other similar matters can often be delegated to assistant counsel, thus freeing lead counsel to spend more time on closing argument.

[2] Presentation.

Both the formal and substantive aspects of the actual presentation of closing argument are discussed in a later paragraph. n6 However, to the extent that documents, exhibits, trial testimony or similar materials are to be used in closing argument, those materials must be prepared and collected.

Documents which have been introduced into evidence are the most common subject of direct reference in closing argument. If the literal language of an exhibit is important and the excerpt is short, reading that language will almost always be more effective than paraphrasing it. It will also be more effective for you to read from the exhibit itself, and let the jury *see* that you are reading from the exhibit, than to read the quoted language from your notes. If the jurors have notebooks of copies of exhibits, ask the jurors to read along with you.

Even if the document or its critical language is too long to be quoted directly, you can hold the document itself up, face forward, so that the jurors can see and be better able to recognize it during their deliberations. In the case of genuinely decisive documents, you may specifically urge the jurors to read and consider the effect of the document during their deliberations. Both in that and in more routine situations, you should give the exhibit number of the document to the jury.

If the document is genuinely critical to the case, and especially if it in substance destroys some element of your opponent's case--for example, if it contains a crushing admission by the adversary party--an enlargement, or "blow-up," of the exhibit can be very effective. The jury not only sees the language of the admission but sees it in enlarged, and subliminally more effective, type. n7

Such enlargements must obviously be prepared well in advance of closing argument. In addition, if there is any question as to whether the enlargement is unfairly selective (showing the jury only part of a document and arguably omitting explanatory language), selection of the portion of the document to be enlarged should err in favor of inclusiveness. If this is not possible (as in the case of a very long document), the arguably exculpatory language should be mentioned and explained to the jury. Of course, your opponent has an equal chance to highlight the portions of documents which favor the other side. But if your opponent does not take advantage of that opportunity, the only enlarged portion of an exhibit or testimony will be yours.

In a similar vein, if particular testimony is critical to the case, it will usually be more effective to quote that testimony directly to the jury rather than paraphrasing it, and reading the testimony from a typedtranscript will almost always be

preferable to a reading based on your notes, however accurate they may be. n8

Partial transcripts of the evidence can sometimes take several days to obtain and are best arranged by a request to the court reporter at the first recess after, or at the end of the day on which, the critical testimony is given.

If one or more of the court's instructions are to be argued to the jury, it is not only more effective but safer to read the exact language of the instruction. Copies of the entire charge will normally be available to the attorneys at the time of closing argument. n9 If they are not, you should try to obtain a copy of the particular instruction you plan to discuss and should always be sure that you are reading from the *final* version of the instructions.

If demonstrative exhibits--charts, graphs, models, etc.--have played an important role in the case, use them effectively in closing argument. The logistics of their use should be carefully planned. More than one easel may be helpful (or necessary, if two or more charts are to be compared), and their physical management should, if possible, permit you to move freely from chart to chart (and from rostrum to chart) without requiring or enabling opposing counsel to create the visual diversion of moving about the courtroom in order to follow the argument.

Use your associates or paralegals to stage manage the display and removal of demonstrative material in order to minimize the distractions. If you will be replaying a portion of a video or audio tape during closing argument, do not permit yourself to suffer any embarrassing delays while the equipment is being set and tested. Have the technology ready to go.

A technique which is rarely used but can sometimes be very effective, particularly in complex or multiple-issue cases, is to prepare a chart reflecting a point-by-point outline of a closing argument. For example, counsel for a defendant in a case involving multiple claims might (and perhaps logically should) organize closing argument to correspond to the various elements of the plaintiff's proof. A chart listing those elements will (a) help the jury to follow and remember defense counsel's argument, (b) underscore the variety of issues on which the plaintiff bears the burden of proof, and (c) enable defense counsel to emphasize the number of issues on which that proof has failed.

Such "outline charts" will not normally be objectionable, but they should use neutral, shorthand terms such as "intent," "causation" or "material misrepresentation," and should, in any doubtful case, be shown to adversary counsel and/or the court before they are displayed to the jury.

As a final and perhaps obvious matter, all of the materials to be used in closing argument must be carefully collected and arranged prior to the argument so that the flow and momentum of that argument is not lost in fumbling for (and perhaps not finding) a critical item. You should *personally* check both the availability and proper order of the materials you plan to use as carefully as you would review the substance of the argument itself.

[3] Length, Order and Division of Time.

Generally, matters relating to the conduct of the trial, such as time allotted for opening statement and closing argument, are reserved to the broad discretion of the trial judge. n10 It is necessary to consult the local rules, however, as they may control one or more aspects of closing argument in many federal districts. n11 Generally, those rules speak to formal matters of the type considered in this subparagraph, but a few of them relate to substantive issues. n12 Rules relating to formal matters can and usually will be waived or modified to accommodate special circumstances, but the fact that the local rules in a given district speak to a particular subject may suggest an underlying philosophy or attitude on the part of the judges in that district which you should consider in formulating your argument.

For example, a local rule limiting closing argument to one hour per side will usually be waived by the trial court in a complex case. The existence of that rule, however, suggests a concern by the local judges as to the length of closing argument; if you genuine need additional time you should limit your request to the additional time actually required,

and if you can summarize your case in substantially less than an hour, you should probably do so. The existence of the rule also means that if you need more time you must ask for it before beginning your argument. If you must beg for more time when the clock runs on your argument, you will convey the impression that you have not managed your time well. Similarly, while local rules prohibiting lawyers from "arguing law" presumably do not prohibit you from discussing the application of the court's instructions to the facts of the particular case, they do suggest that discussion should be *most* carefully limited to the law as announced by the instructions.

Length of argument.

In general, the trial court has broad discretion in determining the length of counsel's oral argument. n13 While local rules in at least five districts limit closing argument to one hour, or to one hour per side, n14 several of these rules also state that the allotted time can be shortened or lengthened in the trial court's discretion, and this, in practical terms, is undoubtedly the case in all jurisdictions.

All other things being equal, a shorter argument will usually be more effective than a longer one. However, counsel should obviously seek as much time for argument as the circumstances of the case require and should normally, as a matter of prudence, ask for at least a little more time than you actually expect to use. The attorney whose case is relatively simple and whose opponent's argument will require more extensive discussion (for example, a breach of contract case in which the plaintiff primarily relies upon the fact of the breach and the defendant urges a variety of defenses) might suggest a shorter allocation of time, but the purpose of that suggestion will usually be transparent.

Division of argument for a single party.

Rules in several districts provide that only one counsel for any party may argue the case to the jury without leave of court. n15 Rules in other districts provide that no more than two attorneys for each party may argue, n16 and others provide that if more than one attorney argues, one must open and one must close. n17 While these rules are an understandable effort to avoid "tag team" closing argument, most courts will modify them on a prior request for any good reason. As a matter of strategy, you rarely should divide the closing argument. It is hard enough to build an atmosphere of trust between the jury and one lawyer per side, much less two. Rarely are two or more lawyers equally skilled at closing argument. The lawyer who worked on certain substantive aspects of the case and handled witnesses on those issues may want to address the jury about them, but that lawyer is not necessarily the best suited to do so. He or she may know too much about the substance and become bogged down in details, rather than carry the burden of persuading the jury.

The circumstances in which counsel for a party should divide their argument in chief will be relatively few. Closing argument should reflect a consistent philosophy, and this is more likely to be accomplished if the lawyer with the best forensic skills and the broadest grasp of the case makes the entire argument. Exceptions do, of course, exist. For example, if one counsel is substantially more adroit in the extemporaneous argument, required in rebuttal, and if the philosophy of the case is well understood by both counsel, a division between the argument-in-chief and rebuttal might be considered.

Division of plaintiff's time.

Local rules in at least two districts state that the plaintiff (or other party entitled to open the argument) may reserve not more than one-third of its time for rebuttal, n18 and rules in two other districts provide that the plaintiff must use (or will be charged with the use) of at least one-half of the allotted time in the opening argument. n19 Rules in many districts require that plaintiff's counsel make a full statement of the case in the opening argument and/or prohibit the plaintiff from arguing new matter in rebuttal. n20 A rule in one district provides that opening argument cannot be waived, n21 and the rule in another district provides that the plaintiff has no right to rebuttal if the defendant has offered no evidence. n22 These rules are designed to reduce "sandbagging" where the plaintiff is tempted to save the best

arguments or illustrations for rebuttal.

These rules reflect general practice. They also reflect sound strategy. The plaintiff or other party entitled to open the argument normally has the burden of proof on most if not all issues but, as compensation, has the substantial advantages of setting the framework of the jury's thinking and of placing the adversary on the defensive. These advantages should be fully exploited. In addition, reserving substantial points for discussion in rebuttal runs the risk that discussion will be deemed "new matter" and thus not be allowed. The tactical advantage of saving a "big" argument for rebuttal is illusory. It is not worth the risk that an impatient judge will sustain your opponent's objection to your argument. That mistake would be the last image of you in the jurors' minds, and you will have lost the chance to use your "big" argument.

Sequence of argument.

In general, the party bearing the burden of proof has the right to open and close the argument. n23 Rules in a number of districts make it clear that the party with the burden of proof on all issues is entitled to open and close. n24 The trial court determines which party carries this burden and, thus, who is entitled to open and close. n25 In general, this means the plaintiff opens and closes the argument. However, there will be instances where the burden of proof is placed on a defendant or respondent, thereby giving him or her the right to open and close the argument. n26 Some local rules also provide that if the burden of proof is divided between the parties, the court may determine the sequence of argument. n27 Remarkably, the local rules in two districts provide that the plaintiff is entitled to (or must) argue last and that no rebuttal will be allowed to either side. n28

The party with the burden on all or a preponderance of the issues should obviously take advantage of or seek the right to open and close. The existence of the burden will be known to the jury or will be clearly indicated in the court's instructions; nothing will be gained by trying to suggest otherwise, and the substantial advantage of opening and closing the argument should not be foregone.

If the defendant is presenting a counter-claim, rebuttal should allowed limited to that claim, after the plaintiff's final closing argument on its case in chief. With additional parties, counter- andcross-claims, and third parties, the order and allocation of argument will become more complex. Cogent reasons why a particular order or limitation is fair should persuade the trial judge to allow a non-traditional order in the presentation of arguments.

Multiple party cases: allowed time.

Serious problems as to the time available for closing argument can be presented in multiple party cases. This is especially true if there is only one plaintiff and multiple defendants, or vice versa. Do local rules limiting argument to one hour "per side" require that multiple plaintiffs or defendants divide that hour? In the absence of any rule, if a plaintiff has sued five defendants, will the defendants collectively be allowed to argue five times longer than the plaintiff? The court is vested with broad discretion in determining whether multiple attorneys may argue and the length of their arguments. n29

However, only one district appears to address these problems by rule, and then in ambiguous terms, stating merely that, in cases involving multiple parties, "additional time allotments should be made to insure adequate opportunities to all parties." n30

In general, the trial court will strike a suitable balance, having in mind all of the facts and circumstances of the case. In spite of this, a single plaintiff or defendant may still be confronted with situations in which multiple adversaries will be allowed more aggregate time than the single party is allowed, and multiple plaintiffs or defendants may be forced to allocate various aspects of the case among themselves.

A third party defendant should and normally will be considered a separate party entitled to the full allotment of time.

n31

Multiple party cases: sequence of argument.

Rules in two districts specifically provide for the sequence of argument in cases involving third party defendants. n32 That sequence, generally followed in other districts, is:

Plaintiff

Defendant and third party plaintiff (responding to plaintiff and stating its case-in-chief against third party defendant)

Third party defendant

Defendant and third party plaintiff (responding only to the third party defendant)

Plaintiff

The sequence in which multiple plaintiffs or defendants may speak does not appear to be established by any local rule. Most judges will expect the parties to settle that matter among themselves, and they should obviously attempt to do so. While parties seeking to control the case will want to speak first or last, other parties who are small actors or have only limited exposure may gladly squeeze in the middle or take less time. A party with a "bit part" may rely on the strategy that if the jury doesn't remember it well or it appears to have a minor role in the lawsuit, the jury will overlook it or quickly dismiss it as a factor during deliberations. In the absence of agreement, the trial court will normally establish the sequence of argument in some arbitrary fashion--for example, the order in which the parties are named in the pleadings or the order in which their evidence was presented. n33 In most cases, the order in which parties are named in the lawsuit is a good indication of their importance. If that is not true, a minor party who is named first should seek to be further down in the batting order for all parts of the trial.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsClosing ArgumentsGeneral OverviewCivil ProcedureTrialsClosing ArgumentsObjectionsEvidenceProcedural ConsiderationsBurdens of ProofAllocationEvidenceTestimonyGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See* Lubet, *The Trial as a Persuasive Story, 14 Am. J. Trial Advoc. 77 (1990).*

(n2)Footnote 2. For a discussion of the use of shadow juries, see Erlich, *Shadow of a Verdict,* Cal. Law. 36 (Aug. 1991).

(n3)Footnote 3. *See § 36.04 infra.*

(n4)Footnote 4. *See § 36.04 infra.*

(n5)Footnote 5. *See* Levitt, *Rhetoric in Closing Argument, 17 Litig. 17 (Winter 1991).*

(n6)Footnote 6. *See § 36.04 infra.*

(n7)Footnote 7. The alternative of distributing copies of a particular document to the jury during closing argument will usually be awkward and might be deemed objectionable by some judges. The increasingly common practice of

giving the jurors individual copies of a compilation of all the exhibits ensures fairer consideration of both parties' closing arguments. You may seek permission to use juror notebooks, especially in more complex or lengthy cases.

(n8)Footnote 8. A local rule in one federal district prohibits reading from deposition or trial transcripts. Middle District of Florida, Rule 5.03(b)(15). This prohibition is not generally observed in other districts.

(n9)Footnote 9. *Fed. R. Civ. P. 51*: "The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. ..."
If you are not familiar with the standard parts of a judge's charge, it will be furnished to you on request. It is becoming the practice for federal judges give counsel a complete copy of the instructions before closing argument.

(n10)Footnote 10. *Glenn v. Cessna Aircraft Co., 32 F.3d 1462, 1464 (10th Cir. 1994)* .

(n11)Footnote 11. The citation and references to local rules contained in this chapter do not purport to be exhaustive.

(n12)Footnote 12. *See § 36.05 infra*.

(n13)Footnote 13. *Glenn v. Cessna Aircraft Co., 32 F.3d 1462 (10th Cir. 1994)* ; *Cleveland v. Piper Aircraft Corp., 985 F.2d 1438, 1449 (10th Cir.)* , *cert. denied, 114 S. Ct. 291, 126 L. Ed. 2d 240 (1993)* .

(n14)Footnote 14. *One hour*: District of New Hampshire, Rule 33(f); District of Rhode Island, Rule 17(f).

One hour per side: District of Maryland, Rule 4; Eastern District of Michigan, Rule 24(f); District of North Dakota, Rule 8(f). The New Hampshire and Rhode Island rules probably mean, but do not say, one hour per side.

(n15)Footnote 15. District of Arizona, Rule 44(e); District of Maine, Rule 25; District of Maryland, Rule 4; District of New Hampshire, Rule 33(f); Eastern District of Pennsylvania, Rule 38.

(n16)Footnote 16. Eastern District of Tennessee, Rule 17; Middle District of Tennessee, Rule 12(e); District of Utah, Rule 10(a)(1).

(n17)Footnote 17. District of Idaho, Rule 10-104; Eastern District of Michigan, Rule 24(f).

(n18)Footnote 18. District of Nebraska, Rule 28(f); District of Utah, Rule 10(c).

(n19)Footnote 19. Northern District of West Virginia, Rule 1.07(b); Southern District of West Virginia, Rule 1.10(b).

(n20)Footnote 20. *See, e.g.,* Eastern District of Michigan, Rule 24(f); Eastern District of Tennessee, Rule 17.

(n21)Footnote 21. Eastern District of Pennsylvania, Rule 38.

(n22)Footnote 22. Eastern District of North Carolina, Rule 27.04.

(n23)Footnote 23. *Martin v. Chesebrough-Pond's, Inc., 614 F.2d 498, 501 (5th Cir. 1980)* .

(n24)Footnote 24. *See, e.g.,* District of Arizona, Rule 44(d); District of Nebraska, Rule 28(f); Middle District of North Carolina, Rule 8; District of North Dakota, Rule 8(f); District of Utah, Rule 10(c); Northern District of West Virginia, Rule 1.07(a); Southern District of West Virginia, Rule 1.10(a).

(n25)Footnote 25. *See Commercial Iron & Metal Co. v. Bache Halsey Stuart, Inc., 581 F.2d 246, 250 (10th Cir.*

1978) , *cert. denied, 440 U.S. 914 (1979)* (no abuse of discretion to deny defendant's pretrial motion that the parties be realigned, i.e., that it be designated the plaintiff and given the right to open first and close last). *See also Fernandez v. Corporation Insular De Seguros, 79 F.3d 207, 210 (1st Cir. 1996)* (no abuse of discretion for district court to deny plaintiff "right" of rebuttal, as decision is procedural matter within discretion of court and rarely provides grounds for appeal).

(n26)Footnote 26. *See, e.g., Ridgeway v. Montana High School Ass'n, 633 F. Supp. 1564, 1569, n. 5 (D. Mont. 1986)* , *aff'd, 858 F.2d 579 (9th Cir. 1988)* (in action by high school girls and their parents alleging sex discrimination in high school athletics programs, defendants had burden of proof and right to open first).

(n27)Footnote 27. *See, e.g.,* Middle District of North Carolina, Rule 8; Eastern District of New York, Rule 44; Southern District of New York, Rule 44.

(n28)Footnote 28. District of New Hampshire, Rule 33(f); District of Rhode Island, Rule 17(f). By report: (1) though not reflected in a local rule, this unusual practice is also generally followed in Massachusetts, at least to the point of permitting or requiring the defendant to open; (2) some Massachusetts judges commonly provide opportunity for reply; (3) at least one Rhode Island judge follows the normal practice of allowing the plaintiff to open and close.

(n29)Footnote 29. *See EEOC v. G-K-G, Inc., 39 F.3d 740, 745 (7th Cir. 1994)* (in case in which appellate court found E.E.O.C. should have been allowed to pursue action along with individual plaintiff, the court stated that "[t]he breadth of the district court's managerial discretion ... precludes any suggestion that the E.E.O.C. has an absolute right...to make lengthy opening and closing arguments").

(n30)Footnote 30. Eastern District of Michigan, Rule 24(f).

(n31)Footnote 31. *Cf.* Eastern District of Pennsylvania, Rule 38; Middle District of Pennsylvania, Rule 38.

(n32)Footnote 32. *Id.*

(n33)Footnote 33. *See Martin v. Chesebrough-Pond's, Inc., 614 F.2d 498, 501 (5th Cir. 1980)* (where multiple parties are involved, the order of their opening statement and closing arguments as among themselves rests in the sound discretion of the trial court).

* Chapter 36 revised in 1995 by Prof. Seymour Moskowitz, Valparaiso University School of Law, Valparaiso, Indiana, Linda D. Moskowitz, Esq., Sharon Sowa Vandercoy, Esq.

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CHAPTER 36 Closing Argument *

3-36 Federal Litigation Guide § 36.04

§ 36.04 The Ingredients of an Effective Closing Argument.

An effective closing argument will be well organized, will have a central, well articulated theme or themes, will deal with the hard issues in the case, including damages, and will refer to the evidence inspecific terms. Discussion of peripheral matters, including the conduct or good faith of adversary counsel, will usually be unwise, improper, or both. Strong, even emotional arguments do not require "noisy" oratory, and several frequently used tactical ploys, though usually effective, nevertheless require careful evaluation.

The uniquely subjective and personal nature of an effective closing argument has already been noted. That uniqueness flows from the style and strengths of the individual advocate. It also commonly flows from the particular facts and nuances of the case. It may depend on a variety of other considerations, including the length of the trial, its complexity or simplicity, the extent to which the case possesses emotional or motivational issues, and the apparent intelligence of the jury.

In spite of those variables, there are a few basic ingredients which every closing argument will possess. There are also ingrained lawyer habits to avoid. In most cases, you should avoid the customary bowing and scraping which frequently serves as the introduction to closing argument. A simple thank you to the jury for their time and attention is acceptable. But any extended recitation of their admirable attention, extraordinary patience, high standards of personal grooming, etc., will be seen as fawning condescension. Jurors are doing a job. So are you. Get on with it.

There are also guidelines which, if followed, will contribute to the strength of closing argument. Finally, there are certain specific techniques which may be advisable in the context of a particular argument.

Though it does not, *per se,* constitute advocacy, good organization is an essential threshold ingredient to any effective closing argument. An otherwise effective argument will inevitably lose force, and may fail, if it is not well organized.

Good organization is not an accident; it requires careful thought, particularly in complex cases. Also, while the sound organization of a closing argument will normally follow a logical progression of the factual or legal issues of the case, the closing argument based on a pure issue-by-issue analysis is not always the most effective. Other facts should be considered. A good closing argument should begin and end on a strong point. It should exploit those emotional or psychological issues in the case favorable to the client's cause. It will usually have to deal with unfavorable facts or inferences. It must also normally include some discussion of the law as applied to the facts. Any one of these or other considerations may suggest an effective organization that does not follow the strict logic of the case.

Good organization is of no value if the jury does not understand that organization. Thus, at or near the beginning of closing argument, you should almost always explain the manner and sequence in which you plan to deal with the issues. If it is not apparent, a brief explanation of the rationale of that sequence should be given. Thereafter, you must be sure that the fundamental structure of your argument is clear to the jury as you proceeds from point to point. This should not be difficult. The you may, for example:

1. First, tell the jury that you will first address the four issues which the jury must consider on the subject of liability;

2. Next, tell the jury what those four elements are;

3. As you complete your discussion of each point, you will usually summarize that portion of your argument in a sentence or two;

4. Your next statement can then introduce the next subject of argument, as, for example: "Turning now to the second point which you must consider on the issue of liability ..."

5. At the conclusion of your discussion of the liability issues, you might well summarize your arguments on all of those issues and point out that you are now turning to the subject of damages.

In short, though a good closing argument must have real meat, the "skeleton" on which that meat is hung must be apparent to the jury as the argument proceeds.

An effective closing argument should have a central theme. In most cases, that theme will be obvious. In a personal injury case, the seriousness of the defendant's wrong and of the plaintiff's injury will normally be twin motifs which will permeate every aspect of the plaintiff's argument. In a contract case, a defendant's central theme might be the unforeseen nature of the events which required breach of the literal terms of the contract.

Other themes, however, may be more subtle and may only be parallel to, or implicit in, the formal issues in the case. Thus, if the defendant's plea of justifiable breach is strong, plaintiff's counsel may wish to stress the extent of the plaintiff's reliance on the defendant's promised performance and may also wish, at a more abstract level,to suggest the social and economic importance of enforcing contracts. In a libel case, the defendant may wish to stress the importance of freedom of the press, the public policy underlying the defense of fair comment, or the rationale of some other privilege justified the defendant's settlement.

These more subtle themes will be more difficult to establish and will often form the "backdrop" of an argument, rather than its overt rationale. For example, now that video-taped instances of police misconduct have been universally broadcast, those images lurk in the back of the jurors' minds in every civil rights suit against law enforcement officers. The argument that "every cop beats people, therefore, these cops beat the plaintiff" would not get far if it was verbalized, but there is no reason to verbalize it. A fleeting reference to videotaped beatings will call up those images, but even that brief reference may be unnecessary.

Most themes can be clearly sounded at the beginning and at the end of argument and at other critical points between. Thus, to suggest the policy underlying the defense of fair comment, defendant's initial statement in closing argument might be: "Members of the jury, in its broadest aspect, this case presents the fundamental question of whether a newspaper can, without fear of retribution, fairly comment on the conduct of a public official." At this point or, perhaps preferably, in the summation of the argument, defendant's counsel can discuss the reasons why the defense of fair comment exists. Counsel might also directly or indirectly suggest the social and political value of a free press.

Counsel must, of course, pursue these points without invading the court's prerogative to define and discuss the law of

the case. However, the advancement of an indirect, or "second level," theme is more often a matter of phraseology or nuance than of direct assertion. Thus, as opposed to merely stating the fact of the publication of the article in issue, defendant's counsel might argue: "At this point, members of the jury, believing and relying on the information he possessed, *and believing that his readers had a right to know about these charges,* my client published the article which plaintiff claims to be libelous." More overtly, but still within proper bounds, defendant's counsel might introduce the summation of the fair comment defense by saying: "I am not trying to tell you what the defense of fair comment is; the court will do that. I do, however, invite you to consider the importance of that defense, to all of us and to the free society in which we live, and to consider the reasons why that defense exists."

An effective closing argument will always deal with the *hard* issues in the case. Never appear defensive or apologetic when discussing the hard issues. If one of your witnesses has been irreparably impeached, admit it, but link such an admission with all the other proof of the same facts about which that witness testified. You have strong, affirmative reasons why you should win, even if you don't have the burden of proof. That same affirmative attitude will also be the best approach to countering your opponent's best arguments.

Preferably you will address the hard issues as early as possible in the argument. This will serve the dual purpose of (1) avoiding the impression that you are afraid of the difficult issues and (2) enabling you to conclude your argument on more positive matters.

Damages will normally be discussed by plaintiff's counsel after the liability issues are considered. This is logical and, in practical terms, inevitable. However, even plaintiff's counsel should generally review the liability issue in something more than a summary way *after* discussing damages. This is especially so if the plaintiff's damage case is weak; returning to the liability part of the case will remind the jurors of the seriousness of the defendant's wrong and thus remind or suggest to them why substantial damages should be awarded.

Defendant's counsel should discuss damages as fully as the circumstances of the case warrant. The fear that the jury might believe that by discussing damages defendant's counsel has conceded liability can be dispelled by at least two techniques. First, when turning to the damage issue, defendant's counsel can and should specifically state that, by discussing the damage issue counsel is in no way suggesting that the plaintiff has proved its case on liability or that the jury will have occasion to consider the damage issue. This explanation can usually be brief but it can, if necessary, be expanded to include the concept that the lawyer is discussing damages solely because his duty to his client requires him to do so. Second, like, but to a greater degree than, plaintiff's counsel, defendant's counsel should normally return, *after* the discussion of damages, to a substantive, and substantial, discussion of the liability issues.

A much more difficult problem is faced by the attorney who represents a large corporation or other wealthy party and who fears that fact will adversely affect the jury's deliberations. The tactic ofdirectly addressing this issue in closing argument--the only point at which it can properly or meaningfully be addressed--poses serious risks. Any mention of the issue will emphasize the wealth of the party or the abstract character of the corporation will be emphasized. The jurors may be offended that their impartiality has been questioned. And, discussing a party's size or wealth may be construed as a waiver of the normal rule that the financial worth of a party may not be discussed in closing argument. n1

Despite these problems, if a party's wealth or corporate identity poses a serious risk of jury bias, the issue should usually be directly, and candidly, discussed. The corporate plaintiff or defendant will almost always be entitled to the standard federal pattern jury instruction to the effect that the law makes no distinction between corporations and individuals and that both are entitled to the same fair treatment by the jury. If you represent such a corporation you can tell the jury that you have confidence in their good faith and in their ability to follow the court's instruction. You can also, as appropriate, point out that corporations, like individuals, have character and that character is reflected in the personalities and conduct of the individuals--the shareholders, officers and employees--of which the corporation consists. You can also stress the ways in which the evidence may have shown the character of the corporate or other client to be commendable. Or you might simply remind the jurors of the instruction and that they should not hold the deep pocket defendant to a

higher standard than any other defendant in the same circumstances.

Any risk that the jurors may feel that their impartiality is being impugned can be dispelled by the manner in which these or similar points are made. Also, discussion of these issues by the attorney representing a corporation or other wealthy party should not have the effect of opening those issues up to the adversary. The purpose of the attorney representing such a party is to neutralize the size or corporate issue; the purpose of the adversary can only be to exploit it.

An effective closing argument should generally avoid a detailed recitation of all the evidence, but it should discuss the important evidence in *specific* terms. Witnesses should be referred to by name; critical testimony should be read or closely paraphrased; important documents should be specifically mentioned and, as appropriate, directly quoted. The wisdom of the jury system is that, while no one juror remembers everything, or even as much as an attorney would, collectively the jurors remember everything and they remember much more than an attorney can. Therefore, your accurate specificity on any one point may only impress the jurors who happen to remember that point well, but on another point you will impress other jurors similarly. Cumulatively you will convince most of the jurors that your argument about the facts was true and complete.

To the extent possible, the evidence and the witnesses referred to should be personalized. A client or a friendly witness should be referred to by their full name--*e.g.,* Ralph Jones, not Mr. Jones--and perhaps thereafter by their first name alone, if the judge allows such informality. Some federal judges will require you to refer to all witnesses by their full names or as Mr. or Mrs. Jones. Endearing or admirable qualities of particular witnesses can be pointed out. For example: "Ralph Jones, the driver of the passing vehicle who could have gone about his business but didn't, who stopped to see if there was any way he could help. ..."

Events of the trial unrelated to the merits of the case can, be discussed in closing argument. Thus, if adversary counsel has, in objections to evidence or otherwise, questioned your conduct or good faith, the conduct or matter in issue might be discussed. As a general proposition, however, it is best to assume that the jury has understood the adversarial process and will confine itself to the real issues of the case. In particular, it is unwise to attack the conduct or good faith of adversary counsel. If that conduct was improper, the jury is likely to have recognized and remembered it as such; if it was not, your suggestion of impropriety will not only detract from your arguments on the merits, but may well draw a valid objection. It is also a waste of time to compliment your learned opponent. The jury may take it as sarcasm, which cannot help you. If you mean it sincerely, it may make your opponent seem more credible, to the detriment of your case.

It may, however, be appropriate to disclaim any personal animosity toward the adversary party or witnesses. Thus, if your cross-examination of a witness was particularly sharp, your discussion of that witness' testimony in closing argument might include the statement: "Now, I know I may have seemed hard on Mr. Smith when I cross-examined him, but I did that for a reason, and I think that reason must be apparent to you." Or, if you must attack the merits of thetestimony of an honest or sympathetic witness, your closing argument might include the statement: "Please understand: I am not attacking Mr. Smith personally; I believe, as you probably do, that he was sincere; I am simply suggesting that he spoke to an issue on which he is not qualified to speak."

The bias or lack of bias of particular witnesses should also be freely discussed and compared. n2 It is by such fundamental standards that questions of credibility are normally resolved, and closing argument is your only opportunity to address those matters. You can argue bias without attacking the honesty or integrity of the witness. When the witness was sympathetic, you certainly want to avoid sounding harsh. You might say "You know, based on Mr. Smith's relationship with the plaintiff over the last twenty years, it would be only natural for him to want to help the plaintiff in this case."

The oratorical style in which a lawyer delivers closing argument will be highly individualized. This is particularly true in the treatment of moral and emotional issues such as bad faith or fraud, pain and suffering, or mental anguish. As a general proposition, however, the era of bombast and hyperbole is past. Chiefly through the vehicle of television,

Americans are accustomed to having public events and other news items, of whatever character, reported in calm and analytical fashion. Even politicians generally manage to be eloquent without being loud and to buttress emotional arguments with hard facts. In the courtroom, strong arguments are usually best made with quiet words.

The decision whether to speak from a rostrum or while standing at the counsel table and whether, from time to time, to move about the courtroom will also depend on the preference of the individual attorney. Speaking from the counsel table will require your delivery to be largely extemporaneous. If you must rely heavily on your notes, you will be better off at the rostrum. However, a closing argument should never be read; even if it has been prepared on a word-for-word basis, a closing argument should be delivered with the appearance of spontaneity. If you are required or choose to stand at a rostrum, at least stand to the side of it, so that the jury can see your body language and know that you are not hiding from them.

Too much--and especially pointless--movement about the courtroom can be distracting. Also be careful not to approach the jury box too closely. Scenes which show the lawyer leaning on or over the rail in front of the jury box occur largely in movies; many judges prohibit that practice, and many jurors will feel that the lawyer's proximity is overbearing.

A good closing argument will speak not only to the things that have been proved but also to the things that have not been proved. A frequently effective technique for this purpose is to remind the jury of the claims made by one or both sides in opening statement. Thus, you might remind the jury that, in your opening statement, you promised that the proof would show certain facts and then discuss the evidence which has indeed established those facts. You might also remind the jury that your opponent promised the jury that certain facts would be established and then point out either that the record is silent on those facts or that they have been affirmatively disproved.

Before employing the latter element of this technique, however, you should be very sure that your adversary's proof is as deficient as you think it is, and should consider whether certain facts may have been proved by inference. In cases of doubt, and particularly if the issues involved are not central to the case, you should avoid giving your adversary the opportunity to score a largely forensic point to which the jury might attribute undue significance.

The technique of specifically challenging an adversary to respond to certain arguments can sometimes be effective but also carries considerable risk. If the point or argument on which the adversary is challenged is strong, the jury will normally recognize it as such and will wait, without benefit of the challenge, to see whether, and how well, the adversary responds to it. If the point or argument is not persuasive or is subject to a plausible answer, the challenge will merely underscore its defects or lend force to the adversary's response.

Defendant's counsel is usually wise to mention the fact that he will have no opportunity to respond to the plaintiff's rebuttal argument. But, any extended discussion of the plaintiff's advantage in speaking last may sound to the jury like whining. Counsel must, however, be sure to anticipate that rebuttal argument as fully as possible.

Objections to improper argument should normally be made. n3 Failure to object in a timely fashion will waive the issue for appeal. Thus,appellate court review will be limited to "plain error" where an objection has not been made. n4 However, many judges take a very broad view of the permissible scope of closing argument, and most judges frown on objections which are not based on some clear breach of the applicable rules. If a judge allows unseemly conduct during the trial, it will undoubtedly be allowed during closing argument. In one case where the lawyers waged a sixteen-day war with "constant acrimonious and quarrelsome conflicts regarding anything and everything that could imaginably be challenged," repeating charges during closing argument was held not to have created prejudice. n5 In addition, the party who successfully objects to certain types of argument must remember that an opponent's objection to similar arguments will also likely be sustained.

A defendant may have greater latitude to object to plaintiff's rebuttal argument than either attorney has with respect to an opponent's argument-in-chief. In particular, defendant should object if the plaintiff's rebuttal argument raises new

matter or deals with issues not discussed by the defendant in closing argument. Depending on the judge, the defendant may also have greater freedom to object to the factual or legal foundation of arguments made by the plaintiff in rebuttal.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsClosing ArgumentsGeneral OverviewCivil ProcedureTrialsClosing ArgumentsImproper RemarksCivil ProcedureTrialsClosing ArgumentsObjectionsEvidenceTestimonyGeneral OverviewEvidenceTestimonyCredibilityGeneral OverviewEvidenceTestimonyCredibilityImpeachmentGeneral OverviewEvidenceTestimonyCredibilityImpeachmentBias, Motive & Prejudice

FOOTNOTES:
(n1)Footnote 1. *See § 36.05 infra*.

(n2)Footnote 2. *See Littlefield v. McGuffey, 954 F.2d 1337 (7th Cir. 1992)* (counsel is permitted to characterize a party as dishonest by pointing out a lack of corroboration; the missing witness rule does not preclude arguments regarding the credibility of testimony).

(n3)Footnote 3. See the discussion of the limitations on closing argument in *§ 36.05 infra* .

(n4)Footnote 4. *Johnson v. National Sea Products Ltd., 35 F.3d 626 (1st Cir. 1994)* .

(n5)Footnote 5. *Baker v. Connecticut Bank & Trust Co., 125 F.R.D. 25 (D. Conn. 1988)* .

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CHAPTER 36 Closing Argument *

3-36 Federal Litigation Guide § 36.05

§ 36.05 Meeting and Enforcing Formal and Substantive Limitations on Closing Argument.

Though real, several apparently substantive limitations on closing argument, such as the prohibition against Golden Rule arguments, limitations on "per diem" or "unit of time" arguments, and the rule that an attorney may not express personal opinion as to the merits of the case or the credibility of witnesses, are largely matters of form. Other limitations on closing argument are few in number and generally straightforward. "[I]t is rare that improper comments made during closing argument rise to the level of reversible error." n1 Although cases are sometimes reversed or new trials awarded because of an improper closing argument, counsel's principal weapons against such an argument are objections coupled with requests for cautionary instructions to the jury and/or admonitions to adversary counsel. n2 Where, however, other misconduct has occurred during the course of the trial, the improper closing argument remarks may significantly increase the risk of reversal on appeal. n3

A lawyer engages in improper argument when he or she seeks to introduce any extraneous matter which has a reasonable probability of improperly influencing the jury's verdict. n4 Reversal will occur where counsel's remarks are such as to deny the opposing party its "substantial rights to a fair trial." n5 In practical terms, however, thesubstantive limitations on closing argument are few, and several apparently substantive limitations are in fact limitations upon the form or manner in which an otherwise proper argument can be ma

A good example is the prohibition against a Golden Rule n6 argument directed to damage issues. A Golden Rule argument asks the jurors to place themselves in the position of a party in the case and "do unto him as they would have them do unto them under similar circumstances." n7 It is said that this argument is "universally recognized as improper as it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." n8 It has also been held that a Golden Rule argument is made when counsel states that he is *not* going to ask the jurors to place themselves in a party's position. n9

Although as to all other factual matters, the jury is *expected* to apply its judgment and common sense, n10 Several circuits have held that the Golden Rule argument is impermissible under any circumstances because "the jury's departure from its neutral role is equally inappropriate regardless of the issue at stake." n11

Beyond this, however, it is important to note that the prohibition against the Golden Rule argument is violated, not when the attorney seeks to arouse the jury's sympathy for a client's condition--every attorney representing a party who has suffered severe physical or even financial injury will seek to do that--but when, and only when, the attorney takes the final step of asking the jury to place itself in the client's position. An attorney may properly ask the jury to *imagine*

the length and level of the client's suffering and to *consider* the ways in which the client's life will be affected by a permanent disability. n12 The attorney may also remind the jury of the client's testimony or other testimony concerning those subjects, and he may properly ask the jury to observe or recall the ways in which the client's appearance reflects that injury or disability. In short, the attorney has great latitude in argument, but is not allowed to ask the jury to think of the client as they would of themselves.

While counsel will seek to evoke sympathy on behalf of his or her injured client, an outright appeal for sympathy is not proper as it seeks to distract the jurors from the actual issues in the case. Thus, stating "I'm asking, I'm begging for your sympathy for this man... They [plaintiffs] are begging for your sympathy." during summation was found to be "plainly improper" and, having no legal relevance to any of the real issues, "*per se*" objectionable. n13

A "per diem" or "unit of time" argument is one in which counsel suggests a specific damage amount for a unit of time and then urges the jury to multiply that amount by the expected duration of the client's suffering. While per diem arguments are not generally prohibited,many courts have emphasized the necessity of carefully controlling them, particularly if the dollar or unit of time calculations suggested by counsel are arbitrary or artificial. n14 And, some courts of appeal have stated that if a per diem argument is employed, the trial court should give a cautionary instruction to the effect that "the dollar figures advanced by counsel do not constitute evidence but merely represent argument which the jury is free to disregard in its deliberations." n15 As a matter of tactics, however, the attorney who makes a per diem argument can usually avoid an objection, and may even avoid the necessity of a cautionary instruction if care is taken to qualify the argument by expressly stating that the figures are intended only as suggestive, that the jury is entitled to make its own determination, and that the jury may well conclude that a lower or even a higher number is appropriate. n16 It may be improper to put a specific price tag on intangible damages. n17 Instead the attorney might state what the plaintiff is seeking and argue why that figure or a higher figure is a reasonable amount based on the evidence.

The rule that an attorney may not express a personal opinion as to matters in issue, including the justness of the client's cause and the credibility of particular witnesses, is expressed in the local rules of at least one district, n18 in the ABA Model Code of Professional Responsibility n19 and by a number of federal cases. n20 This prohibition includes injecting counsel's own credibility into the case. Thus, in Fineman v. Armstrong World Indus., Inc., n21 the court found that the following colloquy by the plaintiff's trial counsel exceeded the bounds of propriety:

I have a certain calmness about me today because of you, that is because I trust you. I have come to know you over almost three months and I think I know what type of people you are and I know, I don't think, I don't hope, but I just know that you're going to do the right thing.

* * *

I could show you all the documents... [o]r, I said to myself, hopefully, by now after three months you trust me enough that if I tell you something that I've not lied to you yet, that I'm not about to start now. And I thought I could shorten it up a great deal on the hope that you will trust me, ...you will trust me enough that I will be straight with you... that's one of the reasons why yesterday I spent a lot of time on the credibility of the people who were talking up here, myself and[defense counsel].

Though important, the principle implicit in the rule against injecting personal opinion is in practice achieved, and lawyers enabled to survive as advocates, through a very subtle difference in the *form* of the attorney's statements. This difference is suggested by the concluding language of the ABA Disciplinary Rule which states that the attorney may, "*on his analysis of the evidence*," n22 argue for any position or conclusion with respect to the relevant issues. Thus, the critical difference is between "I believe ..." and "the evidence proves ..."; between, "I ask you to base your verdict on my opinion ..." and "I submit to you that, under the evidence, and as reasonable jurors, you are compelled to find. ..."

It should also be noted that the rule against the expression of counsel's personal opinion does not apply to collateral statements concerning the trial proceedings. There, the personal pronoun "I" isessentially unavoidable. It is likewise clear that counsel is free to comment on facts which might affect the credibility of witnesses, including financial bias, n23 and may also comment upon the adversary's failure to call an available witness whose testimony might naturally be expected to be favorable to that party. n24 If the comment is harsh, but fair, courts will permit it. n25

However, it is improper to refer to a party's failure to call an "available" witness where the witness' bias made it extremely unlikely that testimony favorable to that party would have been brought forth. n26

"[J]ustice is not dependent upon the wealth or poverty of the parties and a jury should not be urged to predicate its verdict on a prejudice against bigness or wealth." n27 Unless the financial worth of a party is relevant to some issue in the case, such as punitive damages, references to the size of a company, or to the financial status of a party, or to the disparity in the financial condition of the parties, are, therefore, improper. n28 Such argument is especially objectionable if the jury would not otherwise have been aware of the party's financial situation. n29

Specific references to a party's financial condition are generally unwise. The adversary will almost certainly object, and if the reference is gratuitous, the trial court may give a strong cautionary instruction concerning the equality of all parties, large and small, in the eyes of the law.

Appeals to the jurors' self-interests are improper when made during the course of a trial. These interests are not at issue and should not be a consideration during deliberations. The appellate court found the following appeal to the jurors' interests as consumers of insurance during summation to be highly inflammatory: n30

Ladies and gentlemen of the jury, if you were outside the confines of this formal setting of this courtroom, if you were reading the paper and you read the facts of this case, this is the type of case, ladies and gentlemen of the jury, you would look at and you would read the facts and say: Why didn't somebody do something about this? That's why my insurance premiums are so high. Well, that somebody is you six people. And, ladies and gentlemen of the jury we're grown up enough to know...

And the following appeal to the jurors' self-interest as taxpayers was found improper in City of Cleveland v. Peter Kiewit Sons' Co.: n31

I respectfully request that you discharge your responsibility in your own conscience as best you can and that you find for the City of Cleveland and that you make us whole and hold Peter Kiewit responsible for the damage that they have caused to the taxpayers of the City of Cleveland.

Discussions of the law must be limited to the court's instructions as applied to the facts of the case, n32 and the local rules in two districts expressly prohibit counsel from reading to the jury from any legal textbook or reported decision, from instructing the jury on any matter of law and from arguing "law" to the jury. n33

The local rule in one district prohibiting counsel from reading from a deposition or trial transcript n34 is contrary to general practice. On the other hand, the provision of the same rule, prohibiting counsel from suggesting to the jury that they should *request* a transcript or the reading of testimony by the reporter, would probably be followed by most courts.

Otherwise, and in very general terms, a lawyer may not refer in closing argument to evidence which has not been admitted in the case, n35 criminal laws not implicated in the case, n36 to the adversary's indemnity protection n37 insurance coverage, n38 to a party's settlement with other parties, n39 or to other litigation which is not part of the record. n40

Available responses to improper closing argument range from silence at one extreme to motions for mistrial and

reversal on appeal at the other. It must be recognized, however, that even clear violations of the rules governing closing argument will rarely result in a new trial or reversal on appeal. n41 For example, violations of the prohibition against Golden Rule arguments are typically found to be harmless error. n42 As a result, the attorney confronted with improper argument must recognize that the principal weapon is to object to that argument and to seek appropriate precautionary instructions. The attorney must also recognize that the failure to object to improper argument will usually constitute waiver of it. n43 This is particularly so if an objection would not have magnified the prejudice, n44 if the lack of an objection reflected a "deliberate sandbagging tactic," or if the lack of objection reflected a "tactically sound assessment by the person best able to judge the matter that though technically objectionable, the comment threatens no significant prejudice." n45 When closing argument is so prejudicial as to violate notions of substantial justice, however, a party's failure to object does not constitute waiver and the district court has the discretion to grant a new trial. n46

This does not mean that objection should be made to every improper argument. In many cases, even a successful objection will merely magnify the opponent's argument in the jury's mind, and an unsuccessful objection may have serious adverse consequences. Genuinely egregious conduct should, of course, be protested, and the objection should, if possible, be fully stated in the jury's presence. In addition, improper argument worthy of an objection will usually also merit a cautionary comment by the court. Such comments are of two varieties: an instruction to the jury to disregard the improper matter and an admonition to the offending counsel not to repeat the improper argument. The latter admonition will not usually be given in connection with a first, or minor, infraction but should be sought and givenif the improper argument is serious or repeated. If the conduct is truly egregious, the attorney should object for the record every time the impropriety is repeated, even if the objection is overruled. This will preserve for appeal an argument based on the cumulative effect of the improper statements.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsClosing ArgumentsGeneral OverviewCivil ProcedureTrialsClosing ArgumentsImproper RemarksCivil ProcedureTrialsClosing ArgumentsObjectionsLegal EthicsSanctionsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Marshall v. Porter Co. Plan Comm'n, 32 F.3d 1215, 1221 (7th Cir. 1994)* , *cert. denied*, *115 S. Ct. 1111, 130 L. Ed. 2d 1076 (1995)* .

> *See also Kehr v. Smith Barney, Harris Upham & Co., Inc., 736 F.2d 1283 (9th Cir. 1984)* ; *Arnold v. Eastern Air Lines, Inc., 681 F.2d 186 (4th Cir. 1982)* ; *Johnson v. Ford Motor Co., 988 F.2d 573 (5th Cir. 1993)* ; *Williams v. Fermenta Animal Health Co., 984 F.2d 261 (8th Cir. 1993)* ; *Ramsey v. American Air Filter Co., 772 F.2d 1303, 1311 (7th Cir. 1985)* ; *Loughman v. Consol-Pennsylvania Coal Co., 740 F. Supp. 1114 (W.D. Pa. 1990)* (curative instructions); *Lamborn v. Dittmer, 688 F. Supp. 113 (S.D.N.Y. 1988)* (counsel's use of sarcasm in closing argument was well within boundaries of acceptable conduct).
>
> *But see Fineman v. Armstrong World Indus., Inc., 980 F.2d 171 (3d Cir. 1992)* , *cert. denied, 113 S. Ct. 1285, 122 L. Ed. 2d 677 (1993)* ; *Pappas v. Middle Earth Condominium Ass'n, 963 F.2d 534 (2d Cir. 1992)* .

(n2)Footnote 2. *See, e.g., Arnold v. Eastern Air Lines, Inc., 681 F.2d 186 (4th Cir. 1982)* (any improper influence references to settlement may have had adequately corrected and dissipated by reprimand to counsel and curative instruction).

> *But see Draper v. Airco, Inc., 580 F.2d 91 (3d Cir. 1978)* (when considering closing argument as a whole, curative instructions were insufficient to cure the prejudice caused by objectionable statements).

(n3)Footnote 3. *See, e.g., Outley v. City of New York, 837 F.2d 587 (2d Cir. 1988)* (improper remarks by counsel, beginning with opening statement and continuing on through testimony and summation, denied the plaintiff a fair hearing on his claims); *City of Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749 (6th Cir. 1980)* (curative instructions insufficient to remove the probability of prejudice where improprieties permeated entire trial).

(n4)Footnote 4. *See Fineman v. Armstrong World Indus., Inc., 980 F.2d 171 (3d Cir. 1992) , cert. denied, 113 S. Ct. 1285, 122 L. Ed. 2d 677 (1993)* (new trial required where summation contained improper conduct such that a strong probability existed that the verdict had been influence by the improper conduct); *Morrissey v. Welsh Co., 821 F.2d 1294 (8th Cir. 1987)* (argument designed to elicit sympathy for plaintiffs or to call for defendant's punishment for irrelevant matters constitute grounds for reversal); *Ayoub v. Spencer, 550 F.2d 164, 170 (3d Cir.) , cert. denied, 432 U.S. 907, 97 S. Ct. 2952, 53 L. Ed. 2d 1079 (1977)* ; *Vanskike v. Union Pacific Railroad Co., 725 F.2d 1146, 1149 (8th Cir. 1984)* .

(n5)Footnote 5. *Bufford v. Rowan Cos., Inc., 994 F.2d 155 (5th Cir. 1993)* (plaintiffs' substantial rights to fair trial impaired as a result of actions by judge and defendant's counsel).*See also Gruca v. Alpha Therapeutic Corp. 51 F.3d 638, 644 (7th Cir. 1995)* ("Improper remarks during a closing argument warrant reversal of the judgment only if the remarks " 'influenced the jury in such a way that substantial prejudice resulted to" the opposing party...Statements made during closing argument must be plainly unwarranted and clearly injurious to constitute reversible error.' "(citations omitted)--improper remarks and district court's erroneous instruction substantially prejudiced plaintiffs, compelling new trial); *Outley v. City of New York, 837 F.2d 587 (2d Cir. 1988)* (improper remarks by counsel, beginning with opening statement and continuing on through testimony and summation, denied the plaintiff a fair hearing on his claims).

(n6)Footnote 6. "Therefore, all things whatsoever ye would that men should do to you, do ye even so to them: for this is the law of the prophets." *Matthew* 7:12.

(n7)Footnote 7. *Ivy v. Security Barge Lines, Inc., 585 F.2d 732, 741 (5th Cir. 1978) , rev'd on other grounds, 606 F.2d 524 (5th Cir. 1979*) (en banc).

(n8)Footnote 8. *Id.; Edwards v. City of Philadelphia, 860 F.2d 568 (3d Cir. 1988) . See Forrestal v. Magendantz, 848 F.2d 303 (1st Cir. 1988)* ("Golden Rule" argument did not require new trial where adequate curative instruction was given); *Joan W. v. Chicago, 771 F.2d 1020 (7th Cir. 1985)* ("Golden Rule" appeal is error, but not reversible error, where trial court instructs the jury on the requirement of impartiality, and reasonably rules that this argument did not sway the jury).

(n9)Footnote 9. *Loose v. Offshore Navigation, Inc., 670 F.2d 493, 496 (5th Cir. 1982)* ("I'm not going to ask you to put yourself in Mr. Loose's position, having to work and live the rest of his life with ... the loss of that ... elbow").
Objections to closing argument, not raised at the time, are waived on appeal, even if remarks complained of would otherwise have resulted in reversal, unless plain error is committed. *Associated Business Tel. Sys. v. Greater Capital Hotel Corp., 729 F. Supp. 1488 (D.N.J. 1990)* .

(n10)Footnote 10. *Johnson v. Celotex Corp., 899 F.2d 1281 (2d Cir.) , cert. denied, 111 S. Ct. 297, 112 L. Ed. 2d 250 (1990)* ; *Stuckey v. Northern Propane Gas Co., 874 F.2d 1563 (11th Cir. 1989)* (counsel was free to ask the jury to "send a message" because even compensatory damages may serve as a deterrent). *See also Shultz v. Rice, 809 F.2d 643 (10th Cir. 1986)* (defense counsel asked jury to judge the reasonableness of defendant's actions at the time they were made).

(n11)Footnote 11. *Edwards v. City of Philadelphia, 860 F.2d 568 (3d Cir. 1988)* ; *Joan W. v. City of Chicago, 771 F.2d 1020 (7th Cir. 1985)* .

(n12)Footnote 12. *Smith v. Piedmont Airlines, Inc., 728 F. Supp. 914 (S.D.N.Y. 1989)* .

(n13)Footnote 13. *Arnold v. Eastern Air Lines, Inc., 681 F.2d 186, 194-200 (4th Cir. 1982)* (while statements were objectionable, when viewed in the context of the entire trial and plaintiff's injuries, were "a foolish redundancy rather than an independent source of prejudice").

(n14)Footnote 14. *Murphy v. National Railroad Passenger Corp., 547 F.2d 816, 818 (4th Cir. 1977)* ; *Mileski v. Long Island R.R. Co., 499 F.2d 1169, 1174 (2d Cir. 1974)* ; *Waldron v. Hardwick, 406 F.2d 86, 89 (7th Cir. 1969)* ; *Baron Tube Co. v. Transport Ins. Co., 365 F.2d 858, 864 (5th Cir. 1966)* ; *Rush v. Cargo Ships & Tankers, Inc., 360 F.2d 766, 769 (2d Cir.)* , *cert. denied, 385 U.S. 842 (1966)* .

(n15)Footnote 15. *Baron Tube Co. v. Transport Ins. Co. 365 F.2d 858, 864-65 (5th Cir. 1966)* (when per diem arguments are permitted by the trial court, a cautionary instruction is not discretionary).

(n16)Footnote 16. *See, e.g., Rush v. Cargo Ships & Tankers, Inc., 360 F.2d 766 (2d Cir.)* , *cert. denied, 385 U.S. 842 (1966)* .

(n17)Footnote 17. *E.g., Waldorf v. Shuta, 896 F.2d 723 (3d Cir. 1990)* . *But see Queen v. Washington Metro. Area Transit Auth., 901 F.2d 135 (D.C.Cir. 1990)* (counsel's statement that he thought "a million dollars" was adequate compensation was not reversible error in the absence of a showing of prejudice).

(n18)Footnote 18. Middle District of Florida, Rule 5.02(b)(15).

(n19)Footnote 19. D.R. 7-106(C)(4). Model Rule of Professional Responsibility 3.4(e). 7-106(C)(4).

(n20)Footnote 20. *See, e.g., Guaranty Serv. v. American Employers' Ins., 893 F.2d 725 (5th Cir. 1990)* ; *Polansky v. CNA Ins. Co., 852 F.2d 626 (1st Cir. 1988)* (opinion of plaintiff's counsel as to credibility of defense witnesses was improperly included in closing argument); *Canada Dry Corp. v. Nehi Beverage Co., 723 F.2d 512, 526 (7th Cir. 1983)* ; *Smith v. Piedmont Airlines, Inc., 728 F. Supp. 914 (S.D.N.Y. 1989)* ; *Johnson v. Trueblood, 476 F. Supp. 90, 96 (E.D. Pa. 1979)* , *vacated on other grounds, 629 F.2d 302 (3d Cir. 1980)* .

(n21)Footnote 21. *980 F.2d 171 at 209 (3d Cir. 1992)* .

(n22)Footnote 22. Model Code of Professional Responsibility, DR 7-106(C)(4). *See also Lamborn v. Dittmer, 688 F. Supp. 113, 117 (S.D.N.Y. 1988)* ("[t]here can be no valid cause for complaint when an opponent uses trial testimony as part of his closing argument").

(n23)Footnote 23. *Fund of Funds, Ltd. v. Arthur Anderson & Co., 545 F. Supp. 1314, 1370 (S.D.N.Y. 1982)* . *See also Rosenburg v. Lincoln Am. Life Ins. Co., 883 F.2d 1328 (7th Cir. 1989)* .

(n24)Footnote 24. *See McQuaig v. McCoy, 806 F.2d 1298 (5th Cir. 1987)* ; *Probus v. K-Mart, 794 F.2d 1207 (7th Cir. 1986)* (on closing, defense counsel's remarks as to plaintiff's expert's failure to testify on rebuttal, although harsh and derisive, did not amount to reversible error).

(n25)Footnote 25. *Id.; Mills v. Beech Aircraft Corp., Inc., 886 F.2d 758 (5th Cir. 1989)* .

(n26)Footnote 26. *Tyler v. White, 811 F.2d 1204 (8th Cir. 1987)* .

(n27)Footnote 27. *Draper v. Airco, Inc., 580 F.2d 91, 95 (3d Cir. 1978)* .

(n28)Footnote 28. *See, e.g., Kehr v. Smith Barney, Harris Upham & Co., Inc. 736 F.2d 1283 (9th Cir. 1984)* ; *Garcia v. Sam Tanksley Trucking, Inc., 708 F.2d 519, 522 (10th Cir. 1983)* ; *Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749, 757 (6th Cir. 1980)* ; *Draper v. Airco, Inc., 580 F.2d 91, 95 (3d Cir. 1978)* ; *Mason v. Texaco, Inc., 741 F. Supp. 1472 (D. Kan. 1990)* ; *Associated Business Tel. Sys. v. Greater Capital Hotel Corp., 729 F. Supp. 1488, 1498 (D.N.J. 1990)* .

(n29)Footnote 29. *Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749, 757 (6th Cir. 1980)* (the jurors would have been unaware of defendant's size without plaintiff's repeated reference to it since the Kiewit name is not, among the general public, synonymous with a "corporate giant"). *See also Lockley v. Deere & Co., 927 F.2d 1430 (8th Cir. 1991)* ; *Lamborn v. Dittmer, 688 F. Supp. 113 (S.D.N.Y. 1988)* (remarks about the defendant's power and wealth which were supported by the record were not improper).

(n30)Footnote 30. *Allstate Ins. Co. v. James, 845 F.2d 315, 318 (11th Cir. 1988)* .

(n31)Footnote 31. *624 F.2d 749, 755 (6th Cir. 1980)*

(n32)Footnote 32. *Baron Tube Co. v. Transport Ins. Co. 365 F.2d 858, 861 (5th Cir. 1966)* .

(n33)Footnote 33. Eastern District of Louisiana, Rule 14.3; Middle District of Louisiana, Rule 16A.3.

(n34)Footnote 34. Middle District of Florida, Rule 5.03(b)(15).

(n35)Footnote 35. *Draper v. Airco, Inc., 580 F.2d 91 (3d Cir. 1978)* (improper for counsel to refer to his having met and talked with deceased's children, none of whom had testified).

(n36)Footnote 36. *Pitchford v. Pepi, Inc., 531 F.2d 92, 106 (3d Cir. 1975)* , *cert. denied, 426 U.S. 935 (1976)* .

(n37)Footnote 37. *Griffin v. Hilke, 804 F.2d 1052 (8th Cir. 1986)* , *cert. denied, 107 S. Ct. 3184 (1987)* (closing argument which implied the government would indemnify individual police defendants constituted reversible error).

(n38)Footnote 38. *Bozark Farms, Inc. v. Ozark Border Elec. Co-op, 849 F.2d 306 (8th Cir. 1988)* ; *Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749, 758 (6th Cir. 1980)* ("while mention of the contractually-mandated insurance may have been inevitable, it was prejudicial error for counsel for the City to inject into the trial the idea that Kiewit had insurance which would cover any damages the defendant would be obligated to pay").

(n39)Footnote 39. *Arnold v. Eastern Airlines, Inc., 681 F.2d 186, 196 (4th Cir. 1982)* ; *Kuzniak v. Taylor Supply Co., 471 F.2d 702, 703 (6th Cir. 1972)* .

(n40)Footnote 40. *O'Rear v. Fruehauf Corp., 554 F.2d 1304 (5th Cir. 1977)* .

(n41)Footnote 41. *See Marshall v. Porter Co. Plan Comm'n, 32 F.3d 1215, 1221 (7th Cir. 1994)* , *cert. denied, 115 S. Ct. 1111, 130 L. Ed. 2d 1076 (1995)* ("[I]t is rare that improper comments made during closing argument rise to the level of reversible error."); *United States v. North, 910 F.2d 843, 897 (D.C. Cir. 1990)* (even when the defendant was compared to Hitler, the D.C. Circuit said: "Our unwillingness to reverse a conviction [for improper statements during closing argument] has been particularly pronounced when the trial judge issues curative instructions").

(n42)Footnote 42. *Edwards v. City of Philadelphia, 860 F.2d 568 (3d Cir. 1988)* ; *Joan W. v. City of Chicago, 771 F.2d 1020 (7th Cir. 1985)* . *Spray-Rite Serv. Corp. v. Monsanto Co., 684 F.2d 1226, 1246 (7th Cir. 1982)* , *aff'd, 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)* (plaintiff's request to the jury to place itself in plaintiff's position "was clearly improper, but we are not convinced that it was so prejudicial that it deprived Monsanto[defendant] of a fair trial"); *Lacaze v. Olendorff, 526 F.2d 1213, 1223 (5th Cir. 1976)* (the trial court's instruction to ignore the "Golden Rule" appeal cured any possible error).

(n43)Footnote 43. *Johnson v. National Sea Products Ltd., 35 F.3d 626 (1st Cir. 1994)* (where no timely objection to closing argument remarks, issue waived on appeal and review, therefore, limited to "plain error"); *Associated Business Tel. Sys. v. Greater Capital Hotel Corp., 729 F. Supp. 1488 (D.N.J. 1990)*

(n44)Footnote 44. *Bryant v. Consolidated Rail Corp., 672 F.2d 217, 218 (1st Cir. 1982)* (the court also noted that counsel had ample opportunity to speak to the court about the allegedly improper remarks outside of the jury's

presence); *Curtis Publishing Co. v. Butts, 351 F.2d 702, 714 (5th Cir. 1965)* .

(n45)Footnote 45. *Arnold v. Eastern Airlines, Inc., 681 F.2d 186, 200 (4th Cir. 1982)* ; *Skogen v. Dow Chem. Co., 375 F.2d 692, 703 (8th Cir. 1967)* . *See also* *Curtis Publishing Co. v. Butts, 351 F.2d 702, 714 (5th Cir. 1965)* (waiting 9 days after the jury's verdict to raise an objection regarding opposing counsel's conduct during closing arguments indicated counsel did not consider the argument objectionable at the time but made the claim as an afterthought); *Bergland v. Martin Marietta Aluminum, Inc., 74 F.R.D. 635, 636 (D. St. Croix 1977)* (while inaction at time of trial does not preclude the seeking of post-trial relief, it does manifest the fact that, at the time of trial, no one was "taken aback" by the improper statements made during the course of argument).

(n46)Footnote 46. *McWhorter v. City of Birmingham, 906 F.2d 674 (11th Cir. 1990)* .

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CHAPTER 36 Closing Argument *

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§ 36.06 Bibliography.

[1] Law Reviews and Periodicals.

Bergan, *Thoughts About Closing Argument, 12 Litig. 36 (Summer 1986).*

Bernard, Cohen & Lupfer, *The Influence of Juror's Level of Moral Reasoning and the Nature of Closing Arguments in Determining the Verdict in a Civil Case: A Report of Two Experiments, 9 Law & Psychology Rev. 93 (Spring 1985).*

Carlson, *Arguments to the Jury: Passion, Persuasion, and Legal Controls, 33 St. Louis U. L.J. 787 (1989).*

Carlson & Imwinkelried, *The Three Types of Closing Arguments, 18 Am. J. Trial Advoc. 115 (Summer 1994).*

Carroll & Clark, *Reversible Error-- Opening and Closing Statements,* 19 Trial Law. Q. 28 (Summer 1988).

Furman, *Error in Closing Argument*, 24 Colo. Law. 33 (1995) .

Gibbins, *Closing Argument: Consolidating Your Theme,* 26 Trial 83 (1990).

Gonzalez, *Trial Tips: Closing Argument, 68 Fla. B.J. 69 (May 1994).*

Goodman, *Crisis in Closing Arguments, 74 Ill. B.J. 120 (1985).*

Handley, *Opening Statement and Closing Argument: A Golden Opportunity and the Last Chance,* 34 For the Def. 16 (December 1992).

Levitt, *Rhetoric in Closing Argument, 17 Litig. 17 (Winter 1991).*

Lubet, *The Trial as a Persuasive Story, 14 Am. J. Trial Advoc. 77 (1990).*

McCarter, *Closing Argument in Civil Cases, 46 J. Mo. B. 31 (1990).*

Ramsey, *A Practical Guide: Final Arguments in Civil Cases, 49 Tex. B.J. 632 (1986).*

Redfearn, *Closing Argument, 57 UMKC L. Rev. 735 (1989).*

Ring, *Effective Closing Arguments in Civil Trials (Trial Techniques),* 29 Trial 61 (October 1993).

Stone, *Staging a Persuasive Closing Argument*, 6 Nat'l Trial Law. 75 (March 1994).

Tanford, *Closing Argument Procedure, 10 Am. J. Trial Advoc. 47 (Summer 1986).*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsClosing ArgumentsGeneral OverviewCivil ProcedureTrialsClosing ArgumentsImproper RemarksCivil ProcedureTrialsClosing ArgumentsObjectionsCivil ProcedureAppealsStandards of ReviewReversible Errors

* Chapter 36 revised in 1995 by Prof. Seymour Moskowitz, Valparaiso University School of Law, Valparaiso, Indiana, Linda D. Moskowitz, Esq., Sharon Sowa Vandercoy, Esq.

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CHAPTER 37 Objections *

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§ 37.syn Synopsis to Chapter 37: Objections *

§ 37.01 Evaluating the Purposes of Objections

§ 37.02 Deciding Whether To Object

§ 37.03 Objecting on the Record

§ 37.04 Considering Jury and Court Reactions to Objections

§ 37.05 Using Motions in Limine as an Alternative to Objections

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CHAPTER 37 Objections *

3-37 Federal Litigation Guide Scope

Scope

SCOPE

This chapter examines objections to the introduction of evidence at trial. Objections are the formal means by which an attorney challenges an opponent's evidence, arguments, or conduct. The chapter discusses the purposes of objections, factors to consider in determining whether to object, the methods of objecting, and how to deal with an opponent's objections. In addition to coverage of the practical treatment of evidentiary objections at trial, the chapter also deals with motions in limine, issues of waiver, limiting instructions, and the preservation of arguments in the record on appeal.

The chapter concludes with a list of the most frequently made objections at trial.

For expanded coverage of trial objections, ***see*** Weinstein's Federal Evidence, Ch. 103, ***Rulings on Evidence*** (Matthew Bender 2d ed.).

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CHAPTER 37 Objections *

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§ 37.01 Evaluating the Purposes of Objections

A working knowledge of objections is indispensable to successful trial advocacy. Objections are used to oppose the introduction of improper evidence or argument, and they can also be used to protest improper conduct and procedures during the trial.

The primary purpose of objections is to exclude harmful matters from consideration by the jury. Objections must be made promptly and must indicate to the trial judge the specific nature of the impropriety. n1 Another important purpose of objections is to make a record to preserve rights for appellate review. A claimed error in the admission of evidence ordinarily will not be reviewed on appeal if the appealing party failed to object when the disputed evidence was offered. n2

In addition to making objections to exclude evidence and to protect the record, objections can be used effectively to control or shape the opponent's evidentiary presentation. For example, an objection on the basis of the "best evidence rule" can preclude a witness from testifying as to the contents of a particular document. The document itself, rather than the witness's interpretation, may then be offered as evidence to the jury. Under some circumstances, permitting the jury to examine the document may be less damaging than testimony regarding the document.

Objections can be raised at any stage of litigation, including discovery, pretrial and post-trial motions, or during trial. This chapter focuses on objections made during trial. Objections can relate to the form or substance of questions put to a witness or to the substance of the answers given. Objections can relate to the foundation for testimony or exhibits as well. The competency of a witness to testify to certain facts, or to testify at all, may have to be determined in response to an objection. In addition, objections can relate to the improper conduct or remarks of attorneys, of the judge, of witnesses, or of jurors.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureAppealsReviewabilityPreservation for ReviewEvidenceProcedural ConsiderationsObjections & Offers of ProofObjectionsEvidenceProcedural ConsiderationsRulings on Evidence

FOOTNOTES:

(n1)Footnote 1. *See Fed. R. Evid. 103(a).*

(n2)Footnote 2. *See Fed. R. Evid 103(a)*; *see also United States v. Parikh, 858 F.2d 688, 697 (11th Cir. 1988)* .

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§ 37.02 Deciding Whether To Object

Deciding whether to object is a critical component of trial advocacy. To automatically object whenever possible does not generally result in effective advocacy, and restraint should be a controlling consideration. In short, no objection should be made unless there is reason to believe that the objection will do more good than harm. Among the factors that counsel should consider in deciding whether to object are:

- The need to keep out harmful evidence
- The need to protect the record for appellate purposes
- The need to control the flow of testimony
- The strength of the legal authority for the objection
- Possible jury and court reactions to objections made on the record

Although counsel may have only a split second between the question and the answer to weigh these factors and come to a decision, many objectionable questions may be anticipated. Counsel should plan beforehand whether to object aggressively during a particular examination and should further plan how to specifically react to a particular line of questioning that may be anticipated.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureAppealsReviewabilityPreservation for ReviewEvidenceProcedural ConsiderationsObjections & Offers of ProofObjectionsEvidenceProcedural ConsiderationsObjections & Offers of ProofTimelinessEvidenceProcedural ConsiderationsRulings on Evidence

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§ 37.03 Objecting on the Record

Claimed error in the admission of evidence ordinarily will not be reviewed on appeal unless the appealing party objects on the record when the disputed evidence is offered. n1 The purpose of Rule 103 is to expedite finality and economy in litigation by requiring parties to object at trial or risk waiving the right to raise the error on appeal. n2

The plain error rule set forth in *Federal Rule of Evidence 103(d)* provides an exception to the general rule that objections must be made on the record. Under Rule 103(d), the admission of highly prejudicial or fundamentally unfair evidence affecting substantial rights may be reviewed on appeal without the need for objection at trial. n3 Counsel should note, however, that because a showing of plain error requires "extraordinary circumstances," a party invoking the doctrine bears a heavy burden of proof in convincing the appellate court to reverse the decision below, and the appellate court may award sanctions if an appeal on these grounds is deemed frivolous. n4

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Evid. 103(a)*; *see also United States v. Parikh, 858 F.2d 688, 697 (11th Cir. 1988)* (finding the trial court committed "no error in admitting into evidence relevant documents ... to which no objection was made"; citing Rule 103); *Ward v. United States, 838 F.2d 182, 187 (6th Cir. 1988)* (two articles written by a medical specialists were admitted into evidence; plaintiffs failed to object at trial; court found plaintiffs' objection was waived on appeal under Rule 103); *Shepp v. Uehlinger, 775 F.2d 452, 454 (1st Cir. 1985)* (Defendant waived his objection to testimony by failing to object until the day after the testimony was heard; court noted that counsel "must object to the admission of evidence as soon as the ground becomes apparent ... [usually] as soon as the question is asked.").

(n2)Footnote 2. *Morrow v. Greyhound Lines, Inc., 541 F.2d 713, 724 (8th Cir. 1976)* .

(n3)Footnote 3. *See Fed. R. Evid. 103(d)*; *see also United States v. West, 898 F.2d 1493 (11th Cir. 1990)* ; *United States v. Castiello, 915 F.2d 1 (1st Cir. 1990)* ; *Snyder v. Whittaker Corp., 839 F.2d 1085 (5th Cir. 1988)* .

(n4)Footnote 4. *See Stringel v. The Methodist Hosp. of Indiana, Inc., 89 F.3d 415, 423 (7th Cir. 1996)* .

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§ 37.04 Considering Jury and Court Reactions to Objections

The effect that an objection has on the jury may be more important than the exclusionary results obtained. The manner of objection, the frequency of objections, and the perceived intent of raising objections can either enhance or reduce rapport and credibility with the jury and the court. Although jury reactions must be considered before objecting to evidence, the possibility of adverse jury response should never cause counsel to forgo sound objections which might provide the necessary foundation for a mistrial motion or a successful appeal. Even if it is likely that an objection will be overruled, the objection should be made to preserve the issue for appeal. But when the record is not at stake, the jury's anticipated reaction may be a controlling factor in the decision whether to object. Even a single objection that is overruled may have an adverse impact on the jury. Objecting implies to jurors that counsel does not want evidence to be heard, and they will likely assume that the evidence under objection is damaging. The judge's overruling of an objection tells the jury that the evidence is proper and that it must be considered. Not only will jurors likely consider the evidence, they may even give it more weight than if no objection had been made.

Judges may become impatient with a series of technically correct but trivial objections, especially objections to the form of questions rather than the substance of the evidence proffered. Although sound, such objections may be viewed as an unnecessary delay of the trial. In this situation, counsel's careful judgment is needed. The benefits to be gained from raising a proper objection must be weighed against the detrimental effects of being in disfavor with the judge. Other situations require similar assessment. For example, if the opponent has failed to lay a sufficient foundation for an exhibit to be admitted, counsel must weigh forgoing an objection against the likelihood that the opponent will properly lay a foundation by supplemental questions.

Raising even sound objections may also unintentionally result in an unfavorable jury reaction. An objection may serve to call special attention to the very matter that counsel seeks to have excluded. Even though the objection is sustained, the jury may speculate about what the witness's answer might have been, and its assumptions may be much worse than the excluded testimony. Although preliminary instructions from the court and comments in the opening statement explaining the need for objections under the rules of evidence are intended to prevent the jury from drawing such adverse inferences, these caveats may have only a limited preclusive effect. Consequently, careful judgment is once again needed. Counsel should consider forgoing a well-founded objection if the harmful matter is not central to the case and if the jury seems not to have given special notice to its admission. Similarly, a sound objection should be waived if the defect may be curable. If the opponent can simply rephrase the question, an objection to the form should not be made.

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§ 37.05 Using Motions in Limine as an Alternative to Objections

Motions in limine are appropriate for many of the preliminary questions the court must decide under *Federal Rule of Evidence 104(a)*. n1 The motion *in limine* is not expressly provided for in either the Federal Rules of Evidence or the Federal Rules of Civil Procedure. n2 Nevertheless, such motions are widely used, and may often aid the trial process by enabling the court to rule in advance of trial on the relevance of certain anticipated evidence. Motions *in limine* are usually confined to very specific evidentiary issues of an extremely prejudicial nature. n3 The motion should be specific, giving the trial context, the character of the evidence, and the proponent's theory as to why the evidence should be excluded. n4

Pursuant to *Federal Rule of Evidence 103(a)*, once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal. n5 If the trial court has deferred ruling on a motion in limine, the mere making of the motion will not preserve a claim of error; counsel must object during trial and secure a ruling. n6

A pretrial motion in limine, even though not renewed at trial, will be preserved for appeal if the following three factors are met: n7

- The issue was fairly presented to the district court
- The issue is the type that can be finally decided in a pretrial hearing
- The issue was unequivocally decided by the trial judge

The safest procedure, particularly when an objection made pursuant to a motion in limine has not been clearly delineated and determined, is to renew the objection at trial. n8

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Evid. 104.*

(n2)Footnote 2. *Banque Hypothecaire du Canton De Geneve v. Union Mines, Inc., 652 F. Supp. 1400 (D. Md. 1987)* (the motion "is not a creature of the Federal Rules of Evidence or of the Federal Rules of Civil Procedure."). *Fed. R. Civ. P. 16(c)(2)(C)* does provide that the parties may seek advance rulings on evidence from the court at the

pretrial conference.

(n3)Footnote 3. *United States v. Certain Land Situated in City of Detroit, 547 F. Supp. 680 (E.D. Mich. 1982)* .

(n4)Footnote 4. *See Black v. M & W Gear Co., 269 F.3d 1220 (10th Cir. 2001)* .

(n5)Footnote 5. *Fed. R. Evid. 103(a)*; *See Bandera v. City of Quincy, 344 F.3d 47, 54 (1st Cir. 2003)* ; *Micro Chemical, Inc. v. Lextron, Inc., 317 F.3d 1387, 1391 (Fed. Cir. 2003)* ; *Mathis v. Exxon Corp., 302 F.3d 448, 459, n.16 (5th Cir. 2002)* ; *see also* Weinstein's Federal Evidence, Ch. 103, Rulings on Evidence (Matthew Bender 2d ed.).

(n6)Footnote 6. *See United States v. Ellis, 121 F.3d 908, 918-919 (4th Cir. 1997)* , cert. denied, *522 U.S. 1068 (1998)* .

(n7)Footnote 7. *See Black v. M & W Gear Co., 269 F.3d 1220, 1230 (10th Cir. 2001)* , citing *United States v. Mejia-Alarcon, 995 F.2d 982, 986 (10th Cir. 1993)* .

(n8)Footnote 8. *See Black v. M & W Gear Co., 269 F.3d 1220, 1230 (10th Cir. 2001)* .

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§ 37.06 Raising Objections During Testimony

The discovery provisions of the Federal Rules of Civil Procedure were designed to eliminate surprise at trial. Following discovery, counsel generally will have a good idea of the testimony that will be offered by witnesses at trial. Regardless of the basis of an objection, counsel should not object if it is likely that the answer will be neutral or favorable. But if the answer, though neutral or favorable, is a predicate to offering substantially harmful evidence, counsel should strongly consider objecting immediately.

Even if the answer will almost certainly be unfavorable, counsel should consider two additional factors before you assert your objection. First, permitting the admission of objectionable evidence may open the door for the admission of other favorable evidence which might otherwise have been excluded, since opening the subject matter may allow for the submission of rebuttal evidence. n1 If rebuttal evidence outweighs or overshadows an adversary's objectionable evidence, counsel may want to refrain from objecting. Second, the objectionable testimony may present an opportunity to effectively impeach the witness. If objectionable testimony is a potential source of impeachment, it may be the best strategy to allow the testimony and then attack the credibility of the witness.

FOOTNOTES:
(n1)Footnote 1. *United States v. Gleason, 766 F.2d 1239, 1246 (8th Cir.) , cert. denied, 474 U.S. 1058, 106 S. Ct. 801, 88 L. Ed. 2d 777 (1985)* ("Cross- examination may embrace any matter germane to direct examination, qualifying or destroying it, or tending to elucidate, modify, explain, contradict, or rebut testimony given by the witness.").

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§ 37.07 Objecting to Form of Question

[1] Addressing the Style of the Question

There are two general categories of objections: objections to the form of the question and objections to the substance of the evidence offered. Many tactical decisions during trial will involve consideration of the type of objection that is involved. During the courtroom interrogation of a witness, counsel may frame questions in ways that are objectionable regardless of the content of the answers being elicited. The objection in this case is to the form of the question, not to the substance of the answer sought, and it addresses the phraseology or style of the question. An objection "to the form of the question" is a general objection, however, and it may not be sufficient to preserve the matter for review on appeal. To avoid waiver, the specific grounds for the objection always should be stated. n1

[2] Rephrasing Question as to Form

Generally, counsel may correct the impropriety of the form of a question by rephrasing it, thus allowing the substantive evidence to be admitted. For example, the question, "Was the defendant driving and had he previously been told not to do so?" may be objectionable on the ground that it is "compound" or "multiple" in presenting two or more questions at once. These questions are objectionable because the answer usually will be ambiguous or confusing in court or on review of the record. By separating the question into two queries, asked separately, you will have cured the improper form.

The relative ease with which improper form is cured and the objection thus overcome is one of the primary differences between objections to form and objections to substance. Inasmuch as the substantive evidence is eventually admitted once the question is properly framed, counsel may safely avert further objections to it. The opponent's ability to cure an improper question always must be considered before the objection is made. However, counsel may have difficulty in ascertaining the proper form to use in any given court because of the significant role the judge's discretion traditionally plays.

[3] Common Objections to Form of Question

Counsel may object to the form of a question during direct or cross-examination, or during the taking of depositions. During direct examination, probably the most frequent objection to form is that the question is "leading." Inasmuch as a witness's testimony must be based on knowledge of facts that he or she claims are true, the witness should be asked to state these facts without assistance during direct examination. A leading question is improper because it suggests an

answer to the witness or because it contains factual details that could and should originate with the witness.

The general tendency to forgo objections to the form of a question should not be observed in the case of leading questions. If an attorney is leading a witness on direct examination, it is for one of three reasons:

- Witness has to be led
- Attorney does not know better
- Attorney recognizes how effective the use of leading questions can be in giving a precise and persuasive narrative

Although the natural assumption is that the form of a question is most often a problem on direct examination, it is the cross-examiner who most often yields to the temptation to frame unfair or argumentative questions. On cross-examination, the accuracy and sufficiency of the witness's knowledge and the truth of the facts to which he or she has just testified may be fully tested, but counsel may not ask the witness to speculate or to engage in conjecture. Thus, during cross-examination, the proponent for the witness may object on the following grounds:

- "Ambiguous question"
- "Badgering"
- "Lack of specificity"
- Improper implications of fact

Counsel also may object to form on the following grounds:

- Confusing question
- Compound question
- Repetitious question ("asked and answered")
- Misleading question
- Assumes a fact not in evidence, that is, a fact not testified to by the witness

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Evid. 103(a)(1).*

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§ 37.08 Objecting to Substance of Evidence

The pleadings mark the limits of evidence that is admissible. A fact not in issue need not and should not be proved. Thus, the first thing that a court must do in order to make rulings on objections to substance is determine what issues are created by the pleadings. Once the issues have been determined, counsel may make objections to substance based on:

- Materiality
- Relevancy
- Competence

When evidence of a fact is offered, it must be material and relevant to the issues raised by the pleadings. Witnesses and real or demonstrative evidence must be competent to offer proof of that fact. Although all three concepts--materiality, relevancy, and competence--determine the substantive nature of objections, they are not synonymous and must be carefully used as the basis for objections. Whether the subject matter of a particular question is in issue will also determine rulings on objections to substance. That is, the same question may be objectionable or not depending on the issues in the case. The list of possible objections to the substance of evidence is seemingly endless. A few examples are objections to hearsay, improper impeachment, lack of proper foundation, irrelevancy, incompetency, and violation of privileged communication.

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§ 37.09 Evaluating Differences Between Form and Substance Objections

[1] Form of Question

Although objections to the form of a question involve the law of evidence, finding the rules that define the proper form of a question is a difficult task. Despite their practical impact on litigation, objections to form rarely are analyzed in case law or found in codified law. Most jurisdictions, however, generally accept the governing principle of *Federal Rule of Evidence 611(a)*, giving the judge power to exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence as to: n1

- Make the interrogation and presentation effective for the ascertainment of the truth
- Avoid needless consumption of time
- Protect witnesses from harassment or undue embarrassment

[2] Substance of Evidence

Objections to the substance of evidence involve the entire law of evidence. Although the law of evidence originally was based mainly on decisional law, it has been increasingly codified. In the federal courts, the codification contained in the Federal Rules of Evidence creates most of the grounds for objections. The codified evidentiary rules of many states are based on the federal model, but you always should consult them for disparities. In both state and federal courts, additional objections to the substance of the evidence may have a basis in local rules of trial practice, rules of civil procedure, and relevant case law as well.

In addition, common sense and fairness often can be the basis for substantive objections, due to the broad discretion given the judge in deciding rulings on evidentiary issues. Not all judges recognize all objections; contrary rulings from different judges should be expected. Indeed, the effective trial lawyer may have to assert those objections that the judge does recognize rather than argue the validity of other discretionary objections.

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Evid. 611(a).*

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3-37 Federal Litigation Guide § 37.10

§ 37.10 Timing of Objections

[1] Objecting When Ground First Becomes Apparent

Counsel must promptly inform the court of objections to evidence for the trial judge to take appropriate preventive or corrective action. Consequently, counsel is not allowed to gamble on the possibility of a favorable response to an objectionable question. Rather, counsel must make an objection when the ground for objection first becomes apparent. n1

Federal Rule of Evidence 103 does not define "timely." n2 The general rule is that an objection is timely if made as soon as the ground of objection becomes apparent. n3 This requirement avoids unfairness to the proponent of the evidence, who otherwise might rely on the admission and forgo offering additional proof on the same point, only to find that this substitute is no longer available at a later time. A timely objection gives the proponent a chance to cure the mistake.

[2] Objecting Before Trial

An objection to an impropriety during a deposition that might be obviated if raised during the course of the deposition ordinarily must be raised at that time or be deemed waived. n4 Sometimes raising objections to an evidentiary issue before trial may not preserve the matter for appeal if the issue should arise again at trial. n5 There is a split among the circuits as to whether an objection made by a motion in limine without subsequent contemporaneous objection at trial is sufficient to preserve an evidentiary ruling for appeal. Also, a proposed rule amendment may affect this issue. The safest course is to always raise an objection at trial, even if the objection has been the subject of an earlier pretrial motion.

In courts that employ the procedure of pre-marking exhibits before trial, counsel may advantageously object at that time so as to avoid bringing in unnecessary witnesses and to allow the parties to meet unforeseen objections. If the jury may be unduly influenced by viewing a prejudicial exhibit prior to the time it is offered at trial, object at the time the exhibit is marked, or as soon as the risk is known. Ordinarily though, objections to real evidence will be made when the evidence is offered at trial.

[3] Objecting During Trial

The requirement of timeliness usually is applied to objections made during trial. n6 Timeliness during trial may vary

with the circumstances. Usually the ground for an objection will be apparent as soon as the question is asked, assuming the question shows that it calls for inadmissible evidence. When this is the case, counsel must state the objection before the witness answers. Although courtesy usually requires that the opponent be allowed to complete the statement or question without interruption, if the question itself is prejudicial, interruption with an objection is necessary. On the other hand, sometimes the ground for an objection will not be apparent until after the answer or evidence has been given, and in that event, a motion to strike is called for.

[4] Preserving Issue for Appeal

A timely and specific objection usually is required in order to preserve the issue for review on appeal. n7 However, the "plain error" exception may apply in some situations, and objections to the calling of witnesses or interrogation by the court can be postponed until the first opportunity when the jury is not present. n8

Moreover, timeliness, by itself, is not sufficient to preserve an objection on appeal. *Federal Rule of Evidence 103* also requires that the objection be specific. n9 Thus, a timely objection made on the wrong grounds will preclude the objecting party from raising an objection on proper grounds on appeal. n10

FOOTNOTES:

(n1)Footnote 1. *See United States v. Heinemann, 801 F.2d 86, 96 (2d Cir. 1986)* , cert. denied, *479 U.S. 1094 (1987)* .

(n2)Footnote 2. *See Fed. R. Evid. 103.*

(n3)Footnote 3. *See, e.g., McKnight v. Johnson Controls, Inc., 36 F.3d 1396, 1407-1408 (8th Cir. 1994)* (error not preserved because grounds became apparent during direct examination but objection not made until after close of direct examination).

(n4)Footnote 4. *See Fed. R. Civ. P. 32(b), (d).*

(n5)Footnote 5. *See Porter-Cooper v. Dalkon Shield Claimants Trust, 49 F.3d 1285, 1287 (8th Cir. 1995)* (party's pretrial designation of expert witness did not constitute offer of proof sufficient to preserve alleged error of exclusion of expert's testimony).

(n6)Footnote 6. *See Fed. R. Evid. 103(a)(1).*

(n7)Footnote 7. *See United States v. Davis, 261 F.3d 1, 62, n.24 (1st Cir. 2001)* (defendant's failure to object at trial to testimony of two witnesses precluded his argument on appeal that that evidence was insufficient to establish certain routine practice); *Colon v. Howard, 215 F.3d 227, 234-235 (2d Cir. 2000)* (neither plaintiff nor his attorney objected when evidence first introduced at trial, nor when defendant had document read aloud during trial; however, even if objection had been preserved, evidence would be admissible); *Forklifts of St. Louis v. Komatsu Forklift, USA, 178 F. 3d 1030, 1035 (8th Cir. 1999)* (because specific objections to expert opinion on damage estimates were not made to direct testimony at trial, issues were not preserved for appeal).

(n8)Footnote 8. *Fed. R. Evid. 103(d), 614(c).*

(n9)Footnote 9. *Fed. R. Evid. 103(a)(1).*

(n10)Footnote 10. *See Prymer v. Ogden, 29 F.3d 1208, 1213-1214 (7th Cir. 1994)* , cert. denied, *513 U.S. 1057 (1994)* .

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§ 37.11 Moving to Strike

[1] Striking Unavoidable Testimony

Despite the general rule that counsel may not await the witness's answer before objecting to the question, it is generally acknowledged that this requirement is not always feasible. In a number of situations it may be impossible to object before the inadmissible evidence has come to the attention of the jury. A witness may blurt out an answer before counsel has a chance to object, or a question that is not objectionable may elicit an objectionable unresponsive answer that you could not have foreseen. Testimony that is apparently proper when given later may appear inadmissible in light of subsequently developed facts. Moreover, the court may admit evidence conditionally upon the offering party's assurance that a proper foundation will later be established, and the party may fail to do so. In all such cases, make a motion to strike the inadmissible evidence, and request that the jury be instructed to disregard the evidence. n1 If the witness gives an unresponsive answer, it is generally agreed that only the questioning attorney may make the motion to strike.

[2] Considering Disadvantages of Striking Testimony

A motion to strike and request for instruction may serve only to remind the jury of harmful evidence, the impact of which has been abated by subsequent events at trial. Counsel must make an assessment of whether it is best to exercise restraint. If the initial fight over the admissibility of the evidence was waged in the presence of the jury, and counsel lost face in the process, it would generally be best to renew the objection by moving to strike, if it is likely the objection would now be sustained.

[3] Making Timely Motion to Strike

As with an objection, a motion to strike must be timely in order to preserve rights on appeal. n2 Accordingly, the motion should be made immediately following an objectionable answer. Thus, a motion to strike inadmissible hearsay that is not made until the close of all the evidence will be untimely and will be denied. n3 The exclusion of inadmissible evidence by striking it usually has only the effect of avoiding waiver since the testimony will have already been heard by the jury.

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Evid. 103(a)(1).*

(n2)Footnote 2. *Fed. R. Evid. 103(a)(1).*

(n3)Footnote 3. *See, e.g., Terrell v. Poland, 744 F.2d 637, 639 (8th Cir. 1984)* .

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§ 37.12 Restating Objections

If an objection is sustained, counsel should repeat the objection if the opponent offers similar testimony by the same or another witness. An objection should also be repeated if an initial objection is overruled, and the opposing side asks further questions in the same vein. Although some courts hold that counsel does not need to repeat an objection, the sound approach is to raise a "continuing objection" for the record. n1 The effect of a continuing objection is not only that the first overruled objection remains good and is not waived, but also that its reach extends to all similar evidence subject to the same objection. n2 When a continuing objection is used, the best approach to ensure that the record is protected is to renew the objection at the close of the witness's testimony with an additional motion to strike the testimony and to have the jury instructed to disregard it. n3 If the testimony is extremely prejudicial, a motion for mistrial should also be made.

FOOTNOTES:
(n1)Footnote 1. *See, e.g., Clay v. Ford Motor Co., 215 F.3d 663, 667 (6th Cir. 2000*).

(n2)Footnote 2. *See United States v. Fortenberry, 919 F.2d 923, 924 (5th Cir. 1990)* .

(n3)Footnote 3. *See Clay v. Ford Motor Co., 215 F.3d 663, 667 (6th Cir. 2000)* (motion to strike expert testimony in its entirety, after continuing objection regarding admissibility of expert testimony throughout examination of expert).

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CHAPTER 37 Objections *

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§ 37.13 Stating Grounds for Objection

A specific ground for an objection must be stated if the objection is to be preserved for appeal. n1 Such a specific objection is in contrast to a general objection, which assigns no particular grounds and which is typically phrased by saying, "Objection," "Your Honor, I object," or by stating the objection in other general terms. The requirement of specificity is enforced primarily on appeal, and consequently, there is no per se ban on the use of general objections at trial. n2 Indeed, many trial judges prefer them because they do not encourage colloquy between counsel. However, specificity in objections serves several valuable functions.

A specific objection enables the trial judge to make an informed ruling on the asserted violation. n3 It affords the proponent of the evidence an opportunity to contest the objection or to take corrective action. In addition, a specific objection may increase the jury's understanding so that counsel's interruption is not viewed as a dilatory or spurious tactic. Whenever feasible, a specific objection should be made.

Under *Federal Rule of Evidence 103(a)(1)* and similar rules in most jurisdictions, specificity is required for appellate review unless the ground for exclusion is apparent from the context in which the objectionable evidence is given. n4 If the ground is not obvious, and a general objection is overruled, counsel will be deemed to have waived the correct specific objection. n5 Conversely, if counsel's general objection is sustained, although only a specific objection could properly raise the issue, the ruling will also generally be upheld, if any ground in fact existed for the exclusion. In this situation, the appellate court assumes that the evidence was excluded for the proper reason. In effect, the correct specific objection is not waived. This rule is usually applied, and makes practical sense, when the target of the specific objection could not have been corrected and when it would be pointless to reverse because counsel would be sure to assert the correct specific ground upon retrial.

The risk of waiver arises also when counsel makes the wrong specific objection. Because specific objections implicitly waive all other grounds for objection to the evidence, if counsel makes an incorrect specific objection that is overruled, he will be deemed to have waived the correct specific objection. To reduce the risk of waiver, counsel should make sure to include all possible bases of exclusion in his objection. These grounds should be stated at the same time and should be enumerated, as for example, "Your Honor, I object on three grounds: first, relevancy, second, hearsay and lastly, privilege." This way, even if the objection is overruled, the correct specific objection may be preserved for review of error. This is also safe practice because counsel may never know which ground will persuade the court to rule favorably. Although the correct specific objection will be waived when counsel's untenable objection is overruled, this may not be the case if the objection is sustained. In most circumstances, the appellate court will uphold the ruling if there is any

possible ground for doing so, even though a different and incorrect specific ground was urged below.

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Evid. 103(a)(1).*

(n2)Footnote 2. *See Fed. R. Evid. 103(a)(1).* The rule governs treatment of rulings on appeal and motions for a new trial and thus does not ban the use of general objections at trial.

(n3)Footnote 3. *See, e.g., Collins ex rel. Kay v. Seaboard Coast Line R.R., 675 F.2d 1185, 1194 (11th Cir. 1982) .*

(n4)Footnote 4. *See, e.g., Bandera v. City of Quincy, 344 F.3d 47, 55 (1st Cir. 2003) .*

(n5)Footnote 5. *United States v. Akitoye, 923 F.2d 221, 223-224 (1st Cir. 1991) .*

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§ 37.14 Determining Where to Object

Not only should objections be timely and specific, they should also be made to the appropriate audience. Counsel should always consider whether to make or argue an objection outside the presence of the jury. Although both parties should be prepared to argue the merits of an objection, there will often be no opportunity for argument when an objection runs to the form of a question. Most courts will rule prior to hearing from the questioner. However, when an objection is aimed at the substance of the evidence, most courts afford the proponent of the evidence at least an opportunity to state whether the objection is contested. Often, the proponent can defend the offer with arguments before the objecting counsel provides the reasoning for the objection.

Typically, it will be advantageous for the jury to hear an objection when counsel wants to reveal unfairness in the opponent's manner of conducting his examination or when counsel is confident that the objection will be sustained. It is particularly appropriate for the jury to hear an objection that is aimed at the form of a question rather than at impermissible substantive evidence. Counsel's specification of the reasons supporting the objection will demonstrate that it is not a dilatory tactic but a necessary intervention to prevent leading questions or other harmful practice. Finally, all objections should be directed to the court and not opposing counsel, since only the court can rule on the objection.

Federal Rule of Evidence 103(c) gives the court authority to grant hearings on objections outside the hearing of the jury. n1 When an objection is aimed at excluding inadmissible evidence rather than merely correcting the form of a question, it may be necessary to state the basis for the objection outside of the jury's hearing. The objecting party will usually be unable to state the reasons as to why particular evidence is prejudicial or otherwise defective without disclosing, to some degree, the nature of the inadmissible evidence. This unavoidable disclosure can adversely influence the jurors. The jurors may understand enough to surmise the entire testimony or they may believe that something worse is being concealed. Once exerted, this influence may be difficult or impossible to erase. In addition, objecting in the jury's presence will often highlight the very matter that counsel seeks to exclude.

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Evid. 103(c).*

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§ 37.15 Failing to Object

The failure to raise an objection or to make a sufficiently timely, specific and proper objection to inadmissible evidence waives any ground of complaint on appeal. n1 But this failure has another effect, equally important, which counsel should always bear in mind. If the inadmissible evidence is received without objection, it becomes part of the record and is usable as proof for whatever rational persuasive power it may have. However, the failure to object will not affect the relevancy of any admitted evidence. n2 If the admitted evidence has no probative worth or insufficient probative worth to support the proposition for which it is offered, the lack of an objection does not affect its value. The admitted evidence will still be irrelevant and will not support a finding.

The failure to object to inadmissible evidence does not, of itself, preclude the trial judge from excluding the evidence on his or her own motion. If a witness is incompetent or evidence is inadmissible and the interests of justice require the exclusion, the trial judge has discretion to do so. The Federal Rules of Evidence grant the judge broad powers to make such exclusions. Rule 611(a) permits the judge to control the presentation of the evidence so as to "make the interrogation and presentation effective for the ascertainment of the truth." n3 This provision, coupled with the "plain error" doctrine of Rule 103(d), affords the basis for the judge's exclusionary power. n4

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Evid. 103(a).*

(n2)Footnote 2. *See Fed. R. Evid 401.*

(n3)Footnote 3. *See Fed. R. Evid 611(a).*

(n4)Footnote 4. *Fed. R. Evid, 103(d).*

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§ 37.16 Understanding Offers of Proof

[1] Making Known the Substance of Excluded Evidence

When the court sustains an objection to a question or other offer of evidence, counsel who asked the question or offered the evidence can respond in either or both of two ways. Of course, counsel should never argue with the judge, but should try to reformulate the question so that the evidence might be admitted in a different form. When correction is not possible, counsel should make an offer of proof. n1

The purpose of an offer of proof is to make known to the trial and appellate courts the substance of the excluded evidence. The offer of proof also permits the trial judge to reconsider the claim for admissibility and may persuade the judge to change the ruling. n2 Offers of proof are important to establish the purported relevance of the excluded evidence. n3 The procedure is primarily important, though, for appellate review. When evidence is excluded, the only way in which the appellate court can determine whether a substantial right of a party has been affected is to see the excluded evidence. The offer of proof makes this possible. As a general rule, error may not be predicated on a ruling that excludes evidence unless an offer of proof is made. n4 Under *Federal Rule of Evidence 103(a)(2)*, an offer of proof is required unless the nature of the excluded evidence is apparent from the context. n5 Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal. n6

[2] Timing of Offer of Proof

Although *Federal Rule of Evidence 103(a)(2)* does not require explicitly that the offer of proof be "timely," it is generally made immediately after the court has ruled on the opponent's objection. n1 In some courts, counsel may indicate his or her intention to make an offer immediately--by a brief statement at the side bar--but the actual detailed offer is made at the next recess or some other convenient time. n2 Usually, this postponement must be requested. This method is advantageous because it prevents delays in the proceedings and thus eliminates the possibility of unfavorable jury reaction toward offering counsel. It also gives the court a better opportunity to augment the record.

Whatever the method followed, counsel should explain on the record the theory under which counsel is making the offer of proof. n3 If the opponent has any objections to counsel's offer of proof, they must be made in a timely fashion like any other objections. Failure to do so will waive the objection for review of error on appeal. In order to protect the record, offering counsel should make sure that the court rules on these objections. An offer of proof should always be made outside the hearing of the jurors in order to prevent the disclosure of inadmissible evidence. *Federal Rule of*

Evidence 103(c) requires that this be done to the extent practicable. n4

In addition, when an objection to direct examination is sustained, counsel should consider requesting that the opponent's offer be made outside the hearing of the witness. A witness who is allowed to hear a narrative offer of proof may have his or her memory refreshed. Should the trial judge later reverse the ruling and admit the testimony, the witness may be tempted to modify it to conform to the offer--to the detriment of counsel's case. Similarly, if an objection to counsel's cross-examination is sustained, counsel should conduct the offer of proof outside the witness's presence. Otherwise, the witness will be forewarned of counsel's proposed cross-examination. If counsel is permitted to proceed after the offer, this advance preparation will be disadvantageous.

[3] Considering Logistics of Offers of Proof

If an objection to counsel's offer of real evidence has been sustained, counsel should request that the exhibit be retained by the court clerk as an offer of proof. Above all, counsel must be sure that the exhibit has been marked for identification. The exhibit then becomes part of the record for the reviewing court. To preserve the issue for appeal, counsel's offer of proof must be reasonably specific; it also must state the purpose and theory of the offered evidence if they are not apparent. n5 Ordinarily, the offer can be made in either narrative or question and answer form. n6 However, the court can require that the latter method be used. n7

In the narrative method, counsel states to the court, out of the jury's presence, what counsel expects to prove by the witness. If the expected testimony raises a question as to its materiality or relevancy, or as to the competence of the witness, counsel must indicate the facts on which admissibility of the testimony depends. The offer will be improper if it contains inadmissible conclusions or if it goes beyond the scope of the question asked or testimony desired. In the question and answer method, counsel also must establish any facts on which admissibility depends. Here, however, counsel questions the witness on the stand, outside the jury's presence, and the questions and answers are recorded. This method is the most reliable because the witness answers as if actually testifying to the jury. It is also the most time-consuming and disruptive. Unless the court permits the postponed offer discussed earlier, it is probably best to use the question and answer method only for critical aspects of the case.

Another method is for counsel to ask the court for leave to make a written offer of proof with an attached affidavit of the witness. This should be submitted before the objecting counsel rests. This method may be more advantageous than dictating the offer into the record, because the judge can study the document and may be influenced to change his or her ruling. This writing should be marked for identification and introduced into the record for use on appeal.

An offer of proof generally is not made until after an objection is made. However, by excluding one or a few questions that open a line of questioning, the judge may cut off the entire line, thereby saving time and reducing the risk of exposing the jury to inadmissible material. The offer of proof that counsel makes at such a time should encompass the entire line of questioning. n8 Similarly, if several witnesses, who are not in court, will testify to the same line of facts, and the judge's rulings indicate an inclination to exclude this line of testimony, usually counsel will not have to produce each witness before the jury. If there is nothing in the record to indicate bad faith or inability to produce the proof, a sufficiently specific offer of proof will be acceptable. Counsel should name the witnesses and indicate the particulars that each would prove. The narrative method can be used, or counsel can make a statement describing the questions counsel would have asked and the specific factual or admissible opinion testimony that the witnesses would have given.

FOOTNOTES:

(n1)Footnote 1. *See, e.g., Weir v. Crown Equip. Corp., 217 F.3d 453, 459 (7th Cir. 2000)* .

(n2)Footnote 2. *See New York v. Microsoft Corp., 209 F. Supp. 2d 125, 130 (D.D.C. 2002)* .

(n3)Footnote 3. *Moses.com Sec., Inc. v. Comprehensive Software Sys., Inc., 406 F.3d 1052, 1059 (8th Cir. 2005)* .

(n4)Footnote 4. *Glover v. Johnson, 198 F.3d 557, 561-562 (6th Cir. 1999)* .

(n5)Footnote 5. *See Fed. R. Evid. 103(a)(2).*

(n6)Footnote 6. *Fed. R. Evid. 103(a).*

(n7)Footnote 1. *See Fed. R. Evid. 103(a)(2).*

(n8)Footnote 2. *See New York v. Microsoft Corp., 209 F. Supp. 2d 125, 130-132 (D.D.C. 2002)* (when evidence has multiple uses, some permissible and some impermissible, a more detailed explanation of use of evidence is appropriate; motion to reconsider exclusion of evidence denied, based in part on party's failure to articulate all justifications for offering the evidence in question).

(n9)Footnote 3. *See Price v. Seydel, 961 F.2d 1470, 1475 (9th Cir. 1992)* .

(n10)Footnote 4. *See Fed. R. Evid. 103(c).*

(n11)Footnote 5. *See Price v. Seydel, 961 F.2d 1470, 1475 (9th Cir. 1992)* .

(n12)Footnote 6. *See Tiller v. Baghdady, 244 F.3d 9, 13, n.3 (1st Cir. 2001)* (offer of proof not required to be in any particular form).

(n13)Footnote 7. *See Fed. R. Evid. 103(b).*

(n14)Footnote 8. *See Fed. R. Evid. 103* advisory committee's note.

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§ 37.17 Admitting Evidence for Limited Purpose

Evidence that relates to a number of issues in a case may be admissible for a particular purpose or as to one party, but inadmissible for another purpose or against another party. In this situation, the normal practice is to admit the evidence despite an objection, but to restrict its scope by instructing the jury to consider it only for the allowable purpose. n1 *Federal Rule of Evidence 105* and similar rules in most jurisdictions provide for this procedure and require that a request for a limiting instruction be made to the court. n2

The party against whom the judge rules on an objection has the burden of calling the limited purpose of the evidence to the court's attention. If counsel objects to proffered evidence and the objection is sustained, the opponent will have to show that the evidence is properly admissible for some purpose. If, on the other hand, counsel's objection is overruled, counsel will have the burden of showing that the evidence has only limited admissibility.

Generally, when counsel decides that the offered evidence has only limited admissibility, counsel should not point this out in the objection. Rather, counsel should object to the entire evidence as being inadmissible and leave the burden of establishing limited admissibility to the other side. If the objection is sustained, and there has been no offer of a limited purpose, the exclusion of the evidence will not be reversed on appeal. If counsel indicates the limited purpose in counsel's objection, counsel will only aid the opponent by suggesting a ground for admitting the evidence. When counsel's objection is overruled, counsel must request the court to give limiting instructions to the jury.

FOOTNOTES:
(n1)Footnote 1. *See, e.g., Rinehimer v. Cemcolift, Inc., 292 F.3d 375, 382 (3d Cir. 2002)* (limiting instruction under *Fed. R. Evid. 105*).

(n2)Footnote 2. *Fed. R. Evid. 105*.

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§ 37.18 Objecting During Nontestimonial Portions of Trial

[1] Objecting During Voir Dire of Jurors

Since voir dire is used to determine any bias, prejudice or interest of prospective jurors relative to the pending case, it is objectionable to argue or discuss the law during this process. Most judges, though, permit some general questions concerning the law. Similarly, counsel cannot argue or draw conclusions from the facts of the case during jury selection. Nor can counsel ask jurors to hypothesize questions assuming the facts of the case. Such objectionable discussions of the details of the case may be attempted by the opponent under the pretense of trying to ascertain a juror's attitude toward certain evidence. While counsel needs to make informed challenges, too much disclosure of the case is unfair. The court must rule carefully on objections of this sort.

Inadmissible evidence cannot be mentioned for obvious reasons of prejudice. Hearsay testimony, the remarriage of the surviving spouse in wrongful death cases, or subsequent repairs will be objectionable if mentioned. Similarly, specific mention of a party's insurance against liability is not allowed, although some jurisdictions permit general inquiries on insurance matters in order to determine a juror's bias or interest. n1 Other objectionable conduct during jury selection includes making prejudicial or inflammatory comments, asking humiliating or embarrassing questions, protracting the examination, misstating the law, and using improper form in questioning.

[2] Objecting During Opening Statement and Closing Argument

Since the opening and closing are counsel's two opportunities to give structure to the trial, considerable latitude is often permitted. As a general rule, restrictions consistent with fairness are imposed. The failure to object during opening statements or closing arguments may have undesirable consequences. If counsel reads from a proposed exhibit during the opening statement, counsel's adversary, by not objecting then and there, may be deemed to have waived any objection to receipt in evidence of the exhibit. n2

Objections should usually be made when the opponent has completed his or her statement or argument; n3 otherwise, the jury may view counsel's conduct as bad manners or obstructive--especially if the objection is overruled. However, some judges may require the objection to be made when the improper remark is stated, in order to be timely. Once again, it is important to know the preferences of the trial judge. The opening statement and closing argument are particularly vulnerable to the opponent's tactic of posing objections simply to disrupt the continuity of presentation. Since these parts of trial are often the most effective times to focus and shape the attention of the jurors, an unbroken rapport with them is crucial during the opening and closing. Special consideration of how to respond to disruptive

tactics is thus advisable.

[3] Objecting to Jury Instructions

A party who objects to a jury instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds of the objection. n4 An objection is timely if a party that has been informed of an instruction or action on a request before the jury is instructed and before final jury arguments, as provided by Rule 51(b)(1), objects at the opportunity for objection required by Rule 51(b)(2); n5 or a party that has not been informed of an instruction or action on a request before the time for objection provided under Rule 51(b)(2) objects promptly after learning that the instruction or request will be, or has been, given or refused. n6

A party may assign as error an error in an instruction actually given if that party made a proper objection under Rule 51(c); n7 or a failure to give an instruction if that party made a proper request under Rule 51(a), and, unless the court made a definitive ruling on the record rejecting the request, also made a proper objection under Rule 51(c). n8 A court may consider a plain error in the instructions affecting substantial rights that has not been preserved as required by Rule 51(d)(1)(A) or (B). n9

To preserve objections to a charge, counsel must object as required under the rule. Rule 51 has been stringently enforced to the extent that a district court judge cannot waive it even with the acquiescence of counsel. n10

FOOTNOTES:
(n1)Footnote 1. *See Fed R. Evid. 411.*

(n2)Footnote 2. *See United States v. Benitez, 920 F.2d 1080, 1087-1088 (2d Cir. 1990)* .

(n3)Footnote 3. *See, e.g., United States v. Abboud, 438 F.3d 554, 586 (6th Cir. 2006)* (prosecutor's improper statement during closing did not require reversal because it was not flagrant and defense did not object at trial).

(n4)Footnote 4. *Fed. R. Civ. P. 51(c)(1).*

(n5)Footnote 5. *Fed. R. Civ. P. 51(2)(A).*

(n6)Footnote 6. *Fed. R. Civ. P. 51(2)(B).*

(n7)Footnote 7. *Fed. R. Civ. P. 51(d)(1)(A).*

(n8)Footnote 8. *Fed. R. Civ. P. 51(d)(1)(B).*

(n9)Footnote 9. *Fed. R. Civ. P. 51(2).*

(n10)Footnote 10. *Babcock v. GMC, 299 F.3d 60, 64-66 (1st Cir. 2002)* (district court alerted counsel that to preserve objections to charge, they had to object as required under Rule 51; counsel nevertheless failed to object).

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§ 37.19 Obtaining a Ruling on the Record

The trial judge has the obligation to rule on all objections, and such rulings should be a part of the trial record. The responsibility for obtaining rulings rests with trial counsel. If the trial judge reserves a ruling on certain evidence, the objecting party must renew the objection before the case is concluded. n1

If the judge fails to make a ruling, then you must request a ruling and if no ruling is forthcoming, you should object to the court's failure to rule. The judge's rulings on evidence must be unambiguous. The term "sustained" or "overruled" should appear in the ruling. If the court renders a ruling without using these magic words, you can politely say to the court, "Your Honor, do I understand correctly that you are overruling (sustaining) my objection?" If the trial judge comments informally in chambers that he will admit or refuse certain evidence, a record must be made of that action if it is to form a basis of appeal.

FOOTNOTES:
(n1)Footnote 1. *Douthit v. Jones, 619 F.2d 527 (5th Cir. 1980)* .

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§ 37.20 Considering Common Objections

It may be impossible to formulate an exhaustive list of all possible objections that can be made at trial. The types of objections that can be made at trial are limited only by the fertile imagination of trial counsel. Counsel should review the Federal Rules of Evidence, the substantive law, and the relevant federal or state statutes for objections to be made at trial. The law of evidence is intended to be changing and flexible. Therefore, the grounds for objections are not static, and grow and change with the law. What follows is a checklist of some of the most frequent objections. The basis for an objection is always context-specific, and more or fewer types of objections may be relevant in a particular circumstance.

1. Form of the question

    a. Leading

    b. Argumentative

    c. Confusing

    d. Compound

    e. Vague, unintelligible or ambiguous

    f. Assumes a fact not in evidence

    g. Misleading; misquotes testimony or an exhibit

    h. Narrative answer requested

    i. Previously asked and answered

    j. Beyond the scope of direct (cross, redirect, etc.)

    k. Insufficient foundation for hypothetical question

2. Exhibits or Testimony

a. Immaterial

b. Irrelevant

c. Non-responsive

d. Best evidence rule

e. Parol evidence rule

f. Document speaks for itself

g. Cumulative

h. Hearsay

i. Speculation

j. Narrative answer

k. No basis for opinion

l. Lack of foundation

m. Witness reading from notes or prepared testimony

n. Privileged matter

o. Incompetence of witness

p. Relevance outweighed by prejudice, confusion, or waste of time

3. Opening Statements

a. Arguing case

b. Improper discussion of law

c. Misstatement of law

d. Addressing juror by name

e. Inflammatory or prejudicial matter

f. Violates prior court order regarding excluded evidence; inadmissible matters

g. Describes adversary's evidence

4. Closing Argument

    a. Misstatement of law

    b. Excluded matters referred to

    c. Misstatement of evidence

    d. Prejudicial or inflammatory statements

    e. Personal beliefs

    f. Juror addressed by name

    g. Personal attack on party or his counsel

    h. Request for jurors to put themselves in the place of a party

5. Conduct of Counsel

    a. Arguing

    b. Coaching witness in objections

    c. Interrupting questions

    d. Interrupting answers

    e. Blocking counsel's view

    f. Display of excluded exhibits

    g. Personal communications with jurors

    h. Communications with the press

    i. Harassing witnesses

    j. Improper remarks when objecting

    k. Grandstanding

6. Conduct of Judge

    a. Prejudicial statements

    b. Off-the-record statements

    c. Bias

d. Defamatory remarks about a party or counsel

e. Excessive interrogation

f. Gestures, expressions or signs of disbelief or belief

g. Summarizing evidence

7. Jury Instructions

a. Not the law

b. Misstates the law

c. Ambiguous or unclear

d. Confusing

e. No evidence to support

f. Omits issue

g. Manner of instructing emphasizes certain matters

h. Technical terms not defined or wrongly defined

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CHAPTER 38 Dispositive Trial Motions 1

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§ 38.44 Court Has Discretion Regarding Timing

§ 38.45 Court Must Make Findings and Conclusions to Enter a Judgment on Partial Findings

§ 38.46 Comparing Judgment on Partial Findings to JMOL

§ 38.47 Appealing Judgment on Partial Findings

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CHAPTER 38 Dispositive Trial Motions 1

3-38 Federal Litigation Guide Scope

Scope

SCOPE

This chapter discusses dispositive trial motions made under Rule 50(a) and Rule 52(c).

Discussions of both the Rule 50(a) motion for judgment as a matter of law in a jury trial and the Rule 52(c) motion for judgment on partial findings in a nonjury case are presented. Particular emphasis is placed on the following:

- The evidentiary standard applicable to each motion
- When each motion may or must be made
- Tactical considerations
- The form each motion should take

For expanded coverage of dispositive trial motions, ***see*** MOORE'S Federal Practice, Ch. 50, ***Judgment as a Matter of Law in Actions Tried by Jury; Alternative Motion for New Trial; Conditional Rulings*** , and Ch. 52, ***Findings by the Court; Judgment on Partial Findings*** (Matthew Bender 3d ed.).

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CHAPTER 38 Dispositive Trial Motions 1
A. Motion for Judgment as a Matter of Law

3-38 Federal Litigation Guide § 38.01

§ 38.01 Moving for Judgment as a Matter of Law Under Rule 50(a) in Jury Trial

If a party has been fully heard on an issue during a 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: n1

- Resolve the issue against the party, and n2

- 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 n3

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. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawDirected VerdictsCivil ProcedureJudgmentsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 50(a)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 50(a)(1)(A).*

(n3)Footnote 3. *Fed. R. Civ. P. 50(a)(1)(B).*

(n4)Footnote 4. *Fed. R. Civ. P. 50(a)(2).*

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CHAPTER 38 Dispositive Trial Motions 1
A. Motion for Judgment as a Matter of Law

3-38 Federal Litigation Guide § 38.02

§ 38.02 Judgment as Matter of Law Replaces Directed Verdict and Judgment Notwithstanding Verdict

Rule 50 uses the term "judgment as a matter of law" to encompass both of the former terms "directed verdict" and "judgment notwithstanding the verdict" (also known as judgment non obstante verdicto, often abbreviated as "j.n.o.v."). n1 The change in terminology, adopted by amendment in 1991, does not alter the substance of the law under preexisting Rule 50. n2

A party's mistaken use of the rule's prior language in denominating a motion under Rule 50 is merely a "formal error." Thus, a motion using the former terminology should be treated as a motion for judgment as a matter of law in accordance with the current rule. n3

This chapter uses current terminology unless discussing or quoting cases employing the former terminology.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawDirected VerdictsCivil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding Verdicts

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 50* advisory committee's note (1991); *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 199 n.14 (1st Cir.)* , *cert. denied*, *519 U.S. 927 (1996)* (the term "judgment as a matter of law" refers to directed verdict and JNOV).

(n2)Footnote 2. *Fed. R. Civ. P. 50* advisory committee's note (1991); *Doctor's Assocs., Inc. v. Weible, 92 F.3d 108, 111-113 (2d Cir. 1996)* , *cert. denied*, *519 U.S. 1091 (1997)* (standard is unaltered by name change).

(n3)Footnote 3. *American & Foreign Ins. Co. v. Bolt, 106 F.3d 155, 157 (6th Cir. 1997)* (court treated motion for directed verdict as JMOL motion).

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CHAPTER 38 Dispositive Trial Motions 1
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3-38 Federal Litigation Guide § 38.03

§ 38.03 Rule 50 Motions Required to Challenge Sufficiency of Evidence at Trial and on Appeal

A party challenging the sufficiency of an opponent's evidence in a civil jury trial must raise claimed deficiencies in a motion for judgment as a matter of law (JMOL) before submission of the case to the jury. n1 If the trial court does not grant a pre-verdict motion for judgment, and elects to submit the case to the jury, the moving party may renew the motion for judgment as a matter of law after the jury reaches or fails to reach a verdict; n2 the failure to renew properly the motion for judgment after the jury reaches or fails to reach a verdict generally precludes a party from challenging the sufficiency of evidence on appeal. Thus, the failure to assert properly both pre-verdict and post-verdict motions for judgment as a matter of law may result in the waiver of the right to object to the sufficiency of an opponent's evidence on appeal.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewEvidenceProcedural ConsiderationsWeight & Sufficiency

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 50(a)(2).*

(n2)Footnote 2. *Fed. R. Civ. P. 50(b).*

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CHAPTER 38 Dispositive Trial Motions 1
A. Motion for Judgment as a Matter of Law

3-38 Federal Litigation Guide § 38.04

§ 38.04 Judgment as Matter of Law Speeds Litigation and Avoids Unnecessary Retrial

Judgment as a matter of law operates as a tool for speeding litigation of civil jury trials and for preventing unnecessary retrials. n1 Under Rule 50(a), federal trial courts have a procedure for avoiding the time and expense of a jury trial on issues or claims for which there is insufficient proof as a matter of law. If the trial court decides there is insufficient evidence to find for a party on an issue, the court may: n2

- Resolve the issue against the party, and n2.1
- Grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, may be maintained or defeated only with a favorable finding on that issue n2.2

Further, a trial court may render a pretrial judgment as a matter of law on its own motion. n3

Rule 50(b) avoids unnecessary retrials when a judgment as a matter of law is held improper on appeal because it permits reinstatement of the original verdict. n4 Rather than grant a pre-verdict motion for judgment, a trial judge may allow the case to go to the jury while reserving a decision on the legal issues raised in the motion for judgment as a matter of law. If the moving party properly renews the motion for judgment, the court may reconsider the legal issues raised in the motion after the jury reaches or fails to reach a verdict. n5 If the jury verdict is not supported by the evidence, the trial court may render judgment as a matter of law. n6

An appellate court reviewing the trial court's decision may reinstate the original jury verdict if it finds the trial court erred in granting the post-verdict motion for judgment. n7 If, on the other hand, the trial court grants a pre-verdict motion for judgment, an appellate court must order a new trial if it finds the trial court erred in granting the motion for judgment. For this reason, appellate courts have often indicated that in general the better and safer practice is for trial courts to wait for a verdict and rule on the sufficiency of the evidence in a post-verdict motion for judgment. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawPreverdict JudgmentsEvidenceProcedural ConsiderationsWeight &

Sufficiency

FOOTNOTES:

(n1)Footnote 1. *Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 250, 61 S. Ct. 189, 85 L. Ed. 147 (1940)* (*Fed. R. Civ. P. 50* "was adopted for the purpose of speeding litigation and preventing unnecessary retrials"); Teneyck v. Omni Shoreham Hotel, 365 F.3d (citing **Moore's**).

(n2)Footnote 2. *Fed. R. Civ. P. 50(a)(1).*

(n3)Footnote 2.1. *Fed. R. Civ. P. 50(a)(1)(A).*

(n4)Footnote 2.2. *Fed. R. Civ. P. 50(a)(1)(B).*

(n5)Footnote 3. *Fed. R. Civ. P. 50(a)(1).*

(n6)Footnote 4. *Therrell v. Georgia Marble Holdings Corp., 960 F.2d 1555, 1569 (11th Cir. 1992)* (original verdict may be reinstated without new trial if reviewing court finds trial court erred in granting post-verdict motion for judgment).

(n7)Footnote 5. *Fed. R. Civ. P. 50(b).*

(n8)Footnote 6. *Fed. R. Civ. P. 50(b)(3), (c).*

(n9)Footnote 7. *Futrell v. J.I. Case, 38 F.3d 342, 350 (7th Cir. 1994)* (reversing district court's decision to grant Rule 50(b) motion and remanding with directions to reinstate verdict).

(n10)Footnote 8. *Mattivi v. South African Marine Corp., 618 F.2d 163, 166 n.2 (2d Cir. 1980)* (better, safer practice is to wait until jury renders verdict).

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CHAPTER 38 Dispositive Trial Motions 1
A. Motion for Judgment as a Matter of Law

3-38 Federal Litigation Guide § 38.05

§ 38.05 Alerting Court and Opposing Party to Evidentiary Insufficiencies While Remedy Possible

Pre-verdict motions for judgment provide notice to the trial court and to opposing counsel of any deficiencies in the opposing party's case before it reaches the jury, while deficiencies still may be corrected. n1 Under Rule 50(a)(2), pre-verdict motions for judgment must specify the judgment sought and the law and facts on which the moving party bases the motion. Movants must provide nonmoving parties with specific notice of the alleged proof defects at a time when nonmovants still may augment their proof. This pre-verdict notice requirement, then, prevents movants from waiting until after the case is submitted to the jury to inform the court and opposing parties of any evidentiary defects, thereby preventing movants from gaining an unfair advantage through surprise. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewEvidenceProcedural ConsiderationsWeight & Sufficiency

FOOTNOTES:
(n1)Footnote 1. *Brokerage Concepts, Inc. v. United States Healthcare, Inc., 140 F.3d 494, 519 n.18 (3d Cir. 1998)* (*Fed. R. Civ. P. 50(a)* ensures party bearing burden of proof has opportunity to buttress its case before it goes to jury).

(n2)Footnote 2. *Lynch v. City of Boston, 180 F.3d 1, 13 n.9 (1st Cir. 1999)* (rule is designed to prevent unfair surprise); *Brokerage Concepts, Inc. v. United States Healthcare, Inc., 140 F.3d 494, 519 n.18 (3d Cir. 1998)* (*Fed. R. Civ. P. 50(a)* ensures that party bearing burden of proof has opportunity to buttress its case before it goes to jury and that moving party will not gain unfair advantage through surprise); *see Ross v. Rhodes Furniture, Inc., 146 F.3d 1286, 1288-1289 (11th Cir. 1998)* (*Fed. R. Civ. P. 50* is designed to protect party's *Seventh Amendment* right to cure evidentiary deficiencies before case goes to jury).

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CHAPTER 38 Dispositive Trial Motions 1
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3-38 Federal Litigation Guide § 38.06

§ 38.06 Rule 50(a) Does Not Violate Seventh Amendment Right to Jury Trial

Judgment as a matter of law under Rule 50(a) has been held not to violate the right to a jury trial under the *Seventh Amendment to the United States Constitution*. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJury TrialsGeneral OverviewConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil ActionsEvidenceProcedural ConsiderationsWeight & Sufficiency

FOOTNOTES:
(n1)Footnote 1. *Galloway v. United States, 319 U.S. 372, 389, 63 S. Ct. 1077, 87 L. Ed. 1458 (1943)* (upholding constitutionality of pre-verdict judgment as matter of law under former *Fed. R. Civ. P. 50(a)*).

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CHAPTER 38 Dispositive Trial Motions 1
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3-38 Federal Litigation Guide § 38.07

§ 38.07 JMOL Applicable Only in Civil Cases Tried by Jury With Power to Return Binding Verdict

Rule 50(a) provides that a court may grant a motion for judgment as a matter of law during a jury trial. n1 Courts have interpreted this language to mean that motions for judgment as a matter of law are available only in civil cases tried by a jury with the power to return a binding verdict. n2 Accordingly, Rule 50 does not apply to cases or matters in which the trial court acts as finder of fact, n3 or to cases tried to the court with an advisory jury. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJury TrialsGeneral OverviewConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil ActionsEvidenceProcedural ConsiderationsWeight & Sufficiency

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 50(a).*

(n2)Footnote 2. *Ortloff v. United States, 335 F.3d 652, 660 (7th Cir. 2003)* ; *Granite State Ins. Co. v. Smart Modular Techs., Inc., 76 F.3d 1023, 1030-1031 (9th Cir. 1996)* (*Fed. R. Civ. P. 50(a)* applies only to issues tried by jury, not to issue of equitable estoppel, which must be tried by court).

(n3)Footnote 3. *Geddes v. Northwest Mo. State Univ., 49 F.3d 426, 429 n.7 (8th Cir. 1995)* (*Fed. R. Civ. P. 50* does not apply in case in which district court acted as finder of fact).

(n4)Footnote 4. *Schlitt v. Florida, 749 F.2d 1482, 1483 (11th Cir. 1985)* (*Fed. R. Civ. P. 50* "does not apply to cases tried before a court with an advisory jury").

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CHAPTER 38 Dispositive Trial Motions 1
A. Motion for Judgment as a Matter of Law

3-38 Federal Litigation Guide § 38.08

§ 38.08 JMOL May Be Rendered Against Plaintiffs and Defendants

Judgment as a matter of law may be entered against both plaintiffs and defendants. n1 However, granting judgment as a matter of law for a party who bears the burden of proof is an extreme step that may be taken only when the evidence favoring the movant is so one-sided that, absent adequate evidentiary response by the nonmovant, it could not be disbelieved by a reasonable jury. n2 Therefore, judges faced with motions for judgment as a matter of law by parties carrying the burden of proof must test the body of evidence, not for its insufficiency to support a finding, but rather for its overwhelming effect.

Potential use against defendants is one of the fundamental differences between Rule 50 motions for judgment as a matter of law and Rule 12(b)(6) motions to dismiss for failure to state a claim. Motions under Rule 12(b)(6), by their nature, may be brought only as a defense to claim. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewEvidenceProcedural ConsiderationsWeight & Sufficiency

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 50* advisory committee's note (1993); *Bristol Steel & Iron Works, Inc. v. Bethlehem Steel Corp., 41 F.3d 182, 187 (4th Cir. 1994)* (*Fed. R. Civ. P. 50* equally applicable to plaintiffs and defendants).

(n2)Footnote 2. *Weese v. Schukman, 98 F.3d 542, 547 (10th Cir. 1996)* ("The test is a strict one, and a directed verdict for the party having the burden of proof may be granted only where he has established his case by evidence that the jury would not be at liberty to disbelieve").

(n3)Footnote 3. *Fed. R. Civ. P. 12(b).*

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CHAPTER 38 Dispositive Trial Motions 1
A. Motion for Judgment as a Matter of Law

3-38 Federal Litigation Guide § 38.09

§ 38.09 JMOL May Be Rendered on Evidentiary or Legal Grounds

Judgment as a matter of law is appropriate when there is an absence of evidence on an issue or claim essential to a nonmoving party's cause of action or defense or, if the movant bears the initial burden of production, the evidence in favor of the movant is so overwhelming that reasonable persons could not arrive at a contrary verdict. n1

In deciding a motion for judgment as a matter of law, the court is not to resolve legitimately disputed issues of fact already decided by the jury, and even if the court finds the evidence unpersuasive, or that it would have reached a different result if it were sitting as a fact-finder, that is not a basis for overturning the jury's verdict and granting judgment as a matter of law. n1.1

In addition, when appropriate, judgment as a matter of law may be granted on purely legal issues unrelated to the sufficiency of evidence at trial. n2 This situation will arise where no real dispute exists over the relevant facts and the only dispute between the parties concerns question of law that were not made evident on the face of the pleadings. For example, a moving party may assert entitlement to judgment as a matter of law based on qualified or official immunity. n3 In this type of case, the parties may dispute whether or not the defendant is entitled to immunity as a matter of law, but once the court resolves that legal issue the outcome of the suit on the facts is clear.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewEvidenceProcedural ConsiderationsWeight & Sufficiency

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 50(a).*

(n2)Footnote 1.1. *See Pitt v. District of Columbia, 404 F. Supp. 2d 351, 354 (D.D.C. 2005)* (citing **Moore's Federal Practice**).

(n3)Footnote 2. *K & T Enters., Inc. v. Zurich Ins. Co., 97 F.3d 171, 175 (6th Cir. 1996)* ("motion for judgment as a matter of law ... can also be made on purely legal grounds ...").

(n4)Footnote 3. *Tamez v. City of San Marcos, Tex., 118 F.3d 1085, 1091-1092 (5th Cir. 1997)* , *cert. denied*, *522 U.S. 1125 (1998)* (court reviewed trial court's post-verdict judgment as matter of law on qualified immunity grounds despite movant's failure to renew motion formally post-verdict).

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CHAPTER 38 Dispositive Trial Motions 1
A. Motion for Judgment as a Matter of Law

3-38 Federal Litigation Guide § 38.10

§ 38.10 JMOL May Be Rendered as to Nondispositive Issues or Defenses

Trial courts may render judgment as a matter of law with respect to issues ordefenses that are wholly dispositive of a claim or defense. n1 A party may appropriately move for judgment on a discrete legal issue, such as whether the terms of a contract govern the rights and liabilities of the parties, even though granting the motion would not completely dispose of a claim or defense. n2 Similarly, a party may move for judgment as a matter of law on an issue-by-issue basis. n3 A granted motion for judgment as a matter of law need not dispose of an entire case.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawConditional RulingsEvidenceProcedural ConsiderationsWeight & Sufficiency

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 50* advisory committee's note (1993).

(n2)Footnote 2. *Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp., 51 F.3d 1229, 1236 (4th Cir. 1995)* (party may appropriately move for judgment on discrete legal issues because *Fed. R. Civ. P. 50* permits judgments with respect to issues not wholly dispositive of claim or defense).

(n3)Footnote 3. *Hammond v. T.J. Litle & Co., Inc., 82 F.3d 1166, 1172 (1st Cir. 1996)* ("A party may move for judgment as a matter of law on an issue by issue basis; it does not have to be all or nothing").

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CHAPTER 38 Dispositive Trial Motions 1
A. Motion for Judgment as a Matter of Law

3-38 Federal Litigation Guide § 38.11

§ 38.11 Moving for JMOL Before Submission of Case to Jury

Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. n1 Federal courts interpret Rule 50(a) to require parties to assert the motion sometime beforesubmission of the case to the jury. n2 However, motions for judgment as a matter of law are inappropriate before a jury trial begins. n3 In general, a district court may not grant a Rule 50 motion prior to the presentation of any evidence in a case because a party must be afforded the opportunity to present evidence, and the court must evaluate that evidence in order to grant a Rule 50 motion. n4 Most commonly, the motion is asserted after the close of the opponents' case or before submission to the jury.

The failure to move for judgment as a matter of law within the time required under Rule 50(a)(2) may result in waiver of the right to file a renewed motion for judgment under Rule 50(b), which in turn may result in waiver of the right to challenge the sufficiency of evidence on appeal.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawPreverdict JudgmentsEvidenceProcedural ConsiderationsWeight & Sufficiency

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 50(a)(2)*; *Galdieri-Ambrosini v. National Realty & Dev. Corp., 136 F.3d 276, 286 (2d Cir. 1998)* (party may move for JMOL during trial at any time prior to the submission of the case to the jury).

(n2)Footnote 2. *United States ex rel. Wallace v. Flintco Inc., 143 F.3d 955, 960 (5th Cir. 1998)* (challenge to sufficiency of evidence must be raised in pre-verdict motion for judgment before submission of case to jury).

(n3)Footnote 3. *In re M & L Bus. Mach. Co., 181 B.R. 530, 532 (D. Colo. 1995)* (movant cannot assert pretrial motion for judgment as matter of law).

(n4)Footnote 4. *See McSherry v. City of Long Beach, 423 F.3d 1015, 1019 (9th Cir. 2005)* .

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CHAPTER 38 Dispositive Trial Motions 1
A. Motion for Judgment as a Matter of Law

3-38 Federal Litigation Guide § 38.12

§ 38.12 Tactical Considerations in Timing of Motion

Within the broad rule requiring a pre-verdict motion for judgment as a matter of law before the case is submitted to the jury, Rule 50 does not designate a specific time for filing the motion. n1 Courts may consider motions for judgment as a matter of law at any time during the trial, as soon as it is apparent that either party is unable to carry the burden of proof on an issue of fact that is essential to that party's case. n2 Stated differently, a motion for judgment as a matter of law is appropriate after a party has completed its presentation of evidence on a factual issue that is essential to the case. However, in no event may a court enter judgment against a party who has not been apprised of the materiality of the dispositive fact and been afforded an opportunity to present any available evidence bearing on that fact. n3

Typically, the opportunity to file a motion for judgment as a matter of law arises in four situations:

- After the opponent's opening statement if it is clear that no question exists for the jury.
- After the presentation of all evidence on a discrete legal issue.
- After the close of the opponent's evidence.
- After the close of all evidence.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Galdieri-Ambrosini v. National Realty & Dev. Corp., 136 F.3d 276, 286 (2d Cir. 1998)* (party may move for JMOL at any time before case is submitted to jury).

(n2)Footnote 2. *United States v. Vahlco Corp., 720 F.2d 885, 889 (5th Cir. 1983)* (court has power to direct verdict at any point in trial when there is complete absence of any question for jury).

(n3)Footnote 3. *Fed. R. Civ. P. 50* advisory committee's note (1991).

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CHAPTER 38 Dispositive Trial Motions 1
A. Motion for Judgment as a Matter of Law

3-38 Federal Litigation Guide § 38.13

§ 38.13 Moving for JMOL After Opening Statement

Judgment as a matter of law may be granted following an opponent's opening statement if that opening statement embraces all operative facts expected to be proven at trial and those facts are insufficient to sustain a claim for relief under any legal theory. n1 However, despite the existence of authority supporting this conclusion, district courts should exercise restraint. If the court entertains any doubt as to the propriety of granting a pre-verdict motion, the court should wait until both sides have presented their evidence. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawPreverdict Judgments

FOOTNOTES:
(n1)Footnote 1. *Brown v. United Missouri Bank, 78 F.3d 382, 387 (8th Cir. 1996)* (JMOL should rarely be granted after opening statements and rarely sustained).

(n2)Footnote 2. *United States v. Vahlco Corp., 720 F.2d 885, 889 (5th Cir. 1983)* (decided under pre-1991 rule; although generally disapproving of irregularity in granting JMOL before nonmoving party had chance to present evidence, court found no reversible error).

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CHAPTER 38 Dispositive Trial Motions 1
A. Motion for Judgment as a Matter of Law

3-38 Federal Litigation Guide § 38.14

§ 38.14 Moving for JMOL After All Evidence on Discrete Issue

Judgment as a matter of law may be granted during an opponent's case in chiefafter all evidence has been presented on a discrete issue. The issue need not be wholly dispositive of a claim or defense. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawConditional RulingsCivil ProcedureTrialsJudgment as Matter of LawPreverdict Judgments

FOOTNOTES:
(n1)Footnote 1. *Hammond v. T.J. Litle & Co., Inc., 82 F.3d 1166, 1172 (1st Cir. 1996)* (party may move for JMOL on issue by issue basis).

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CHAPTER 38 Dispositive Trial Motions 1
A. Motion for Judgment as a Matter of Law

3-38 Federal Litigation Guide § 38.15

§ 38.15 Moving for JMOL After Close of Opponent's Evidence

Judgment as a matter of law may be appropriate at the close of an opponent's case. n1 However, if the court entertains any doubt as to the propriety of granting a pre-verdict motion, the court should wait until both sides have presented their evidence. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawConditional RulingsCivil ProcedureTrialsJudgment as Matter of LawPreverdict Judgments

FOOTNOTES:
(n1)Footnote 1. *McClaran v. Plastic Indus., Inc., 97 F.3d 347, 360 (9th Cir. 1996)* (motion for JMOL at close of plaintiff's case).

(n2)Footnote 2. *United States v. Vahlco Corp., 720 F.2d 885, 889 (5th Cir. 1983)* (decided under pre-1991 rule; authority to render directed verdict should be exercised with great restraint).

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CHAPTER 38 Dispositive Trial Motions 1
A. Motion for Judgment as a Matter of Law

3-38 Federal Litigation Guide § 38.16

§ 38.16 Moving for JMOL After Close of All Evidence

A party may seek judgment as a matter of law following the close of all the evidence. n1 Further, to preserve the right to seek a post-verdict judgment as a matter of law, a party should move for judgment at the close of all the evidence. As a practical matter, however, most courts will decline to grant the motion at this point in time, submit the case to the jury, and await the jury's verdict. Following the verdict, the court may then evaluate the sufficiency of the evidence supporting the jury's verdict in a post-verdict motion for judgment as a matter of law. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawConditional RulingsCivil ProcedureTrialsJudgment as Matter of LawPreverdict Judgments

FOOTNOTES:
(n1)Footnote 1. *American & Foreign Ins. Co. v. General Elec. Co., 45 F.3d 135, 139 (6th Cir. 1995)* (JMOL appropriate at close of all evidence).

(n2)Footnote 2. *Therrell v. Georgia Marble Holdings Corp., 960 F.2d 1555, 1568-1569 (11th Cir. 1992)* (better to pass on sufficiency of evidence in context of post-verdict motion).

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CHAPTER 38 Dispositive Trial Motions 1
A. Motion for Judgment as a Matter of Law

3-38 Federal Litigation Guide § 38.17

§ 38.17 Failure to Make Motion at Close of All Evidence May Waive Right to Renew Motion

Most courts interpret Rule 50(b) to require movants to make pre-verdict motions for judgment at the close of all the evidence as a prerequisite to filing a renewed motion for judgment under Rule 50(b). n1 As a result, a party who moves for judgment after an opponent's opening statement or at the close of the opponent's evidence must ordinarily reassert the motion at the close of all the evidence or risk waiving the right to renew the motion under Rule 50(b) and the right to appellate review of the sufficiency of an opponent's evidence. Although some courts permit post-verdict motions for judgment despite the movant's failure to reassert a previously made Rule 50(a) motion at the close of all the evidence, the safest course is to reassert the motion at the close of all the evidence.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawPreverdict JudgmentsCivil ProcedureAppealsReviewabilityPreservation for Review

FOOTNOTES:
(n1)Footnote 1. *See Zachar v. Lee, 363 F.3d 70, 74 (11th Cir. 2004)* .

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CHAPTER 38 Dispositive Trial Motions 1
A. Motion for Judgment as a Matter of Law

3-38 Federal Litigation Guide § 38.18

§ 38.18 Specifying Judgment Sought and Basis for JMOL Motion

In making a motion for judgment as a matter of law, the moving party must specify the judgment sought and the law and facts on which the moving party is entitled to judgment. n1 However, the rule does not provide guidance as to the degree of specificity required for pre-verdict motions. n2 Some courts hold that at a minimum, however, the motion must identify the specific element of the opponent's case that the movant contends lacks sufficient support. n3 Generalized or conclusory language in a motion for judgment as a matter of law is usually deemed inadequate. n4 Thus, for example, blanket supporting statements such as "there is no legally sufficient evidentiary basis for a reasonable jury to find for" a party, absent more specific factual allegations, are widely deemed to be insufficient, n5 as are motions stating little more than "defendants move for a directed verdict." n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawPreverdict Judgments

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 50(a)(2).*

(n2)Footnote 2. *Galdieri-Ambrosini v. National Realty & Dev. Corp., 136 F.3d 276, 286 (2d Cir. 1998)* (Rule 50(a) does not define how specific the motion must be).

(n3)Footnote 3. *Waters v. Young, 100 F.3d 1437, 1441 (9th Cir. 1996)* (motion must inform responding party of dispositive facts on which it must introduce evidence).

(n4)Footnote 4. *Galdieri-Ambrosini v. National Realty & Dev. Corp., 136 F.3d 276, 286-287 (2d Cir. 1998)* (generalized challenge is inadequate).

(n5)Footnote 5. *Williams v. Runyon, 130 F.3d 568, 572 (3d Cir. 1997)* ("blanket statement ... is obviously insufficient").

(n6)Footnote 6. *Piesco v. Koch, 12 F.3d 332, 341 (2d Cir. 1993)* (conclusory statement inadequate).

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CHAPTER 38 Dispositive Trial Motions 1
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3-38 Federal Litigation Guide § 38.19

§ 38.19 JMOL Motion May Be Written or Oral

Because movants assert pre-verdict motions for judgment during trial, n1 they need not be in writing. n2 Thus, movants may make oral pre-verdict motions for judgment. n3 However, as a prudential matter, the better practice is to file a written motion for judgment. n4 In any event, the moving party should ensure that oralmotions and any accompanying argument are on the record. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsRule Application & InterpretationCivil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawPreverdict Judgments

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 50(a)(2).*

(n2)Footnote 2. *Fed. R. Civ. P. 7(b)(1).*

(n3)Footnote 3. *United States ex rel. Wallace v. Flintco Inc., 143 F.3d 955, 962 (5th Cir. 1998)* (appellate court noted that moving party neither made nor insisted on right to make written or oral pre-verdict motion).

(n4)Footnote 4. *Doctor's Assocs., Inc. v. Weible, 92 F.3d 108, 111-113 (2d Cir. 1996) , cert. denied, 519 U.S. 1091 (1997)* (prudence suggests that written motion is better practice).

(n5)Footnote 5. *Ross v. Rhodes Furniture, Inc., 146 F.3d 1286, 1289 (11th Cir. 1998)* ("Rule 50 motions must be made on the record").

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CHAPTER 38 Dispositive Trial Motions 1
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3-38 Federal Litigation Guide § 38.20

§ 38.20 Nonmovant Must Be "Fully Heard" Before Court Grants Motion

Before a trial court may grant judgment as a matter of law, under Rule 50(a), the nonmoving party must be fully heard during a trial on the issue on which judgment may be granted. n1 The Rule, however, does not define what is meant by "fully heard." Several circuits have interpreted this language to place an overlapping responsibility on trial courts to inform nonmovants of deficiencies in their proof, and afford nonmovants an opportunity to correct any such deficiencies before granting judgment as a matter of law against them. n2 Meeting the "fully heard" requirement is particularly important in cases in which the motion for judgment falls short of the specificity requirement of Rule 50(a), n3 and in cases involving pro se litigants. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawPreverdict JudgmentsConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of Protection

FOOTNOTES:
(n1)Footnote 1. *Echeverria v. Chevron USA Inc., 391 F.3d 607, 610 (5th Cir. 2004)* ; *Francis v. Clark Equip. Co., 993 F.2d 545, 555 (6th Cir. 1993)* ("before a Rule 50(a) motion may be granted, a party must have been 'fully heard' ").

(n2)Footnote 2. *Waters v. Young, 100 F.3d 1437, 1442 (9th Cir. 1996)* (trial court has overlapping responsibility to inform nonmoving party of deficiencies in proof and to afford party opportunity to correct deficiency).

(n3)Footnote 3. *Waters v. Young, 100 F.3d 1437, 1441 (9th Cir. 1996)* (when pre-verdict motion fails to identify deficiencies in proof, trial court may not rule on motion until it apprises nonmovant of materiality of dispositive fact).

(n4)Footnote 4. *Waters v. Young, 100 F.3d 1437, 1441-1442 (9th Cir. 1996)* (particular need for trial court to observe requirements of *Fed. R. Civ. P. 50* when pro se litigants are involved).

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CHAPTER 38 Dispositive Trial Motions 1
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§ 38.21 Hearing Motion Outside Jury's Presence

Ordinarily, courts hear motions for judgment as a matter of law outside the presence of the jury. n1 However, it is not necessarily an abuse of discretion for courts to hear such motions without excusing the jury. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawPreverdict Judgments

FOOTNOTES:
(n1)Footnote 1. *Andrade v. Jamestown Hous. Auth., 82 F.3d 1179, 1185 (1st Cir. 1996)* (court considered *Fed. R. Civ. P. 50* motion after excusing jury).

(n2)Footnote 2. *Womble v. J. C. Penney Co., 431 F.2d 985, 988 (6th Cir. 1970)* (trial court did not abuse its discretion in hearing motion for directed verdict without excusing jury).

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3-38 Federal Litigation Guide § 38.22

§ 38.22 Court Granting JMOL Need Not Make Findings of Fact

A trial court granting a pre-verdict motion for judgment under Rule 50(a) is not required to make findings of fact and conclusions of law justifying or explaining its action. n1 Although findings of fact are required in actions tried on the facts without a jury or tried with an advisory jury under Rule 52, that Rule intimates that findings of fact and conclusions of law are unnecessary with regard to motions for judgment under Rule 50(a). n2 However, before ruling on the motion, the trial court should specify the materiality of the dispositive issue and controlling law to identify the nonmovant's failure to carry the burden of proof with regard to an issue. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawPreverdict Judgments

FOOTNOTES:
(n1)Footnote 1. *Williams v. Mueller, 13 F.3d 1214, 1216 (8th Cir. 1994)* (trial court in nonjury case mistakenly treated defendants' motion for partial findings as motion for judgment under *Fed. R. Civ. P. 50* and made no findings of fact).

(n2)Footnote 2. *Fed. R. Civ. P. 50(a),(c).*

(n3)Footnote 3. *Francis v. Clark Equip. Co., 993 F.2d 545, 555-556 (6th Cir. 1993)* (trial court magistrate's decision to grant defendant's JMOL motion reversed when magistrate did not give plaintiff an opportunity to be fully heard).

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CHAPTER 38 Dispositive Trial Motions 1
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§ 38.23 Decision Not to Grant Motion Automatically Submits Action to Jury Subject to Later Determination of Motion

If a 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. n1 Therefore, the court is not required to actually rule on the motion. n2 If the jury reaches a verdict contrary to that sought by the moving party in the initial motion for judgment, the moving party may renew the motion. n3 Thus, a trial court's decision not to grant a pre-verdict motion for judgment automatically operates to reserve a decision on legal issues raised in the pre-verdict motion until after the jury reaches or fails to reach a verdict. n4 Even the denial of a pre-verdict motion for judgment results in reservation of a decision on the motion. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawConditional RulingsCivil ProcedureTrialsJudgment as Matter of LawPreverdict Judgments

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 50(b).*

(n2)Footnote 2. *Pro Football Weekly, Inc. v. Gannett Co., 988 F.2d 723, 726 (7th Cir. 1993)* (court took "matter under advisement," rather than expressly ruling on motion).

(n3)Footnote 3. *Fed. R. Civ. P. 50(b).*

(n4)Footnote 4. *Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 321, 87 S. Ct. 1072, 18 L. Ed. 2d 75 (1967)* ("Under Rule 50(b), if a party moves for a directed verdict at the close of the evidence and if the trial judge elects to send the case to the jury, the judge is 'deemed' to have reserved decision on the motion").

(n5)Footnote 5. *Samuels v. Air Transp. Local 504, 992 F.2d 12, 14 (2d Cir. 1993)* (trial court denial of motion for directed verdict at close of all evidence deemed to have submitted action to jury subject to later determination of legal questions raised by motion).

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CHAPTER 38 Dispositive Trial Motions 1
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3-38 Federal Litigation Guide § 38.24

§ 38.24 Evaluating the Standard for Granting JMOL

[1] Judgment Proper When No Legally Sufficient Evidentiary Basis Exists for Reasonable Jury to Find for Nonmovant

If a party has been fully heard on an issue during a 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: n1

- Resolve the issue against the party, and n1.1

- Grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, may be maintained or defeated only with a favorable finding on that issue n1.2

In short, judgment as a matter of law is proper if there is no legally sufficient evidentiary basis for a reasonable jury to find for the nonmovant under controlling law. n2 Stated differently, judgment as a matter of law must be granted when, under governing law, there can be but one reasonable conclusion as to the verdict. n3

Rule 50(a)(1) makes clear that courts have a duty to enforce controlling law without intruding on the jury's responsibility for fact determinations as dictated by the *Seventh Amendment* or by federal law. n4 It is important to emphasize that in deciding whether or not to grant a motion for judgment as a matter of law the trial court is not resolving legitimately disputed issues of fact. Rather, it is deciding only whether such issues actually exist.

Thus, the fact that the court finds the nonmovant's evidence merely unpersuasive or would have reached a different result sitting as the factfinder does not automatically lead to the conclusion that it should grant the motion for judgment as a matter of law. Rather it is only if the court finds that, under controlling principles of law, the nonmovant's evidence is so insufficient that a reasonable finder of fact could not possibly find for the nonmovant that granting the motion is appropriate. n5

[2] Courts Apply Diverse Formulations But Same Rule

In articulating the criteria for granting motions for judgment as a matter of law, Rule 50(a)(1) has been construed to effect no change in the standard as expressed in long-standing case law. n6 What that standard is exactly, however, is not entirely clear. Though Rule 50 does not on its face provide a controlling standard for decision, courts have

uniformly framed the guiding principle in terms of what a reasonable jury could conceivably find. Despite this broad uniformity of standard, however, when the decisions adhering to that standard are deconstructed they reveal a sharp diversity in approach. Federal courts have employed diverse formulations of the standard through the years. n7

Thus, despite articulation of the standard in Rule 50(a)(1), the diversity of approach in applying the standard continues. Most courts require "substantial evidence" in support of the verdict sought or obtained by the nonmoving party in order to avoid judgment as a matter of law. However, a few courts apply a more lenient "any evidence" test.

[3] Judgment Improper if Reasonable Jurors Could Differ

The standard applicable to judgments as a matter of law employs a "reasonable jury" test for determining the propriety of granting judgment as a matter of law. n8 If reasonable minds could differ in viewing the evidence presented at trial, judgment as a matter of law is improper. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewEvidenceProcedural ConsiderationsWeight & Sufficiency

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 50(a)(1).*

(n2)Footnote 1.1. *Fed. R. Civ. P. 50(a)(1)(A).*

(n3)Footnote 1.2. *Fed. R. Civ. P. 50(a)(1)(B).*

(n4)Footnote 2. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* (standard for summary judgment "mirrors" that "under *Federal Rule of Civil Procedure 50(a)*, which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict"); *Merrill Lynch Interfunding, Inc. v. Argenti, 155 F.3d 113, 120 (2d Cir. 1998)* (judgment "appropriate where 'there is no legally sufficient evidentiary basis for a reasonable jury to find for' a party").

(n5)Footnote 3. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-251, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* (standard for summary judgment "mirrors" that "under *Federal Rule of Civil Procedure 50(a)*, which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict").

(n6)Footnote 4. *Fed. R. Civ. P. 50* advisory committee's note (1991).

(n7)Footnote 5. *This is Me, Inc. v. Taylor, 157 F.3d 139, 142 (2d Cir. 1998)* (motion granted only when "evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable [persons] could have reached").

(n8)Footnote 6. *Fed. R. Civ. P. 50* advisory committee's note (1991).

(n9)Footnote 7. The following citations provide a sampling rather than an exhaustive survey of the different formulations of the standard under Rule 50:
Golden Rule Ins. Co. v. Atallah, 45 F.3d 512, 516 (1st Cir. 1995) (motion granted "only if the facts and inferences 'point so strongly and overwhelmingly in favor of the movant' that a reasonable jury could not have reached a verdict against that party"); *This is Me, Inc. v. Taylor, 157 F.3d 139, 142 (2d Cir. 1998)* (motion granted only when "evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there

can be but one conclusion as to the verdict that reasonable [persons] could have reached"); *Stratton v. Department for the Aging, 132 F.3d 869, 878 (2d Cir. 1997)* (courts grant motion only if there is "such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture"); *Keith v. Truck Stops Corp. of Am., 909 F.2d 743, 745 (3d Cir. 1990)* (court must "determine whether the record contains the 'minimum quantum of evidence from which a jury might reasonably afford relief' "); *Konkel v. Bob Evans Farms Inc., 165 F.3d 275, 279 (4th Cir. 1999)* ("Rule 50(b) motion should be granted if a district court determines ... substantial evidence does not support the jury's findings"); *Travis v. Board of Regents of Univ. of Tex. Sys., 122 F.3d 259, 263 (5th Cir. 1997)* , *cert. denied*, *522 U.S. 1148 (1998)* ("court should grant a Rule 50(a) motion not only when the non-movant presents no evidence, but also when there is not a sufficient 'conflict in substantial evidence to create a jury question' "); *American & Foreign Ins. Co. v. Bolt, 106 F.3d 155, 157 (6th Cir. 1997)* (evidence is sufficient to go to jury "unless, when viewed in light of those inferences most favorable to non-movant, there is either a complete absence of proof on the issues or no controverted issue of fact upon which a reasonable person could differ"); *Klunk v. County of St. Joseph, 170 F.3d 772, 775 (7th Cir. 1999)* (JMOL entered when evidenceis so one-sided that one party must prevail as matter of law); *Sanjuan v. IBP, Inc., 160 F.3d 1291, 1298 (10th Cir. 1998)* (renewed motion for judgment "must be granted if ... all the evidence and the inferences to be drawn from it are so clear that reasonablepersons could not differ in their conclusions"); *Bryan v. James E. Holmes Reg'l Med. Ctr., 33 F.3d 1318, 1333 (11th Cir. 1994)* , *cert. denied*, *514 U.S. 1019 (1995)* (judgment may be granted only when "there can be but one reasonable conclusion as to the proper judgment"); *Smith v. United States, 894 F.2d 1549, 1552 (11th Cir. 1990)* ("[t]he moving party is entitled to a directed verdict if the nonmoving party failed to make a showing on an essential element of his case with respect to which he had the burden of proof").

(n10)Footnote 8. *Caruso v. Forslund, 47 F.3d 27, 32 (2d Cir. 1995)* (judgment "proper under *Fed. R. Civ. P. 50* 'only if ... there can be but one conclusion as to the verdict that reasonable [persons] could have reached' ").

(n11)Footnote 9. *Winant v. Bostic, 5 F.3d 767, 774 (4th Cir. 1993)* (court must deny motion for judgment if "reasonable minds could differ as to the conclusion to be drawn from the facts under the applicable law").

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CHAPTER 38 Dispositive Trial Motions 1
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3-38 Federal Litigation Guide § 38.25

§ 38.25 Defeating JMOL Motion With Substantial Evidence

Most federal courts construe the reasonableness test to require "substantial evidence" in support of the claim or defense of a nonmoving party having the burden of production in order to avoid judgment as a matter of law. n1 Substantial evidence is typically defined as evidence of such quality and weight that reasonable and fair-minded jurors may reach different conclusions. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewEvidenceProcedural ConsiderationsWeight & Sufficiency

FOOTNOTES:
(n1)Footnote 1. *Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001, 1014 (9th Cir. 1985)* , *cert. denied*, *474 U.S. 1059 (1986)* ("... (JNOV) is proper when the jury verdict is not supported by substantial evidence").

(n2)Footnote 2. *Krystek v. University of So. Miss., 164 F.3d 251, 255 (5th Cir. 1999)* ("Substantial evidence is defined as 'evidence of such quality and weight that reasonable and fair minded men in the exercise of impartial judgment might reach different conclusions' ").

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CHAPTER 38 Dispositive Trial Motions 1
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3-38 Federal Litigation Guide § 38.26

§ 38.26 Appealing JMOL Orders

Entry of judgment on a trial court's grant or denial of a motion for judgment as a matter of law results in a final judgment for purposes of appeal. Specifically, if the trial court grants the motion for judgment, the nonmoving party may appeal from entry of judgment on the order granting the motion. n1 If the trial court denies the motion for judgment as a matter of law, the jury verdict stands and the movant may appeal from the judgment entered on the verdict. n2 However, a district court order determining the issue of liability but leaving damages to be determined is not a final appealable order. n3

The proper way to appeal trial court rulings on motions for judgment as a matter of law is to appeal from the entry of judgment on the order or verdict. This type of appeal allows the appellant to challenge all prior nonfinal orders and all rulings producing the judgment. n4 A notice of appeal is technically defective if it appeals from grant or denial of the motion for judgment.

As a general rule, a party has 30 days to file a notice of appeal after the judgment or order appealed from is entered. n5 A timely post-verdict motion for judgment as a matter of law on the ground of insufficient evidence suspends commencement of the appeal period until the day after the order deciding the motion. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionFinal Judgment RuleCivil ProcedureAppealsReviewabilityTime Limitations

FOOTNOTES:
(n1)Footnote 1. *Johnson Enters. of Jacksonville, Inc. v. FPL Group, Inc., 162 F.3d 1290, 1308 (11th Cir. 1998)* (review of district court's grant of JMOL motion).

(n2)Footnote 2. *Orchard Group, Inc. v. Konica Med. Corp., 135 F.3d 421, 424 (6th Cir. 1998)* (review of denial of motion for judgment on requirements of contract and apparent authority issues); *Vining ex rel. Vining v. Enterprise Fin. Group, Inc., 148 F.3d 1206, 1212-1213 (10th Cir. 1998)* (appeal from district court denial of motion for judgment as matter of law).

(n3)Footnote 3. *Cook v. Carolina Freight Carriers Corp., 867 F.2d 1266, 1267 (11th Cir. 1989)* (district court judgment granting plaintiffs' motion for judgment that determined liability but left amount of damages for future determination is not final appealable order).

(n4)Footnote 4. *Grubb v. Federal Deposit Ins. Corp., 868 F.2d 1151, 1154 n.4 (10th Cir. 1989)* (proper appeal from trial court rulings on motions for judgment is from entry of judgment on order or verdict, allowing appellant to challenge all prior nonfinal orders and all rulings producing judgment).

(n5)Footnote 5. *Fed. R. App. P. 4(a)(1)(A).*

(n6)Footnote 6. *Fed. R. App. P. 4(a)(4)(A)(i); Harrell v. Dixon Bay Transp. Co., 718 F.2d 123, 126 (5th Cir. 1983)* (timely motion under *Fed. R. Civ. P. 50(b)* suspended commencement of appeal period until day after order deciding motion).

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CHAPTER 38 Dispositive Trial Motions 1
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3-38 Federal Litigation Guide § 38.27

§ 38.27 Proper Pre-Verdict and Renewed Motions for Judgment Are Prerequisites to Review

Proper pre-verdict and renewed motions for judgment as a matter of law are prerequisites to appellate review of the sufficiency of evidence supporting a verdict. n1 Thus, a party's failure to properly assert pre-verdict and renewed motions for judgment on the basis of insufficient evidence ordinarily waives the right to challenge sufficiency of the evidence on appeal. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsStandards of ReviewSubstantial EvidenceSufficiency of Evidence

FOOTNOTES:
(n1)Footnote 1. *See Miller v. Eby Realty Group LLC, 396 F.3d 1105, 1114 (10th Cir. 2005)* .

(n2)Footnote 2. *Pahuta v. Massey-Ferguson, Inc., 170 F.3d 125, 129 (2d Cir. 1999)* ("In the absence of a Rule 50(b) renewed motion or extraordinary circumstances, an 'appellate court [i]s without power to direct the District Court to enter judgment contrary to the one it had permitted to stand' ").

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CHAPTER 38 Dispositive Trial Motions 1
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3-38 Federal Litigation Guide § 38.28

§ 38.28 Ruling on Motion for Judgment as a Matter of Law Reviewed De Novo

In general, appellate courts review district court action on a motion for judgment as a matter of law on a de novo basis, applying the same standard the district court applied in ruling on the motion. n1 In "de novo" review, the appellate court reviews the record in light of its own independent judgment without giving special weight to the decision under review. If the appellate court finds, after drawing all reasonable inferences in favor of the nonmovant and making all credibility assessments in the nonmovant's favor, that sufficient evidence permits a rational juror to find for the nonmovant, the appellate court must overturn the judgment as a matter of law. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsStandards of ReviewDe Novo Review

FOOTNOTES:
(n1)Footnote 1. *Konkel v. Bob Evans Farms Inc., 165 F.3d 275, 279 (4th Cir. 1999)* (denial of post-verdict motion for JMOL reviewed de novo).

(n2)Footnote 2. *This is Me, Inc. v. Taylor, 157 F.3d 139, 142 (2d Cir. 1998)* (stating de novo standard).

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CHAPTER 38 Dispositive Trial Motions 1
A. Motion for Judgment as a Matter of Law

3-38 Federal Litigation Guide §§ 38.29 through 38.39

[Reserved]

§§ 38.29 [Reserved]

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CHAPTER 38 Dispositive Trial Motions 1
B Motion for Judgment on Partial Findings

3-38 Federal Litigation Guide § 38.40

§ 38.40 Moving for Judgment on Partial Findings in Nonjury Trials

In nonjury trials, Rule 52(c) allows the court to enter a judgment on partial findings, the nonjury equivalent of the Rule 50(a) judgment as a matter of law, at any time the court can make a dispositive finding of fact based on all the evidence bearing on an issue. Rule 52(c) provides:

(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).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsGeneral Overview

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CHAPTER 38 Dispositive Trial Motions 1
B Motion for Judgment on Partial Findings

3-38 Federal Litigation Guide § 38.41

§ 38.41 Entering Judgment on Partial Findings Requires Full Hearing on Critical Issue

A district judge may enter a judgment as a matter of law before the end of a non-jury trial on any claim, counterclaim, cross-claim, third party claim, or defense, provided: n1

- The court has decided against the party as to a particular issue;
- The claim cannot be maintained or defeated absent a favorable finding on that issue; and
- The party has been fully heard with respect to that issue.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 52(c)*; *Granite States Ins. Co. v. Smart Modular Techs., Inc., 76 F.3d 1023, 1031 (9th Cir. 1996)* (offer of proof was appropriate means for court to receive and consider parties' proffered evidence; court was not required to receive live evidence in order to provide the party with an adequate opportunity to be fully heard before granting judgment under Rule 52(c)).

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CHAPTER 38 Dispositive Trial Motions 1
B Motion for Judgment on Partial Findings

3-38 Federal Litigation Guide § 38.42

§ 38.42 Invoking Judgment on Partial Findings

A judgment on partial findings may be invoked when: n1

- The party pursuing the claim has not demonstrated the elements of the claim either in fact or in law; or

- The evidence of the party pursuing the claim has established one of the opposing party's defenses as a matter of fact or law.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Eberhardt v. Comerica Bank, 171 B.R. 239, 243 (E.D. Mich. 1994)* .

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CHAPTER 38 Dispositive Trial Motions 1
B Motion for Judgment on Partial Findings

3-38 Federal Litigation Guide § 38.43

§ 38.43 Comparing Rule 52(c) to Predecessor, Rule 41(b)

The addition of subsection (c) to Rule 52 replaced a portion of Rule 41(b), which had permitted the district court to dismiss at the close of the plaintiff's case if the plaintiff failed to sustain the burden of proof on an essential matter. The cases that were decided under the predecessor statute, Rule 41(b), are often used by courts as precedent for cases decided under Rule 52(c).

Rule 52(c) is broader than its predecessor because it is not limited to the plaintiff. Judgment may be entered against either the plaintiffor defendant with respect to issues that may or may not be wholly dispositive of a claim or defense. n1 Furthermore, it allows a judgment to be entered at any time after the affected party has been fully heard with respect to the issue. The court no longer must wait until the conclusion of that party's case.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 52(c)* (this point was clarified in a 1993 technical and stylistic amendment to the Rule). *See Fed. R. Civ. P. 52* advisory committee note (1993).

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CHAPTER 38 Dispositive Trial Motions 1
B Motion for Judgment on Partial Findings

3-38 Federal Litigation Guide § 38.44

§ 38.44 Court Has Discretion Regarding Timing

The court in its discretion may enter a judgment on a claim after all the evidence on the crucial issue is heard, or the court may wait and render a judgment at the close of all the evidence. n1 The court may enter judgment upon its own motion or following a motion by a party. A judge who decides to wait until all the evidence has been heard will not be found to have committed an abuse of discretion. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 52(c).*

(n2)Footnote 2. *International Union of Operating Eng'rs, Local Union 103 v. Indiana Constr. Corp., 13 F.3d 253, 257 (7th Cir. 1994)* (trial court's decision to reserve ruling until the close of all the evidence "was certainly not an abuse of discretion in this case").

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CHAPTER 38 Dispositive Trial Motions 1
B Motion for Judgment on Partial Findings

3-38 Federal Litigation Guide § 38.45

§ 38.45 Court Must Make Findings and Conclusions to Enter a Judgment on Partial Findings

A decision to enter a judgment on partial findings must be supported by findings of fact and conclusions of law. n1 Of course, these findings are subject to all the requirements of clarity and completeness that are applicable to the findings that are required in any non-jury trial. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 52(c)*; *Martinez v. United States Sugar Corp., 880 F. Supp. 773, 775 (M.D. Fla. 1995)* , *aff'd*, *77 F.3d 497 (11th Cir. 1996)* (district court must weigh all evidence presented and set forth findings of fact and conclusions of law).

(n2)Footnote 2. *Gibbs v. King, 779 F.2d 1040, 1046 (5th Cir. 1986)* , *cert. denied*, *476 U.S. 1117 (1986)* (district court must enter findings on order of dismissal, and unclear or incomplete findings may require reversal).

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CHAPTER 38 Dispositive Trial Motions 1
B Motion for Judgment on Partial Findings

3-38 Federal Litigation Guide § 38.46

§ 38.46 Comparing Judgment on Partial Findings to JMOL

A trial court's evaluation of a motion for judgment on partial findings in a non-jury case or a case with an advisory jury must be distinguished from the court's consideration of a motion for judgment as a matter of law. Specifically, when issuing a judgment on partial findings the trial judge is not required to draw any special inferences in favor of the nonmoving party. n1 The judge may sustain a motion for judgment on partial findings even when the moving party has established a prima facie case. However, the court usually will not sustain the motion unless the prima facie case has been impeached in some way. n2 A trial judge who is deciding whether to order a judgment on partial findings must evaluate and weigh all the evidence, make determinations regarding credibility, and resolve the case on the basis of the preponderance of the evidence. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Geddes v. Northwest Mo. State Univ., 49 F.3d 426, 429 n.7 (8th Cir. 1995)* (in deciding whether to enter judgment against plaintiff in civil rights action for failure to renew employment contract, trial court did not have to consider evidence in light favorable to non-moving party).

(n2)Footnote 2. *Holmes v. Bevilacqua, 794 F.2d 142, 147 (4th Cir. 1986)* (referring to predecessor Rule 41(b), judge may sustain defendant's motion even though prima facie case may have been presented).

(n3)Footnote 3. *International Union of Operating Eng'rs, Local Union 103 v. Indiana Constr. Corp., 13 F.3d 253, 257 (7th Cir. 1994)* (court should weigh evidence, resolve any conflicts, and decide where preponderance lies).

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CHAPTER 38 Dispositive Trial Motions 1
B Motion for Judgment on Partial Findings

3-38 Federal Litigation Guide § 38.47

§ 38.47 Appealing Judgment on Partial Findings

A district court's findings in support of a judgment on partial findings are reviewed in the same manner as the findings made in any other non-jury case. Thus, an appellate court that reviews a judgment made on partial findings may not set aside the findings of fact unless they are clearly erroneous, i.e., a review of the evidence leaves the court with a firm belief that a mistake has been made. n1 Conclusions of law are reviewed de novo. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsBench TrialsCivil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsStandards of ReviewClearly Erroneous Review

FOOTNOTES:
(n1)Footnote 1. *Southern Travel Club, Inc. v. Carnival Air Lines, Inc., 986 F.2d 125, 128-129 (5th Cir. 1993)* (in contract dispute, findings of district court supporting judgment for defendant on partial findings were not clearly erroneous).

(n2)Footnote 2. *Williams v. Fab-Con, Inc., 990 F.2d 228, 230 (5th Cir. 1993)* (conclusions of law are reviewed de novo).

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CHAPTER 39 Jury Instructions *

3-39 Federal Litigation Guide 39.syn

§ 39.syn Synopsis to Chapter 39: Jury Instructions *

§ 39.01 Providing Jury With Instructions Under Rule 51

§ 39.02 Submitting Proposed Instructions in Timely Manner
[1] Avoiding Waiver of Right to Instruction
[2] Filing Proposed Instructions

§ 39.03 Beginning Drafting Process At Onset of Litigation

§ 39.04 Governing Law Depends on Type of Case
[1] Governing Law in Diversity Cases
[2] Governing Law in Federal Cases

§ 39.05 Evaluating Sources for Proposed Instructions
[1] Using Standardized Instructions
[2] Incorporating Statutory Language Into Instructions
[3] Incorporating Case Law Into Instructions
[4] Incorporating Restatements Into Instructions

§ 39.06 Drafting Proposed Jury Instructions
[1] Drafting Instructions on all Issues Presented
[2] Written Instructions Required
[3] Form of Instructions
[4] Using Clear Language
[5] Stating Law Correctly in Proposed Instructions

§ 39.07 Drafting General Instructions

§ 39.08 Drafting Case-Specific Instructions

§ 39.09 Objecting to Proposed Instructions
[1] Objecting After Court Advisement
[2] Purpose of Objection Right
[3] Attending Instructions Conference

[4] Objecting on the Record
[5] Raising Timely Objection
[6] Making Specific and Distinct Objections
[7] Submission of Alternative Instruction Not Sufficient to Preserve Objection
[8] Court's Rejection of Request on Record Preserves Right to Appeal

§ 39.10 Excusing Failure to Object Based on Intervening Change of Controlling Law

§ 39.11 Choosing Jury Instructions is Within Court's Discretion

§ 39.12 Charging the Jury
[1] Giving Instructions During Trial to Limit Confusion
[2] Providing the Jury with Written Instructions
[3] Giving Additional Jury Instructions During Deliberations
[4] Giving Additional Instructions in Presence of Counsel

§ 39.13 Evaluating Standard of Appellate Review Regarding Jury Instruction Errors
[1] Considering Instructions in Context of Entire Trial
[2] Failing to Object Limits Review to Search for Plain Error

§ 39.14 Applying Law as It Exists at Time of Appeal on Review of Instructions

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CHAPTER 39 Jury Instructions *

3-39 Federal Litigation Guide Scope

Scope

SCOPE

This chapter covers every aspect of *Federal Rule of Civil Procedure 51*, which governs issues relating to jury instructions. The chapter provides discussion of the following topics:

- Drafting proposed jury instructions
- Submitting proposed instructions in a timely manner
- Evaluating sources for proposed instructions such as standardized and pattern instructions
- The acceptance or denial of jury instructions by the court
- The trial court's duties with respect to informing the parties of the content of the jury instructions before the charge
- Attending the charge conference and objecting to the court's proposed instructions on the record to preserve error
- Charging the jury
- The standard of appellate review for jury instruction errors

The chapter also discusses the trial court's discretion in fashioning instructions and the law to be applied in diversity actions and in cases brought under federal law.

Particular attention is paid to the requirement that objections be timely and specific, to the exceptions to the objection requirement, and to the standard of appellate review of both preserved and unpreserved instruction errors.

For examples of both general and substantive instructions for use in federal court, see Sand et al., ***Modern Federal Jury Instructions.***

For expanded coverage of jury instructions, *see* MOORE'S Federal Practice, Ch. 51, ***Instructions to Jury; Objections; Preserving a Claim of Error*** .

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CHAPTER 39 Jury Instructions *

3-39 Federal Litigation Guide § 39.01

§ 39.01 Providing Jury With Instructions Under Rule 51

The purpose of jury instructions is to give the jury a clear and concise statement of the law applicable to the facts of the case. n1 Jury instructions are meant to "clarify issues for the jury and to educate the jury about what factors are probative on those issues." n2

Rule 51 of the Federal Rules of Civil Procedure governs jury instructions and specifically addresses the following:

- Filing written requests for instructions in a timely manner n3
- The court's obligation to inform parties of proposed instructions and any action on requests, and to allow an opportunity to object on the record to the proposed instructions n4
- When the court may instruct the jury n5
- Making timely objections to instructions or the court's action on instruction requests n6
- Preserving a claim of error in instructions through proper requests and/or objections n7
- Plain error review of instructions n8

The provisions of Rule 51 not only apply to the trial court's instructions to the jury, but also to special verdicts and interrogatories under Rule 49, n9 verdict forms, n10 and instructions on the form of the verdict to be returned by the jury. n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsObjections to InstructionsCivil ProcedureTrialsJury TrialsJury InstructionsRequests for InstructionsCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureTrialsJury TrialsJury InstructionsSupplemental InstructionsCivil ProcedureAppealsStandards of ReviewPlain ErrorGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Christopher v. Cutter Lab., 53 F.3d 1184, 1194 (11th Cir. 1995)* .

(n2)Footnote 2. *Spesco, Inc. v. General Elec. Co., 719 F.2d 233, 239 (7th Cir. 1983)* .

(n3)Footnote 3. *Fed. R. Civ. P. 51(a).*

(n4)Footnote 4. *Fed. R. Civ. P. 51(b).*

(n5)Footnote 5. *Fed. R. Civ. P. 51(b).*

(n6)Footnote 6. *Fed. R. Civ. P. 51(c).*

(n7)Footnote 7. *Fed. R. Civ. P. 51(d)(1).*

(n8)Footnote 8. *Fed. R. Civ. P. 51(d)(2).*

(n9)Footnote 9. *Matei v. Cessna Aircraft Co., 35 F.3d 1142, 1146 (7th Cir. 1994)* .

(n10)Footnote 10. *McGuire v. Davidson Mfg. Corp., 398 F.3d 1005, 1009 (8th Cir. 2005)* .

(n11)Footnote 11. *Correa v. Hospital San Francisco, 69 F.3d 1184, 1195 (1st Cir. 1995)* , *cert. denied sub nom. Hospital S.F. v. Gonzalez, 517 U.S. 1136 (1996)* .

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CHAPTER 39 Jury Instructions *

3-39 Federal Litigation Guide § 39.02

§ 39.02 Submitting Proposed Instructions in Timely Manner

[1] Avoiding Waiver of Right to Instruction

A federal district court judge must instruct the jury as to the law and the burden of proof and must give reasonable guidance to the jury on the facts of the case. Apart from the plain error doctrine recognized in Rule 51(d)(2), a court is not obliged to instruct the jury on issues raised by the evidence unless a party requests an instruction. n1 If a party fails to request a certain instruction on a necessary element of its claim or defense, and does not demonstrate plain error on the court's part in failing to *sua sponte* formulate and give the appropriate instruction, the party will have waived any further relief with respect to that issue. n2 It is therefore incumbent on counsel to submit proposed instructions in a timely manner. n3

[2] Filing Proposed Instructions

Parties are required to file with the court and furnish to every other party written proposed jury instructions either: n4

- At the close of the evidence, or
- At an earlier reasonable time that the court directs

It is becoming increasingly common for judges to require submission of proposed jury instructions at the time that pre-trial materials are submitted to the court, which in many courts may be weeks or even months before trial. n5

After the close of evidence, a party may file requests for instructions on issues that could not reasonably have been anticipated at an earlier time. n6 In addition, a party may seek the court's permission to file an untimely request for instructions on any issue. n7

Local rules and court practices vary as to when instructions must be submitted and local rules should be consulted.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsObjections to InstructionsCivil ProcedureTrialsJury TrialsJury InstructionsRequests for Instructions

FOOTNOTES:

(n1)Footnote 1. *Harless v. Boyle-Midway Div. Am. Home Prods., 594 F.2d 1051, 1057 (5th Cir. 1979)* .

(n2)Footnote 2. *Missouri P. R. Co. v. Star City Gravel Co., 592 F.2d 455, 459 (8th Cir. 1979)* .

(n3)Footnote 3. *Unit Drilling Co. v. Enron Oil & Gas Co., 108 F.3d 1186, 1190 (10th Cir. 1997)* .

(n4)Footnote 4. *Fed. R. Civ. P. 51(a)(1).*

(n5)Footnote 5. *See Senra v. Cunningham, 9 F.3d 168, 170-171 (1st Cir. 1993)* (Rule 16 justified pretrial order which required parties to submit all proposed jury instructions 20 days prior to trial).

(n6)Footnote 6. *Fed. R. Civ. P. 51(a)(2)(A).*

(n7)Footnote 7. *Fed. R. Civ. P. 51(a)(2)(B).*

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CHAPTER 39 Jury Instructions *

3-39 Federal Litigation Guide § 39.03

§ 39.03 Beginning Drafting Process At Onset of Litigation

Because proper instructions define the elements and issues which must be proved or challenged, the drafting of instructions should start early in the preparation of the case.

The best time to finalize proposed instructions is before the trial begins, when there is time for deliberate thought. In many jurisdictions, parties are required to exchange proposed instructions and objections in advance of trial. The final pretrial order will often dictate the timing of that exchange.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsRequests for Instructions

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CHAPTER 39 Jury Instructions *

3-39 Federal Litigation Guide § 39.04

§ 39.04 Governing Law Depends on Type of Case

[1] Governing Law in Diversity Cases

In order to prevent the widespread abuse of diversity jurisdiction, the Supreme Court has held that" [e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the [forum] State." n1 Accordingly, a federal court exercising diversity or supplemental jurisdiction must apply state law to matters of substantive law, including the substance of jury instructions. n2 This rule applies even if the district court disagrees with the substance of the law of the forum state, or finds it ill-advised. n3

In the absence of precedent set by the forum state's highest court, however, the federal court is not required to follow the law of intermediate state appellate courts interpreting state law. Nonetheless, it generally will abide by an intermediate appellate court's interpretation of state law unless the federal court is convinced that the state's highest court would decide the issue differently. n4 Furthermore, before automatically applying the substantive law of the forum state, a federal court sitting in diversity must first apply the forum state's choice of law rules, which may or may not select the forum state's substantive law to govern the dispute. n5

While state law governs the substance of jury instructions in a federal diversity or supplemental jurisdiction action, federal law governs the procedural aspects of instructing the jury such as the timing and manner of filing of proposed instructions and the granting or denial of proposed instructions by the court. n6

[2] Governing Law in Federal Cases

Federal law governs both substantive and procedural aspects of jury instructions in actions based on federal law. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsRequests for InstructionsCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsConstitutional LawThe JudiciaryJurisdictionDiversity

FOOTNOTES:
(n1)Footnote 1. *Erie R.R. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)* .

(n2)Footnote 2. *Salve Regina Coll. v. Russell, 499 U.S. 225, 231-233, 111 S. Ct. 1217, 113 L. Ed. 2d 190 (1991)* .

(n3)Footnote 3. *Kassel v. Gannett Co., Inc., 875 F.2d 935, 949-950 (1st Cir. 1989)* .

(n4)Footnote 4. *DePaepe v. General Motors Corp., 33 F.3d 737, 742 (7th Cir. 1994)* .

(n5)Footnote 5. *S. A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 50 F.3d 476, 478 (7th Cir. 1995)* , *cert. denied, 516 U.S. 1010 (1995)* .

(n6)Footnote 6. *Hardin v. Ski Venture, Inc., 50 F.3d 1291, 1293-1294 (4th Cir. 1995)* .

(n7)Footnote 7. *Everett v. Carnival Cruise Lines, 912 F.2d 1355, 1358 (11th Cir. 1990)* .

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CHAPTER 39 Jury Instructions *

3-39 Federal Litigation Guide § 39.05

§ 39.05 Evaluating Sources for Proposed Instructions

[1] Using Standardized Instructions

A good way to begin the process of drafting jury instructions typically is to refer to standardized and pattern instructions. Such instructions often carry great weight with the court and are excellent resource tools. Some circuits, including the Fifth Circuit, the Eighth Circuit, the Ninth Circuit, and the Eleventh Circuit, have published model civil jury instructions, which are compilations of standard instructions routinely used by the courts. Model instructions typically cover introductory, evidentiary, and concluding instructions and may also include substantive instructions for certain types of cases such as patent and securities actions.

In addition, there are a variety of standardized instruction books and practice guides that contain suggested instructions with citations to relevant authorities. Many standardized instructions contain bracketed information or blanks that need to be particularized for the case at hand. The citations to relevant authorities may be helpful to tailor form instructions to a particular case, or aid in the drafting of supplemental instructions. Proposed instructions should include all relevant authorities, and some courts require a citation for the source of the published standard instructions.

State law pattern jury instructions are a valuable resource for instructions on when state law governs substantive law issues in diversity cases. n1

For a comprehensive guide to standardized and pattern instructions for use in federal court, see Sand et al., ***Modern Federal Jury Instructions.***

[2] Incorporating Statutory Language Into Instructions

It is never error to incorporate the relevant language of a statute into an instruction and such incorporation is common practice. n2 Indeed, when statutory law governs the case, the use of statutory language may be preferred. n3 Oftentimes, however, statutory language must be tailored to the specific facts of the case at hand before it can be made meaningful to the jury. The Federal Circuit held that a court" abdicated its responsibility to inform the jury of how the statute applies to the particular case" when it merely instructed the jury as to the language of the statute. n4

[3] Incorporating Case Law Into Instructions

To avoid reversal and to attain accuracy, some judges will limit their charges to quotations from decisions of the

appellate courts. Many attorneys do the same when submitting their requests for instructions. However, the language used by an appellate judge or a Supreme Court justice may not be appropriate for a jury charge; it depends on whether the words clearly and plainly communicate the applicable legal principles to the jurors. n5 The jury should not be instructed in the language of an appellate opinion where the language would be misleading. n6

An instruction which is proper under the facts of one case may be improper under inapposite facts of another case. n7 Before relying on an "approved" instruction, the facts and contentions in the case must be carefully evaluated and compared with those of the case approving the instruction.

[4] Incorporating Restatements Into Instructions

Restatements of the law can be a valuable resource for use in the drafting of proposed jury instructions. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsObjections to InstructionsCivil ProcedureTrialsJury TrialsJury InstructionsPeremptory InstructionsCivil ProcedureTrialsJury TrialsJury InstructionsRequests for InstructionsCivil ProcedureTrialsJury TrialsJury InstructionsStandard Instructions

FOOTNOTES:
(n1)Footnote 1. *Bersett v. K-Mart Corp., 869 F.2d 1131, 1135 (8th Cir. 1989)* .

(n2)Footnote 2. *United States v. Faurote, 749 F.2d 40, 45 (7th Cir. 1984)* (citing cases).

(n3)Footnote 3. *See, e.g., Monahan v. Flannery, 755 F.2d 678, 681 (8th Cir. 1985)* .

(n4)Footnote 4. *Structural Rubber Prods. v. Park Rubber, 749 F.2d 707, 723 (Fed. Cir. 1984)* .

(n5)Footnote 5. *United States Lines Co. v. Williams, 365 F.2d 332, 335 (5th Cir. 1966)* .

(n6)Footnote 6. *Johnson v. Bryant, 671 F.2d 1276, 1280-1281 (11th Cir. 1982)* .

(n7)Footnote 7. *See* Keeton, *Trial Tactics and Methods,* § 6.4 at 239-40 (1973).

(n8)Footnote 8. *See Kane v. J.R. Simplot Co., 60 F.3d 688, 691 (10th Cir. 1995)* .

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CHAPTER 39 Jury Instructions *

3-39 Federal Litigation Guide § 39.06

§ 39.06 Drafting Proposed Jury Instructions

[1] Drafting Instructions on all Issues Presented

Because the purpose of jury instructions is to give the jury a clear and concise statement of the law that applies to the facts of the case, a litigant is entitled to an instruction on its theory of the case only if the instruction is supported both by the law and the evidence adduced at trial. n1 In this regard, a litigant is entitled to have the jury instructed on a particular claim or theory even if the evidence at trial was minimal or was presented in a piecemeal fashion. n2 Jury instructions must be formulated so that they fairly and adequately cover the issues presented, correctly state the law, and are not misleading. n3

[2] Written Instructions Required

Rule 51 offers little guidance as to the form of instructions, although it requires that requested instructions be in written form. n4

[3] Form of Instructions

Since the form of instructions may be governed by local rules, local rules must be consulted prior to drafting proposed instructions. For instance, Local Rule 51.1 for the Southern District of California requires that each instruction cover one subject in a concise manner on a separate page which includes the following information:

- The number of the instruction in consecutive order
- Subject matter of instruction
- Name of submitting party
- Citation to authorities supporting the instruction

A disposition block in the lower left corner of each instruction page (below the cited authority) is generally required. The block will typically state the following possible dispositions for the court to endorse: Given, Given as Modified, Refused, or Withdrawn. The block may also include a signature line for the judge's signature. Depending on local rules and practice requirements, jury instructions will typically also include a caption page and a table of contents with each

instruction consecutively numbered.

The court also may require the submission of a clean set of instructions which include only the name of the instruction and the instruction itself, with no identifying information about the submitting party and without citations or disposition blocks. The clean copy is used for presentation to the jury.

Instructions generally should be organized in a manner consistent with presentation to the jury, beginning with introductory issues regarding the jury's general responsibilities, then covering evidentiary and burden issues, followed by substantive law instructions on the issues presented, and ending with concluding instructions regarding the manner of deliberations and the rendering of a verdict.

[4] Using Clear Language

In order to accomplish their purposes, jury instructions must be comprehensible to the jurors. Research into jurors' comprehension of instructions reveals that legalistic language and terminology often make jury instructions confusing. n5 Accordingly, the trial court's instructions should avoid legalistic terms, and present controlling principles in a clear, concise, and forthright manner. n6

[5] Stating Law Correctly in Proposed Instructions

A party should cite legal authority in support of a proposed instruction, which should correctly set forth the applicable law. n7 While the trial court may properly refuse a proposed instruction that is not correct, n8 Rule 51 does not require technical perfection. If the instruction concerns an issue crucial to the proper determination of the case, proffer of an instruction containing an error of law, but sufficient to alert the district court to the need for a particular charge, may provide the basis for a new trial if the court fails to instruct the jury on the issue. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsObjections to InstructionsCivil ProcedureTrialsJury TrialsJury InstructionsRequests for InstructionsCivil ProcedureTrialsJury TrialsJury InstructionsStandard Instructions

FOOTNOTES:
(n1)Footnote 1. *Gizoni v. Southwest Marine Inc., 56 F.3d 1138, 1141-1142 (9th Cir. 1995) , cert. denied, 516 U.S. 944 (1995) .*

(n2)Footnote 2. *BAII Banking Corp., v. UPG, Inc. 985 F.2d 685, 695 (2d Cir. 1993) .*

(n3)Footnote 3. *Chuman v. Wright, 76 F.3d 292, 294 (9th Cir. 1996) .*

(n4)Footnote 4. *Fed. R. Civ. P. 51(a).*

(n5)Footnote 5. Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions, 79 Colum. L. Rev. 1306 (1979).*

(n6)Footnote 6. *Gehring v. Case Corp., 43 F.3d 340, 345 (7th Cir. 1994) , cert. denied, 515 U.S. 1159 (1995) .*

(n7)Footnote 7. *Fikes v. Cleghorn, 47 F.3d 1011, 1013 (9th Cir. 1995) .*

(n8)Footnote 8. *Trytko v. Hubbell, Inc., 28 F.3d 715, 725 (7th Cir. 1994) .*

(n9)Footnote 9. *Bueno v. City of Donna, 714 F.2d 484, 490 (5th Cir. 1983)* .

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CHAPTER 39 Jury Instructions *

3-39 Federal Litigation Guide § 39.07

§ 39.07 Drafting General Instructions

The court's charge to the jury generally includes routine matters that are not case-specific. The extent of such instruction depends on the particular judge and the particular case. Almost all trial judges have a favorite set of instructions relating to routine and recurring matters, such as burden of proof, preponderance of the evidence, and credibility of witnesses.

Although the judge may disregard the parties' requests on these matters, counsel nonetheless should consider submitting requests on these issues. For example, particular types of cases require the application of special rules concerning burdens of proof, and in those cases a critical eye should be given to general burden of proof instructions to make sure they are appropriate. Form instructions regarding damages may also require special tailoring to meet the needs of the case.

Normally, the following matters should be covered in the judge's charge to the jury:

- Nature of the action
- Issues
- Province of the jury
- Burden of proof
- Elements of the plaintiff's cause of action (and of the defendant's counterclaim or affirmative defenses)
- Application of law to facts
- Inferences
- Presumptions
- Effect of rulings on objections and motions

- Preponderance of the evidence
- Weight of the evidence
- Credibility of witnesses
- Interest of witnesses
- False testimony
- Expert testimony
- Sympathy, prejudice and bias may not be considered
- Jurors may use common sense and experience in life
- Damages
- Number required for verdict
- Form of verdict

Obviously, this list is not exhaustive. What should be included depends on the particular case.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsObjections to InstructionsCivil ProcedureTrialsJury TrialsJury InstructionsRequests for Instructions

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CHAPTER 39 Jury Instructions *

3-39 Federal Litigation Guide § 39.08

§ 39.08 Drafting Case-Specific Instructions

The first step to preparing case-specific jury instructions is to have an understanding of the theories of the case, the law supporting those theories, and the evidence which is expected to be adduced at trial. The primary focus will be to draft instructions relating to the issues and the theories of the case. In a case in which the law is not well settled, counsel should also prepare alternative requests, particularly when there is a primary and a secondary legal theory in support of the case. The following issues should be considered when drafting case-specific instructions:

- The legal elements of each of the relevant claims
- The legal elements of each defense and counterclaim
- Damages
- Any issue that may be unique to the case

Just as general form instructions are useful and often required resources for the submission of proposed instructions, specialized form books are a useful resource for drafting case-specific instructions, especially since form instructions can be tailored to the case at hand. It is generally good practice to indicate on the proposed instruction the source of the standardized instruction, and any modifications that have been made to the instruction with relevant authority.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsObjections to InstructionsCivil ProcedureTrialsJury TrialsJury InstructionsRequests for Instructions

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CHAPTER 39 Jury Instructions *

3-39 Federal Litigation Guide § 39.09

§ 39.09 Objecting to Proposed Instructions

[1] Objecting After Court Advisement

The court must inform the parties, before instructing the jury and before final arguments to the jury related to the instruction, of the proposed instructions as well as the proposed action on instruction requests. n1 The time limit is addressed to final jury arguments to reflect the practice that allows interim arguments during trial in complex cases. The court is further required to give the parties an opportunity to object on the record and out of the jury's hearing to the proposed instructions and actions on requests before the instructions and arguments are delivered. n2

[2] Purpose of Objection Right

The primary purpose of providing the parties with an opportunity to object to proposed instructions under Rule 51 is to ensure that litigants draw the trial court's attention to deficiencies in the jury charge, so that the court may correct errors in jury instructions before the jurors retire to deliberate. n3

Absent a distinct and timely objection, a litigant may not challenge on appeal any error in the giving, or failure to give, an instruction. n4 By ensuring that errors are brought to the trial court's attention before the jury begins to deliberate, n5 Rule 51 preserves scarce judicial resources n6 and reduces the burden on appellate courts by diminishing the number of possible appeals. n7

Additionally, the Rule "vindicates [a] powerful interest in orderliness and finality," n8 and prevents a litigant from remaining silent in the face of an incorrect instruction, hoping to obtain a favorable verdict despite the error, and planning to use the error to seek a new trial in the event of an unfavorable verdict. n9

[3] Attending Instructions Conference

Typically, the court will schedule a charge conference after conclusion of the evidence to provide the parties an opportunity to object to the court's proposed action with regard to jury instructions. In some courts it is common practice for judges to provide the parties copies of the court's proposed instructions in advance of the conference for comment. The instructions conference must be held on the record. n10

[4] Objecting on the Record

A party who objects to an instruction or the failure to give an instruction must do so on the record, stating each of the following distinctly: n11

- The matter objected to
- The grounds of the objection

Each party has the obligation and burden of voicing objections; litigants involved in multi-party suits may not rely on objections made by co-parties but may adopt a co-party's objections as their own if they do so expressly. n12 Except in certain narrowly defined circumstances, a litigant's failure to object to an error in the jury charge forfeits the ability to challenge that error on appeal. n13

To meet the objection requirement, it is not necessary that a litigant use the words "I object" or "objection." It is sufficient that the litigant give the district court the information needed for the court to avoid an error in the jury instructions. n14

[5] Raising Timely Objection

An objection is timely if: n15

- A party that has been informed of an instruction or action on a request before the jury is instructed and before final jury arguments objects under Rule 51(b)(2) when given the opportunity to do so by the court; or
- A party that has not been informed of an instruction or action on a request before the time for objection under Rule 51(b)(2) objects promptly after learning that the instruction or request will be, or has been, given or refused

[6] Making Specific and Distinct Objections

Rule 51 requires that objections be distinct, and that litigants state the grounds for their objections. n16 Litigants voicing objections to the court's charge must do so on the record and take care that the court is aware that counsel has an objection to the charge, n17 and not merely a preference for a different one, n18 counsel should make sure that the objection "bring[s] into focus the precise nature of the alleged error." n19

Just as compliance with Rule 51 does not require "surgical precision," n20 neither does it require the submission of a written instruction to preserve the issue for appeal, n21 but an objection must be sufficiently clear so that the grounds stated are obvious, plain, or unmistakable. n22 A general objection, or an objection unaccompanied by a statement of the grounds will not preserve error for appellate review. n23 Thus, a party's oblique reference to cases that might support an objection to a jury instruction is not sufficiently specific to give the district court notice of potential errors in the instruction. n24 Similarly, an objection on one ground will not preserve for appeal a claim of error on another. n25 Moreover, merely referring to requested instructions by number when voicing objections to the court's charge is insufficient to preserve any error, because such an objection fails to satisfy the specific and distinct requirements for Rule 51 objections. n26

[7] Submission of Alternative Instruction Not Sufficient to Preserve Objection

A litigant may not rely solely on the proffer of alternative instructions to preserve a claim of error for appeal. The requirements that objections to instructions given or refused be specific and that the grounds for the objection be stated distinctly mean that in addition to the proffer of instructions, a litigant must object to a specific error in the court's

charge, or provide an explanation why the proffered instruction is preferable. Accordingly, the mere submission of a proposed instruction will not be considered an objection to the instruction as given. n27 It is therefore critical to specifically point out the objectionable instruction and to specify the grounds for the objection. n28

[8] Court's Rejection of Request on Record Preserves Right to Appeal

If the court has made it clear on the record that that a request has been considered and rejected on the merits, Rule 51 specifically establishes authority to review the failure to grant a timely request, despite a failure to add a formal objection. n29

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsObjections to InstructionsCivil ProcedureTrialsJury TrialsJury InstructionsRequests for Instructions

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 51(b)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 51(b)(2).*

(n3)Footnote 3. *Caruso v. Forslund, 47 F.3d 27, 30-31 (2d Cir. 1995) .*

(n4)Footnote 4. *Chestnut v. City of Lowell, 305 F.3d 18, 20 (1st Cir. 2002)* (en banc) (per curiam); *Graham v. Davis, 880 F.2d 1414, 1420 (D.C. Cir. 1989) .*

(n5)Footnote 5. *Palmer v. Hoffman, 318 U.S. 109, 119, 63 S. Ct. 477, 87 L. Ed. 645 (1943) .*

(n6)Footnote 6. *Elder v. Holloway, 984 F.2d 991, 998 (9th Cir. 1993) .*

(n7)Footnote 7. *McAdam v. Dean Witter Reynolds, Inc., 896 F.2d 750, 769 n.29 (3d Cir. 1990) .*

(n8)Footnote 8. *Highlands Ins. Co. v. National Union Fire Ins. Co., 27 F.3d 1027, 1032 (5th Cir. 1994) , cert. denied, 513 U.S. 1112 (1995) .*

(n9)Footnote 9. *Glaros v. H.H. Robertson Co., 797 F.2d 1564, 1572 (Fed. Cir. 1986) .*

(n10)Footnote 10. *Fed. R. Civ. P. 51(b)(2).*

(n11)Footnote 11. *Fed. R. Civ. P. 51(c)(1).*

(n12)Footnote 12. *Osterneck v. E.T. Barwick Indus., Inc., 825 F.2d 1521, 1532-1533 (11th Cir. 1987) , aff'd on other grounds, 489 U.S. 169, 169, 109 S. Ct. 987, 103 L. Ed. 2d 146 (1989) .*

(n13)Footnote 13. *Jones v. Spentonbush-Red Star Co., 155 F.3d 587, 590 (2d Cir. 1998) .*

(n14)Footnote 14. *Orix Credit Alliance, Inc. v. Taylor Mach. Works, Inc., 125 F.3d 468, 477-478 (7th Cir. 1997) .*

(n15)Footnote 15. *Fed. R. Civ. P. 51(c)(2).*

(n16)Footnote 16. *Fed. R. Civ. P. 51(c)(1); see Taita Chem. Co., Ltd. v. Westlake Styrene, 351 F.3d 663, 668 (5th Cir. 2003) ; Negron v. Caleb Brett U.S.A., Inc., 212 F.3d 666, 671-672 (1st Cir. 2000) .*

(n17)Footnote 17. *Jardien v. Winston Network, Inc., 888 F.2d 1151, 1156-1157 (7th Cir. 1989) .*

(n18)Footnote 18. *United States v. Parsons Corp., 1 F.3d 944, 945 (9th Cir. 1993)* .

(n19)Footnote 19. *Westcott v. Crinklaw, 133 F.3d 658, 662 (8th Cir. 1998)* .

(n20)Footnote 20. *Exxon Corp. v. Amoco Oil Co., 875 F.2d 1085, 1090 (4th Cir. 1989)* .

(n21)Footnote 21. *Unit Drilling Co. v. Enron Oil & Gas Co., 108 F.3d 1186, 1190 n.5 (10th Cir. 1997)* .

(n22)Footnote 22. *Royal Maccabees Life Ins. Co. v. Choren, 393 F.3d 1175, 1179 (10th Cir. 2005)* ; *Comcoa, Inc. v. NEC Tel., Inc., 931 F.2d 655, 660 (10th Cir. 1991)* .

(n23)Footnote 23. *Taita Chem. Co., Ltd. v. Westlake Styrene, 351 F.3d 663, 667 (5th Cir. 2003)* .

(n24)Footnote 24. *Drohan v. Vaughn, 176 F.3d 17, 21 n.1 (1st Cir. 1999)* .

(n25)Footnote 25. *Travelers Indem. Co. v. Scor Reinsurance Co., 62 F.3d 74, 79 (2d Cir. 1995)* .

(n26)Footnote 26. *Jerlyn Yacht Sales, Inc. v. Wayne R. Roman Yacht Brokerage, 950 F.2d 60, 66 (1st Cir. 1991)* .

(n27)Footnote 27. *Caruso v. Forslund, 47 F.3d 27, 31 (2d Cir. 1995)* .

(n28)Footnote 28. *See City of Wichita v. United States Gypsum Co., 72 F.3d 1491, 1495 (10th Cir. 1996)* .

(n29)Footnote 29. *Fed. R. Civ. P. 51(d)(1)(B).*

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CHAPTER 39 Jury Instructions *

3-39 Federal Litigation Guide § 39.10

§ 39.10 Excusing Failure to Object Based on Intervening Change of Controlling Law

On direct review, an appellate court must apply the law in effect at the time it renders its decision. n1 Because the purpose of Rule 51 is to alert the trial court to instruction errors, a litigant is not required to anticipate a change in the law and object to an instruction that is correct when given but that is rendered incorrect by a subsequent change in the controlling law. n2

Accordingly, a change in the controlling law during the pendency of an appeal excuses strict compliance with the objection requirement of Rule 51, n3 and permits a challenge to the instruction, despite the absence of objection below. n4

This narrow exception to the objection requirement applies only to intervening decisions that announce a substantial departure from a previous rule of law; intervening decisions that merely clarify the law as it existed at trial will not excuse a failure to object at trial. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsObjections to InstructionsCivil ProcedureTrialsJury TrialsJury InstructionsRequests for InstructionsCivil ProcedureAppealsReviewabilityGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Hegger v. Green, 646 F.2d 22, 26 (2d Cir. 1981)* .

(n2)Footnote 2. *Phillips v. Cameron Tool Corp., 950 F.2d 488, 491 (7th Cir. 1991)* .

(n3)Footnote 3. *Brown v. M&M/Mars, 883 F.2d 505, 512-513 (7th Cir. 1989)* .

(n4)Footnote 4. *Hegger v. Green, 646 F.2d 22, 27 (2d Cir. 1981)* .

(n5)Footnote 5. *Castrignano v. E. R. Squibb & Sons, Inc., 900 F.2d 455, 460 (1st Cir. 1990)* .

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CHAPTER 39 Jury Instructions *

3-39 Federal Litigation Guide § 39.11

§ 39.11 Choosing Jury Instructions is Within Court's Discretion

Subject to the requirement that instructions be adequate to guide the jury's deliberations in a proper and meaningful manner, a district court judge enjoys wide latitude in choosing and fashioning instructions. n1 Accordingly, the district court is not required to use the exact wording of a litigant's proffered instructions, nor must the court give every correct instruction submitted by litigants, n2 give a redundant instruction, n3 or adhere to the forum state's pattern instructions.

Many federal judges have their own sets of standard instructions which they give to juries in civil cases. These instructions do not embrace the particular issues in every case but frequently they include a format for the presentation of those issues. Counsel must obtain these standard instructions which, of course, will vary from judge to judge, and study them, looking to see whether they are accurate and adequate. As with any other inadequate instruction, counsel must object to standard instructions issued by the court if the instructions are inadequate to properly guide the jury's deliberations. Some judges give preliminary instructions to the jury as soon as it is empaneled. Counsel must obtain and study those instructions as well. The district court, however, may properly refuse to give an instruction that is without evidentiary support. n4 It should be noted that the evidence supporting an issue need only to be minimal to entitle a litigant to an instruction. n5

The court may reject an instruction that is argumentative, n6 or contains an error of law. n7 Despite the broad discretion vested in the district court, it must be recalled that "ultimately, it is the responsibility of the court to be sure that the jury is properly instructed." n8 Accordingly, when a litigant proposes an instruction addressing an issue that is crucial to the fair presentation of the case, the district court may have an obligation to fashion an appropriate instruction on the issue, even if the tendered instruction is incorrect or deficient in some respect. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsObjections to InstructionsCivil ProcedureTrialsJury TrialsJury InstructionsRequests for Instructions

FOOTNOTES:
(n1)Footnote 1. *Hardin v. Ski Venture, Inc., 50 F.3d 1291, 1293 (4th Cir. 1995)* .

(n2)Footnote 2. *Adams v. Sewell, 946 F.2d 757, 767-768 (11th Cir. 1991)* .

(n3)Footnote 3. *Trademark Research Corp. v. Maxwell Online Inc., 995 F.2d 326, 340 (2d Cir. 1993)* .

(n4)Footnote 4. *Roberts v. Wal-Mart Stores, Inc., 7 F.3d 1256, 1258 (5th Cir. 1993)* .

(n5)Footnote 5. *BAII Banking Corp. v. UPG, Inc., 985 F.2d 685, 695-696 (2d Cir. 1993)* .

(n6)Footnote 6. *S. A. Healy Co., v. Milwaukee Metro. Sewerage Dist., 50 F.3d 476, 480 (7th Cir. 1995)* , *cert. denied, 516 U.S. 1010 (1995)* .

(n7)Footnote 7. *Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1219 (5th Cir. 1995)* .

(n8)Footnote 8. *Dahlgren v. United States, 553 F.2d 434, 440 (5th Cir. 1977)* .

(n9)Footnote 9. *Bosse v. Litton Unit Handling Sys., 646 F.2d 689, 693 (1st Cir. 1981)* .

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CHAPTER 39 Jury Instructions *

3-39 Federal Litigation Guide § 39.12

§ 39.12 Charging the Jury

[1] Giving Instructions During Trial to Limit Confusion

The court may instruct the jury at any time after trial begins and before the jury is discharged. n1 Although the judge decides when to instruct the jury, counsel should urge that relevant instructions be given early and as often as necessary to minimize jury confusion. For example, certain instructions may be given at the outset of the case to place the law and facts of the case in perspective for the jury. Instructions also may be given during the presentation of evidence at trial, as when the court instructs the jury to disregard a statement, cautions the jury not to discuss the case with family or friends, or advises the jury that certain evidence is being admitted for only a limited purpose. Generally, however, jury instructions are charged at the last stage of the trial when the judge provides a comprehensive road map for the jury to use in deciding the case.

[2] Providing the Jury with Written Instructions

One way to help the jurors understand the instructions is to provide a copy for them to follow while the judge is delivering the charge or to permit them to take a copy of the instructions with them into the jury room. Although federal district judges vary as to their willingness to give copies of instructions to jurors, no rule prohibits their doing so. The trend is toward giving earlier instructions and providing copies to the jurors.

Each juror should have his or her own set of the instructions so that during deliberations, they may review the instructions together. While litigants are not entitled to the best possible instruction, n2 at a minimum the court's instructions must give the jury adequate guidance to intelligently determine the questions presented. n3

[3] Giving Additional Jury Instructions During Deliberations

The court has discretion to provide additional instructions to the jury after the jury has retired for deliberation. Any supplemental instructions must be delivered in the presence of counsel and counsel must object at that time or the objection is waived.

Once the jury has retired to deliberate, the law imposes strict rules prohibiting communication with the jury. The trial court should make a record of all communications between the court and the jury. All comments by the judge to the jury should be made in open court.

[4] Giving Additional Instructions in Presence of Counsel

Sometimes the jury may request additional information from the court. The request may relate to testimony, exhibits or the judge's charge. The jury may even ask for additional instructions or clarification of the instructions already given. Whether or not additional instructions will be given is within the discretion of the court. Although it is error for the judge to give such instructions outside of the presence of counsel, the court may satisfy this obligation by making reasonable efforts to inform counsel and by providing counsel with a reasonable opportunity to be present.

The court need not delay jury deliberations unreasonably while counsel is being located. Therefore, in preparation for any eventuality during jury deliberations, counsel should be readily available and provide the court with adequate information to assure that proper contact is made.

Essentially the rules relating to the giving of initial instructions apply equally to supplemental instructions. The court should inform counsel of the substance of additional instructions to provide counsel with an opportunity to object.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsObjections to InstructionsCivil ProcedureTrialsJury TrialsJury InstructionsRequests for InstructionsCivil ProcedureTrialsJury TrialsJury InstructionsSupplemental Instructions

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 51(b)(3).*

(n2)Footnote 2. *Gehring v. Case Corp., 43 F.3d 340, 344, (7th Cir. 1994)* , *cert. denied, 515 U.S. 1159 (1995)* .

(n3)Footnote 3. *Bender v. Brumley, 1 F.3d 271, 276 (5th Cir. 1993)* .

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CHAPTER 39 Jury Instructions *

3-39 Federal Litigation Guide § 39.13

§ 39.13 Evaluating Standard of Appellate Review Regarding Jury Instruction Errors

[1] Considering Instructions in Context of Entire Trial

On appellate review, an error in instructions may not be viewed in isolation but must be examined in the context of the entire charge as part of an integrated whole. n1 Jury instructions need not be perfect to withstand appellate scrutiny, n2 and will not form the basis for reversal if the charge as a whole--when considered in the context of the entire trial--fairly and adequately covers the issues presented, correctly states the law, and is not misleading. n3

Even if an instruction misstates the applicable law or provides insufficient guidance on an issue, a court of appeals will disturb the judgment below only if the error could have affected the outcome of the trial; n4 otherwise, the error is considered harmless. n5

If the error affected only the jury's assessment of damages, the determination on the issue of liability remains and a remand for a new trial on damages only is the appropriate remedy. n6

[2] Failing to Object Limits Review to Search for Plain Error

A party preserves a claim of error when a proper objection under Rule 51(c) is made to an instruction that is subsequently given. n7 In addition, a party may assign as error the court's failure to give an instruction if a proper request was made for the particular instruction and, unless the court made a definitive ruling on the record rejecting the request, the party also makes a proper objection under Rule 51(c). n8 Accordingly, a district court's failure to grant a timely request for a proposed instruction is subject to review once the court makes a definitive ruling regarding the request on the record.

An error not preserved under Rule 51 may also be reviewed in exceptional circumstances. Specifically, a court may consider a plain error in the instructions affecting substantial rights even if no party has preserved the error. n9 While it is difficult to precisely predict when plain error relief is warranted, the following factors may be considered: n10

- The obviousness of the mistake n11
- The importance of the error
- The costs of correcting the error

- The impact the verdict may have on nonparties

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsObjections to InstructionsCivil ProcedureAppealsReviewabilityGeneral OverviewCivil ProcedureAppealsStandards of ReviewHarmless & Invited ErrorsHarmless Error Rule

FOOTNOTES:
(n1)Footnote 1. *Trytko v. Hubbell, Inc., 28 F.3d 715, 725 (7th Cir. 1994)* .

(n2)Footnote 2. *Floyd v. Laws, 929 F.2d 1390, 1394 (9th Cir. 1991)* .

(n3)Footnote 3. *Hardin v. Ski Venture, Inc., 50 F.3d 1291, 1294 (4th Cir. 1995)* .

(n4)Footnote 4. *Bebout v. Norfolk & W. Ry. Co., 47 F.3d 876, 878 (7th Cir. 1995)* .

(n5)Footnote 5. *Arleth v. Freeport-McMoran Oil & Gas Co., 2 F.3d 630, 634 (5th Cir. 1993)* .

(n6)Footnote 6. *McLaughlin v. State Farm Mut. Auto. Ins. Co., 30 F.3d 861, 868-869 (7th Cir. 1994)* , *cert. denied, 513 U.S. 1149 (1995)* .

(n7)Footnote 7. *Fed. R. Civ. P. 51(d)(1)(A)*.

(n8)Footnote 8. *Fed. R. Civ. P. 51(d)(1)(B)*.

(n9)Footnote 9. *Fed. R. Civ. P. 51(d)(2)*; *see McGuire v. Davidson Mfg. Corp., 398 F.3d 1005, 1010 (8th Cir. 2005)* ; *see also Connelly v. Hyundai Motor Co., 351 F.3d 535, 545-546 (1st Cir. 2003)* .

(n10)Footnote 10. *Fed. R. Civ. P. 52* Committee Note (2003).

(n11)Footnote 11. *Connelly v. Hyundai Motor Co., 351 F.3d 535, 545-546 (1st Cir. 2003)* .

* Chapter 39 was rewritten in 2004 by Andrew E. Westley, Esq., of San Francisco, California.

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CHAPTER 39 Jury Instructions *

3-39 Federal Litigation Guide § 39.14

§ 39.14 Applying Law as It Exists at Time of Appeal on Review of Instructions

On review of instructions in federal diversity and supplemental jurisdiction cases, a court of appeals applies the law as it exists at the time of appeal and not as it existed at time of trial. n1

State law governs the review of the correctness of the substance of the instructions in those cases, while federal law governs review of the procedural aspects of giving or refusing instructions. Whether a jury instruction misstates the elements that must be proved at trial is a question of law that is reviewed de novo. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsObjections to InstructionsCivil ProcedureAppealsReviewabilityGeneral OverviewCivil ProcedureAppealsStandards of ReviewDe Novo Review

FOOTNOTES:
(n1)Footnote 1. *United States v. Taylor, 102 F.3d 767, 771 (6th Cir. 1996) , cert. denied, 522 U.S. 927 (1995) .*

(n2)Footnote 2. *Hadley v. VAM P T S, 44 F.3d 372, 374-375 (5th Cir. 1995) .*

* Chapter 39 was rewritten in 2004 by Andrew E. Westley, Esq., of San Francisco, California.

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CHAPTER 40 Verdicts and Jury Deliberations

3-40 Federal Litigation Guide 40.syn

§ 40.syn Synopsis to Chapter 40: Verdicts and Jury Deliberations

§ 40.01 Comparing General and Special Verdicts

§ 40.02 Using Special Verdict and General Verdict Accompanied by Answers to Special Interrogatories as Alternatives to General Verdict

§ 40.03 Evaluating the Effect of Inconsistencies in the Jury's Special Verdicts

§§ 40.04 through 40.09 [Reserved]

§ 40.10 Using Special Verdicts to Avoid Confusion and Appellate Uncertainty

§ 40.11 Using Special Verdicts to Focus Jury's Attention to Material Questions of Fact

§ 40.12 Utilizing Special Verdict to Limit Potential Issues for Retrial

§ 40.13 Rule 49 Utilized At Sole Discretion of Trial Judge

§ 40.14 Formulation of Questions Not Prescribed by Rule 49(a)

§ 40.15 Appealing the Use of Special Verdicts

§ 40.16 Submitting Questions to the Jury

§ 40.17 Court May Insert Finding of Omitted Issue of Material Fact to Complete Jury Verdict

§ 40.18 Failing to Object to Omission in Interrogatories Constitutes Waiver of Jury Trial as to That Issue

§ 40.19 Objecting to Form of Special Interrogatories at Trial to Preserve Issue for Appellate Review

§ 40.20 Reconciling Inconsistent Responses to Special Verdict Questions

§ 40.21 Rule 49(a) Findings on Factual Issues Omitted From Special Interrogatories Reviewable Under Clearly Erroneous Standard

§§ 40.22 through 40.29 [Reserved]

§ 40.30 Submitting Special Interrogatories to Jury Concerning Selected Issues of Fact

§ 40.31 Identifying Whether Verdicts Represent Special Verdict or General Verdict With Answers to Interrogatories

§ 40.32 Submitting Interrogatories is Discretionary

§ 40.33 Submitting Additional Interrogatories for Clarification Purposes

§ 40.34 Failing to Object to Interrogatories Constitutes Waiver on Appeal

§ 40.35 Raising Post-Verdict Objections

§ 40.36 Evaluating the Effect of Inconsistencies Between Interrogatory Answers and General Verdict
[1] Entering Judgment in Accordance With Answers Notwithstanding Verdict, Seeking Further Jury Deliberations, or Ordering New Trial
[2] Resubmitting Inconsistent Answers to Jury
[3] New Trial May Be Ordered if General Verdict and Interrogatory Answers Inconsistent

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CHAPTER 40 Verdicts and Jury Deliberations

3-40 Federal Litigation Guide Scope

Scope

SCOPE

This chapter covers jury verdicts, and focuses on the use of special verdicts and general verdicts accompanied by answers to interrogatories under Rule 49 as alternatives to the general verdict. The chapter discusses the operation of these two possible jury dispositions in detail. Special attention is given to the grounds for objection to the questions submitted under the rule and to the effect the timing of the objection may have on its waiver as a ground for appeal. Also described and analyzed are the effects of inconsistencies in jury verdicts.

For expanded coverage of special verdicts and general verdicts, *see* Moore's Federal Practice, Ch. 49, *Special Verdicts and Interrogatories* . For expanded discussion of the effect and timing of objections to instructions to the jury, *see* Moore's Federal Practice, Ch. 51, *Instructions to Jury: Objection* .

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CHAPTER 40 Verdicts and Jury Deliberations
A. Understanding the Function of Rule 49

3-40 Federal Litigation Guide § 40.01

§ 40.01 Comparing General and Special Verdicts

The general verdict is the most commonly used form of verdict. The jury determines only whether the defendant is liable and, if so, in what amount, without providing a specific basis for the verdict. The general verdict is well suited for simple cases.

The special verdict is authorized by Rule 49 as a more detailed alternative to the more commonly used general verdict. n1 The general verdict has the advantage of certainty, but suffers from the disadvantage of being either all right or all wrong.

Plaintiffs often seek simplicity in the verdict so that it is easy for the jury to return a verdict for the plaintiff, while defendants usually seek complexity so that it is difficult for the jury to return a verdict for the plaintiff. There are situations in which special verdicts or interrogatories are necessary. For example, in a diversity personal injury action in which state law requires itemization of or places limits on certain types of damages, there must be a special verdict.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial Verdicts

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 49(a)*; *see also Zhang v. American Gem Seafoods, Inc., 339 F.3d 1020, 1031 (9th Cir. 2003)* (special verdicts and general verdicts with interrogatories involve only factual findings; general verdicts involve not factual findings but ultimate legal conclusions) .

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CHAPTER 40 Verdicts and Jury Deliberations
A. Understanding the Function of Rule 49

3-40 Federal Litigation Guide § 40.02

§ 40.02 Using Special Verdict and General Verdict Accompanied by Answers to Special Interrogatories as Alternatives to General Verdict

In response to the difficulties posed by the basic general verdict, n1 Rule 49 provides two practical alternatives:

- The special verdict n2
- The general verdict accompanied by answers to special interrogatories n3

A special verdict is returned in lieu of a general verdict and contains factual findings on all of the material issues in the case. n4 Pursuant to Rule 49(a), the jury returns its special verdict in the form of written answers to separate questions concerning each factual issue in the case. The trial court then applies the law to those answers and enters judgment accordingly. n5 By removing from the jury the consideration or application of the law (which a general verdict requires through application of the court's instruction), the special verdict avoids those two sources of possible error in the general verdict. n6

Under Rule 49(b), on the other hand, the jury after being instructed returns a general verdict together with answers to specific interrogatories. Rule 49(b) combines the two types of verdicts, the general verdict and the special verdict. If the answers to the interrogatories do not contradict the general verdict, the trial court enters judgment on the verdict. n7

Under Rule 49(b), special interrogatories are directed to selected issues of fact and the answers should support, rather than take the place of, the general verdict. The Rule 49(b) verdict has been described as a middle course between the simple general verdict and the Rule 49(a) special verdict because it "focuses the jury's attention on the controlling points at issue, and the interrogatory answers provide a check on the propriety of the general verdict." n8

The decision to use special verdicts under Rule 49(a) or special interrogatories under Rule 49(b) is within the discretion of the trial court judge. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral

OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial Verdicts

FOOTNOTES:

(n1)Footnote 1. *Jones v. Miles, 656 F.2d 103, 106 (5th Cir. 1981)* .

(n2)Footnote 2. *Fed. R. Civ. P. 49(a).*

(n3)Footnote 3. *Fed. R. Civ. P. 49(b).*

(n4)Footnote 4. *See Johnson v. ABLT Trucking Co., 412 F.3d 1138, 1142 (10th Cir. 2005)* ; *see also Quaker City Gear Works, Inc. v. Skil Corp., 747 F.2d 1446, 1453 (Fed. Cir. 1984)* (citing **Moore's Federal Practice**).

(n5)Footnote 5. *See Lavoie v. Pacific Press & Shear Co., 975 F.2d 48, 53 (2d Cir. 1992)* (citing **Moore's Federal Practice**).

(n6)Footnote 6. *See Portage II v. Bryant Petroleum Corp., 899 F.2d 1514, 1520 (6th Cir. 1990)* .

(n7)Footnote 7. *See Lavoie v. Pacific Press & Shear Co., 975 F.2d 48, 53 (2d Cir. 1992)* (citing **Moore's Federal Practice**).

(n8)Footnote 8. *See Allen Organ Co. v. Kimball Int'l, Inc., 839 F.2d 1556, 1561-1562 (Fed. Cir. 1988)* .

(n9)Footnote 9. *See Micrel, Inc. v. TRW, Inc., 486 F.3d 866, 882 (6th Cir. 2007)* .

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CHAPTER 40 Verdicts and Jury Deliberations
A. Understanding the Function of Rule 49

3-40 Federal Litigation Guide § 40.03

§ 40.03 Evaluating the Effect of Inconsistencies in the Jury's Special Verdicts

The most important distinction between Rule 49(a) and Rule 49(b) is in the effect of inconsistencies in the jury's special verdicts. Rule 49(a) contains no provision for this situation, while Rule 49(b) provides that "[w]hen the answers [to interrogatories] are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial." n1 When special interrogatories are inconsistent with the general verdict, objection must be made before the jury is discharged. Rule 49(b) expressly recognizes that judgments should not be entered in those circumstances and "the court should return the jury for further consideration of its answers and verdict or shall order a new trial." n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsInconsistent VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial Verdicts

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 49(b).*

(n2)Footnote 2. *Fed. R. Civ. P. 49(b).*

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CHAPTER 40 Verdicts and Jury Deliberations
A. Understanding the Function of Rule 49

3-40 Federal Litigation Guide §§ 40.04 through 40.09

[Reserved]

§§ 40.04[Reserved]

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CHAPTER 40 Verdicts and Jury Deliberations
B. Understanding Special Verdicts

3-40 Federal Litigation Guide § 40.10

§ 40.10 Using Special Verdicts to Avoid Confusion and Appellate Uncertainty

The Rule 49(a) special verdict was designed to avoid confusion, appellate uncertainty, n1 and the need for additional proceedings by identifying the bases upon which the jury rendered its verdict. n2 Thus, special verdicts promote judicial efficiency by reducing the likelihood of new trials. n3 Special verdicts are especially well-suited to cases involving multiple, alternative theories of recovery because such verdicts eliminate the uncertainty that can rise with a general verdict as to whether the verdict was based wholly on an improper theory requiring a retrial of the case. n4

Additionally, special verdicts are useful in cases where the law is uncertain or in its early stages of development. n5 For example, trial courts have found that special verdicts are particularly suited to patent cases by reducing the number of retrials, n6 and by effectuating Congressional policy expressed in the patent law. n7 Indeed, the Seventh Circuit has specifically instructed its trial courts to utilize special verdicts in patent cases. n8 As a result, the subsequent failure of a trial court to use the special verdict in a patent case was held to be reversible error. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureTrialsJury TrialsVerdictsInconsistent VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCivil ProcedureAppealsStandards of ReviewReversible Errors

FOOTNOTES:
(n1)Footnote 1. *See Ware v. Reed, 709 F.2d 345, 355 (5th Cir. 1983)* .

(n2)Footnote 2. *See McGuire v. Russell Miller, Inc., 1 F.3d 1306, 1310 (2d Cir. 1993)* .

(n3)Footnote 3. *See Portage II v. Bryant Petroleum Corp., 899 F.2d 1514, 1520 (6th Cir. 1990)* .

(n4)Footnote 4. *See Mueller v. Hubbard Milling Co., 573 F.2d 1029, 1038-1039 (8th Cir. 1978)* (citing **Moore's Federal Practice**).

(n5)Footnote 5. *See Portage II v. Bryant Petroleum Corp., 899 F.2d 1514, 1520 (6th Cir. 1990)* .

(n6)Footnote 6. *See American Hoist & Derrick Co. v. Sowa & Sons, Inc., 725 F.2d 1350, 1361 (Fed Cir. 1984)* .

(n7)Footnote 7. *See Structural Rubber Prods. Co. v. Park Rubber Co., 749 F.2d 707, 724 (Fed. Cir. 1984)* (citing **Moore's Federal Practice**).

(n8)Footnote 8. *See Dual Mfg. & Eng'g, Inc. v. Burris Indus., Inc., 619 F.2d 660, 667 (7th Cir. 1980)* (*en banc*, citing **Moore's Federal Practice**).

(n9)Footnote 9. *See Roberts v. Sears, Roebuck & Co., 723 F.2d 1324, 1342 (7th Cir. 1983)* .

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CHAPTER 40 Verdicts and Jury Deliberations
B. Understanding Special Verdicts

3-40 Federal Litigation Guide § 40.11

§ 40.11 Using Special Verdicts to Focus Jury's Attention to Material Questions of Fact

One of the chief attributes of the special verdict is its ability to focus the jury's attention by identifying the issues in complex cases. n1

Further, special verdict questions can organize the issues and evidence in complex cases and can focus the jury's attention on specific issues in order to promote orderly decision making. n2 Finally, Rule 49(a) has the effect of simplifying the court's jury instructions. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureTrialsJury TrialsVerdictsInconsistent VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial Verdicts

FOOTNOTES:
(n1)Footnote 1. *See Ware v. Reed, 709 F.2d 345, 355 (5th Cir. 1983)* .

(n2)Footnote 2. *See SCM Corp. v. Xerox Corp., 463 F.Supp. 983, 988 (D. Conn. 1978)* , remanded, *599 F.2d 32 (2d Cir. Conn. 1979)* .

(n3)Footnote 3. *See Structural Rubber Prods., Co. v. Park Rubber, Co., 749 F.2d 707, 723-724 (Fed. Cir. 1984)* .

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CHAPTER 40 Verdicts and Jury Deliberations
B. Understanding Special Verdicts

3-40 Federal Litigation Guide § 40.12

§ 40.12 Utilizing Special Verdict to Limit Potential Issues for Retrial

Another important advantage of the special verdict becomes evident in situations where a verdict contains one or more errors or inconsistencies. In such a case, the trial judge may grant a retrial on a limited issue while the rest of the verdict may be saved. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureTrialsJury TrialsVerdictsInconsistent VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial Verdicts

FOOTNOTES:
(n1)Footnote 1. *See Barton's Disposal Servs., Inc. v. Tiger Corp., 886 F.2d 1430, 1434 (5th Cir. 1989)* .

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CHAPTER 40 Verdicts and Jury Deliberations
B. Understanding Special Verdicts

3-40 Federal Litigation Guide § 40.13

§ 40.13 Rule 49 Utilized At Sole Discretion of Trial Judge

Rule 49 places the decision to use or not use a special verdict within the court's discretion. n1 No party has a right to the use of a special verdict. n2 Furthermore, a party may not raise for the first time on appeal the failure of a trial judge to employ a special verdict. n3

The wide discretion accorded to the trial judge extends to the nature, form, and scope of the issues, n4 as well as the construction and utilization of verdict forms. n5 As a consequence of the broad latitude accorded the trial court, the scope of appellate review is correspondingly narrow.

A number of courts have recommended that a special verdict be used in complex litigation, particularly in cases involving multiple parties or alternative theories of liability. n

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsInconsistent VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial Verdicts

FOOTNOTES:
(n1)Footnote 1. *See Fidelity & Guaranty Ins. Underwriters Inc. v. Jasam Realty Corp., 540 F.3d 133, 139 (2d Cir. 2008)* ; *see also Chlopek v. Fed. Ins. Co., 499 F.3d 692, 701 (7th Cir. 2007)* .

(n2)Footnote 2. *See Floyd v. Laws, 929 F.2d 1390, 1395 (9th Cir. 1991)* .

(n3)Footnote 3. *See Great Coastal Express, Inc. v. International Bhd. of Teamsters, 511 F.2d 839, 845 (4th Cir. 1975)* (citing **Moore's Federal Practice**).

(n4)Footnote 4. *See Bowers v. Firestone Tire & Rubber Co., 800 F.2d 474, 476 (5th Cir. 1986)* .

(n5)Footnote 5. *See Putnam Res. v. Pateman, 958 F.2d 448, 456 (1st Cir. 1992)* .

(n6)Footnote . *See Huff v. Sheahan, 493 F.3d 893, 904 n.14 (7th Cir. 2007)* ; *see also King v. Ford Motor Co.,*

597 F.2d 436, 439 n.2 (5th Cir. 1979) .

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CHAPTER 40 Verdicts and Jury Deliberations
B. Understanding Special Verdicts

3-40 Federal Litigation Guide § 40.14

§ 40.14 Formulation of Questions Not Prescribed by Rule 49(a)

Rule 49(a) provides little direction as to the formulation of special verdict questions. Similarly, there is no prescription for the form of the jury's verdict. n1 The rule specifies only that questions shall be "susceptible of a categorical or other brief answer," or that the court may submit "written forms of the special findings that might properly be made under the pleadings and evidence" or that the court may use "any other method that the court considers appropriate." n2 However, the questions asked of the jury must be sufficient to elicit answers which will establish the factual issues essential to support the judgment. n3 Additionally, the questions together with the court's instructions must "fairly present the issues to the jury." n4

When submitting a special verdict, the court must give to the jury the instructions and explanations necessary to enable the jury to make its findings on each submitted issue. n5 The court's instructions must be sufficient to allow the jury to respond intelligently to the interrogatories. n6 Questions submitted to the jury should be clear and unambiguous. n7 Judgments entered on answers to interrogatories which mislead or confuse the jury, n8 or which inaccurately frame the issues to be resolved by the jury are reversible. n9 Each question submitted to the jury should be limited to a single issue; n10 However, a single question may combine elements of one claim, provided that "the question is fair and does not combine two issues disjunctively." n11

Because Rule 49(a) expressly authorizes the court to use such methods of submitting issues as it deems most appropriate, district courts may "mix and match" types of verdicts. n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsInconsistent VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial Verdicts

FOOTNOTES:
(n1)Footnote 1. *See Putnam Res. v. Pateman, 958 F.2d 448, 457 (1st Cir. 1992)* .

(n2)Footnote 2. *Fed. R. Civ. P. 49(a)* .

(n3)Footnote 3. *See Kornicki v. Calmar S.S. Corp., 460 F.2d 1134, 1139 (3d Cir. 1972)* .

(n4)Footnote 4. *See Miley v. Oppenheimer & Co., 637 F.2d 318, 334 (5th Cir. 1981)* (Citing **Moore's Federal Practice**).

(n5)Footnote 5. *Fed. R. Civ. P. 49(a)(2)*; *see also Santos v. Posadas de Puerto Rico Assocs., Inc., 452 F.3d 59, 65 (1st Cir. 2006)* .

(n6)Footnote 6. *See Fidelity & Guaranty Ins. Underwriters Inc. v. Jasam Realty Corp., 540 F.3d 133, 139 (2d Cir. 2008)* .

(n7)Footnote 7. *See Kinnel v. Mid-Atlantic Mausoleums, Inc., 850 F.2d 958, 961 (3d Cir. 1988)* .

(n8)Footnote 8. *See Petes v. Hayes, 664 F.2d 523, 525 (5th Cir. 1981)* .

(n9)Footnote 9. *See Romano v. Howarth, 998 F.2d 101, 106 (2d Cir. 1993)* .

(n10)Footnote 10. *See Dobbs v. Gulf Oil Co., 759 F.2d 1213, 1216 (5th Cir. 1985)* .

(n11)Footnote 11. *See United States v. Pforzheimer, 826 F.2d 200, 204 (2d Cir. 1987)* .

(n12)Footnote 12. *See Putnam Res. v. Pateman, 958 F.2d 448, 456 (1st Cir. 1992)* .

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CHAPTER 40 Verdicts and Jury Deliberations
B. Understanding Special Verdicts

3-40 Federal Litigation Guide § 40.15

§ 40.15 Appealing the Use of Special Verdicts

The trial court has broad discretion in the formulation and utilization of Rule 49(a) special verdicts. As a consequence, a reviewing court's inquiry is limited to whether the form of the interrogatories is an abuse of discretion. n1 Imposing an element of proof not required by law in a special verdict question is an example of such an abuse of discretion. n2

Once the court opts to use a Rule 49(a) special verdict, it must submit "all material issues raised by the pleadings and evidence." n3 Failure to submit to the jury special verdict interrogatories on all material issues in the case has been held to be an abuse of discretion. n4

However, Rule 49(a) does not require the submission of a question on every issue presented in a case. n5 Thus, it is not error to refuse to submit a special interrogatory where the issue is adequately covered by other questions or instructions. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

FOOTNOTES:
(n1)Footnote 1. *See Cutlass Productions, Inc. v. Bregman, 682 F.2d 323, 325 (2d Cir. 1982)* .

(n2)Footnote 2. *See Deadwyler v. Volkswagen of Am., Inc., 884 F.2d 779, 782 (4th Cir. 1989)* .

(n3)Footnote 3. *See Bowers v. Firestone Tire & Rubber Co., 800 F.2d 474, 478 (5th Cir. 1986)* .

(n4)Footnote 4. *See Cutlass Prods., Inc. v. Bregman, 682 F.2d 323, 326 (2d Cir. 1982)* (citing **Moore's Federal Practice**); *see also §§ 40.18*.

(n5)Footnote 5. *See Reorganized Church of Jesus Christ of Latter Day Saints v. United States Gypsum Co., 882 F.2d 335, 338 (8th Cir. 1989)* .

(n6)Footnote 6. *See Wheeler v. John Deere Co., 935 F.2d 1090, 1102 (10th Cir. 1991)* .

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CHAPTER 40 Verdicts and Jury Deliberations
B. Understanding Special Verdicts

3-40 Federal Litigation Guide § 40.16

§ 40.16 Submitting Questions to the Jury

Rule 49(a) authorizes the judge to submit written questions together with instructions to the jury in order for it to make findings upon each issue. n1 Answers to these questions must be consistent with each other in order to form the basis of a sound judgment. n2

There are two time frames within which questions may be submitted to a jury:

- When the jury receives the case for its deliberations
- After deliberations but before the jury is discharged

Rule 49(a) is silent as to the procedure to be followed in the event that the jury makes inconsistent findings. However, it is well established that trial courts are required to attempt to reconcile apparent inconsistencies in the special verdict if at all possible. n3

When a special verdict presents irresolvable inconsistencies or ambiguities which the judge has been unable to harmonize, the jury may be consulted to assist the court in reconciling the interrogatory answers. Rule 49(a) is silent as to whether it is appropriate to resubmit the questions which have yielded inconsistent answers for further deliberations by the jury before it is discharged or whether it is permissible to submit supplemental interrogatories to clarify an ambiguous result.

Resubmission presents several advantages. First, the submission of inconsistent verdicts to the jury preserves the jury's traditional role as fact-finder. In addition, to the extent the jury resolves the conflicting responses to the interrogatories, resubmission promotes the efficient and fair resolution of inconsistent specialverdicts and is preferable to the costly alternative of another round of trial. n4 Finally, by removing an uncertainty to the jury's findings, resubmission solidifies any judgment entered on the special verdict. n5

Resubmission has been upheld in the First, n6 Fourth, n7 Fifth, n8 Eighth, n9 and Ninth Circuit Courts of Appeals. n10

To avoid the impression that the court is making an improper suggestion as to the outcome of a case by resubmitting it to the jury, the judge may explain that no inference should be drawn as to the ultimate decision reached by the jury. n11

In the absence of improper influence or coercion, allowing the jury to reconsider its inconsistent answers is the preferred course. n12

In addition to the court's discretion in resubmitting special verdict interrogatories to the jury, the court also may submit additional or supplemental questions to aid the jury in reconciling inconsistencies or ambiguities. These questions are submitted to the jury after the original questions have been answered. The submission of supplemental interrogatories has been upheld in the First n13 and Fifth Circuit Court of Appeals. n14

Another situation in which questions may be submitted after the jury has deliberated occurs when the jury is deadlocked. n15 However, it is impermissible to submit interrogatories to a jury that has reached a consistent verdict, n16 because there is no reason to ask the question a second time or to raise doubts about the jury's reasoning. n17

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury DeliberationsCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial Verdicts

FOOTNOTES:
(n1)Footnote 1. *See Karl v. Burlington N. R. Co., 880 F.2d 68, 72 (8th Cir. 1989)* .

(n2)Footnote 2. *See Auwood v. Harry Brandt Booking Office, Inc., 850 F.2d 884, 890 (2d Cir. 1988)* .

(n3)Footnote 3. *See Gallick v. B & O R.R., 372 U.S. 108, 119, 83 S. Ct. 659, 9 L. Ed. 2d 618 (1963)* ; *see also California v. Altus Finance, S.A., 540 F.3d 992, 1004 (9th Cir. 2008)* .

(n4)Footnote 4. *See Santiago-Negron v. Castro-Davila, 865 F.2d 431, 444 (1st Cir. 1989)* .

(n5)Footnote 5. *See Richard v. Firestone Tire & Rubber Co., 853 F.2d 1258, 1260-1261 (5th Cir. 1988)* .

(n6)Footnote 6. *See Poduska v. Ward, 895 F.2d 854, 857 (1st Cir. 1990)* .

(n7)Footnote 7. *See Taylor v. Home Ins. Co., 777 F.2d 849, 858-859 (4th Cir. 1985)* .

(n8)Footnote 8. *See Richard v. Firestone Tire & Rubber Co., 853 F.2d 1258, 1260-1261 (5th Cir. 1988)* .

(n9)Footnote 9. *See Karl v. Burlington N.R. Co., 880 F.2d 68, 72 (8th Cir. 1989)* .

(n10)Footnote 10. *See California v. Altus Finance, S.A., 540 F.3d 992, 1004 (9th Cir. 2008)* .

(n11)Footnote 11. *See Nance v. Gulf Oil Corp., 817 F.2d 1176, 1179 (5th Cir. 1987)* .

(n12)Footnote 12. *See Santiago-Negron v. Castro-Davila, 865 F.2d 431, 444 (1st Cir. 1989)* .

(n13)Footnote 13. *See Skillin v. Kimball, 643 F.2d 19, 19-20 (1st Cir. 1981)* .

(n14)Footnote 14. *See Alverez v. J. Ray McDermott & Co., 674 F.2d 1037, 1040-1041 (5th Cir. 1982)* .

(n15)Footnote 15. *See Thorpe v. Mutual of Omaha Ins. Co., 984 F.2d 541, 544-545 (1st Cir. 1993)* .

(n16)Footnote 16. *See McCollum v. Stahl, 579 F.2d 869, 871 (4th Cir. 1978)* .

(n17)Footnote 17. *See Binder v. Long Island Lighting Co., 57 F.3d 193, 199 (2d Cir. 1995)* .

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CHAPTER 40 Verdicts and Jury Deliberations
B. Understanding Special Verdicts

3-40 Federal Litigation Guide § 40.17

§ 40.17 Court May Insert Finding of Omitted Issue of Material Fact to Complete Jury Verdict

Under Rule 49(a), a court may supply an omitted finding that would complete the jury's verdict. n1 This is so even if the jury did not answer specific interrogatories on the issue. n2 In the absence of a jury verdict, however, a court may not determine the ultimate liability of a party. n3

Moreover, courts have recognized that partially completed special verdict forms are sufficient, provided that the answered questions support the verdict and the unanswered questions, if answered in favor of the nonprevailing party, would not render the judgment erroneous. n4 If a jury fails to answer all the questions submitted in a special verdict, the verdict may be accepted for those issues that are resolved. n5 The court's legal rulings and the jury's factual findings may be combined to complete the jury's verdict. n6

When a party fails to request that an issue be submitted and if the court fails to make an express finding, Rule 49(a) permits a judgment by implying findings necessary to support it. n7 On the other hand, if the court does make a finding contrary to the jury's verdict, a party is not entitled to the presumption that a finding was made in its favor on issues omitted from the special verdict form. n8

Although a district court may make its own findings as to issues not submitted to the jury, Rule 49(a) does not authorize the court to reform a jury's decisions on issues submitted to the jury, nor does it permit a court to make findings contrary to the jury verdict. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial Verdicts

FOOTNOTES:
(n1)Footnote 1. *See Anderson v. Cryovac, Inc., 862 F.2d 910, 915-916 (1st Cir. 1988)* .

(n2)Footnote 2. *See Watkins v. Fibreboard Corp., 994 F.2d 253, 257-258 (5th Cir. 1993)* .

(n3)Footnote 3. *See Neely v. Club Med Management Servs., Inc., 63 F.3d 166, 202-203 (3d Cir. 1995)* .

(n4)Footnote 4. *See* *Bristol Steel & Iron Works v. Bethlehem Steel Corp., 41 F.3d 182, 190 (4th Cir. 1994)* .

(n5)Footnote 5. *See* *Quaker City Gear Works v. Skil Corp., 747 F.2d 1446, 1453 (Fed. Cir. 1984)* .

(n6)Footnote 6. *See* *Simms v. Village of Albion, 115 F.3d 1098, 1105-1106 (2d Cir. 1997)* .

(n7)Footnote 7. *See* *Eastern Mt. Platform Tennis v. Sherwin-Williams Co., 40 F.3d 492, 501 (1st Cir. 1994)* .

(n8)Footnote 8. *See* *Roberts v. Karimi, 251 F.3d 404, 407-408 (2d Cir. 2001)* .

(n9)Footnote 9. *See* *Gaia Techs., Inc. v. Recycled Prods. Corp., 175 F.3d 365, 370-371 (5th Cir. 1999)* .

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CHAPTER 40 Verdicts and Jury Deliberations
B. Understanding Special Verdicts

3-40 Federal Litigation Guide § 40.18

§ 40.18 Failing to Object to Omission in Interrogatories Constitutes Waiver of Jury Trial as to That Issue

Under Rule 49(a), the court is required to give to the jury such explanation and instruction concerning the matters at issue as may be necessary to enable the jury to make findings on each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the omitted issue unless the party demands its submission to the jury before the jury retires. n1

Case law also provides that a failure to object to the omission of a material issue of fact from a Rule 49(a) verdict before a jury retires constitutes a waiver of jury trial as to that issue. n2 In making such an objection, a party must use methods which are sufficient to inform the court of issues which are missing in the special interrogatories. n3 The waiver rule does not apply in situations where the omitted issue was not raised by the pleadings or the evidence. n4

A party subject to waiver should keep in mind that the waiver of a jury determination on an issue does not preclude determination of the issue by the court. Rule 49(a) provides that the court may enter its own finding on an issue omitted from the jury. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCivil ProcedureAppealsReviewabilityGeneral OverviewCivil ProcedureAppealsReviewabilityPreservation for Review

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. Rule 49(a).*

(n2)Footnote 2. *See Putnam Res. v. Pateman, 958 F.2d 448, 457 (1st Cir. 1992) .*

(n3)Footnote 3. *See Fischer v. Dallas Federal Sav. & Loan Asso., 835 F.2d 567, 569 (5th Cir. 1988) .*

(n4)Footnote 4. *See Union Planters Nat'l Bank v. Commercial Credit Business Loans, Inc., 651 F.2d 1174, 1188 (6th Cir. 1981) .*

(n5)Footnote 5. *See Bristol Tech., Inc. v. Microsoft Corp., 114 F. Supp. 2d 59, 81 (D. Conn. 2000)* .

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CHAPTER 40 Verdicts and Jury Deliberations
B. Understanding Special Verdicts

3-40 Federal Litigation Guide § 40.19

§ 40.19 Objecting to Form of Special Interrogatories at Trial to Preserve Issue for Appellate Review

A party must object to the form of the special interrogatories in the trial court in order to preserve this issue on appeal. n1

This principle also applies to the instructions or explanation that the court may have provided to the jury along with the interrogatories. Under *Rule 51 of the Federal Rules of Civil Procedure*, no party may assign as error the giving or the failure to give an instruction unless that party objects to the instruction before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds for the objection. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsObjections to InstructionsCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCivil ProcedureAppealsReviewabilityGeneral OverviewCivil ProcedureAppealsReviewabilityPreservation for Review

FOOTNOTES:
(n1)Footnote 1. *See Neely v. Club Med Management Servs., 63 F.3d 166, 200 (3d Cir. 1995)* .

(n2)Footnote 2. *Fed. R. Civ. P. Rule 51.*

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CHAPTER 40 Verdicts and Jury Deliberations
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3-40 Federal Litigation Guide § 40.20

§ 40.20 Reconciling Inconsistent Responses to Special Verdict Questions

A trial court must render a judgment that makes the jury's answers consistent if such a construction is possible. n1 Although Rule 49(a) does not explicitly provide for resubmission to the jury in case of an inconsistency, the Ninth Circuit has held that, because the rule does not prohibit it, special verdicts are subject to resubmission if the jury has not yet been excused. n2

The limits of a district court's discretion to harmonize the jury's findings are not clearly delineated. n3

A case must be reversed and remanded for a new trial if, after review of the responses to the special verdict questions and the court's attempt to reconcile apparently inconsistent or ambiguous responses, there is no way to view the case in which the special verdict can be seen as supporting the judgment. This principle also seems to be consistent with efficient judicial management. n4

There is conflict among the circuits as to whether a party must object to perceived inconsistencies in the jury's verdict before the jury is discharged. Those circuits that hold there is no waiver of the right to appeal on the basis that the verdict is irreconcilably inconsistent in the absence of an objection in the trial court are the Third, n5 Fourth, n6 Fifth, n7 and Ninth Circuits. n8 Those courts use as a basis for their decision the lack of any provision in Rule 49(a) requiring the lodging of an objection before the jury is discharged. The Second Circuit, while receptive to the nonwaiver principle, n9 favors a case-by-case application of waiver principles. n10

The First, n11 Tenth, n12 and Eleventh n13 Circuits require that an objection be made in the trial court in order to preserve the issue for appeal. One of the primary justifications for this view is to prevent litigants from using perceived inconsistencies as a strategy to obtain a new trial. n14 This view also seems to be consistent with efficient judicial management. Providing notice to the trial court gives the district judge the opportunity to resubmit questions to the jury before it has been discharged.

Litigants should be afforded a meaningful opportunity to review the verdict answers to determine whether there are any inconsistencies. The courts of appeal disagree as to the amount of prior notice counsel should be given regarding the special interrogatories and instructions that will be submitted to the jury. The Sixth Circuit requires only that the trial judge give counsel the "substance," not the exact wording, of the questions, n15 while the Second Circuit determined that the trial court has discretion whether to show the text of the special verdict before submitting it to the jury. n16 The

notice requirement has been adopted by analogy to the notice requirement of Rule 51. n17

In attempting to reconcile inconsistent verdicts, the reviewing court must consider the court's instructions as well as the interrogatories themselves. n18 Indeed, the appellate court may review the entire record in order to ascertain whether the reconciliation of apparently inconsistent verdicts by the trial court represents a fair and reasonable view of the case. n19

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsJury TrialsJury InstructionsObjections to InstructionsCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsInconsistent VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCivil ProcedureAppealsReviewabilityGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See Gallick v. B & O R.R., 372 U.S. 108, 119, 83 S. Ct. 659, 9 L. Ed. 2d 618 (1963) .*

(n2)Footnote 2. *See Duk v. MGM Grand Hotel, Inc., 320 F.3d 1052, 1056-1057 (9th Cir. 2003) .*

(n3)Footnote 3. *See McGuire v. Russell Miller, Inc., 1 F.3d 1306, 1311-1312 (2d Cir. 1993) .*

(n4)Footnote 4. *See Riley v. K Mart Corp., 864 F.2d 1049, 1054-1055 (3d Cir. 1988) .*

(n5)Footnote 5. *See Simmons v. Philadelphia, 947 F.2d 1042, 1057 (3d Cir. 1991) .*

(n6)Footnote 6. *See Ladnier v. Murray, 769 F.2d 195, 198, n.3 (4th Cir. 1985) .*

(n7)Footnote 7. *See Alverez v. J. Ray McDermott & Co., 674 F.2d 1037, 1040 (5th Cir.1982) .*

(n8)Footnote 8. *See Pierce v. Southern Pac. Transp. Co., 823 F.2d 1366, 1370 (9th Cir. 1987) .*

(n9)Footnote 9. *See Auwood v. Harry Brandt Booking Office, Inc., 850 F.2d 884, 890-891 (2d Cir. 1988) .*

(n10)Footnote 10. *See Denny v. Ford Motor Co., 42 F.3d 106, 111 (2d Cir. 1994) .*

(n11)Footnote 11. *See Andrade v. Jamestown Hous. Auth., 82 F.3d 1179, 1189 (1st Cir. 1996) .*

(n12)Footnote 12. *See Bell v. Mickelsen, 710 F.2d 611, 616 (10th Cir. 1983) .*

(n13)Footnote 13. *See Golub v. J.W. Gant & Associates, 863 F.2d 1516, 1520, & n.4 (11th Cir. 1989) .*

(n14)Footnote 14. *See McIsaac v. Didriksen Fishing Corp., 809 F.2d 129, 134 (1st Cir. 1987) .*

(n15)Footnote 15. *See Sakamoto v. N.A.B. Trucking Co., 717 F.2d 1000, 1006 (6th Cir. 1983) .*

(n16)Footnote 16. *See Cutlass Prods., Inc. v. Bregman, 682 F.2d 323, 330 (2d Cir. 1982) .*

(n17)Footnote 17. *See Fed R. Civ. P. 51.*

(n18)Footnote 18. *See Gallick v. B & O R.R., 372 U.S. 108, 118-122, 83 S. Ct. 659 (1963) .*

(n19)Footnote 19. *See Royal Cup, Inc. v. Jenkins Coffee Service, Inc., 898 F.2d 1514, 1519 (11th Cir. 1990) .*

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CHAPTER 40 Verdicts and Jury Deliberations
B. Understanding Special Verdicts

3-40 Federal Litigation Guide § 40.21

§ 40.21 Rule 49(a) Findings on Factual Issues Omitted From Special Interrogatories Reviewable Under Clearly Erroneous Standard

The court's finding on a factual issue omitted from the special interrogatories is reviewable under the clearly erroneous standard of Rule 52(a). n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCivil ProcedureAppealsStandards of ReviewClearly Erroneous Review

FOOTNOTES:
(n1)Footnote 1. *See Therrell v. Georgia Marble Holdings Corp., 960 F.2d 1555, 1563 (11th Cir. 1992)* .

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CHAPTER 40 Verdicts and Jury Deliberations
B. Understanding Special Verdicts

3-40 Federal Litigation Guide §§ 40.22 through 40.29

[Reserved]

§§ 40.22[Reserved]

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CHAPTER 40 Verdicts and Jury Deliberations
C. Understanding General Verdicts with Answers to Interrogatories

3-40 Federal Litigation Guide § 40.30

§ 40.30 Submitting Special Interrogatories to Jury Concerning Selected Issues of Fact

Rule 49(b) provides the mechanism by which the court submits special interrogatories to a jury concerning selected issues of fact. The jury then answers those questions while also reaching a general verdict. n1 Because a Rule 49(b) verdict combines aspects of both the general verdict and special interrogatories, Rule 49(b) has been described as providing a "middle ground" between the general and the special verdict. n2

A trial court has broad discretion in the formulation of jury interrogatories, including the authority to combine the issues of liability and affirmative defenses into a single interrogatory, as long as the verdict form does not misstate the law, contain inconsistencies, or otherwise mislead or confuse the jury. n3

A Rule 49(b) verdict can be particularly useful in complex cases involving numerous theories of recovery. n4 Federal law pertaining to the submission of special interrogatories to a jury is controlling in diversity actions. n5 However, state law governs the determination of whether a verdict is inconsistent. n6

The decision to use interrogatories together with a general verdict should be made before the case is submitted to the jury. n7 Counsel may request the submission of special interrogatories, but the court has broad discretion to grant or deny such a request. However, the court should advise counsel when Rule 49(b) will be used, and the court should give counsel an opportunity to review the questions. n8 The pretrial conference is often the appropriate time to raise the potential use of Rule 49(b) interrogations.

Judicial economy is served through the use of interrogatories because the necessity of retrials fades when the answers to interrogatories illuminate the jury'sanalysis. n9

Special interrogatories are useful to "test" the jury's verdict n10 by providing acheck on the application of the law to the facts. n11 Thus, the use of Rule 49(b) interrogatories is strongly preferred as a mechanism to guide a jury, thereby increasing the reliability of its verdict, and facilitating appellate review. n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral

VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial Verdicts

FOOTNOTES:

(n1)Footnote 1. *See Fed. R. Civ. P. 49(b).*

(n2)Footnote 2. *See Portage II v. Bryant Petroleum Corp., 899 F.2d 1514, 1520 (6th Cir. 1990) .*

(n3)Footnote 3. *See EEOC v. E.I. Du Pont de Nemours & Co., 406 F. Supp. 2d 645, 652 (E.D. La. 2005) .*

(n4)Footnote 4. *See Royal Typewriter Co., Div. of Litton Business Systems, Inc. v. Xerographic Supplies Corp., 719 F.2d 1092, 1098-1099 (11th Cir. 1983) .*

(n5)Footnote 5. *See Bartak v. Bell-Galyart & Wells, Inc., 629 F.2d 523, 531 (8th Cir. 1980) .*

(n6)Footnote 6. *See Conte v. General Housewares Corp., 215 F.3d 628, 639 (6th Cir. 2000) .*

(n7)Footnote 7. *See Portage II v. Bryant Petroleum Corp., 899 F.2d 1514, 1520 (6th Cir. 1990) .*

(n8)Footnote 8. *See Portage II v. Bryant Petroleum Corp., 899 F.2d 1514, 1520 (6th Cir. 1990) .*

(n9)Footnote 9. *See Austin-Westshore Constr. Co., Inc. v. Federated Dep't Stores, Inc., 934 F.2d 1217, 1220 (11th Cir. 1991) .*

(n10)Footnote 10. *See Brown v. Tennessee Gas Pipeline Co., 623 F.2d 450, 455 (6th Cir. 1980) .*

(n11)Footnote 11. *See Allen Organ Co. v. Kimball Int'l, Inc., 839 F.2d 1556, 1562 (Fed. Cir. 1988) .*

(n12)Footnote 12. *See Railroad Dynamics, Inc. v. A. Stucki Co., 727 F.2d 1506, 1515-1516 (Fed. Cir. 1984) .*

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CHAPTER 40 Verdicts and Jury Deliberations
C. Understanding General Verdicts with Answers to Interrogatories

3-40 Federal Litigation Guide § 40.31

§ 40.31 Identifying Whether Verdicts Represent Special Verdict or General Verdict With Answers to Interrogatories

Appellate courts are often faced with the difficulty of identifying whether a verdict represents a Rule 49(a) special verdict or a Rule 49(b) general verdict with answers to interrogatories. n1 The label given to a verdict is not necessarily dispositive. Instead, courts examine the characteristics of the verdict, such as the written questions, the form, and the issue sought to be resolved. n2

Also, a court that is using Rule 49(b) interrogatories will instruct the jury on the law. n3 Legal instructions are not necessary in Rule 49(a) special verdicts where the jury's role is limited to fact-finding n4 because the court applies the law. n5 Similarly, a Rule 49(b) submission always should be accompanied by a general verdict. n6

If a party is uncertain whether a case is being submitted under Rule 49(a) or (b), the party should inquire of the court; otherwise objections may be inadvertently waived.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial Verdicts

FOOTNOTES:
(n1)Footnote 1. *See Bills v. Aseltine, 52 F.3d 596, 604-605 (6th Cir. 1995)* .

(n2)Footnote 2. *See Portage II v. Bryant Petroleum Corp., 899 F.2d 1514, 1520-1522 (6th Cir. 1990)* .

(n3)Footnote 3. *See Lavoie v. Pacific Press, 975 F.2d 48, 53 (2d Cir. 1992)* .

(n4)Footnote 4. *See Portage II v. Bryant Petroleum Corp., 899 F.2d 1514, 1521 (6th Cir. 1990)* .

(n5)Footnote 5. *See Bills v. Aseltine, 52 F.3d 596, 605 (6th Cir. 1995)* .

(n6)Footnote 6. *See Lavoie v. Pacific Press & Shear Co., Div. of Canron Corp., 975 F.2d 48, 53 (2d Cir. 1992)* .

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CHAPTER 40 Verdicts and Jury Deliberations
C. Understanding General Verdicts with Answers to Interrogatories

3-40 Federal Litigation Guide § 40.32

§ 40.32 Submitting Interrogatories is Discretionary

Rule 49(b) provides that the decision to submit special interrogatories in connection with a general verdict is a discretionary act within the power of the trial court. n1 Matters pertaining to the form of the interrogatories, n2. including determinations as to the number, n3 and wording n4 of the interrogatories are also within the discretion of the court and ordinarily will not be disturbed absent an abuse of discretion. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial Verdicts

FOOTNOTES:
(n1)Footnote 1. *See Portage II v. Bryant Petroleum Corp., 899 F.2d 1514, 1520 (6th Cir. 1990)* .

(n2)Footnote 2. *See Bills v. Aseltine, 52 F.3d 596, 605 (6th Cir. 1995)* .

(n3)Footnote 3. *See Aetna Cas. Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1555 (1st Cir. 1994)* .

(n4)Footnote 4. *See Piper v. Goodwin, 20 F.3d 216, 221 (6th Cir. 1994)* .

(n5)Footnote 5. *See Hammerquist v. Clarke's Sheet Metal, Inc., 658 F.2d 1319, 1322 (9th Cir. 1981)* .

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3-40 Federal Litigation Guide § 40.33

§ 40.33 Submitting Additional Interrogatories for Clarification Purposes

Appellate courts have upheld the submission of additional interrogatories to seek clarification from the jury as to a particular aspect of the verdict. n1 However, special interrogatories may not be submitted to a jury after it has reached a clear and unambiguous verdict. n2 To do so invites inconsistency, as the jury may give different answers to post-verdict questions than it did originally. Post-verdict interrogatories may also imply that the jury's verdict is unjustified. n3 In addition, nothing in the text of Rule 49(b) justifies a court's submission of special questions after a jury asked to render a general verdict returns such a verdict.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial Verdicts

FOOTNOTES:
(n1)Footnote 1. *See McLaughlin v. Fellows Gear Shaper Co., 786 F.2d 592, 596 (3d Cir. 1986)* .

(n2)Footnote 2. *See Jacobs Mfg. Co. v. Sam Brown Co., 19 F.3d 1259, 1267 (8th Cir. 1994)* .

(n3)Footnote 3. *See Jacobs Mfg. Co. v. Sam Brown Co., 19 F.3d 1259, 1267 (8th Cir. 1994)* .

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CHAPTER 40 Verdicts and Jury Deliberations
C. Understanding General Verdicts with Answers to Interrogatories

3-40 Federal Litigation Guide § 40.34

§ 40.34 Failing to Object to Interrogatories Constitutes Waiver on Appeal

Objection to the form or content of special interrogatories must be made before the jury is discharged. Otherwise, the objections may be considered waived in a subsequent appeal. n1

Similarly, timely objections must be made to the court's instructions or else they also may be waived. n2 This rule protects integrity of the jury. It also advances the overall efficiency of the judicial system by providing an opportunity to cure any defect in the verdict procedure.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsObjections to InstructionsCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureAppealsReviewabilityPreservation for Review

FOOTNOTES:
(n1)Footnote 1. *See Stancill v. McKenzie Tank Lines, Inc., 497 F.2d 529, 535 (5th Cir. 1974)* .

(n2)Footnote 2. *See Fed. R. Civ. P. 51.*

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CHAPTER 40 Verdicts and Jury Deliberations
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3-40 Federal Litigation Guide § 40.35

§ 40.35 Raising Post-Verdict Objections

The last sentence of Rule 49(b) provides that, "when the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial." n1 As with other objections to the form and content of interrogatories, it is better practice to raise objections to inconsistencies prior to discharge of the jury or risk waiving them. n2

The circuits are not uniform as to the effect of a failure to object toinconsistencies, but a majority of courts of appeals that have considered the issue have held there is a waiver of objections not timely made. The First, n3 Fourth, n4 Fifth, n5 Tenth, n6 and Eleventh n7 Circuits have invoked the waiver doctrine with respect to objections involving inconsistencies in interrogatory answers by failing to raise them before the discharge of the jury. It is important to note that in nearly all of the cases where waiver has been invoked, the trial court had given counsel an opportunity to object to the jury's verdict before the jury was discharged and counsel raised no objection until appeal.

The waiver doctrine promotes the fair and expeditious correction of error while avoiding the need to present evidence to a new jury. n8 In addition, waiver promotes court efficiency in the management of its caseload. n9

However, other circuits have taken a different approach to the inconsistency issue. The Ninth Circuit has taken the opposite view and has squarely held that the failure to object to an inconsistency in answers to interrogatories does not result in a waiver to argue that the court erred in entering judgment on the general verdict. n10 As a result, a party may challenge the consistency of a verdict for the first time on a post-trial motion. n11

The Ninth Circuit distinguished waiver cases on the basis that in nearly all of them, counsel had been given an opportunity to object to inconsistencies before the jury's discharge but that counsel had declined to do so. Thus, the Ninth Circuit reasoned, waiver would be an appropriate result in those instances where counsel had affirmatively misled the judge in order to get the jury dismissed prior to objecting to the inconsistency. n12

The Second Circuit has indicated that while a party's failure to object "carries some weight in our analysis on appeal" it was incumbent on the trial judge to resolve inconsistencies in special interrogatory answers. n13

The answers to interrogatories and the general verdict must be viewed in light of the instructions given to the jury to

determine whether there are any inconsistencies. n14 In one case, for example, in which the instructions identified two alternative theories of liability from which a jury could choose, the verdicts were not considered inconsistent, eliminating the need for an objection. n15

Objections to errors in instructions must also be timely raised, or else waived. n16 *Rule 51 of the Federal Rules of Civil Procedure* provides for waiver of such objections unless there is plain error in the sense that a miscarriage of justice would result. n17

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureAppealsReviewabilityPreservation for Review

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 49(b).*

(n2)Footnote 2. *See Babcock v. General Motors Corp., 299 F.3d 60, 63-64 (1st Cir. 2002) .*

(n3)Footnote 3. *See Trull v. Volkswagen of Am., Inc., 320 F.3d 1, 5 (1st Cir. 2002) , cert. denied, 540 U.S. 938 (2003) .*

(n4)Footnote 4. *See White v. Celotex Corp., 878 F.2d 144, 146 (4th Cir. 1989) .*

(n5)Footnote 5. *See Stancill v. McKenzie Tank Lines, Ltd., 497 F.2d 529, 534-535 (5th Cir. 1974) .*

(n6)Footnote 6. *See Diamond Shamrock Corp. v. Zinke & Trumbo, Ltd., 791 F.2d 1416, 1422-1423 (10th Cir. 1986) .*

(n7)Footnote 7. *See Itel Capital Corp. v. Cups Coal Co., 707 F.2d 1253, 1261 (11th Cir. 1983) .*

(n8)Footnote 8. *See White v. Celotex Corp., 878 F.2d 144, 146 (4th Cir. 1989) .*

(n9)Footnote 9. *See Strauss v. Stratojac Corp., 810 F.2d 679, 683 (7th Cir. 1987) .*

(n10)Footnote 10. *See Grosvenor Properties, Ltd. v. Southmark Corp., 896 F.2d 1149, 1151 (9th Cir. 1990) .*

(n11)Footnote 11. *See Los Angeles Nut House v. Holiday Hardware Corp., 825 F.2d 1351, 1354 (9th Cir. 1987) .*

(n12)Footnote 12. *See Los Angeles Nut House v. Holiday Hardware Corp., 825 F.2d 1351, 1354-1355 (9th Cir. 1987) .*

(n13)Footnote 13. *See Schaafsma v. Morin Vermont Corp., 802 F.2d 629, 634 (2d Cir. 1986) .*

(n14)Footnote 14. *See Grosvenor Properties, Ltd. v. Southmark Corp., 896 F.2d 1149, 1151-1152 (9th Cir. 1990) .*

(n15)Footnote 15. *See Grosvenor Properties, Ltd. v. Southmark Corp., 896 F.2d 1149, 1151-1152 (9th Cir. 1990) .*

(n16)Footnote 16. *See Abou-Khadra v. Mahshie, 4 F.3d 1071, 1078-1079 (2d Cir. 1993) .*

(n17)Footnote 17. *See Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 924 (10th Cir. 1984) .*

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CHAPTER 40 Verdicts and Jury Deliberations
C. Understanding General Verdicts with Answers to Interrogatories

3-40 Federal Litigation Guide § 40.36

§ 40.36 Evaluating the Effect of Inconsistencies Between Interrogatory Answers and General Verdict

[1] Entering Judgment in Accordance With Answers Notwithstanding Verdict, Seeking Further Jury Deliberations, or Ordering New Trial

Where the general verdict and the answers to interrogatories are harmonious, Rule 49(b) provides that the appropriate judgment shall be entered pursuant to Rule 58. n1 While general verdicts with special interrogatories must be consistent, no such consistency requirement is extended to multiple general verdicts. n2

In addition, in situations where answers to interrogatories are consistent with each other but inconsistent with the general verdict, the rule provides three alternatives: n3

- Judgment may be entered in accordance with the answers notwithstanding the general verdict, n4
- The court may return the jury for further deliberations n5
- A new trial may be ordered n6

However, the rule does not apply to situations in which the claimed inconsistency is between the verdict and the evidence. n7 Thus, a district court cannot be compelled to strike a general verdict and enter a verdict consistent with the factual findings. n8

A district court has a duty to reconcile and harmonize the jury's answers to interrogatories to support the judgment, if that is possible. n9 The test in reconciling inconsistencies is whether "the answers represent a logical and probable decision on the relevant issues as submitted." n10

A court may enter a judgment pursuant to Rule 49(b) only if it is not reasonably possible to resolve the apparent inconsistency presented by the verdict and the answer to the interrogatory. n11 In a civil rights action brought by a citizen against a police officer alleging that his constitutional rights were violated by the officer's use of excessive force in detaining him, the jury entered a general verdict for the citizen but awarded no damages. Plaintiff filed a post-trial motion to correct the verdict to award him damages. The district court determined that the verdict and interrogatory answers were inconsistent and denied the motion. On appeal, the Ninth Circuit held that the general verdict and

interrogatory answers could be harmonized by reflecting the jury's view that while the officer violated plaintiff's civil rights that plaintiff suffered no injury as a result. Accordingly, the case was reversed and remanded with instructions to enter judgment for plaintiff and to award $1 nominal damages. n12

[2] Resubmitting Inconsistent Answers to Jury

Under Rule 49(b), the trial court has the power to permit a jury to correct mistakes in its verdict before the jury is discharged. n13 The resubmission of inconsistent answers to special interrogatories or the submission of supplemental interrogatories is expressly authorized by Rule 49(b). n14

Most courts hold that any objection concerning the interrogatories and the verdict must be raised prior to the discharge of the jury or it will be waived. n15

[3] New Trial May Be Ordered if General Verdict and Interrogatory Answers Inconsistent

The new trial is the last option offered by Rule 49(b) when there is an inconsistency between the answers to interrogatories and the general verdict. Trial courts have broad discretion in considering the award of a new trial. n16 This includes the power to refuse to accept a jury's inconsistent answers to interrogatories. n17 Vacating a verdict and ordering a new trial does not violate a party's *Seventh Amendment* rights where the verdict is confused and impossible to understand. n18 However, a trial court must exhaust its efforts to harmonize the interrogatory answers and the verdict before ordering a new trial. n19

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureTrialsJury TrialsVerdictsInconsistent Verdicts

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 58.*

(n2)Footnote 2. *See Arthur Pew Constr. Co. v. Lipscomb, 965 F.2d 1559, 1571 (11th Cir. 1992) .*

(n3)Footnote 3. *Fed. R. Civ. P. 49(b)(3).*

(n4)Footnote 4. *See Wilbur v. Correctional Services Corp., 393 F.3d 1192, 1199 (11th Cir. 2004) .*

(n5)Footnote 5. *See Armstrong ex rel. Armstrong v. Brookdale University Hospital & Medical Center, 425 F.3d 126, 135 (2d Cir. 2005) .*

(n6)Footnote 6. *See Turyna v. Martam Construction Co., 83 F.3d 178, 181-182 (7th Cir. 1996) .*

(n7)Footnote 7. *See Jewell v. Holzer Hosp. Foundation, Inc., 899 F.2d 1507, 1511 (6th Cir. 1990) .*

(n8)Footnote 8. *See Rinehart v. Wedge, 943 F.2d 1158, 1160 (9th Cir. 1991) .*

(n9)Footnote 9. *See McAdam v. Dean Witter Reynolds, Inc., 896 F.2d 750, 763-764 (3d Cir. 1990) .*

(n10)Footnote 10. *See White v. Grinfas, 809 F.2d 1157, 1161 (5th Cir. 1987) .*

(n11)Footnote 11. *See Los Angeles Nut House v. Holiday Hardware Corp., 825 F.2d 1351, 1353-1354 (9th Cir. 1987) .*

(n12)Footnote 12. *See Wilks v. Reyes, 5 F.3d 412, 415-416 (9th Cir. 1993)* .

(n13)Footnote 13. *See Rowe Int., Inc. v. J-B Enterprises, Inc., 647 F.2d 830, 835 (8th Cir. 1981)* .

(n14)Footnote 14. *See McLaughlin v. Fellows Gear Shaper Co., 786 F.2d 592, 596 (3d Cir. 1986)* .

(n15)Footnote 15. *See Correia v. Fitzgerald, 354 F.3d 47, 56-57 (1st Cir. 2003)* .

(n16)Footnote 16. *See MacQuarrie v. Howard Johnson Co., 877 F.2d 126, 131 (1st Cir. 1989)* .

(n17)Footnote 17. *See Atlantic Tubing & Rubber Co. v. International Engraving Co., 528 F.2d 1272, 1276 (1st Cir. 1976)* .

(n18)Footnote 18. *See Cool Light Co. v. GTE Prods. Corp., 973 F.2d 31, 35-36 (1st Cir. 1992)* .

(n19)Footnote 19. *See Harvey v. General Motors Corp., 873 F.2d 1343, 1348 (10th Cir. 1989)* .

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CHAPTER 41 Bench Trials *

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§ 41.syn Synopsis to Chapter 41: Bench Trials *

41.01 Evaluating Constitutional Guidelines Pertaining to Trials

41.02 Evaluating Rule 38 Guidelines Pertaining to Trials

41.03 Evaluating Rule 39 Guidelines Pertaining to Trials

41.04 Understanding When Bench Trials May Occur Following Jury Demand
[1] Consenting to Bench Trial Following Jury Demand
[2] Waiving Jury Trial By Conduct Following Jury Demand
[3] Failing to Object to Order Scheduling Bench Trial May Constitute Consent
[4] Moving to Strike Opponent's Jury Demand May Function as Consent
[5] Finding By Court That No Right to Jury Trial Exists
[6] Moving to Strike Jury Demands

41.05 Considering Combined Trials of Jury and Nonjury Issues

41.06 Jury's Determinations of Common Facts Are Binding

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41.10 Persuading the Court Throughout the Litigation

41.11 Addressing Procedural and Substantive Issues at Pretrial Conferences

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41.15 Considering Order of Proof in Bench Trials

41.16 Conducting Direct Examination in Bench Trials

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41.18 Evaluating Evidentiary Issues in Bench Trials

41.19 Using Deposition Transcripts in Bench Trials

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41.21 Presenting Closing Arguments at Bench Trials

§§ 41.22 through 41.29 [Reserved]

41.30 Impaneling Advisory Jury on Motion or Sua Sponte

41.31 Impaneling Advisory Jury Does Not Satisfy Seventh Amendment

41.32 Impaneling Advisory Jury Is Discretionary

41.33 Understanding the Effect of Verdict of Advisory Jury

41.34 Accepting or Rejecting Advisory Verdict

41.35 Challenging Findings, Not Advisory Verdict

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CHAPTER 41 Bench Trials *

3-41 Federal Litigation Guide Scope

Scope

SCOPE

This chapter examines issues pertaining to bench trials. The chapter explains bench trials that result because no jury was demanded, because the parties were never entitled to a jury trial, or because the parties stipulated to a bench trial.

The chapter also addresses tactics and techniques that are effective when a case is tried by a judge without a jury. In general, the art of persuasion remains the same before a judge or a jury. Therefore, the overall approach to the trial of a nonjury case should be basically the same as the approach to the trial of a jury case. Although the fundamental strategy and approach to bench trials may the same as that for jury trials, the evidence may be streamlined for some bench trials, as discussed in the chapter.

Finally, the chapter analyzes advisory juries and includes a discussion of when advisory juries may be used by the court.

For expanded coverage of bench trials, *see* Moore's Federal Practice, Ch. 39, *Trial By Jury or By the Court* .

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CHAPTER 41 Bench Trials *
A. Understanding When Bench Trials May Occur

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41.01 Evaluating Constitutional Guidelines Pertaining to Trials

The *Seventh Amendment to the United States Constitution* guarantees the right to a jury trial for "suits at common law" where the value in controversy exceeds twenty dollars. The amendment is construed to embrace all suits which are not of equity or admiralty jurisdiction. n1 Accordingly, parties in an action seeking relief in equity do not have a right to a jury trial, and trials in those cases will typically be bench trials.

When a party brings both legal and equitable claims in the same action, the *Seventh Amendment* right to jury trial on the legal claims must be preserved by trying those claims first, or at least simultaneously with equitable claims, and the jury's findings on any common questions of fact must be applied when the court decides the equitable claims. n2

The *Seventh Amendment* does not mandate jury trials but instead preserves an entitlement to a jury trial for parties in particular cases. As such, the right to a jury trial may be waived. n3

FOOTNOTES:
(n1)Footnote 1. *See Teamsters v. Terry, 494 U.S. 558, 564, 110 S. Ct. 1339, 108 L. Ed. 2d 519 (1990)* .

(n2)Footnote 2. *See Colorado Visionary Academy v. Medtronic, Inc., 397 F.3d 867, 875 (10th Cir. 2005)* .

(n3)Footnote 3. *See Bellmore v. Mobil Oil Corp., 783 F.2d 300, 306 (2d Cir. 1986)* .

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CHAPTER 41 Bench Trials *
A. Understanding When Bench Trials May Occur

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41.02 Evaluating Rule 38 Guidelines Pertaining to Trials

Rule 38(a) preserves the right to a jury trial in those cases in which the right is protected by the *Seventh Amendment to the Constitution*, as well as in those cases that allow for a jury under federal statute. n1

Rule 38(b) provides that any party may demand a jury trial on any issue to which the right to a jury trial exists. The demand must be in writing, and must be served on the other parties within 14 days after service of the last pleading addressing the issue. n2 Failure to timely serve and file a Rule 38 jury demand may waive any right to a trial by jury. n3

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 38(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 38(b).*

(n3)Footnote 3. *Fed. R. Civ. P. 38(d).*

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CHAPTER 41 Bench Trials *
A. Understanding When Bench Trials May Occur

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41.03 Evaluating Rule 39 Guidelines Pertaining to Trials

When a jury trial has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless one of the following conditions is met: n1

- The parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury

- The court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States

Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court. However, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been properly made, the court in its discretion upon motion may order a trial by a jury of any or all issues. n2

In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right. n3

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 39(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 39(b).*

(n3)Footnote 3. *Fed. R. Civ. P. 39(c).*

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CHAPTER 41 Bench Trials *
A. Understanding When Bench Trials May Occur

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41.04 Understanding When Bench Trials May Occur Following Jury Demand

[1] Consenting to Bench Trial Following Jury Demand

Even if a jury demand is made with respect to an issue, that issue may be tried to the court rather than a jury if all parties or their attorneys of record so consent by filing a written stipulation or by making an oral stipulation that is entered in the record. n1

Whenever the record adequately reflects the consent of the parties, even if not in the form of a stipulation, courts have permitted nonjury trials of issues that are otherwise subject to valid jury demands. n2

[2] Waiving Jury Trial By Conduct Following Jury Demand

The right to a jury trial may be waived, despite a timely filed demand and the absence of any express stipulation on the record, if the conduct of the partiesmakes it clear that they do not intend to maintain their claim to a jury trial. n3 For example, knowing participation in a bench trial without objection is sufficient to constitute a jury waiver. n4

[3] Failing to Object to Order Scheduling Bench Trial May Constitute Consent

If a timely jury demand is made, but a court makes a pretrial order under Rule 16 assigning the case for a bench trial, a waiver of the right to a jury trial may occur if there is no timely objection to the order. n5

[4] Moving to Strike Opponent's Jury Demand May Function as Consent

Moving to strike the other party's jury demand may preclude a party from objecting when that opposing party subsequently attempts to unilaterally withdraw the jury demand. In one case, for example, the defendant had strenuously opposed plaintiffs' demand for a jury, but when the plaintiffs later attempted to waive their demand, in order to secure an earlier trial date, defendant refused to consent to the waiver. The court concluded that, by virtue of its earlier opposition, defendant waived its right to object to the withdrawal of the jury demand. n6 This quasi-estoppel, using a party's prior conduct to find a waiver of the right to object to the unilateral withdrawal of a jury demand, is the functional equivalent of conduct evidencing consent to a nonjury trial.

[5] Finding By Court That No Right to Jury Trial Exists

Despite a timely demand for jury trial, the action, or particular issues in the action, will be tried by the court if the court determines that there is no right to a jury for the action or for particular issues covered by the jury demand. n7 Permitting a court to ignore a timely-filed jury demand when it rules that there is no right to a jury is proper because Rules 38 and 39 merely preserve the right to a jury trial. A Rule 38 jury demand does not create any right to a jury trial when there is no such right under the *Seventh Amendment* or any statute.

[6] Moving to Strike Jury Demands

Any party may move to strike the demand for a jury trial, or move to strike the action or specified issues in the action from the jury trial list or jury calendar. n8 Rule 39(a) also permits the court to strike an action from the jury trial list on its own initiative. n9

Parties have a great deal of latitude on the timing of motions to strike a jury demand. Because a court has the power to act sua sponte at any time, it follows that a court has the discretion to permit a motion to strike a jury demand at any time, even on the eve of trial. n10

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 39(a).*

(n2)Footnote 2. *See Wauhop v. Allied Humble Bank, N.A., 926 F.2d 454, 455-456 (5th Cir. 1991)* .

(n3)Footnote 3. *See Johnson v. Penrod Drilling Co., 469 F.2d 897, 902-903 (5th Cir. 1972)* .

(n4)Footnote 4. *See White v. McGinnis, 903 F.2d 699, 703 (9th Cir. 1990)* (citing **Moore's Federal Practice**).

(n5)Footnote 5. *Sewell v. Jefferson County Fiscal Court, 863 F.2d 461, 464-465 (6th Cir. 1988)* ; *Fields Eng'g & Equip. v. Cargill, Inc., 651 F.2d 589, 592 (8th Cir. 1981)* .

(n6)Footnote 6. *See Reid Bros. Logging Co. v. Ketchikan Pulp Co., 699 F.2d 1292, 1304 (9th Cir. 1983)* (citing **Moore's Federal Practice**).

(n7)Footnote 7. *Fed. R. Civ. P. 39(a)(2).*

(n8)Footnote 8. *Fed. R. Civ. P. 39(a)(2).*

(n9)Footnote 9. *Fed. R. Civ. P. 39(a)(2).*

(n10)Footnote 10. *See Armco, Inc. v. Armco Burglar Alarm Co., 693 F.2d 1155, 1158 (5th Cir. 1982)* .

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CHAPTER 41 Bench Trials *
A. Understanding When Bench Trials May Occur

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41.05 Considering Combined Trials of Jury and Nonjury Issues

Because the Federal Rules of Civil Procedure allow legal, equitable, and maritime claims to be joined in a single action, n1 and because the right to a jury trial under Rule 38 extends to individual issues in a case rather than to entire actions, n2 combined trials in which the legal claims are submitted to a jury while the equitable or maritime claims are submitted to the court are almost inevitable. n3 The language of Rule 39 anticipates combined actions. When there is a jury demand, the Rule provides for a case to be put on the jury docket for the trial of "all issues so demanded"; n4 and simultaneously recognizes that "issues not demanded for trial by jury" will be tried by the court. n5

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 2*; *Fed. R. Civ. P. 18*.

(n2)Footnote 2. *Fed. R. Civ. P. 38*.

(n3)Footnote 3. *See Kunkel v. Topmaster Intern., Inc., 906 F.2d 693, 696 (Fed. Cir. 1990)* .

(n4)Footnote 4. *Fed. R. Civ. P. 39(a)*.

(n5)Footnote 5. *Fed. R. Civ. P. 39(b)*.

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CHAPTER 41 Bench Trials *
A. Understanding When Bench Trials May Occur

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41.06 Jury's Determinations of Common Facts Are Binding

Absent imperative circumstances, if jury and nonjury claims are raised in the same action, any common questions of fact must be tried the jury first. The right to a jury trial may not be impaired through prior determination of factual issues by a court. n1

In combined jury and nonjury trials, the jury's decisions on the common factual questions are binding on the court. n2 However, the court is not always bound by the jury's verdict. If the court determines that a jury determination of factual issues is"infirm" because it is so without legally sufficient evidentiary support that a judgment as a matter of law (i.e., "judgment n.o.v.") would be justified, n3 or if the court determines that there are grounds for ordering a new trial, n4 the court may make contrary factual decisions without impinging on a party's right to a jury trial. n5

FOOTNOTES:
(n1)Footnote 1. *See Beacon Theatres v. Westover, 359 U.S. 500, 510, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959) .*

(n2)Footnote 2. *See Wade v. Orange County Sheriff's Office, 844 F.2d 951, 954 (2d Cir. 1988) .*

(n3)Footnote 3. *See Fed. R. Civ. P. 50(a).*

(n4)Footnote 4. *See Fed. R. Civ. P. 59.*

(n5)Footnote 5. *See Swentek v. US Air, Inc., 830 F.2d 552, 559 (4th Cir. 1987) .*

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[Reserved]

§§ 41.07[Reserved]

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CHAPTER 41 Bench Trials *
B. Evaluating Bench Trial Strategies and Procedures

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41.10 Persuading the Court Throughout the Litigation

Since the judge is the finder of both the facts and the law in bench trials, it is critical to begin persuading the judge as early in the litigation as possible. In bench trial cases, every pleading and brief, and every oral presentation, even those that relate to purely procedural matters, may present an opportunity to begin persuading the judge that a claim or defense has merit. Impressions formed or conclusions reached by the judge at the beginning of the case may be as important and as lasting as those reached at the end. Therefore, in bench trials great care must be taken in deciding what position to take on all pretrial matters.

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B. Evaluating Bench Trial Strategies and Procedures

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41.11 Addressing Procedural and Substantive Issues at Pretrial Conferences

Most judges will attempt to resolve procedural and substantive issues during the final pretrial conference. While some judges may believe that pretrial conferences are less important in nonjury cases, most judges will use the pretrial conference in a nonjury case to advance the judicial process as much as possible.

The trial court may seek to set evidentiary limits for trial at the time of the pretrial conference, including limiting the number of expert witnesses, warning against cumulative evidence, and establishing specific procedures for the use of deposition transcripts at trial. Additionally, the pretrial conference may be used to determine which facts the parties will stipulate to, obviating the need to present evidence on those facts.

At the final pretrial conference, the judge may also set forth guidelines for the submission of:

- Trial briefs
- Proposed findings of fact and conclusions of law
- Post-trial briefs

The judge in a nonjury case may also consider bifurcating issues for trial at the time of the pretrial conference. This includes not only the possibility of separate trials on liability and damages, but also the possibility of a separate trial on any issue which might be determinative of the case. Therefore, before the pretrial conference, counsel should determine whether bifurcation of particular issues is possible or likely, whether a separate trial of any issue is in the client's interest, and, if it is not, what arguments might be advanced to avoid the bifurcation.

Finally, the judge is likely to encourage the parties to reach a settlement at thepretrial conference.

For complete coverage of pretrial conferences, see Ch. 27 , *Pretrial Conference*.

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B. Evaluating Bench Trial Strategies and Procedures

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41.12 Preparing Trial Briefs for Bench Trials

Because the trial judge will be the finder of both facts and the law, it is generally advisable to file a detailed and persuasive trial brief in all bench trials. Trial briefs in a nonjury case will usually be more comprehensive and, particularly on factual matters, more detailed than jury trial briefs.

In bench trials, a trial brief is an especially effective way to present the case in a cogent and persuasive manner before presenting evidence at trial. A well-drafted trial brief is more likely to positively influence the judge's final decision in the case than one formulated with minimal effort. Although it is possible that motions in limine and briefs in support of requested instructions can do some of the work of a trial brief, the brief plays a unique role in providing the framework for the court's legal and factual analysis of the case.

In general, a trial brief should include an introductory section which provides a factual and procedural overview of the case. Following the introduction, the trial brief will often integrate a discussion of factual and legal issues. It is often desirable to discuss the elements of the claims or defenses on an item by item basis, describing both the evidence in support of the claim or defense and the related legal issues in the same section of the brief.

While the factual summaries contained in a trial brief should be decidedly affirmative, and while the evidence supporting a particular position should almost always precede a discussion of unfavorable evidence, always forewarn the court of adverse evidence by discussing it candidly and by tendering the strongest possible rebuttal.

For complete coverage of trial briefs, see Ch. 29, *Trial Briefs*.

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CHAPTER 41 Bench Trials *
B. Evaluating Bench Trial Strategies and Procedures

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41.13 Making Opening Statements in Bench Trials

The use of opening statements can be every bit as important and as effective in a trial to the court as they are in a trial to a jury. Properly presented opening statements can be used to summarize the case and arouse the judge's interest. However, the use of opening statements in bench trials is at the discretion of the court, since no rules establish the right to present opening statements.

Even if a formal opening statement is not permitted by the court, the equivalent of an opening statement may be delivered in fragments as particular issues are raised or objections are made, or as various procedural watersheds such as motions for judgment are made to the court.

Many judges will limit the opening statement, either by expressly stating what will be permitted or by setting forth specific questions at the beginning of the case. Thus, it is not uncommon for the judge to state at the beginning of the case what the judge understands the issues and contentions of the parties to be and to inquire whether the issues and contentions have been accurately stated. Alternatively, the judge may identify issues for preliminary discussion. In some cases the judge may even affirmatively identify areas of doubt with respect to a party's version of the case.

As a result, the use of opening statements in bench trials requires flexibility, and counsel for both sides must be prepared to confront a variety of situations, from a full blown exposition of all the facts at one extreme to a selective discussion of particular facts or issues at the other.

A good way to prepare for trial is to draft an opening statement early on and continually revise it as the trial date approaches. Even if the planned opening statement is never presented, the process of writing and revising it will help to manage the themes, witnesses, and complexity of the case.

Opening statements to the court are not subject to the same limitations as those made to a jury. For instance, in bench trials, it may be appropriate to discuss points of law or legal issues. Indeed, in a bench trial, discussion of legal points during opening statement may be more important than a discussion of the facts. While purely argumentative, conclusional remarks are never proper in an opening statement, an integrated discussion of the legal issues and the expected proof can produce a more complete opening statement than is possible in a jury trial. The court presumably understands the difference between facts, inferences, and mere supposition and argumentative matter--provided it is relevant and to the point--may be entirely appropriate in an opening statement to the court.

Finally, an opening statement in a bench trial should invite a dialogue with the court. The principal purpose of this dialogue will be to determine if the judge has any preconceived opinions, favorable or unfavorable, about the case and to determine whether there are any aspects of the case over which the judge is concerned or confused. Information obtained on any of these subjects, or any hint that the judge has reservations concerning an aspect of the claim or defense, is invaluable.

For complete coverage of opening statements, see Ch. 32, *Opening Statements*.

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41.14 Maintaining Flexibility as Bench Trial Unfolds

Bench trials are often more unpredictable than jury trials, and can require more flexibility in the sequencing and presentation of evidence. Often in the bench trial, there is more dialogue between the judge and attorneys, and the trial unfolds in amanner that is less choreographed than is the case with many jury trials. Moreover, because of the guidance that the lawyers receive as to the judge's understanding or concerns about the case, the trial may have a substantially different emphasis at the end than it had at the beginning.

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41.15 Considering Order of Proof in Bench Trials

The most effective sequence of proof in a jury trial is likely to be the most effective sequence of proof in a bench trial. Even so, counsel may not need to call as many witnesses. Cumulative evidence will generally have less effect with a judge than with a jury, and may actually have an adverse effect by exhausting the judge's patience. Thus, one expert whose credentials are excellent and whose views are cogently expressed may be enough for the judge in a situation where a second expert, perhaps with a lesser background but a more "folksy" demeanor, might be desirable with a jury.

Depending on the type of case, it may not be necessary to lay the same kind of foundation and background for the substantive elements of a case in a bench trial as it is with a jury. Indeed, it is usually a good strategy in a bench trial to give the court credit for not requiring elaborate exposition of routine facts. Both the pretrial conference and the trial briefs will have laid most of the groundwork.

Although witnesses should always be presented in logical sequence, the sequencing of witnesses in a bench trial will not be as critical as in a jury trial. Whereas a jury may be easily confused by a non-linear presentation, a judge generally will be better able to connect and relate fragments of evidence received at different points in the trial. Notwithstanding that fact, counsel should depart from a well-ordered presentation only out of necessity.

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41.16 Conducting Direct Examination in Bench Trials

As is the case in jury trials, it is critical to choose witnesses who will testify credibly and persuasively in bench trials. Pretrial interviews and depositions are often the best methods of determining which witnesses to present at trial, and key witnesses should be selected for the purpose of creating a complete record at trial.

The preparation of an outline of questions for direct examination is critical. Likewise, witness preparation for direct examination is critical before any trial, and should include:

- Familiarizing witnesses with the trial process
- Educating witnesses about the facts of the case
- Explaining protocol of direct examination and cross-examination
- Reviewing deposition testimony
- Discussing demeanor, attire, and speaking manner
- Explaining the significance of the testimony

During a bench trial, the personal background of witnesses can generally be quickly sketched. Witnesses should testify only to matters strictly germane to the case, and even important substantive witnesses should get quickly to the point.

Unless an attack on an expert's qualifications is expected, the expert's curriculum vitae should be offered as an exhibit without exhaustive questioning regarding the expert's qualifications. The expertise of such witnesses will normally be assumed by the court, and their credibility will be judged primarily by the substance of the testimony.

For complete coverage of direct examination, see Ch. 33, *Direct Examination*.

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41.17 Conducting Cross-Examination in Bench Trials

As one sophisticated in the analysis of evidence and evaluation of credibility, the trial judge will not be interested in points made on cross-examination which do not go to the heart of the case. Effective cross-examination serves two essential purposes:

- To elicit additional favorable facts that were not established
- To neutralize or discredit unfavorable testimony

Cross-examination also provides the opportunity to bring out facts tending to discredit the witness by showing that the witness' testimony was untrue, biased, or based on faulty memory or perception.

A party who is adverse to the party initially calling a witness may cross-examine the witness in the sequence that the court directs. Cross-examination is typically limited to: n1

- The subject matter of the witness' direct examination
- Matters affecting the credibility of the witness

However, the court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination. n2

Planning for an effective cross-examination begins well before trial. Preparation generally includes reviewing discovery responses, deposition testimony, and other related documents. These materials will often illuminate the potentially adverse testimony of key opposition witnesses, and the materials can often beused to impeach or otherwise cross-examine those witnesses. An outline of areas of inquiry for each potential adverse witness that includes potential cross-examination questions will likely be useful at trial.

For complete coverage of cross-examination, see Ch. 35, *Cross-Examination*.

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Evid. 611(b).*

(n2)Footnote 2. *Fed. R. Evid. 611(b).*

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41.18 Evaluating Evidentiary Issues in Bench Trials

The rules of evidence are the same for jury and nonjury trials. However, the standards of admissibility applied in a bench trial may be looser than those applied in a jury trial, and a reversal based on the improper admission of evidence in a bench trial may be unlikely. This is particularly true when the trial judge is careful to address in the findings of fact any evidence which may have been improperly admitted, with an express indication that the evidence was given little or no weight.

Some judges are as disciplined in their evidentiary rulings in a bench trial as they are in a jury trial. Many judges, though more lenient, are nevertheless careful to comment on the infirmity of significant evidence admitted over serious objection and to thus reassure the aggrieved party that the evidence will not be given improper weight. This, however, does not change the essential problem faced by the attorneys offering or opposing the admission of the evidence. The attorney proffering the evidence must recognize that it is not enough to persuade the court that, because it is a bench trial, and to avoid error, the evidence should come in; the attorney must also convince the court that the evidence has substantive value. The attorney opposing the admission of the evidence must recognize that the judge will not forget the nature or details of the tendered evidence, even if it is excluded. Both attorneys must remember that, when admissibility is argued, they are in fact addressing the issues of relevance and probative weight.

Judges in bench trials will often relax the evidentiary rules for the following reasons:

- To expedite the proof
- To admit evidence of slight probative value for evaluation in the context of the entire case
- To avoid the risk of reversal where the evidentiary issue is genuinely close

Counsel should recognize these three objectives and avoid prolonged argument when one or more of them are clearly being served. That is not to say, however, that relevant objections should not be raised on the record just as they would be at a jury trial.

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41.19 Using Deposition Transcripts in Bench Trials

Although judges generally recognize that key evidence and admissions may be contained in deposition transcripts, some judges may grow impatient with the reading of depositions at trial. Some judges may even "prohibit" such reading entirely, stating that they will read all designated portions from depositions tendered by either party, and will give that testimony weight equal to that given to the testimony of live witnesses.

Whether depositions are to be read in open court or by the judge or the clerk in chambers, it is advisable to be very selective when designating which portion of a deposition should be read. This is a prime example of the general concept that the presentation of evidence in a bench trial should be streamlined. Therefore, if key elements of the case depend upon deposition testimony, ask the judge to read only those portions of depositions that are material to the case.

If the judge will not permit the reading of depositions in open court, counsel should orally emphasize the importance of the deposition testimony on the record. If important deposition testimony is not to be heard in open court, the briefs and other documents which are filed should strongly emphasize both the deposition testimony and the points or issues established by that testimony. Such written emphasis would certainly be appropriate for pretrial and post-trial briefs. It would also be appropriate to include references to deposition testimony in any other briefs or motions filed during the course of the trial where the deposition testimony is relevant.

Regardless of the court's attitude toward depositions, if it is necessary to mark extensive or voluminous portions of depositions, file an index or topical table of contents to the deposition identifying by subject matter and page number the topics covered.

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41.20 Using Demonstrative Exhibits in Bench Trials

Demonstrative exhibits should play the same role in a bench trial as in a trial to a jury. Nevertheless, some judges believe that the use of demonstrative exhibits in bench trials should be sparing. It is undoubtedly true that, because of the experience which most judges possess in evidentiary matters, demonstrative exhibits may be less necessary in some cases where they might be essential with a jury.

It is therefore important to evaluate whether demonstrative exhibits are necessary and if they are, to consider reducing the number of demonstrative exhibits offered. This can usually be done without detracting from the merits of the case or defense. It again assumes that the judge has either a greater familiarity with the technicalities of the case or that, because of broader experience, the judge can more readily assimilate complex information presented orally or contained in the trial exhibits.

In general, the use of high-quality graphics and other professionally generated demonstrative exhibits which clarify the issues and succinctly set forth a party's position will be appreciated by the court, and may have a positive impact in the outcome of the case.

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41.21 Presenting Closing Arguments at Bench Trials

At the close of the evidence in a nonjury trial, the trial court will likely do one of the following:

- Hear closing arguments immediately or within a few days
- Set closing arguments for a future date
- Dispense with closing arguments entirely

In the first two events, the judge may indicate particular subjects that should be covered in the argument. In the third event, it may be understood that either post-trial briefs or proposed findings of fact and conclusions of law, or both, will serve the function of closing argument.

The most significant difference between closing argument in jury and nonjury cases is that, in a jury case, except for facial expressions and body language you will have had no dialogue with the jury. By contrast, unless the trial judge in a nonjury case has conducted the trial in truly neutral terms, you should have at least some indication--and very often a clear indication--of the points which the judge believes are significant or about which he or she has particular concerns. Thus, while in a jury case counsel must be sure to cover all possible points of proof or concern, in a bench trial counsel may be very selective and specific in the points covered.

In closing argument to the court it is also possible to be much more candid and direct in addressing points which are of known concern to the court. For example, under the right circumstances, the closing argument might begin with the statement: "Your Honor, I know that there are two points in this case which are of most concern, and I will address them first."

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41.30 Impaneling Advisory Jury on Motion or Sua Sponte

The court, on motion or on its own initiative, may try any issue with an advisory jury. n1 Rule 39(c) expressly authorizes an advisory jury in "an action not triable of right by a jury." n2 The court may accept or ignore an advisory jury's verdict, must make its own findings of fact and conclusions of law, and must bear the responsibility for the ultimate judgment. However, since the judge is very likely to adopt the jury's findings, a trial to an advisory jury should be conducted as though it were a trial to a jury empowered to make binding determinations. For example, the jury should be instructed as the scope and nature of the proceedings, opening statements and closing arguments should be allowed, and evidentiary rulings should be made to the same standard as during a typical jury trial.

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 39(c).*

(n2)Footnote 2. *Fed. R. Civ. P. 39(c).*

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41.31 Impaneling Advisory Jury Does Not Satisfy Seventh Amendment

Use of an advisory jury does not satisfy a party's constitutional right to a jury trial. n1 If a party is entitled to a jury trial, and if a court erroneously denies a party the right to a jury trial, the presence of an advisory jury will be ignored, and the judgment will not stand on appeal. The judgment will be reversed and the case remanded for a new jury trial even in those cases in which an advisory jury was impaneled and the court accepted the advisory verdict, or a party wishes to accept the verdict of the advisory jury. n2

There are tactical differences in presenting a case to a court, as opposed to a jury, and the presence of an advisory jury usually will not alter those differences. Trial before a jury that the parties assume will have only an advisory role does not give the parties the true jury trial to which the Constitution or a statute says they are entitled. n3

FOOTNOTES:
(n1)Footnote 1. *See Fischer Imaging Corp. v. GE, 187 F.3d 1165, 1174 (10th Cir. 1999)* .

(n2)Footnote 2. *See Fischer Imaging Corp. v. GE, 187 F.3d 1165, 1174 (10th Cir. 1999)* .

(n3)Footnote 3. *See Pradier v. Elespuru, 641 F.2d 808, 811 (9th Cir. 1981)* .

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41.32 Impaneling Advisory Jury Is Discretionary

A court's authority to impanel an advisory jury is discretionary, n1 and is not a matter of right. n2 Because the court's decision to use an advisory jury is strictly discretionary, that decision has been held to be unreviewable on appeal. n3

FOOTNOTES:
(n1)Footnote 1. *See NAACP v. Acusport Corp., 226 F. Supp. 2d 391, 397 (E.D.N.Y. 2002)* .

(n2)Footnote 2. *See Delman v. Federal Prods. Corp., 251 F.2d 123, 126 (1st Cir. 1958)* .

(n3)Footnote 3. *See Cox v. Babcock & Wilcox Co., 471 F.2d 13, 14 (4th Cir. 1972)* .

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41.33 Understanding the Effect of Verdict of Advisory Jury

The function of the advisory jury is only to enlighten the court. An advisory jury does not replace the court as the trier of fact in the case. n1 The responsibility for rendering a decision as the trier of fact remains with the judge, even though an advisory jury is used. n2

FOOTNOTES:
(n1)Footnote 1. *See Skoldberg v. Villani, 601 F. Supp. 981, 982 (S.D.N.Y. 1985)* .

(n2)Footnote 2. *See Wilson v. Prasse, 463 F.2d 109, 116 (3d Cir. 1972)* .

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41.34 Accepting or Rejecting Advisory Verdict

The verdict of the advisory jury has no binding effect on the court. n1 The court may accept the advisory verdict and make findings in accordance with it, or the court may reject the advisory verdict in whole or in part. n2

Regardless of whether the court accepts or rejects the advisory verdict, Rule 52(a) requires the court, as the true trier of fact, to make its own, independent findings of fact and conclusions of law. n3 The court may not simply enter judgment on the jury's verdict as if the case had been tried to a nonadvisory jury. n4 In order for a jury to be truly advisory, the court must bear ultimate responsibility for the judgment. n5 In practical terms, this means that if a district court, over objection, erroneously ordered a jury trial, that error may not be overlooked simply by considering the jury to be "advisory." n6

FOOTNOTES:
(n1)Footnote 1. *See Newmann v. United States, 938 F.2d 1258, 1259 (11th Cir. 1991)* .

(n2)Footnote 2. *See American River Transp. Co. v. Paragon Marine Servs., Inc., 213 F. Supp. 2d 1035, 1054 (E.D. Mo. 2002)* .

(n3)Footnote 3. *See Gragg v. City of Omaha, 20 F.3d 357, 358-359 (8th Cir. 1994)* .

(n4)Footnote 4. *Fed. R. Civ. P. 52(a)*; *see also Aetna Ins. Co. v. Stanford, 273 F.2d 150, 153 (5th Cir. 1959)* .

(n5)Footnote 5. *See Wilson v. Prasse, 463 F.2d 109, 116 (3d Cir. 1972)* .

(n6)Footnote 6. *See Troy v. City of Hampton, 756 F.2d 1000, 1003 (4th Cir. 1985)* .

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41.35 Challenging Findings, Not Advisory Verdict

Once the court has made its required findings and conclusions, n1 any motion challenging the judgment is not properly a motion to set aside the jury's verdict or the jury's answer to special interrogatories. Even if the court's findings are identical to the verdict of the advisory jury, a Rule 50 motion for judgment as a matter of law, or for judgment n.o.v., n2 is not appropriate. A Rule 52(b) motion to amend the findings of the court, or to make additional findings, is the only motion that may test the accuracy or sufficiency of the findings. n3

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 52(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 50.*

(n3)Footnote 3. *See Greenwood v. Greenwood, 234 F.2d 276, 278 (3d Cir. 1956)* (citing **Moore's Federal Practice**).

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CHAPTER 42 Class Actions

3-42 Federal Litigation Guide Scope

Scope

SCOPE

This chapter describes the requirements for maintaining a class action in federal court, and covers the process by which a class action is commenced, prosecuted, and defended in federal court. The chapter includes coverage of the Class Action Fairness Act of 2005 (CAFA), which includes provisions relating to diversity jurisdiction in class actions, removal of class action lawsuits from state to federal court, and class action settlements.

The chapter covers the following topics:

- **Types of class actions maintainable under Rule 23**
- **Prerequisites for class certification for each type of class action**
- **Diversity jurisdiction in class actions**
- **Removal procedures for class actions**
- **Drafting the class action complaint**
- **Pre-certification procedural issues**
- **Moving for class certification**
- **Opposing the motion for class certification**
- **Providing notice to potential class members**
- **Prosecuting or defending the action following class certification**
- **Settling the class action**

Also included are procedural checklists for use in determining whether a proposed class action meets the necessary

prerequisites.

The chapter includes a sample Class Action Complaint, Notice of Motion for Class Action Certification, and Notice to Class Members.

For expanded coverage of class actions, ***see*** Moore's Federal Practice, Ch. 23, ***Class Actions*** (Matthew Bender 3d ed.).

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CHAPTER 42 Class Actions
A. Understanding Class Action Purpose, Benefits, and Basic Requirements

3-42 Federal Litigation Guide § 42.01

§ 42.01 Purpose of Class Action

The class action was designed as "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." n1

One primary purpose of the class action is to promote judicial economy and efficiency by obviating the need for multiple adjudications of the same issues. Class actions are particularly appropriate when the " 'issues involved are common to the class as a whole' and when they 'turn on questions of law applicable in the same manner to each member of the class' ". n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 156, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)* ; *Califano v. Yamasaki, 442 U.S. 682, 700-701, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979)* .

(n2)Footnote 2. *General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 155, 159, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)* , *quoting* *Califano v. Yamasaki, 442 U.S. 682, 700-701, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979)* .

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CHAPTER 42 Class Actions
A. Understanding Class Action Purpose, Benefits, and Basic Requirements

3-42 Federal Litigation Guide § 42.02

§ 42.02 Benefits of Class Action

The benefits of a class actions include the following:

- Enhancement of access to the courts by spreading litigation costs among numerous litigants with similar claims n1

- Avoiding inconsistent adjudications by providing a single proceeding in which to determine the merits of the plaintiffs' claims n2

- Ensuring that the interests of absentee class members are considered fairly and adequately n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *United States Parole Comm'n v. Geraghty, 445 U.S. 388, 402-403, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980)* .

(n2)Footnote 2. *United States Parole Comm'n v. Geraghty, 445 U.S. 388, 402-403, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980)* .

(n3)Footnote 3. *See Hansberry v. Lee, 311 U.S. 32, 42-43, 61 S. Ct. 115, 85 L. Ed. 22 (1940)* ; *see also Baby Neal ex rel. Kanter v. Casey, 43 F.3d 48, 55 (3d Cir. 1994)* ; *Sikes v. American Tel. & Tel. Co., 841 F. Supp. 1572, 1578 (S.D. Ga. 1993)* .

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CHAPTER 42 Class Actions
A. Understanding Class Action Purpose, Benefits, and Basic Requirements

3-42 Federal Litigation Guide § 42.03

§ 42.03 Rule 23 Governs Class Actions in Federal Court

Rule 23 governs class actions in the federal courts. Several courts have held that Rule 23 should be given a liberal rather than a narrow interpretation. n1

Other courts, in contrast, have strictly construed the requirements of the Rule. n2 The principle of strict construction follows from the perception of some courts that class actions are often unmanageable. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *In re A.H. Robins Co., 880 F.2d 709, 729 (4th Cir. 1989) , cert. denied sub nom., Anderson v. Aetna Casualty and Sur. Co., 493 U.S. 959 (1989)* ; *Movement v. GMC, 622 F.2d 1235, 1254 (7th Cir. 1980)* ; *Wright v. Stone Container Corp., 524 F.2d 1058, 1061-1062 (8th Cir. 1975)* ; *Green v. Wolf Corp., 406 F.2d 291, 301 (2d Cir. 1968)* ; *Vigue v. Ives, 138 F.R.D. 6, 8 (D. Me. 1991) .*

(n2)Footnote 2. *Roby v. St. Louis S. R. Co., 775 F.2d 959, 961 (8th Cir. 1985)* ; *La Mar v. H.&B. Novelty & Loan Co., 489 F.2d 461, 468 (9th Cir. 1973) .*

(n3)Footnote 3. *See LaMar v. H.&B. Novelty & Loan Co., 489 F.2d 461, 468 (9th Cir. 1973) .*

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CHAPTER 42 Class Actions
A. Understanding Class Action Purpose, Benefits, and Basic Requirements

3-42 Federal Litigation Guide § 42.04

§ 42.04 Failure to Comply With Local Rules May Bar Class Action

Local district court rules impose additional procedural requirements for bringing class actions which must be satisfied before a class may be certified. Those local rules are discussed throughout this chapter where relevant. Local district court rules should be consulted prior to commencing any federal lawsuit.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral Overview

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CHAPTER 42 Class Actions
A. Understanding Class Action Purpose, Benefits, and Basic Requirements

3-42 Federal Litigation Guide § 42.05

§ 42.05 District Court Given Broad Discretion to Decide Whether Suit May Be Maintained as Class Action

The district court has broad discretion to decide whether to certify a class. The district court's decision to certify a class will be overturned only for abuse of discretion. n1

The court's discretion, however, must be exercised within the framework of Rule 23. n2

The court's discretion is tempered by its obligation to protect the interests of absent class members. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsJudicial DiscretionCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Castano v. The American Tobacco Co., 84 F 3d 734, 752 (5th Cir. 1996)* ; *In re American Med. Sys., Inc., 75 F.3d 1069, 1078-1079 (6th Cir. 1996)* ; *Consolidated Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 482 (2d Cir. 1995)* ; *Hoxworth v. Blinder, Robinson & Co., Inc. 980 F.2d 912, 923 (3d Cir. 1992)* ; *Six Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301 (9th Cir. 1990)* .

(n2)Footnote 2. *Gulf Oil Co., v. Bernard, 452 U.S. 89, 99-101, 101 S. Ct. 2193, 68 L. Ed. 2d 693 (1981)* ; *Andrews v. American Tel. & Tel. Co., 95 F.3d 1014, 1022 (11th Cir. 1996)* .

(n3)Footnote 3. *In re* "Agent Orange" *Prod. Liab. Litig., 996 F.2d 1425, 1438 (2d Cir. 1993)* .

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CHAPTER 42 Class Actions
A. Understanding Class Action Purpose, Benefits, and Basic Requirements

3-42 Federal Litigation Guide § 42.06

§ 42.06 Alternate Forms of Certification Permissible

The court is empowered to define an appropriate class, whether by accepting the proposed class, conditionally certifying a class for a limited portion of the litigation, limiting the class to particular issues, or creating subclasses. A complaint's proposed class definition does not bind the court. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsJudicial DiscretionCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Lundquist v. Sec. Pac. Auto. Fin. Servs. Corp., 993 F.2d 11, 14 (2d Cir. 1993) , cert. denied, 510 U.S. 959 (1993) .*

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CHAPTER 42 Class Actions
A. Understanding Class Action Purpose, Benefits, and Basic Requirements

3-42 Federal Litigation Guide §§ 42.07 through 42.19

[Reserved]

§§ 42.07[Reserved]

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CHAPTER 42 Class Actions
B. Jurisdictional Prerequisites and Removing Class Actions From State to Federal Court

3-42 Federal Litigation Guide § 42.20

§ 42.20 Class Actions Must Meet General Jurisdictional Prerequisites

The Federal Rules of Civil Procedure neither extend nor limit the jurisdiction of the federal courts. n1

Therefore, Rule 23 does not provide jurisdiction for an action merely because the plaintiffs wish to proceed as a class. Rather, jurisdiction must be grounded on some other basis, most commonly a federal question or diversity of citizenship. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureRemovalGeneral OverviewCivil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 82.*

(n2)Footnote 2. *See 28 U.S.C. §§ 1331* (federal question jurisdiction), 1332 (diversity jurisdiction).

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CHAPTER 42 Class Actions
B. Jurisdictional Prerequisites and Removing Class Actions From State to Federal Court

3-42 Federal Litigation Guide § 42.21

§ 42.21 Diversity Jurisdiction Under Class Action Fairness Act of 2005

[1] Effective Date of CAFA

The Class Action Fairness Act of 2005 (CAFA) expands the scope of diversity jurisdiction in class actions. n1 In general, the law gives federal courts diversity jurisdiction over multi-state class actions involving claims of $5 million or more where at least one member of a class of plaintiffs is from a different state than any defendant. n2 The changes made by the Act apply to any civil action commenced on or after February 18, 2005. n3 The jurisdictional provisions of the CAFA apply to any action brought as a class action, before or after the entry of a class certification order by the court. n4 Diversity jurisdiction for class action lawsuits filed in federal or state court before February 18, 2005 is governed by the prior law (*see § 42.24, below*).

[2] Evaluating Cases Exempted From Jurisdictional Provisions of the Class Action Fairness Act

The following types of cases are excluded from the jurisdictional provisions of the CAFA:

- **Actions with governmental parties excluded.** The jurisdictional provisions of the CAFA do not apply to any class action in which the primary defendants are states, state officials, or other governmental entities against whom the district court may be foreclosed (on *Eleventh Amendment* grounds) from ordering relief. n5

- *See Frazier v. Pioneer Americas LLC, 455 F.3d 542, 546-547 (5th Cir. 2006)* (governmental parties exception to CAFA jurisdiction applies only when all primary defendants are states, state officials, or other governmental entities).

Small classes excluded. The jurisdictional provisions of the CAFA do not apply when the aggregate number of members of all proposed plaintiff classes in the action is less than 100. n6

- **Securities actions excluded.** The jurisdictional provisions of the CAFA do not apply to any class action that solely involves a claim concerning a covered security as defined under § 16(f)(3) of the Securities Act of 1933 and § 28(f)(5)(E) of the Securities Exchange Act of 1934. n7

- **Actions concerning fiduciary duties and related obligations concerning securities excluded.** The

jurisdictional provisions of the CAFA do not apply to any class action that solely involves a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to, or created by, or pursuant to any security as defined under § 2(a)(1) of the Securities Act of 1933 and the regulations issued under that section. n8

- **Actions concerning intracorporate and business organization litigation excluded.** The jurisdictional provisions of the CAFA do not apply to any class action that solely involves a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the state in which the corporation or business enterprise is incorporated or organized. n9

[3] Complete Diversity Not Required Under CAFA

The federal district courts have original jurisdiction over any class action governed by the Class Action Fairness Act in which the amount in controversy requirement (*see* [4], *below*) is met and either: n10

- Any member of a plaintiff class is a citizen of a state different from any defendant; or

- Any member of a plaintiff class is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a state; or

- Any member of a plaintiff class is a citizen of a state and any defendant is a foreign state or a citizen or subject of a foreign state.

Under the CAFA, "citizenship" of a state should be determined as in other diversity contexts (*see* Ch. 1, *Pleadings*). Additionally, the Act provides that an unincorporated association is deemed to be a citizen of the state where it has its principal place of business, as well as the state under whose laws it is organized. n11 This is a departure from the usual rule under which an unincorporated association has the citizenship of all of its members. n12

Citizenship of the members of a proposed plaintiff class is determined as of the date of filing of the complaint or amended complaint. If the case stated by the initial pleading is not subject to federal jurisdiction, citizenship is determined as of the date of service by the plaintiff of an amended pleading, motion, or other paper indicating the existence of federal jurisdiction. n13

In class actions not covered by the CAFA, the "complete diversity" rule requires that each named class representative must be a citizen of a different state than each defendant. n14

[4] Amount in Controversy Under the CAFA Must Exceed $5,000,000

The federal district courts have original jurisdiction of any class action governed by the Act in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interests and costs, n15 provided the minimum diversity requirements of the Act are met.

The claims of all class members are to be aggregated to determine whether the amount-in-controversy minimum is met. In an action in which a plaintiff class asserts monetary claims, whether the individual claims are large or small, the process of determining the amount in controversy is relatively straightforward. More complex problems of valuation arise in actions involving equitable or injunctive relief. In these cases, the amount in controversy is measured by the value of the "object of the litigation." n16

The difficulty of assigning a value to injunctive relief is enhanced by the question of whether to consider the value of

the claim from the plaintiff's or from the defendant's viewpoint; that is, whether to consider the benefit of the relief to the plaintiff or the cost of the relief to the defendant. Under traditional diversity jurisdiction principles as applied to class actions, the non-aggregation rule also applied to equitable and injunctive relief. Therefore, the value of the injunctive relief being sought, or the cost of injunctive relief to the defendant, had to be prorated throughout the class to determine the amount in controversy. Under the Act, which requires aggregation of claims, this apparently is no longer the case. At least one court has held that the $5,000,000 amount in controversy requirement can be met by considering the aggregate value to all plaintiffs or the aggregate cost to the defendants of equitable or injunctive relief. n17

Those class actions that do not meet the more-than-$5,000,000 threshold are not entitled to be brought in or removed to federal court under the provisions of the Class Action Fairness Act.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See 28 U.S.C. § 1332(d).*

(n2)Footnote 2. *See 28 U.S.C. § 1332(d)(2).*

(n3)Footnote 3. *See Braud v. Transp. Serv. Co., 445 F.3d 801, 803-809 (5th Cir. 2006)* ; *see also Pritchett v. Office Depot, Inc., 420 F.3d 1090, 1093-1098 (10th Cir. 2005)* (the commencement date of the action refers to the date the action is filed in a court of proper jurisdiction, not the date it is removed to federal court).

(n4)Footnote 4. *28 U.S.C. § 1332(d)(8).*

(n5)Footnote 5. *28 U.S.C. § 1332(d)(5)(A).*

(n6)Footnote 6. *28 U.S.C. § 1332(d)(5)(B).*

(n7)Footnote 7. *28 U.S.C. § 1332(d)(9)(A).*

(n8)Footnote 8. *28 U.S.C. § 1332(d)(9)(c).*

(n9)Footnote 9. *28 U.S.C. § 1332(d)(9)(B).*

(n10)Footnote 10. *28 U.S.C. § 1332(d)(2).*

(n11)Footnote 11. *28 U.S.C. § 1332(d)(10).*

(n12)Footnote 12. *See United Steelworkers of America, AFL-CIO v. R.H. Bouligny, Inc., 382 U.S. 145, 146-150, 86 S. Ct. 272, 15 L. Ed. 2d 217 (1965)* .

(n13)Footnote 13. *28 U.S.C. § 1332(d)(7).*

(n14)Footnote 14. *28 U.S.C. § 1332(a)*; *see Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 365, 41 S. Ct. 338, 65 L. Ed. 673 (1921)* .

(n15)Footnote 15. *28 U.S.C. § 1332(d)(7).*

(n16)Footnote 16. *See, e.g., DiTolla v. Doral Dental IPA of N.Y., 469 F.3d 271, 275 (2d Cir. 2006)* (defendant failed to demonstrate that claim satisfied jurisdictional amount in controversy in action seeking an accounting, as amount of damages award, if any, was mere speculation).

(n17)Footnote 17. *Berry v. American Express Publ'g, 381 F. Supp. 2d 1118, 1123 (C.D. Cal. 2005)* ("Since plaintiffs can now aggregate their claims to invoke diversity jurisdiction, finding the amount of controversy from the aggregate cost to defendants does not circumvent any non-aggregation principles and is consistent with the principle that only cases that could have been originally brought in federal court may be removed. Accordingly, the Court concludes that the amount in controversy may be satisfied either from the view of the aggregate value to the class members or defendants.").

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CHAPTER 42 Class Actions
B. Jurisdictional Prerequisites and Removing Class Actions From State to Federal Court

3-42 Federal Litigation Guide § 42.22

§ 42.22 Diversity Jurisdiction Under CAFA Depends on Citizenship of Members of Plaintiff Class

[1] District Court Must Decline Jurisdiction When More Than Two-Thirds of Class Members Are Citizens of Forum State

The Class Action Fairness Act imposes limits on jurisdiction with respect to classes composed largely of citizens of the forum state. Specifically, the Act establishes two situations in which the district court must decline jurisdiction. n1

The first situation in which the court must decline jurisdiction under the CAFA is known as the local-controversy exception, and occurs when: n2

- More than two-thirds of the members of all proposed plaintiff classes, in the aggregate, are citizens of the state in which the action was originally filed;

- There is at least one defendant who is a citizen of the state in which the action was originally filed who is also a defendant "from whom significant relief is sought" by members of the plaintiff class or classes, and "whose alleged conduct forms a significant basis for the claims asserted" by the proposed plaintiff class or classes; n3

- The members of the plaintiff class or classes incurred "principal injuries" resulting from the alleged conduct (or any related conduct) of each defendant in the state in which the action was originally filed; and

- During the three-year period preceding the filing of the class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons.

The second situation, known as the home-state exception, in which the court must decline jurisdiction occurs when two-thirds or more of the members of all proposed plaintiff classes, in the aggregate, as well as the "primary defendants," are citizens of the state in which the action was originally filed. n4

The burden of proof on these exceptions to CAFA jurisdiction falls on the party opposing federal jurisdiction. n5 To

meet the burden of proof, the party opposing federal jurisdiction must show by a preponderance of the evidence that the exception applies. n5.1

[2] District Court Has Discretion to Decline Jurisdiction When More Than One-Third and Less Than Two-Thirds of Class Members Are Citizens of Forum State

The district court may, in the interests of justice and looking at the totality of circumstances, decline to exercise jurisdiction under CAFA over a class action in which: n6

- More than one-third of the members of all proposed plaintiff classes, in the aggregate, are citizens of the state in which the action was originally filed; and
- Fewer than two-thirds of the members of all proposed plaintiff classes, in the aggregate, are citizens of the state in which the action was originally filed; and
- The "primary" defendants are citizens of the state in which the action was originally filed.

The court's exercise of discretion must be based on "the interests of justice and looking at the totality of the circumstances," n7 and the court must consider each of the following six factors:

- Whether the claims asserted involve matters of national or interstate interest n8
- Whether the claims asserted will be governed by laws of the state in which the action was originally filed or by the laws of other states n9
- Whether the class action has been pleaded in a manner that seeks to avoid federal jurisdiction n10
- Whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants n11
- Whether the number of citizens of the state in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other state, and the citizenship of the other members of the proposed class is dispersed among a substantial number of states n12
- Whether, during the 3-year period preceding the filing of the class action, one or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed n13

If the requirements for invoking the court's discretion are met, and if the factors favor a state court proceeding rather than a federal one, the court may, in its discretion, decline to exercise the minimal diversity subject matter jurisdiction provided by the Class Action Fairness Act. n14

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsClass MembersNamed MembersCivil ProcedureClass ActionsJudicial DiscretionCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *28 U.S.C. § 1332(d)(4).*

(n2)Footnote 2. *28 U.S.C. § 1332(d)(4)(A).*

(n3)Footnote 3. *Evans v. Walter Indus., Inc., 449 F.3d 1159, 1163-1168 (11th Cir. 2006)* (whether class seeks "significant relief" includes not only assessment of how many members of class were harmed by defendant's actions, but also comparison of relief sought between all defendants and of each defendant's ability to pay potential judgment).

(n4)Footnote 4. *28 U.S.C. § 1332(d)(4)(B).*

(n5)Footnote 5. See *Serrano v. 180 Connect, Inc., 478 F.3d 1018, 1021-1024 (9th Cir. 2007)* ; *Frazier v. Pioneer Americas LLC, 455 F.3d 542, 544-546 (5th Cir. 2006)* ; *Hart v. FedEx Ground Package Sys. Inc., 457 F.3d 675, 679-682 (7th Cir. 2006)* ; *Evans v. Walter Indus., Inc., 449 F.3d 1159, 1163-1168 (11th Cir. 2006)* .

(n6)Footnote 5.1. *See In re Sprint Nextel Corp., 593 F.3d 669, 673 (7th Cir. 2010)* .

(n7)Footnote 6. *28 U.S.C. § 1332(d)(3).*

(n8)Footnote 7. *28 U.S.C. § 1332(d)(3).*

(n9)Footnote 8. *28 U.S.C. § 1332(d)(3)(A).*

(n10)Footnote 9. *28 U.S.C. § 1332(d)(3)(B).*

(n11)Footnote 10. *28 U.S.C. § 1332(d)(3)(C).*

(n12)Footnote 11. *28 U.S.C. § 1332(d)(3)(D).*

(n13)Footnote 12. *28 U.S.C. § 1332(d)(3)(E).*

(n14)Footnote 13. *28 U.S.C. § 1332(d)(3)(F).*

(n15)Footnote 14. *28 U.S.C. § 1332(d)(3).*

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CHAPTER 42 Class Actions
B. Jurisdictional Prerequisites and Removing Class Actions From State to Federal Court

3-42 Federal Litigation Guide § 42.23

§ 42.23 "Mass Actions" Are Treated as Class Actions

The jurisdictional provisions of the Class Action Fairness Act also apply to "mass actions." n1 Under the Act, a "mass action" is any civil action other than a class action in which the monetary claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact. n2 A "mass action" does not include any civil action in which: n3

- All of the claims in the action arise from an event or occurrence in the state in which the action was filed, and that allegedly resulted in injuries in that state or in states contiguous to that state;

- The claims are joined on motion of a defendant;

- All of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a state statute specifically authorizing such action; or

- The claims have been consolidated or coordinated solely for pretrial proceedings.

Thus, a federal district court may exercise subject matter jurisdiction over a "mass action" based on the same sort of minimal diversity of citizenship that is sufficient under CAFA for class actions. n4 In a mass action, however, jurisdiction exists only over those plaintiffs whose claims satisfy the traditional jurisdictional amount requirements under *28 U.S.C. § 1332(a)* (i.e., more than $75,000 for each plaintiff). n5

This jurisdiction limitation raises the question of who is to be considered when applying the 100-plaintiff minimum, $5,000,000 threshold, and one-third/two-third classifications in the mass action context. The Eleventh Circuit has held that the numerosity and aggregate amount-in-controversy requirements are threshold requirements measured at the time of removal, while the $75,000 provision is to be treated as an exception addressed on a plaintiff-by-plaintiff basis after the action is removed. That is, the $75,000 requirement does not bar district courts from asserting jurisdiction over the entire case even though some of the individual plaintiff's claims turn out not to exceed $75,000 and must, therefore, be remanded to state court. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1332(d)(11)(A).*

(n2)Footnote 2. *28 U.S.C. § 1332(d)(11)(B)(i)*; *see also Louisiana ex rel. Caldwell v. Allstate Ins. Co., 536 F.3d 418, 429-430 (5th Cir. 2008)* ; *Bullard v. Burlington N. Santa Fe Ry. Co., 535 F.3d 759, 761-762 (7th Cir. 2008)* .

(n3)Footnote 3. *28 U.S.C. § 1332(d)(11)(B)(ii).*

(n4)Footnote 4. *28 U.S.C. § 1332(d)(11)(A).*

(n5)Footnote 5. *28 U.S.C. § 1332(d)(11)(B)(i).*

(n6)Footnote 6. *Lowery v. Alabama Power Co., 483 F.3d 1184, 1203-1205 (11th Cir. 2007)* .

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CHAPTER 42 Class Actions
B. Jurisdictional Prerequisites and Removing Class Actions From State to Federal Court

3-42 Federal Litigation Guide § 42.24

§ 42.24 Establishing Complete Diversity When Class Action Fairness Act is Inapplicable

Courts may not assert subject matter jurisdiction over every proposed class action based on the limited or minimal diversity provision of the Class Action Fairness Act. A proposed class action might not meet the jurisdictional tests of the Class Action Fairness Act; a proposed class action might be one of the kinds of class actions excluded from the CAFA; the court also may decline to exercise jurisdiction in appropriate cases. The inapplicability of the CAFA does not necessarily eliminate federal jurisdiction over a class action, however. Even if federal question jurisdiction does not exist, the proposed class might meet the traditional requirements for "complete" diversity jurisdiction. n1

Diversity jurisdiction for cases outside the CAFA requires "complete" diversity of citizenship between all plaintiffs and all defendants. However, only the citizenship of *named* parties is considered. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1332(a).*

(n2)Footnote 2. *28 U.S.C. § 1332(a)*; *see Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 365, 41 S. Ct. 338, 65 L. Ed. 673 (1921) .*

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CHAPTER 42 Class Actions
B. Jurisdictional Prerequisites and Removing Class Actions From State to Federal Court

3-42 Federal Litigation Guide § 42.25

§ 42.25 Aggregating Claims to Satisfy Amount in Controversy When The Class Action Fairness Act is Inapplicable

[1] Aggregating Common and Undivided Claims

In a diversity class action, if no class member's claim is for the requisite jurisdictional amount, aggregation of many smaller claims is not permitted unless the claims are "common and undivided," rather than "separate and distinct." n1 The distinction between "common and undivided" claims and "separate and distinct" claims can be elusive.

The determination of whether aggregation is proper is independent of the Rule 23(b) category in which a class action falls. n2

However, some types of actions are more likely to involve a joint and common interest than others. In particular, an action under Rule 23(b)(1) or 23(b)(2), which is predicated on the relationship between class members, is more likely to involve the assertion of a joint and common claim than an action under Rule 23(b)(3), which is based on the predominance of common legal or factual issues, without regard to the relationship of the class members. n3

[2] "Separate and Distinct" Claims Must Each Satisfy Jurisdictional Amount

When separate and distinct recoveries are sought for each class member, as opposed to a recovery in common, the claim of each class member must meet the requisite jurisdictional amount. n4

[3] If One Class Member Meets Amount in Controversy, Supplemental Jurisdiction Extends to Insufficient Claims of Other Class Members

The United States Supreme Court has held that the supplemental jurisdiction statute n5 has eliminated the requirement, enunciated in *Zahn v. International Paper Co.*, n6 that each class member must meet the amount in controversy requirement. n7

The supplemental jurisdiction statute grants district courts supplemental jurisdiction over all claims so related to a claim within the courts' original jurisdiction that they constitute part of the same case or controversy under Article III of the Constitution. Supplemental jurisdiction extends to claims involving the joinder or intervention of additional parties.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Snyder v. Harris, 394 U.S. 332, 336-337 (1969)* .

(n2)Footnote 2. *Snyder v. Harris, 394 U.S. 332, 336-337 (1969)* .

(n3)Footnote 3. *Gallagher v. Continental Ins. Co., 502 F.2d 827, 831 (10th Cir. 1974)* .

(n4)Footnote 4. *Zahn v. International Paper Co., 414 U.S. 291, 301, 94 S. Ct. 505, 38 L. Ed. 2d 511 (1973)* .

(n5)Footnote 5. *See 28 U.S.C. § 1367.*

(n6)Footnote 6. *Zahn v. International Paper Co., 414 U.S. 291, 301, 94 S. Ct. 505, 38 L. Ed. 2d 511 (1973)* .

(n7)Footnote 7. *Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 125 S. Ct. 2611, 162 L. Ed. 2d 502, 526 (2005)* .

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CHAPTER 42 Class Actions
B. Jurisdictional Prerequisites and Removing Class Actions From State to Federal Court

3-42 Federal Litigation Guide § 42.26

§ 42.26 Removal of State Class Actions to Federal Court

[1] Removal Under Class Action Fairness Act

The Class Action Fairness Act makes removal of class actions easier to accomplish in two distinct ways. First, the CAFA makes it easier to establish jurisdiction based on diversity of citizenship. n1 Second, the CAFA makes several changes to removal procedures that affect the removability of class actions. n2 The changes made by the Act apply to any civil action commenced on or after February 18, 2005. n3 A change in a class definition does not restart a class action suit for purposes of the provision of the Class Action Fairness Act stating that the Act applies only to suits "commenced" on or after the effective date of the Act. n4 An amended pleading relates back to the date of the original pleading and, therefore, does not "commence" a new action for purposes of the CAFA removal provision. n5 However, the addition of new claims and parties may be sufficient, under the applicable state law, to commence a new suit, provided the new claims do not relate back to the filing of the original suit. n6

The Act's procedural changes to the removal procedures apply to any "class action." n7 In this context, "class action" means "any civil action filed under *Rule 23 of the Federal Rules of Civil Procedure* or similar state statute or rule of judicial procedure authorizing an action to be brought by one or more representative persons as a class action." n8 Some courts have held that the Class ActionFairness Act did not change the longstanding rule that the removing party bears the burden of establishing federal subject matter jurisdiction. n9 Other courts have held that the Class Action Fairness Act did change the burden of proof with respect to removal jurisdiction, so that now the party seeking remand has the burden of showing that jurisdiction is lacking and the case should be remanded to state court. n10

The CAFA specifically excludes certain types of class actions from its provisions, including the following:

- **Actions with governmental parties excluded.** The jurisdictional provisions of the CAFA do not apply to any class action in which the primary defendants are states, state officials, or other governmental entities against whom the district court may be foreclosed (on *Eleventh Amendment* grounds) from ordering relief. n11

- **Small classes excluded.** The jurisdictional provisions of the CAFA do not apply when the aggregate number of members of all proposed plaintiff classes in the action is less than 100. n12

- **Securities actions excluded.** The Act's special removal procedures do not apply to any class action that solely involves a claim concerning a covered security as defined under § 16(f)(3) of the Securities Act of 1933 and § 28(f)(5)(E) of the Securities Exchange Act of 1934. n13

- **Actions concerning fiduciary duties and related obligations concerning securities excluded.** The Act's special removal procedures do not apply to any class action that solely involves a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to, or created by, or pursuant to any security as defined under § 2(a)(1) of the Securities Act of 1933 and the regulations issued under that section. n14

- **Actions concerning intracorporate and business organization litigation excluded.** The Act's special removal procedures do not apply to any class action that solely involves a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the state in which the corporation or business enterprise is incorporated or organized. n15

A party seeking remand bears the burden of proof when it seeks to avail itself of an express statutory exception to federal jurisdiction. Thus, a plaintiff class seeking remand based on a CAFA exception, such as the governmental parties exception or the local controversy exception, has the burden of establishing that the exception applies. n16 The standard of proof by which the removing defendant must establish federal jurisdiction under CAFA is a preponderance of the evidence. n17

[2] One-Year Limitation on Removal Does Not Apply

The procedure for removing a class action under the Class Action Fairness Act is, for the most part, the same as for other civil actions, but the one-year absolute limitation on removal does not apply. n18 Under the general removal-procedure statute, a defendant seeking removal must file a notice of removal within 30 days after receipt of the initial pleading or service of summons. If the case stated by the initial pleading is not removable, the defendant must file the notice of removal within 30 days after receipt of an amended pleading or other paper from which the defendant may first ascertain that the case is or has become removable. However, a defendant may not remove a case based on diversity jurisdiction more than one year after the commencement of the action. n19

The 30-day requirement applies to removal of class actions under the Class Action Fairness Act. The Act changes only the absolute one-year limitation on removal. n20 Thus, under appropriate circumstances, a defendant may remove at any time, even several years after commencement of the action, provided the notice of removal is filed within 30 days after receipt of a pleading or other paper from which the defendant may first ascertain that the action is or has become removable. n21

[3] Defendant's Local Citizenship Does Not Preclude Removal

In actions that are not governed by the jurisdictional provisions of the Class Action Fairness Act, the defendants may remove a civil action from state court to federal court on the basis of diversity of citizenship only if none of the defendants is a citizen of the state in which the action was originally brought. n22 This limitation does not apply to class actions governed by the Class Action Fairness Act. These class actions may be removed "without regard to whether any defendant is a citizen of the state in which the action is brought." n23

[4] Any Single Defendant May Remove Class Action

In actions that do not fall under the Class Action Fairness Act, all of the defendants must join in the notice of removal or the case is not removable. n24 Class actions governed by the Class Action Fairness Act may be removed by any

defendant without the consent of the other defendants. n25 The removal applies to the entire action, including the claims of defendants that did not join in the notice of removal. n26

[5] Accelerated, Discretionary Appellate Review of Remand Order Under Class Action Fairness Act

In an action that does not fall under the Class Action Fairness Act, an order granting a motion to remand a case to the state court from which it was removed is rarely reviewable on appeal. n27 In a class action governed by the Class Actions Fairness Act, however, a court of appeals may, in its discretion, accept an appeal from an order of a district court either granting or denying a motion to remand if application is made to the court of appeals "not less than seven days after entry of the order." n28 This appears to be a drafting error. Congress undoubtedly intended to require the application to be made as promptly as reasonably possible, and appears to have decided that this was not later than seven days after entry of the order. The intent to have any such appeals processed as promptly as possible is apparent from the limited time granted to the court of appeals to resolve any such appeal. n29 However, Congress actually stated the opposite. As drafted, the Act requires a seven-day waiting period before the application may be filed with the court of appeals. The circuits that have considered the issue have agreed that this was indeed a drafting error and that the application must be filed not more than seven days after the order to be appealed. n30 All days are counted to compute the seven days. n31 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. n32

This type of appellate review is available only when a class action was removed under the CAFA jurisdictional provisions, not to class actions removed on the basis of traditional diversity jurisdiction. n33

[6] "Mass Actions" May Also be Removed

The Class Action Fairness Act deems a "mass action" to be class action, and the Act makes a mass action removable in the same manner as a class action. n34 Generally, a "mass action" is a civil action other than a class action in which monetary relief of 100 or more persons are proposed to be tried jointly on the grounds that the plaintiffs' claims involve common questions of law or fact. n35

The removal of a "mass action" under the provisions of the Class Action Fairness Act also means that the case will be treated as a class action for purposes of the statute of limitations. The limitations periods on any claims asserted in a mass action that is removed to federal court under the CAFA are tolled during the period that the action is pending in federal court. n36

A mass action that is removed to federal court under the provisions of the Class Action Fairness Act may not later be transferred to another court for consolidated pretrial procedures under *28 U.S.C. § 1407*, unless a majority of the plaintiffs in the action request transfer. n37 This anti-transfer provision applies only to mass actions, not to certified class actions or actions proposed for certification. n38

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalGeneral OverviewCivil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See 28 U.S.C. § 1441(a)*; *see also 28 U.S.C. § 1332(d).*

(n2)Footnote 2. *See 28 U.S.C. § 1453.*

(n3)Footnote 3. *McAtee v. Capital One, F.S.B., 479 F.3d 1143, 1146-1148 (9th Cir. 2007)* ; *Pritchett v. Office*

Depot, Inc., 404 F.3d 1232, 1234-1238 (10th Cir. 2005) ; *see also Natale v. Pfizer, Inc., 424 F.3d 43, 44 (1st Cir. 2005)* (citing **Moore's**).

(n4)Footnote 4. *See Knudsen v. Liberty Mut. Ins. Co., 411 F.3d 805, 806-807 (7th Cir. 2005)* .

(n5)Footnote 5. *Plubell v. Merck & Co., Inc., 434 F.3d 1070, 1071-1074 (8th Cir. 2006)* .

(n6)Footnote 6. *Braud v. Transport Serv. Co., 445 F.3d 801, 806-808 (5th Cir. 2006)* (addition of new defendant after effective date of Act commenced new suit, so that suit was properly removed to federal court).

(n7)Footnote 7. *See 28 U.S.C. § 1453(b).*

(n8)Footnote 8. *See 28 U.S.C. § 1332(d)(1)(B).*

(n9)Footnote 9. *Blockbuster, Inc. v. Galeno, 472 F.3d 53, 57-58 (2d Cir. 2006)* ; *Morgan v. Gay, 471 F.3d 469, 472 (3d Cir. 2006)* ; *Abrego v. Dow Chem. Co., 443 F.3d 676, 682-686 (9th Cir. 2006)* ; *Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 447-449 (7th Cir. 2005)* .

(n10)Footnote 10. *See Berry v. American Express Publ'g, 381 F. Supp. 2d 1118 (C.D. Cal. 2005)* .

(n11)Footnote 11. *28 U.S.C. § 1332(d)(5)(A).*

(n12)Footnote 12. *28 U.S.C. § 1332(d)(5)(B).*

(n13)Footnote 13. *28 U.S.C. § 1453(d)(1).*

(n14)Footnote 14. *28 U.S.C. § 1453(d)(3).*

(n15)Footnote 15. *28 U.S.C. § 1453(d)(2).*

(n16)Footnote 16. *Preston v. Tenet Healthsystems Mem'l Med. Ctr., Inc., 485 F.3d 804, 812-813 (5th Cir. 2007)* ; *Serrano v. 180 Connect, Inc., 478 F.3d 1018, 1021-1024 (9th Cir. 2007)* ; *Frazier v. Pioneer Americas LLC, 455 F.3d 542, 544-546 (5th Cir. 2006)* ; *Hart v. FedEx Ground Package Sys. Inc., 457 F.3d 675, 679-682 (7th Cir. 2006)* ; *Evans v. Walter Indus., Inc., 449 F.3d 1159, 1163-1168 (11th Cir. 2006)* .

(n17)Footnote 17. *Preston v. Tenet Health System Mem'l Med. Ctr., 485 F.3d 804, 813-814 (5th Cir. 2007)* ; *Miedema v. Maytag Corp., 450 F.3d 1322, 1330 (11th Cir. 2006)* .

(n18)Footnote 18. *28 U.S.C. § 1453(d)(2).*

(n19)Footnote 19. *28 U.S.C. § 1446(b).*

(n20)Footnote 20. *28 U.S.C. § 1453(b).*

(n21)Footnote 21. *28 U.S.C. § 1446(b)*; *28 U.S.C. § 1453(b).*

(n22)Footnote 22. *28 U.S.C. § 1441(b).*

(n23)Footnote 23. *28 U.S.C. § 1453(b).*

(n24)Footnote 24. *28 U.S.C. § 1446(b).*

(n25)Footnote 25. *28 U.S.C. § 1453(b).*

(n26)Footnote 26. *Lowery v. Alabama Power Co., 483 F.3d 1184, 1196 (11th Cir. 2007)* (using CAFA procedures, one defendant may remove entire action, including claims against all defendants).

(n27)Footnote 27. *28 U.S.C. § 1447(d).*

(n28)Footnote 28. *28 U.S.C. § 1453(c)(1).*

(n29)Footnote 29. *See* 28 U.S.C. § 1453(c)(2), (c)(3) (appeal must be resolved within 60 days or very short extension of that period).

(n30)Footnote 30. *Morgan v. Gay, 466 F.3d 276, 277-279 (3d Cir. 2006)* (statutory language requiring application for appeal "not less than" seven days after remand order was at odds with clear legislative intent and was, therefore, construed to mean "not more than" seven days); *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., 435 F.3d 1140, 1145-1146 (9th Cir. 2006)* (construing statutory language to mean "not more than"); *Miedema v. Maytag Corp., 450 F.3d 1322, 1326 (11th Cir. 2006)* ("not less than" language construed to mean that application must be filed within seven days of remand order, because to read language literally would produce absurd result); *Pritchett v. Office Depot, Inc., 420 F.3d 1090, 1093 (10th Cir. 2005)* (construing statutory language to mean "not more than").

(n31)Footnote 31. *Fed. Rule. App. P. 26(a)(1).*

(n32)Footnote 32. *Fed. Rule. App. P. 26(a)(1).*

(n33)Footnote 33. *Patterson v. Dean Morris, L.L.P., 448 F.3d 736, 742 (5th Cir. 2006)* ; *Saab v. Home Depot U.S.A., Inc., 469 F.3d 758, 759-760 (8th Cir. 2006)* .

(n34)Footnote 34. *28 U.S.C. § 1332(d)(11)(A).*

(n35)Footnote 35. *28 U.S.C. § 1332(d)(11)(B)(i).*

(n36)Footnote 36. *28 U.S.C. § 1332(d)(11)(D).*

(n37)Footnote 37. *28 U.S.C. § 1332(d)(11)(c)(i).*

(n38)Footnote 38. *28 U.S.C. § 1332(d)(11)(c)(ii).*

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CHAPTER 42 Class Actions
B. Jurisdictional Prerequisites and Removing Class Actions From State to Federal Court

3-42 Federal Litigation Guide §§ 42.27 through 42.29

[Reserved]

§§ 42.27[Reserved]

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CHAPTER 42 Class Actions
C. Summary of Class Action Prerequisites

3-42 Federal Litigation Guide § 42.30

§ 42.30 Satisfying Rule 23 Requirements

Before a class action may proceed, the class must be "certified" by the court. To be certified, *all* of the requirements of Rule 23(a) must be met, n1 as well as those of any of the subsections of Rule 23(b). n2 The Supreme Court has held that Rule 23 trumps a state law prohibiting class actions that seek to recover statutory penalties or minimal recoveries because Rule 23 requires certification if the terms of the Rule are met. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalGeneral OverviewCivil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See §§ 42.31, 42.32.*

(n2)Footnote 2. *See § 42.33.*

(n3)Footnote 3. *See Shady Grove Orthopedic Assocs. v. Allstate Ins. Corp., __ U.S. __, 130 S. Ct. 1431, 176 L. Ed. 2d 311, 325 (2010) .*

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CHAPTER 42 Class Actions
C. Summary of Class Action Prerequisites

3-42 Federal Litigation Guide § 42.31

§ 42.31 Evaluating Implicit Requirements of Rule 23

Rule 23 implicitly imposes the following class definition and representation requirements: n1

- An identifiable class must exist n2
- The named representatives must be members of the proposed class n3

For further discussion of these requirements, see *§§ 42.40*, *42.41*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsClass MembersNamed MembersCivil ProcedureClass ActionsClass MembersNonnamed MembersCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *In re A.H. Robins Co., 880 F.2d 709, 728 (4th Cir. 1989)* , *cert. denied sub nom., Anderson v. Aetna Casualty and Sur. Co., 493 U.S. 959 (1989)* ; *Stambaugh v. Kansas Dep't of Corrections, 151 F.R.D. 664, 671 (D. Kan. 1993)* ; *Ad-Hoc Committee v. City of St. Louis, 143 F.R.D. 216, 216 (E.D. Mo. 1992)* .

(n2)Footnote 2. *Simer v. Rios, 661 F.2d 655, 669 (7th Cir. 1981)* , *cert. denied, 456 U.S. 917 (1982)* .

(n3)Footnote 3. *Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216-217, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974)* .

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CHAPTER 42 Class Actions
C. Summary of Class Action Prerequisites

3-42 Federal Litigation Guide § 42.32

§ 42.32 Evaluating Explicit Requirements of Rule 23(a)

Rule 23(a) explicitly states that the following four factors must be present for a class action to proceed: n1

- Numerosity of parties n2
- Commonality of legal and factual issues n3
- Typicality of claims and defenses of the class representatives n4
- Adequacy of representation n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesAdequacy of RepresentationCivil ProcedureClass ActionsPrerequisitesCommonalityCivil ProcedureClass ActionsPrerequisitesNumerosityCivil ProcedureClass ActionsPrerequisitesTypicality

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 23(a)*; *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* .

(n2)Footnote 2. *See §§ 42.50-42.53*.

(n3)Footnote 3. *See § 42.60*.

(n4)Footnote 4. *See §§ 42.61-42.66*.

(n5)Footnote 5. *See §§ 42.80-42.87*.

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CHAPTER 42 Class Actions
C. Summary of Class Action Prerequisites

3-42 Federal Litigation Guide § 42.33

§ 42.33 Class Action Must Fall Within One of Three Subdivisions of Rule 23(b)

To be certified, a class action must fall within one of the following categories: n1

- Rule 23(b)(1) class action, which is concerned with the risk of prejudice to putative class parties
- Rule 23(b)(2) class action, which involves injunctive or declaratory relief
- Rule 23(b)(3) class action, which focuses on predominant common issues

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 23(b).*

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CHAPTER 42 Class Actions
C. Summary of Class Action Prerequisites

3-42 Federal Litigation Guide § 42.34

§ 42.34 CHECKLIST: Satisfying Class Certification Prerequisites

Rule 23(a) requires that specific prerequisites be met before any class action may be certified. The following checklist may be used as a guide in assuring that all initial certification requirements have been met.

- ☐ An identifiable class exists. n1
- ☐ The named representatives are members of the proposed class. n2
- ☐ All four of the following have been found:
  - ☐ Numerosity of parties. n3
  - ☐ Commonality of legal and factual issues. n4
  - ☐ Typicality of claims and defenses of the class representatives. n5
  - ☐ Adequacy of representation. n6
- ☐ The class action falls into at least one of the following categories:

☐ Rule 23(b)(1) class action, which is concerned with the risk of prejudice to putative class parties.

☐ Rule 23(b)(2) class action, which involves injunctive or declaratory relief.

☐ Rule 23(b)(3) class action, which focuses on predominant common issues.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsPrerequisitesAdequacy of RepresentationCivil ProcedureClass ActionsPrerequisitesCommonalityCivil ProcedureClass ActionsPrerequisitesMaintainabilityCivil ProcedureClass ActionsPrerequisitesNumerosityCivil ProcedureClass ActionsPrerequisitesTypicality

FOOTNOTES:
(n1)Footnote 1. *See § 42.40*.

(n2)Footnote 2. *See § 42.41*.

(n3)Footnote 3. *See §§ 42.50-42.53*.

(n4)Footnote 4. *See § 42.60*.

(n5)Footnote 5. *See §§ 42.61-42.66*.

(n6)Footnote 6. *See §§ 42.80-42.87*.

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CHAPTER 42 Class Actions
C. Summary of Class Action Prerequisites

3-42 Federal Litigation Guide §§ 42.35 through 42.39

[Reserved]

§§ 42.35[Reserved]

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CHAPTER 42 Class Actions
D. Determining Whether Identifiable Class Exists

3-42 Federal Litigation Guide § 42.40

§ 42.40 Class Description Must Be Sufficiently Definite

Before a class may be certified under Rule 23, the class description must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class. n1

The class definition identifies the persons who would be entitled to relief and bound by any judgment. n2 If the class definition is so vague that class members are not readily identifiable, then problems may arise regarding the provision of notice, the binding effect of a judgment, and even the propriety of the class action. n3

If the court determines that the proposed class description is not sufficiently definite, it need not deny class certification. Rather, the court may in its discretion limit or modify the definition of the proposed class to provide the necessary precision. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Murray v. Auslander, 244 F.3d 807, 810 (11th Cir. 2001)* ; *Clay v. American Tobacco Co., 188 F.R.D. 483, 490 (S.D. Ill. 1999)* .

(n2)Footnote 2. *In re Monumental Life Ins. Co., 365 F.3d 408, 413-414 (5th Cir. 2004)* (citing **Moore's)**.

(n3)Footnote 3. *Ad-Hoc Comm. v. City of St. Louis, 143 F.R.D. 216, 219 (E.D. Mo. 1992)* .

(n4)Footnote 4. *Powers v. Hamilton County Pub. Defender Comm'n, 501 F.3d 592, 619 (6th Cir. 2007)* .

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CHAPTER 42 Class Actions
D. Determining Whether Identifiable Class Exists

3-42 Federal Litigation Guide § 42.41

§ 42.41 Named Class Representative Must Be Class Members with Standing

The named class representative must be a member of the class, and have proper standing. To have standing to sue as a class representative, the plaintiff must possess the same interest and suffer the same injury shared by all members of the class that he or she seeks to represent. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewCivil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsClass MembersNamed MembersCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974)* ; *Hadix v. Johnson, 182 F.3d 400, 406 n.3 (6th Cir. 1999)* .

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CHAPTER 42 Class Actions
D. Determining Whether Identifiable Class Exists

3-42 Federal Litigation Guide § 42.42

§ 42.42 Consequences of Claim Becoming Moot

[1] Jurisdiction Unaffected If Representative's Claim Becomes Moot *After* Certification

If a named class representative's claim becomes moot *after* class certification, the court continues to have jurisdiction to hear the merits, provided there remains a controversy between any class member and any defendant. n1

However, if the class representative's claim becomes moot *before* class certification, the entire action becomes moot. n2 To make a suit moot, the defendant must satisfy all the plaintiffs' demands. Otherwise, the plaintiffsare entitled to have the court rule on the merits of their claims. n3 An exception to the general rule concerning mootness may be applicable under either of the following circumstances and the class action may be able to survive even if the representative's claim becomes moot before certification: n4

- Due to the transitory nature of the claim, the representative's claim becomes moot before the district court can reasonably be expected to rule on a certification motion

- The defendant "picks off" the named representative by settling out the representative's claims before there is reasonable opportunity to file a motion for class certification, or before the court can reasonably be expected to rule on a certification motion

[2] Practice Tip: Early Class Definition and Certification May Be Critical

Properly defining and certifying the class at an early stage of the litigation is particularly important in cases in which the class representative's claim may become moot during the pendency of the litigation (*e.g.*, graduation from a school, or release from prison).

If the class representative's claim becomes moot *before* class certification, the entire action becomes moot. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityMootnessGeneral OverviewCivil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Sosna v. Iowa, 419 U.S. 393, 401, 95 S. Ct. 553, 42 L. Ed. 2d 532 (1975)* .

(n2)Footnote 2. *Board of School Commissioners v. Jacobs, 420 U.S. 128, 129, 95 S. Ct. 848, 43 L. Ed. 2d 74 (1975)* ; *Comer v. Cisneros, 37 F.3d 775, 798 (2d Cir. 1994)* ; *Lusardi v. Xerox Corp., 975 F.2d 964, 974 (3d Cir. 1992)* .

(n3)Footnote 3. *See Gates v. Towery, 430 F.3d 429, 430-432 (7th Cir. 2005)* .

(n4)Footnote 4. *See* Nasca v. GC Servs. Ltd. P'ship, 2002 U.S. Dist. 16992, at *6-*7 (S.D.N.Y. Sept. 12, 2002).

(n5)Footnote 5. *See* [1], *above*.

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CHAPTER 42 Class Actions
D. Determining Whether Identifiable Class Exists

3-42 Federal Litigation Guide § 42.43

§ 42.43 Future Class Members Permissible

The definition of a class need not be so specific that every potential member of the class must be identifiable at the commencement of the action. Rather, a class may encompass future members, provided the court would be able to determine at any given time whether a particular individual is then a member of the class. Likewise, the particular members of the class may change over time, provided there is an administratively feasible method of identifying the class members at any particular time. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsClass MembersNonnamed MembersCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Johnson v. Brelje, 482 F. Supp. 121, 123 (N.D. Ill. 1979)* ; *Esler v. Northrop Corp., 86 F.R.D. 20, 32 (W.D. Mo. 1979)* .

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CHAPTER 42 Class Actions
D. Determining Whether Identifiable Class Exists

3-42 Federal Litigation Guide § 42.44

§ 42.44 Less Precision in Class Definition Required in Rule 23(b)(2) Class Actions Seeking Injunctive or Declaratory Relief

A precise class definition is much less important in cases in which the plaintiff attempts to certify a class for injunctive or declaratory relief under Rule 23(b)(2).

Courts generally require that classes be defined with precision in order to ensure that they can identify those entitled to relief, those bound by the judgment, and those entitled to notice. In actions under Rule 23(b)(2), notice need not be given to all of the class members, and members do not have an opportunity to opt out of the class. Furthermore, the defendants are obligated to comply with any orders granting injunctive or declaratory relief, so that it may be unnecessary for the court to identify with precision the people who are entitled to enforce compliance, since the representative plaintiffs may do so. Thus, less precision in defining the class is required in actions seeking relief under Rule 23(b)(2) than in actions seeking damages under Rule 23(b)(3), in which notice is mandatory, and class members are given an opportunity to opt out. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See In re Monumental Life Ins. Co., 343 F.3d 331, 337-338 (5th Cir. 2003)* ; *McHan v. Grandbouche, 99 F.R.D. 260, 265 (D. Kan. 1983)* ; *Battle v. Pennsylvania, 629 F.2d 269, 271 n.1 (E.D. Pa. 1980)* .

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CHAPTER 42 Class Actions
D. Determining Whether Identifiable Class Exists

3-42 Federal Litigation Guide §§ 42.45 through 42.49

[Reserved]

§§ 42.45[Reserved]

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CHAPTER 42 Class Actions
E. Establishing Numerosity of Parties

3-42 Federal Litigation Guide § 42.50

§ 42.50 Class Must Be So Numerous That Joinder of All Members Is Impractical

One or more members of a class may sue or be sued as representative parties on behalf of all only if the class is so numerous that joinder of all members is impracticable. n1

The "numerosity" requirement ensures that a class action will proceed only if there is a real need for the class action device. The requirement does not demand that joinder of all potential class members would be impossible, but rather that joinder would be extremely difficult or inconvenient. n2

There is no set formula to determine whether a class is so numerous it should be certified, and the district court has wide latitude in the determining whether numerosity is present. n3

There is no magical threshold number that must be reached to demonstrate numerosity. Instead, whether the class is sufficiently numerous is judged by a variety of factors, including the nature of the claims and whether those claims could be expected to be brought by particular class members. n4

For discussion of the factors relevant to determining whether joinder of all of the class members would be impracticable, see *§ 42.51[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesNumerosity

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 23(a).*

(n2)Footnote 2. *Trevizo v. Adams, 455 F.3d 1155, 1162-1163 (10th Cir. 2006)* ; *Robidoux v. Celani, 987 F.2d 931, 935 (2d Cir. 1993)* .

(n3)Footnote 3. *Trevizo v. Adams, 455 F.3d 1155, 1162-1163 (10th Cir. 2006)* (court did not abuse its discretion

in finding that class of 84 persons was not so large as to make joinder impracticable when names and addresses had been provided during discovery).

(n4)Footnote 4. *Golden v. City of Columbus, 404 F.3d 950, 965-966 (6th Cir. 2005)* .

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CHAPTER 42 Class Actions
E. Establishing Numerosity of Parties

3-42 Federal Litigation Guide § 42.51

§ 42.51 Determining Numerosity

[1] Factors Relevant to Determining Impracticability of Joining All Class Members

Rule 23 does not require that class actions involve any specific number of putative class members. Rather, whether joinder of all of the class members would be impracticable (the standard for determining "numerosity") depends on the circumstances surrounding the case, and not merely on the number of class members. In addition to the size of the class, which if large enough may alone establish impracticability, the following factors are relevant in determining impracticability: n1

- **Judicial economy arising from avoiding multiple actions.** If the joinder of all claims into one proceeding would be expensive, time-consuming, and logistically unfeasible, then the impracticality requirement will be satisfied

- **Geographic dispersion of class members.** Wide geographic dispersion of class members supports a finding of impracticability of joinder

- **Financial resources of class members.** In cases involving sophisticated individuals with significant economic resources, joinder is less likely to be impracticable

- **Ability of claimants to institute individual suits.** If class members' individual claims involve only a small amount of damages, class members are unlikely to file separate actions, and courts have concluded that their joinder is impracticable; conversely, if the individual class members have considerable financial stakes in the litigation, then joinder is not likely to be impracticable

- **Requests for prospective and injunctive relief that could affect future class members.** Courts often find joinder impracticable in cases where plaintiffs request injunctive relief that could affect future class members, because parties who have not yet been injured, or who do not know that they have been injured, are unlikely to join a lawsuit

[2] Relationship of Class Size to Impracticality

- **Numbers alone may be dispositive.** The larger the class, the greater the chance of a finding of

impracticability of joining all class members n2

- **Fewer than 21 members is generally inadequate.** In the absence of special circumstances, a class of fewer than 21 members generally fails to satisfy the numerosity requirement n3

- **More than 40 members is generally adequate.** Classes with more than 40 members generally satisfy the numerosity requirement n4

- **Between 21 and 40 members receive varying treatment.** A class of 32 has failed the numerosity requirement n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJoinder of Claims & RemediesGeneral OverviewCivil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesNumerosity

FOOTNOTES:
(n1)Footnote 1. *Robidoux v. Celani, 987 F.2d 931, 936 (2d Cir. 1993)* ; *Fox v. Cheminova, Inc., 213 F.R.D. 113, 122 (E.D.N.Y. 2003)* .

(n2)Footnote 2. *Buford v. H & R Block, Inc., 168 F.R.D. 340, 348 (S.D. Ga. 1996)* ; *Lockwood Motors, Inc. v. General Motors Corp., 162 F.R.D. 569, 574-575 (D. Minn. 1995)* ; *Mathis v. Bess, 138 F.R.D. 390, 393 (S.D.N.Y. 1991)* .

(n3)Footnote 3. *Hodge v. McLean Trucking Co., 607 F.2d 1118, 1121 (5th Cir. 1979)* ; *Bivens v. Crowell, 138 F.R.D. 18, 19 (D.N.H. 1990)* ; *CL-Alexanders Laing & Cruickshank v. Goldfeld, 127 F.R.D. 454, 457-458 (S.D.N.Y. 1989)* .

(n4)Footnote 4. *Rodger v. Electronic Data Sys. Corp., 160 F.R.D. 532, 535 (E.D.N.C. 1995)* ; Olen house v. *Commodity Credit Corp., 136 F.R.D. 672, 679 (D. Kan. 1991)* ; *Leyva v. Buley, 125 F.R.D. 512, 515 (E.D. Wash. 1989)* ; *Patrykus v. Gomilla, 121 F.R.D. 357, 361 (N.D. Ill. 1988)* ; *Committee of Blind Vendors v. District of Columbia, 695 F. Supp. 1234, 1242 (D.D.C. 1988)* .

(n5)Footnote 5. *Kilgo v. Bowman Transp., Inc., 789 F.2d 859, 878 (11th Cir. 1986)* ; *Crawford v. Western Elec. Co., 614 F.2d 1300, 1305 (5th Cir. 1980)* ; *Bishop v. New York City Dep't of Housing Preservation and Dev., 141 F.R.D. 229, 235-236 (S.D.N.Y. 1992)* ; *Johnson v. Gross, 125 F.R.D. 169, 171 (W.D. Okla. 1989)* , *aff'd*, *971 F.2d 1487 (10th Cir. 1992)* .

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CHAPTER 42 Class Actions
E. Establishing Numerosity of Parties

3-42 Federal Litigation Guide § 42.52

§ 42.52 Burden Is on Party Seeking Class Certification

To satisfy the numerosity requirement, n1 the party seeking certification need not state the *exact* number of members of the proposed class, or endeavor to identify each member. Rather, the movant need only provide some evidence or a reasonable estimate of the number of class members. n2

Common sense assumptions to support findings of numerosity are permitted. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesNumerosity

FOOTNOTES:
(n1)Footnote 1. *See § 42.50.*

(n2)Footnote 2. *Siles v. ILGWU National Retirement Fund, 783 F.2d 923, 930 (9th Cir. 1986)* .

(n3)Footnote 3. *In re American Med. Sys., Inc., 75 F.3d 1069, 1079 (6th Cir. 1996)* ; *Vickery v. Jones, 856 F. Supp. 1313, 1328 (S.D. Ill. 1994)* ; *Maywalt & Parker & Parsley Petroleum Co., 147 F.R.D. 51, 55 (S.D.N.Y. 1993)* ; *Sherman v. Griepentrog, 775 F. Supp. 1383, 1389 (D. Nev. 1991)* .

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CHAPTER 42 Class Actions
E. Establishing Numerosity of Parties

3-42 Federal Litigation Guide § 42.53

§ 42.53 Presumption of Numerosity in Securities Litigation Cases

In securities litigation cases, courts generally assume that the numerosity requirement is satisfied for classes of sellers or buyers of nationally traded securities as long as there is evidence of a large number of stock transactions or of a large number of affected shareholders during the relevant time period. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesNumerosity

FOOTNOTES:
(n1)Footnote 1. *Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030, 1039 (5th Cir. 1981)* ; *McEwen v. Digitran Sys., Inc., 160 F.R.D. 631, 636 (D. Utah 1994)* ; *Simpson v. Speciality Retail Concepts, 149 F.R.D. 94, 98 (M.D.N.C. 1993)* ; *Trief v. Dun & Bradstreet Corp., 144 F.R.D. 193, 198 (S.D.N.Y. 1992)* ; *CV Reit, Inc. v. Levy, 144 F.R.D. 690, 696 (S.D. Fla. 1992)* ; *Antonson v. Robertson, 141 F.R.D. 501, 505 (D. Kan. 1991)* .

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CHAPTER 42 Class Actions
E. Establishing Numerosity of Parties

3-42 Federal Litigation Guide §§ 42.54 through 42.59

[Reserved]

§§ 42.54[Reserved]

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CHAPTER 42 Class Actions
F. Establishing "Commonality" and "Typicality"

3-42 Federal Litigation Guide § 42.60

§ 42.60 "Commonality" Requires That Questions of Law or Fact Must Be Common to Class

One of the prerequisites to class action certification is *commonality*, which means that there must be questions of law or fact common to the class. A single common question is sufficient. n1

If common questions do not arise among the class as defined in the complaint, the court may in its discretion redefine the putative class or create subclasses. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesCommonalityCivil ProcedureClass ActionsPrerequisitesTypicality

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 23(a)(2)*; *see Powers v. Hamilton County Pub. Defender Comm'n, 501 F.3d 592, 619 (6th Cir. 2007)* ("The commonality requirement is satisfied if there is a single factual or legal question common to the entire class."); *see also Staton v. Boeing Co., 327 F.3d 938, 953-956 (9th Cir. 2003)* .

(n2)Footnote 2. *See Fed. R. Civ. P. 23(c)(5)*.

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CHAPTER 42 Class Actions
F. Establishing "Commonality" and "Typicality"

3-42 Federal Litigation Guide § 42.61

§ 42.61 "Typicality" Requires That Named Class Representative's Claims or Defenses Must Be Typical of Class

One of the prerequisites to class action certification is *typicality,* which means that the claims or defenses of the class representatives must be typical of the claims or defenses of the class. n1 This requirement attempts to ensure that the interests of the class representatives are substantially aligned with those of the absent class members. It also promotes efficient case management and fair representation. n2

To satisfy the typicality requirement, the class representative's claims must arise from the same events, practice, or course of conduct, and must be based on the same legal theory as those of the class members. n3

Typicality issues often overlap with the analysis of other Rule 23 requirements. For example, in deciding whether to certify a class, courts frequently overlap the discussion of the typicality requirement with the Rule 23(a)(4) adequacy of representation requirement. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesCommonalityCivil ProcedureClass ActionsPrerequisitesTypicality

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 23(a)(3).*

(n2)Footnote 2. *Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157 n.13, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982) .*

(n3)Footnote 3. *Dukes v. Wal-Mart, Inc., 474 F.3d 1214, 1232 (9th Cir. 2007) ; Deiter v. Microsoft Corp., 436 F.3d 461, 466-468 (4th Cir. 2006) .*

(n4)Footnote 4. *See, e.g., Weiss v. York Hosp., 745 F.2d 786, 809 n.36 (3d Cir. 1984) .*

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CHAPTER 42 Class Actions
F. Establishing "Commonality" and "Typicality"

3-42 Federal Litigation Guide § 42.62

§ 42.62 "Typicality" Distinguished From "Commonality"

While the commonality inquiry focuses on whether there are questions of law or fact common to the *class,* the typicality inquiry focuses on whether the claims of the putative class *representatives* are typical of the class sharing common questions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesCommonalityCivil ProcedureClass ActionsPrerequisitesTypicality

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CHAPTER 42 Class Actions
F. Establishing "Commonality" and "Typicality"

3-42 Federal Litigation Guide § 42.63

§ 42.63 Typicality Does Not Require Complete Identity of Claims

Complete identity of claims is not required to establish typicality; some factual differences are permissible. The critical inquiry is whether the class representative's claims have the same essential characteristics of the putative class. n1

Differences in damages do not destroy typicality. n2 If the claims arise from similar courses of conduct and share the same legal theory, the presence of factual differences among the claims will not defeat typicality. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesCommonalityCivil ProcedureClass ActionsPrerequisitesTypicality

FOOTNOTES:
(n1)Footnote 1. *Appleyard v. Wallace, 754 F.2d 955, 958 (11th Cir. 1985)* ; *De La Fuente v. Stokely-Van Camp, Inc., 713 F.2d 225, 232 (7th Cir. 1983)* .

(n2)Footnote 2. *DeBoer v. Mellon Mortg. Co., 64 F.3d 1171, 1174 (8th Cir. 1995)* ; *Hoxworth v. Blinder, Robinson & Co., Inc., 980 F.2d 912, 923 (3d Cir. 1992)* ; *Appleyard v. Wallace, 754 F.2d 955, 958 (11th Cir. 1985)* .

(n3)Footnote 3. *Daffin v. Ford Motor Co., 458 F.3d 549, 552-553 (6th Cir. 2006)* (class representative's breach of warranty claims based on defective car part were typical of class, even though some class members had not experienced manifestation of defect).

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CHAPTER 42 Class Actions
F. Establishing "Commonality" and "Typicality"

3-42 Federal Litigation Guide § 42.64

§ 42.64 Unique Defenses of Named Class Representative May Destroy Typicality

If the class representative's claim is subject to one or more unique defenses that likely will be central to the litigation, typicality will not be found because of the fear that the defense will occupy the class representative to the detriment of the interests of absent class members. n1

However, a unique defense that is not central to the litigation, in contrast, does not create a significant danger that the class representative will become distracted, and therefore does not defeat typicality or class certification. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesCommonalityCivil ProcedureClass ActionsPrerequisitesTypicality

FOOTNOTES:
(n1)Footnote 1. *Beck v. Maximus, Inc., 457 F.3d 291, 295-301 (3d Cir. 2006)* ; *Hanon v. Dataproducts Corp., 976 F.2d 497, 508-509 (9th Cir. 1992)* .

(n2)Footnote 2. *Rodger v. Electronic Data Sys. Corp., 160 F.R.D. 532, 538-539 (E.D.N.C. 1995)* ; *Trief v. Dun & Bradstreet Corp., 144 F.R.D. 193, 200-201 (S.D.N.Y. 1992)* ; *In re Amerifirst Sec. Litig., 139 F.R.D. 423, 428-429 (S.D. Fla. 1991)* ; *Riordan v. Smith Barney, 113 F.R.D. 60, 63 (N.D. Ill. 1986)* .

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CHAPTER 42 Class Actions
F. Establishing "Commonality" and "Typicality"

3-42 Federal Litigation Guide § 42.65

§ 42.65 Typicality Not Defeated by Statute of Limitations

The fact that a class representative's claim may be barred by an applicable statute of limitations is not a bar to typicality. Barring typicality on the basis of a limitation defense requires the court to consider the merits in deciding whether to certify a class, which is not permitted. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesCommonalityCivil ProcedureClass ActionsPrerequisitesTypicalityGovernmentsLegislationStatutes of LimitationsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *CV Reit, Inc. v. Levy, 144 F.R.D. 690, 697 (S.D. Fla. 1992)* ; *Goldwater v. Alston & Bird, 116 F.R.D. 342, 351 (S.D. Ill. 1987)* ; *Rishcoff v. Commodity Fluctuations Sys., 111 F.R.D. 381, 382 (E.D. Pa. 1986)* .

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CHAPTER 42 Class Actions
F. Establishing "Commonality" and "Typicality"

3-42 Federal Litigation Guide § 42.66

§ 42.66 Typicality May Be Defeated If Named Class Representative Does Not Have Claims Against Each Defendant

[1] Named Class Representatives Generally Must Be Injured by Each Defendant to Satisfy Typicality Requirement

At least one class representative must have a claim against and be injured by each defendant to meet the typicality requirement. If no class representative has a cause of action against one or more of the defendants, the lack of typicality will preclude class certification, at least as to those defendants. n1

[2] Exceptions to General Rule

Courts have recognized exceptions to the principle that at a named plaintiff must have been injured by each named defendant. These exceptions are:

- If the defendants conspired to injure the plaintiffs n2

- If the defendants are "juridically linked"; a "juridical link" is some legal relationship that relates all defendants in a manner so that a single resolution of the dispute is preferred to multiple, individual actions n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesTypicality

FOOTNOTES:
(n1)Footnote 1. *Thompson v. Board of Educ. of Romeo Com. Schools, 709 F.2d 1200, 1204-1205 (6th Cir. 1983)* ; *LaMar v. H.& B. Novelty & Loan Co., 489 F.2d 461, 466 (9th Cir. 1973)* .

(n2)Footnote 2. *Butt v. Allegheny Pepsi-Cola Bottling Co., 116 F.R.D. 486, 488-489 (E.D. Va. 1987)* .

(n3)Footnote 3. *See, e.g., Angel Music, Inc., v. ABC Sports, Inc., 112 F.R.D. 70, 74-77 (S.D.N.Y. 1986)* ; *Thillens, Inc. v. Community Currency Exchange Asso., 97 F.R.D. 668, 676 (N.D. Ill. 1983)* .

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CHAPTER 42 Class Actions
F. Establishing "Commonality" and "Typicality"

3-42 Federal Litigation Guide §§ 42.67 through 42.79

[Reserved]

§§ 42.67[Reserved]

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CHAPTER 42 Class Actions
G. Determining Whether Representative Parties Will Fairly and Adequately Represent Class

3-42 Federal Litigation Guide § 42.80

§ 42.80 "Adequate Representation" Applies to Both Named Class Representative and Class Counsel

Before a class action will be certified, it must be demonstrated that the representative parties will fairly and adequately protect the interests of the class. n1

Adequate representation requires two elements: n2

- The class representative must not have interests adverse to those of the class
- Class counsel must be qualified, experienced, and generally able to conduct the proposed litigation

In determining the adequacy of the named class representative, courts also consider whether the representative will vigorously advocate the class claims. n3 In order to be an adequate class representative, a named party must be a member of the class at the time certification is sought. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesAdequacy of Representation

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 23(a)(4).*

(n2)Footnote 2. *See Crawford v. Honig, 37 F.3d 485, 487 (9th Cir. 1994)* ; *Retired Chicago Police Ass'n v. City of Chicago, 7 F.3d 584, 598 (7th Cir. 1993)* ; *Hoxworth v. Blinder Robinson & Co., Inc., 980 F.2d 912, 924 (3d Cir. 1992)* ; *In re Drexel Burnham Lambert Group, 960 F.2d 285, 291 (2d Cir. 1992)* .

(n3)Footnote 3. *See Berger v. Compaq Computer Corp., 257 F.3d 475, 478-484 (5th Cir. 2001)* ; *In re American Med. Sys., Inc., 75 F.3d 1069, 1083 (6th Cir. 1996)* ; *Andrews v. American Tel. & Tel. Co., 95 F.3d 1014, 1023 (11th Cir. 1996)* ; *Hassine v. Jeffes, 846 F.2d 169, 179 (3d Cir. 1988)* .

(n4)Footnote 4. *See Paton v. New Mexico Highlands Univ., 275 F.3d 1274, 1278-1280 (10th Cir. 2002)* .

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CHAPTER 42 Class Actions
G. Determining Whether Representative Parties Will Fairly and Adequately Represent Class

3-42 Federal Litigation Guide § 42.81

§ 42.81 Adequate Representation Is Most Critical Factor in Determining Class Certification

"Adequate representation" is the most critical factor in determining class certification. The requirement was designed to protect the due process rights of absent members of the class. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesAdequacy of Representation

FOOTNOTES:
(n1)Footnote 1. *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768, 784 (3d Cir. 1995)* ; *Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 721 (11th Cir. 1987)* .

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CHAPTER 42 Class Actions
G. Determining Whether Representative Parties Will Fairly and Adequately Represent Class

3-42 Federal Litigation Guide § 42.82

§ 42.82 Adequacy Determination Is Made on Case by Case Basis

What constitutes adequate representation is a question of fact that largely depends on the circumstances of the particular case. n1

The district court's adequacy determination will be reversed only for abuse of discretion. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesAdequacy of Representation

FOOTNOTES:
(n1)Footnote 1. *Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 728 (11th Cir. 1987)* .

(n2)Footnote 2. *Boley v. Brown, 10 F.3d 218, 223 (4th Cir. 1993)* ; *Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 728 (11th Cir. 1987)* ; *Malchman v. Davis, 761 F.2d 893, 899 (2d Cir. 1985)* .

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CHAPTER 42 Class Actions
G. Determining Whether Representative Parties Will Fairly and Adequately Represent Class

3-42 Federal Litigation Guide § 42.83

§ 42.83 Burden of Proof--Split in Authority

Courts have disagreed as to which party has the burden of proving adequacy of representation under Rule 23(a)(4). Most courts have held that the party seeking class certification carries the burden of proving that all of the Rule 23(a) requirements, including adequacy of representation, are satisfied. n1 However, some courts have held that the party challenging class certification has the burden of proving the inadequacy of the named representative. Courts have held that, unlike the other factors that determine certification, the burden of proof lies on the party challenging the adequacy of the representative rather than on the party seeking certification. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesAdequacy of RepresentationEvidenceProcedural ConsiderationsBurdens of ProofAllocation

FOOTNOTES:
(n1)Footnote 1. *Buford v. H&R Block, 168 F.R.D. 340, 348 (S.D. Ga. 1996)* ; *Morel v. Giuliani, 927 F. Supp. 622, 633 (S.D.N.Y. 1995)* ; *Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439, 448 (N.D. Cal. 1994)* .

(n2)Footnote 2. *Welch v. Board of Directors of Wildwood Golf Club, 146 F.R.D. 131, 136 (W.D. Pa. 1993)* .

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CHAPTER 42 Class Actions
G. Determining Whether Representative Parties Will Fairly and Adequately Represent Class

3-42 Federal Litigation Guide § 42.84

§ 42.84 Court Has Continuing Obligation to Ensure Adequacy of Representation at All Stages of Litigation

The court has a continuing obligation to ensure adequacy of representation at all stages of litigation. n1

If events occurring *after* class certification render a class representative an inadequate representative, the court may remedy the problem by substituting a new representative, by excluding those class members who are not adequately represented, or by bifurcating the trial.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesAdequacy of Representation

FOOTNOTES:
(n1)Footnote 1. *Foe v. Cuomo, 892 F.2d 196, 198 (2d Cir. 1989)* ; *Key v. Gillette Co., 782 F.2d 5, 7 (1st Cir. 1986)* ; *Shroder v. Suburban Coastal Corp., 729 F.2d 1371, 1374 (11th Cir. 1984)* .

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CHAPTER 42 Class Actions
G. Determining Whether Representative Parties Will Fairly and Adequately Represent Class

3-42 Federal Litigation Guide § 42.85

§ 42.85 Parameters of Adequate Representation by Named Class Representative

[1] Named Class Representative Acts as Fiduciary

The class representative acts as fiduciary for the entire class, and as such owes the class a duty of loyalty. n1

[2] Position of Named Class Representative Need Not Be Identical to That of Class Members, and Need Not Be Best Representative

The interests of the named representative must not be in conflict with or antagonistic to those of the class members. However, the position of the class representative need not be *identical* to that of the class members. n2

There is no requirement for the named representative to be the best possible representative. n3

[3] Conflict Between Representative and Class Must Be More Than Merely Speculative to Defeat Adequacy Requirement

Speculative conflict does not make the class representative inadequate. n4

Disagreements among class members as to the proper type or scope of relief will not create an impermissible conflict of interest, if the class members agree that the defendant is liable. n5

In addition, for a conflict of interest to bar class certification, the conflict must relate to the subject matter of the litigation. n6

In situations in which there is a close familial bond between class counsel and a class representative, there is a danger that the representative might have some interests in conflict with the best interests of the class as a whole when, for example, making decisions that impact on attorney's fees. n7

[4] Named Class Representative Inadequate If Subject to Unique Defense Central to Litigation

If the class representative is subject to a defense that potentially will become a focus of the litigation, the adequacy requirement will not be satisfied. n8

Class treatment will generally be denied if a unique defense is even arguably present. n9

However, if the court determines that the defense has absolutely no merit, the defense will not preclude class certification. n10

[5] Named Class Representative Must Ensure Vigorous Prosecution of Litigation

In determining the adequacy of the named representative, courts consider whether the representative will vigorously advocate the class claim. n11

In assessing whether a class representative will vigorously prosecute a class action case, a court sometimes will consider the actual progress of the proceedings to that point. Delays in seeking class certification, failures to timely prosecute the litigation, and failures to comply with reasonable disclosure obligations or discovery requests are factors that suggest that the class representative is inadequate. n12

[6] Named Class Representative Should Not Delay in Seeking Certification or Fail to Respond to Opposing Party

Delays in seeking class certification and failure to timely prosecute the litigation are indicative of inadequate class representation. n13

[7] Named Class Representative Should Be Familiar With Action and Not Abdicate Conduct of Case to Counsel

The named class representative must:

- At least minimally supervise class counsel n14
- Possess at least a minimal degree of knowledge relating to the class action n15
- Possess a general understanding of the nature of class action litigation n16

Knowledge of the legal or technical aspects of the case is not necessary. n17 Courts properly become concerned when a class representative is or appears to be prosecuting a class action for the benefit of class counsel rather than for the benefit of the class. Therefore, if a class representative is closely affiliated with class counsel, courts often consider this to be a disqualifying conflict of interest. n18

[8] Size of Financial Interest in Outcome May Be Relevant But Is Not Determinative

A large financial interest by the named class representative in the outcome of the litigation is more likely to support a finding of adequacy. n19 However, additional requirements apply in securities class actions. Under the Private Securities Litigation Reform Act (PSLRA), the court ordinarily must appoint as lead plaintiff the person who requests to be appointed lead plaintiff and has the largest financial interest in the relief sought by the class. The statutory requirements relating to the lead plaintiff are in addition to the typicality and adequacy requirements that apply to all class representatives under Rule 23. n19.1

[9] Ability of Named Class Representative to Finance Litigation

In view of its relationship to vigorous prosecution, the ability and willingness of a class representative to finance the litigation is relevant to determining the adequacy of representation. n20

In class actions under Rule 23(b)(3), class representatives must finance the costs of notice to all class members. n21

[10] Named Class Representative May Need to Demonstrate Financial Means

Many courts require class representatives to make an affirmative demonstration of their ability to pay the costs of notice by a showing of either:

- Regularly paid litigation expenses n22
- An established fund created to pay the litigation costs n23

Traditionally, class counsel may only advance litigation costs if the class representative agrees to reimburse the attorney. n24

[11] Honesty, Credibility, and Motives of Named Class Representative Must Be Relevant to Issues in Litigation to Affect Adequacy Determination

If the credibility or honesty of the class representative threatens to become a focus of the litigation, the class representative will be held to be an inadequate representative. n25

Conversely, if the credibility of the class representative is not subject to serious question or does not threaten to become a central issue in the litigation, then a credibility issue will not defeat class certification. n26

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass MembersNamed MembersCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesAdequacy of Representation

FOOTNOTES:
(n1)Footnote 1. *Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 726 (11th Cir. 1987)* ; *Kline v. Wolf, 702 F.2d 400, 402-403 (2d Cir. 1983)* .

(n2)Footnote 2. *Kamen v. Kemper Fin. Servs. Inc., 908 F.2d 1338, 1349-1350 (7th Cir. 1990)* , *rev'd on other grounds*, *500 U.S. 90 (1991)* ; *In re Tetracycline Cases, 107 F.R.D. 719, 730 (W.D. Mo. 1985)* .

(n3)Footnote 3. *McGowan v. Faulkner Concrete Pipe Co., 659 F.2d 554, 559 (5th Cir. 1981)* .

(n4)Footnote 4. *Rosario v. Livaditis, 963 F.2d 1013, 1018-1019 (7th Cir. 1992)* ; *Becher v. Long Island Lighting Co., 164 F.R.D. 144, 151 (E.D.N.Y. 1996)* , *amended on other grounds*, *172 F.R.D. 28 (E.D.N.Y. 1997)* ; *In re Telectronics Pacing Sys., Inc., Accufix Atrial "J" Leads Prods. Liab. Litig., 164 F.R.D. 222, 229 (S.D. Ohio 1995)* ; *Alvarado Partners, L.P. v. Mehta, 130 F.R.D. 673, 676 (D. Colo. 1990)* .

(n5)Footnote 5. *Stewart v. Winter, 669 F.2d 328, 335 (5th Cir. 1982)* ; *Walsh v. Northrup-Grumman Corp., 162 F.R.D. 440, 447-448 (E.D.N.Y. 1995)* ; *Hispanics United of DuPage County v. Village of Addison, 160 F.R.D. 681, 689-690 (N.D. Ill. 1995)* .

(n6)Footnote 6. *German by German v. Federal Home Loan Mortgage Corp., 168 F.R.D. 145, 154-155 (S.D.N.Y. 1996)* ; *Rentschler v. Carnahan, 160 F.R.D. 114, 117 (E.D. Mo. 1995)* ; *Adair v. Sorenson, 134 F.R.D. 13, 19-20 (D. Mass. 1991)* ; *Alvarado Partners, L.P. v. Mehta, 130 F.R.D. 673, 676 (D. Colo. 1990)* .

(n7)Footnote 7. *See Petrovic v. AMOCO Oil Co., 200 F.3d 1140, 1154-1155 (8th Cir. 1999)* .

(n8)Footnote 8. *Gary Plastic Packaging Corp., v. Merrill Lynch, 903 F.2d 176, 178-180 (2d Cir 1990)* .

(n9)Footnote 9. *Kline v. Wolf, 702 F.2d 400, 402-403 (2d Cir. 1983)* ; *J.H. Cohn & Co. v. American Appraisal Assoc., Inc., 628 F.2d 994, 998-999 (7th Cir. 1980)* .

(n10)Footnote 10. *Hardy v. City Optical Inc., 39 F.3d 765, 770 (7th Cir. 1994)* ; *Koenig v. Benson, 117 F.R.D. 330, 335-338 (E.D.N.Y. 1987)* .

(n11)Footnote 11. *See Berger v. Compaq Computer Corp., 257 F.3d 475, 478-484 (5th Cir. 2001)* .

(n12)Footnote 12. *Culver v. City of Milwaukee, 277 F.3d 908, 912 (7th Cir. 2002)* .

(n13)Footnote 13. *East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 405, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977)* ; *Andrews v. Bechtel Power Corp., 780 F.2d 124, 130 (1st Cir. 1985)* , *cert. denied*, *476 U.S. 1172 (1985)* ; *McGowan v. Faulkner Concrete Pipe Co., 659 F.2d 554, 559 (5th Cir. 1981)* ; *Dubin v. Miller, 132 F.R.D. 269, 273 (D. Colo. 1990)* .

(n14)Footnote 14. *Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 727 (11th Cir. 1987)* .

(n15)Footnote 15. *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp., 222 F.3d 52, 60-62 (2d Cir. 2000)* .

(n16)Footnote 16. *Civic Assoc. of Deaf v. Giuliani, 915 F. Supp. 622, 633 (S.D.N.Y. 1996)* ; *In re United Energy Corp. Solar Power Modules Tax Shelter Inv. Sec. Litig., 122 F.R.D. 251, 258 (C.D. Cal. 1988)* .

(n17)Footnote 17. *Trautz v. Weisman, 846 F. Supp. 1160, 1167 (S.D.N.Y. 1994)* .

(n18)Footnote 18. *See London v. Wal-Mart Stores, Inc., 340 F.3d 1246, 1255 (11th Cir. 2003)* .

(n19)Footnote 19. *In re Boardwalk Marketplace Sec. Litig., 122 F.R.D. 4, 8 (D. Conn. 1988)* .

(n20)Footnote 19.1. *See In re Cendant Corp. Litig., 264 F.3d 201, 243-244 (3d Cir. 2001)* .

(n21)Footnote 20. *Palmer v. BRG, Inc., 874 F.2d 1417, 1420-1421 (11th Cir. 1990)* , *rev'd on other grounds*, *498 U.S. 46 (1990)* (en banc); *Rolex Employees Retirement Trust v. Mentor Graphics Corp., 136 F.R.D. 658 (D. Or. 1991)* .

(n22)Footnote 21. *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)* .

(n23)Footnote 22. *See Tedesco v. Mishkin, 689 F. Supp. 1327, 1336 (S.D.N.Y. 1988)* .

(n24)Footnote 23. *Pension Benefit Guar. Corp. v. LTV Corp., 122 F.R.D. 436, 440 (S.D.N.Y. 1988)* ; *Jansen v. Greyhound Corp., 692 F. Supp. 1022, 1028 (N.D. Iowa 1986)* .

(n25)Footnote 24. *See* ABA Model Rules of Professional Responsibility, 1.8(e).

(n26)Footnote 25. *Kline v. Wolf, 702 F.2d 400, 402-403 (2d Cir. 1983)* ; *Wagner v. Lehman Bros. Kuhn Loeb Inc., 646 F. Supp. 643, 660-661 (N.D. Ill. 1986)* .

(n27)Footnote 26. *German by German v. Federal Home Loan Mortgage Corp., 168 F.R.D. 145, 154-155 (S.D.N.Y. 1996)* ; *Adair v. Sorenson, 134 F.R.D. 13, 19-20 (D. Mass. 1991)* ; *Dubin v. Miller, 132 F.R.D. 269, 272 (D. Colo. 1990)* .

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CHAPTER 42 Class Actions
G. Determining Whether Representative Parties Will Fairly and Adequately Represent Class

3-42 Federal Litigation Guide § 42.86

§ 42.86 Class Counsel Must Be Qualified, Experienced, and Able to Conduct Proposed Litigation

[1] Appointing Class Counsel

Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. n1 An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class. n2

Class counsel must be qualified, experienced, and generally able to conduct the proposed litigation. n3

Class counsel has a fiduciary duty of loyalty to the class members. n4

[2] Courts Consider Counsel's Record, Expertise, and Resources

In appointing class counsel, the court must consider the following: n5

- The work counsel has done in identifying or investigating potential claims in the action
- Counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action
- Counsel's knowledge of the applicable law
- The resources counsel will commit to representing the class

In appointing class counsel, the court may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class. n6 The court may also direct potential class counsel to provide information on any subjectpertinent to the appointment and to propose terms for attorney's fees and nontaxable costs. n7

[3] Courts Consider Ethical Conduct of Counsel

In determining whether counsel will provide adequate representation, courts also consider whether counsel has acted unethically in the present case or other litigation. n8 In evaluating any breach of ethical standards, a court will consider the seriousness of the violation and any resulting prejudice to the class. n9

[4] Conflicts of Interest With Class Impermissible

Class counsel must not have conflicts of interest with the class. n10

Depending on the nature of the conflict, class members may be able to retain their counsel by waiving the potential conflict. n11

[5] Appointment Procedure

The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action. n12 When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequately qualified. n13 If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class. n14

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass CounselGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesAdequacy of Representation

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 23(g)(1)*; *see also In re Merck & Co. Sec. Litig., 432 F.3d 261, 266-268 (3d Cir. 2005)* .

(n2)Footnote 2. *Fed. R. Civ. P. 23(g)(1)*; *UAW v. GMC, 497 F.3d 615, 626 (6th Cir. 2007)* (adequacy of representation turns in part on competency of class counsel and in part on absence of conflicts of interest).

(n3)Footnote 3. *Crawford v. Honig, 37 F.3d 485, 487 (9th Cir. 1994)* ; *In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 290 (2d Cir. 1992)* ; *Hoxworth v. Blinder Robinson & Co., Inc., 980 F.2d 912, 924 (3d Cir. 1992)* ; *Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 721 (11th Cir. 1987)* .

(n4)Footnote 4. *In re* "Agent Orange" *Prod. Liab. Litig., 800 F.2d 14, 17-18 (2d Cir. 1986)* ; *Wagner v. Lehman Bros. Kuhn Loeb, Inc., 646 F. Supp. 643, 661 (N.D. Ill. 1986)* .

(n5)Footnote 5. *Fed. R. Civ. P. 23(g)(1)(A).*

(n6)Footnote 6. *Fed. R. Civ. P. 23(g)(1)(B).*

(n7)Footnote 7. *Fed. R. Civ. P. 23(g)(1)(C).*

(n8)Footnote 8. *Piambino v. Bailey, 757 F.2d 1112, 1143-1146 (11th Cir. 1985)* .

(n9)Footnote 9. *Wagner v. Lehman Bros. Kuhn Loeb, Inc., 646 F. Supp. 643, 661-662 (N.D. Ill. 1986)* ; *In re Mid-Atlantic Toyota Antitrust Litig., 93 F.R.D. 485, 488 (D. Md. 1982)* .

(n10)Footnote 10. *Phillips v. Joint Legislative Comm. on Performance and Expenditure Review, 637 F.2d 1014, 1023 (5th Cir. 1981)* ; *Lowenschuss v. Bluhdorn, 613 F.2d 18, 20 (2d Cir. 1980)* , *cert. denied*, *449 U.S. 840 (1980)* .

(n11)Footnote 11. *Ray M. by Juana D. v. Board of Educ. of City of New York, 884 F. Supp. 696, 706-707 (E.D.N.Y. 1995)* .

(n12)Footnote 12. *Fed. R. Civ. P. 23(g)(2).*

(n13)Footnote 13. *Fed. R. Civ. P. 23(g)(2).*

(n14)Footnote 14. *Fed. R. Civ. P. 23(g)(2).*

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CHAPTER 42 Class Actions
G. Determining Whether Representative Parties Will Fairly and Adequately Represent Class

3-42 Federal Litigation Guide § 42.87

§ 42.87 Effect of Private Securities Litigation Reform Act of 1995 on Adequacy of Representation in Securities Litigation

[1] Act Enacted to Address Abusive Securities Fraud Cases

To address a perceived rise in abusive securities fraud lawsuits, Congress enacted the Private Securities Litigation Reform Act of 1995. n1 The Act applies to all securities fraud actions commenced on or after December 22, 1995.

[2] Lead Plaintiff Must Be Most Capable Representative

Pursuant to the Private Securities Litigation Reform Act of 1995, the lead plaintiff should be the person or entity most capable of adequately representing the interests of class members. n1.1 The Act establishes a rebuttable presumption that the most adequate plaintiff is the plaintiff with the largest financial interest in the relief sought by the class. The presumption may be rebutted by showing that the plaintiff with the largest financial interest would not fairly and adequately protect the interests of the class, or is subject to unique defenses. n2

[3] Most Adequate Plaintiff Chooses Lead Counsel

Pursuant to the Private Securities Litigation Reform Act of 1995, the most adequate plaintiff chooses lead counsel, subject to court approval. n3

[4] Ownership of Securities by Lead Counsel

If lead counsel owns an interest in the securities that are the subject of the class litigation, the court must determine whether such an interest constitutes a conflict of interest that disqualifies counsel from representing the class. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsClass CounselGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesAdequacy of RepresentationSecurities LawLiabilityPrivate Securities LitigationLead CounselSecurities LawLiabilityPrivate Securities LitigationLead Plaintiff

FOOTNOTES:

(n1)Footnote 1. Pub. L. 104-67, 109 Stat. 737.

(n2)Footnote 1.1. *See In re Cendant Corp. Litig., 264 F.3d 201, 243-244 (3d Cir. 2001)* .

(n3)Footnote 2. *15 U.S.C. §§ 77z-1(a)(3)(B)(i), (iii), 78u-4(a)(3)(B)(i), (iii).*

(n4)Footnote 3. *15 U.S.C. §§ 77z-1(a)(3)(B)(v), 78u-4(a)(3)(B)(v).*

(n5)Footnote 4. *15 U.S.C. §§ 77z-1(a)(8), 78u-4(a)(8).*

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CHAPTER 42 Class Actions
G. Determining Whether Representative Parties Will Fairly and Adequately Represent Class

3-42 Federal Litigation Guide §§ 42.88 through 42.99

[Reserved]

§§ 42.88[Reserved]

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CHAPTER 42 Class Actions
H. Establishing That Class Action Falls Within One of Three Subdivisions of Rule 23(b)
1. General Requirements

3-42 Federal Litigation Guide § 42.100

§ 42.100 Types of Class Actions Maintainable

If all four prerequisites of Rule 23(a) have been satisfied, n1 a class action may be maintained, provided the action falls within one of the following subdivisions of Rule 23(b):

- Rule 23(b)(1): concerned with the risk that separate adjudications by or against individual members of a class would have on the putative class parties n2
- Rule 23(b)(2): involves injunctive or declaratory relief n3
- Rule 23(b)(3): focuses on predominant common issues n4

It is not unusual for a case to qualify as a class action under more than one of the three categories of class actions set out in Rule 23(b). n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See §§ 42.30-42.32.*

(n2)Footnote 2. *See §§ 42.110-42.116, 42.130-42.136; Fed. R. Civ. P. 23(b)(1).*

(n3)Footnote 3. *See §§ 42.150-42.154; Fed. R. Civ. P. 23(b)(2).*

(n4)Footnote 4. *See §§ 42.160-42.168; Fed. R. Civ. P. 23(b)(3).*

(n5)Footnote 5. *In re A.H. Robins Co, Inc., 880 F.2d 709, 728 (4th Cir. 1989) .*

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CHAPTER 42 Class Actions
H. Establishing That Class Action Falls Within One of Three Subdivisions of Rule 23(b)
1. General Requirements

3-42 Federal Litigation Guide § 42.101

§ 42.101 Preference for Rule 23(b)(1) and 23(b)(2) Actions Over 23(b)(3) Actions

If a choice exists between certification under Rule 23(b)(3) and either Rule 23(b)(1) or (b)(2), courts generally certify the class action pursuant to Rule 23(b)(1) or (b)(2). One of the reasons is that members of a Rule 23(b)(3) class action are entitled to opt out of the action. n1 A mandatory class action is seen as preferable because there is no risk that individual members will opt out of the class and pursue separate litigation that might prejudice other class members or the defendants. n2

Moreover, mandatory notice to all class members pursuant to Rule 23(c)(2) is required only for class actions under Rule 23(b)(3). n3 Class actions requiring notice are less preferable because notice may impede the judiciary's need to expedite the orderly resolution of conflict.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsOpt-Out ProvisionsCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See § 42.168.*

(n2)Footnote 2. *See Robertson v. National Basketball Ass'n, 556 F.2d 682, 685 (2d Cir. 1977) .*

(n3)Footnote 3. *See Fed. R. Civ. P. 23(c)(2); see also § 42.168.*

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CHAPTER 42 Class Actions
H. Establishing That Class Action Falls Within One of Three Subdivisions of Rule 23(b)
1. General Requirements

3-42 Federal Litigation Guide §§ 42.102 through 42.109

[Reserved]

§§ 42.102[Reserved]

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CHAPTER 42 Class Actions
H. Establishing That Class Action Falls Within One of Three Subdivisions of Rule 23(b)
2. Maintaining Class Action Under Rule 23(b)(1)(A)

3-42 Federal Litigation Guide § 42.110

§ 42.110 Overview of Rule 23(b)(1)(A)

The court may certify an action as a class action under Rule 23(b)(1)(A) if: n1

- There is a substantial risk of separate actions being brought in the absence of a class action
- The prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class
- The inconsistent or varying adjudications would, in turn, establish incompatible standards of conduct for the party opposing the class

Actions under Rule 23(b)(1)(A) address the risk posed to the party *opposing* a class; actions under Rule 23(b)(1)(B) address the risk posed to the individual members of a class. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 23(b)(1)(A).*

(n2)Footnote 2. *Fed. R. Civ. P. 23(b)(1).*

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CHAPTER 42 Class Actions
H. Establishing That Class Action Falls Within One of Three Subdivisions of Rule 23(b)
2. Maintaining Class Action Under Rule 23(b)(1)(A)

3-42 Federal Litigation Guide § 42.111

§ 42.111 Rule 23(b)(1)(A) Requires Realistic Possibility of Separate Litigation in Absence of Class Certification

Implicit in Rule 23(b)(1)(A) is that there must be a realistic possibility of separate litigation in the absence of class certification. n1

Certification will be denied if separate adjudications would be unlikely. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See In re Dennis Greenman Sec. Litig., 829 F.2d 1539, 1544-1545 (11th Cir. 1987)* ; *Roper v. Consurve, Inc., 578 F.2d 1106, 1111 n.3 (5th Cir. 1978)* ; *Eliasen v. Green Bay & W. R.R., 93 F.R.D. 408, 412 (E.D. Wis. 1982)* , *aff'd, 705 F.2d 461 (7th Cir. 1983)* .

(n2)Footnote 2. *Eliasen v. Green Bay & W. R.R., 93 F.R.D. 408, 412 (E.D. Wis. 1982)* , *aff'd, 705 F.2d 461 (7th Cir. 1983)* ; *Roper v. Consurve, Inc., 578 F.2d 1106, 1111 n.3 (5th Cir. 1978)* ; *Ruland v. General Elec. Co., 94 F.R.D. 164, 166 (D. Conn. 1982)* .

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CHAPTER 42 Class Actions
H. Establishing That Class Action Falls Within One of Three Subdivisions of Rule 23(b)
2. Maintaining Class Action Under Rule 23(b)(1)(A)

3-42 Federal Litigation Guide § 42.112

§ 42.112 Rule 23(b)(1)(A) Requires Risk That Separate Litigation Will Result in Varying Adjudications

Rule 23(b)(1)(A) provides that there must be the risk that separate litigation will result in varying adjudications that would establish incompatible or varying standards of conduct for the party opposing the class. n1

In general, Rule 23(b)(1)(A) is satisfied only if inconsistent judgments in separate suits would place the party opposing the class in the position of being unable to comply with one judgment without violating the terms of another. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 23(b)(1)(A).*

(n2)Footnote 2. *See In re Dennis Greenman Sec. Litigation, 829 F.2d 1539, 1545 (11th Cir. 1987)* ; *McDonnell Douglas Corp. v. United States Dist. Ct., 523 F.2d 1083, 1086 (9th Cir. 1975)* ; *National Union Fire Ins. Co. of Pittsburgh v. Midland Bancor, 158 F.R.D. 681, 687 (D. Kan. 1994)* ; *Westman v. Textron, 151 F.R.D. 229, 231 (D. Conn. 1993)* .

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CHAPTER 42 Class Actions
H. Establishing That Class Action Falls Within One of Three Subdivisions of Rule 23(b)
2. Maintaining Class Action Under Rule 23(b)(1)(A)

3-42 Federal Litigation Guide § 42.113

§ 42.113 Only Actions for Declaratory or Injunctive Relief May Be Certified Under Rule 23(b)(1)(A)

Rule 23(b)(1)(A) only applies to actions in which the defendant could be sued for different and incompatible affirmative relief, as opposed to actions seeking money damages. n1

Thus, Rule 23(b)(1)(A) class certification is appropriate in a case in which the class seeks injunctive or declaratory relief to alter an ongoing course of conduct that is either legal or illegal as to all members of the class. Rule 23(b)(1)(A) does not apply to actions seeking compensatory damages. n2

A request for money damages in addition to injunctive or declaratory relief does not preclude Rule 23(b)(1)(A) certification unless the injunctive or declaratory relief is incidental to the action. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See National Union Fire Ins. Co. of Pittsburgh v. Midland Bancor, 158 F.R.D. 681, 687 (D. Kan. 1994)* ; *Employees Ins. of Wausau v. Federal Dep. Ins. Corp., 112 F.R.D. 52, 56-57 (E.D. Tenn.1986)* ; *McBirney v. Autrey, 106 F.R.D. 240, 245 (N.D. Tex. 1985)* .

(n2)Footnote 2. *See In re Dennis Greenman Sec. Litigation, 829 F.2d 1539, 1545 (11th Cir. 1987)* .

(n3)Footnote 3. *See In re Copley Pharmaceutical, Inc., 158 F.R.D. 485, 490 (D. Wyo. 1994)* ; *Pruitt v. Allied Chem. Corp., 85 F.R.D. 100, 107 (E.D. Va. 1980)* .

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CHAPTER 42 Class Actions
H. Establishing That Class Action Falls Within One of Three Subdivisions of Rule 23(b)
2. Maintaining Class Action Under Rule 23(b)(1)(A)

3-42 Federal Litigation Guide § 42.114

§ 42.114 Certification of Defendant Classes Under Rule 23(b)(1)(A)

Rule 23(b)(1)(A) expressly provides that defendant classes may be certified, provided the action satisfies the Rule's requirement that individual litigation could establish incompatible standards of conduct for the party opposing the class. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See First Fed. of Mich. v. Barrow, 878 F.2d 912, 919 (6th Cir. 1989)* .

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CHAPTER 42 Class Actions
H. Establishing That Class Action Falls Within One of Three Subdivisions of Rule 23(b)
2. Maintaining Class Action Under Rule 23(b)(1)(A)

3-42 Federal Litigation Guide § 42.115

§ 42.115 No Right to Notice Under Rule 23(b)(1)(A)

Members of a class certified under Rule 23(b)(1)(A) are not entitled to notice of the action. n1

However, for any class certified under Rule 23(b)(1) the court may direct appropriate notice to the class. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsNoticesCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 23(c)(2)*; *U.S. Trust Co. v. Alpert, 163 F.R.D. 409, 419 (S.D.N.Y. 1995)* ; *Walsh v. Great Atlantic & Pacific Tea Co., 726 F.2d 956, 963 n.3 (3d Cir. 1983)* ; *United States Trust Co. v. Alpert, 163 F.R.D. 409, 419 (S.D.N.Y. 1995)* (citing **Moore's Federal Practice**).

(n2)Footnote 2. *Fed. R. Civ. P. 23(c)(2)(A).*

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CHAPTER 42 Class Actions
H. Establishing That Class Action Falls Within One of Three Subdivisions of Rule 23(b)
2. Maintaining Class Action Under Rule 23(b)(1)(A)

3-42 Federal Litigation Guide § 42.116

§ 42.116 No Right to Opt Out Under Rule 23(b)(1)(A)

Members of a Rule 23(b)(1)(A) class are not entitled to opt out of the action. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsNoticesCivil ProcedureClass ActionsOpt-Out ProvisionsCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Walsh v. Great Atlantic & Pacific Tea Co., 726 F.2d 956, 963 n.3 (3d Cir. 1983)* .

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CHAPTER 42 Class Actions
H. Establishing That Class Action Falls Within One of Three Subdivisions of Rule 23(b)
2. Maintaining Class Action Under Rule 23(b)(1)(A)

3-42 Federal Litigation Guide §§ 42.117 through 42.129

[Reserved]

§§ 42.117[Reserved]

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CHAPTER 42 Class Actions
H. Establishing That Class Action Falls Within One of Three Subdivisions of Rule 23(b)
3. Maintaining Class Action Under Rule 23(b)(1)(B)

3-42 Federal Litigation Guide § 42.130

§ 42.130 Rule 23(b)(1)(B) Actions Focus on Preserving Limited Funds for Class Members

A class action may be maintained under Rule 23(b)(1)(B) if: n1

- The prosecution of separate actions by or against individual members of the class would create a risk of individual adjudications; and

- The individual adjudications would, as a practical matter, be dispositive of the interests of other class members or substantially impair or impede the ability of other members to protect their interests.

Rule 23(b)(1)(B) is designed to preserve a limited fund against individual claims of class members that could exhaust the fund and leave subsequent claimants with no remedy. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 23(b)(1)(B).*

(n2)Footnote 2. *County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1303 (2d Cir. 1990)* ; *see § 42.133[1].*

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CHAPTER 42 Class Actions
H. Establishing That Class Action Falls Within One of Three Subdivisions of Rule 23(b)
3. Maintaining Class Action Under Rule 23(b)(1)(B)

3-42 Federal Litigation Guide § 42.131

§ 42.131 Rule 23(b)(1)(B) Compared With Rule 23(b)(1)(A)

Rule 23(b)(1)(A) focuses on the possible prejudice to the party opposing the class, n1 whereas Rule 23(b)(1)(B) focuses on the members of the putative class, and seeks to protect them against situations in which they would be prejudiced by separate litigation. To warrant class certification under Rule 23(b)(1)(B), the risk of prejudice need only be practical, not legal or technical. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See § 42.110.*

(n2)Footnote 2. *Alexander Grant & Co. v. McAlister, 116 F.R.D. 583, 590 (S.D. Ohio 1987)* ; *Esler v. Northrop Corp., 86 F.R.D. 20, 38 (W.D. Mo. 1979)* .

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CHAPTER 42 Class Actions
H. Establishing That Class Action Falls Within One of Three Subdivisions of Rule 23(b)
3. Maintaining Class Action Under Rule 23(b)(1)(B)

3-42 Federal Litigation Guide § 42.132

§ 42.132 Rule 23(b)(1)(B) Inapplicable to Actions for Money Damages Only

Rule 23(b)(1)(B) applies to cases seeking declaratory or injunctive relief in which one member's joint or common right is affected by other members' litigation. Certification under the Rule is limited to cases in which no individual or unique facts exist. n1

Rule 23(b)(1)(B) does not apply to actions seeking money damages only. However, a request for money damages does not preclude certification, provided injunctive or declaratory relief is also sought, and such relief is not incidental to the action. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureRemediesDamagesMonetary Damages

FOOTNOTES:
(n1)Footnote 1. *Bazemore v. Friday, 478 U.S. 385, 406-407, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986)* .

(n2)Footnote 2. *See White v. NFL, 822 F. Supp. 1389, 1407-1409 (D. Minn. 1993)* , *aff'd, 41 F.3d 402 (8th Cir. 1994)* ; *Robertson v. National Basketball Ass'n, 556 F.2d 682, 685 (2d Cir. 1977)* .

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CHAPTER 42 Class Actions
H. Establishing That Class Action Falls Within One of Three Subdivisions of Rule 23(b)
3. Maintaining Class Action Under Rule 23(b)(1)(B)

3-42 Federal Litigation Guide § 42.133

§ 42.133 Rule 23(b)(1)(B) Commonly Used in Limited Fund Cases

[1] Pool of Assets May Be Insufficient to Satisfy All Claims Against the Fund

Rule 23(b)(1)(B) is most commonly used in "limited fund" cases, which are actions in which any recovery will come from a fixed pool of assets that is or may be insufficient to satisfy all the claims against the fund. The fund must be the plaintiff's sole source of recovery. n1

Insolvency may also be the basis of a limited fund. n2

Certification of a class in limited fund cases is intended to ensure that allocation of the defendant's finite funds does not depend on which party rushes to the courthouse first or chooses a courthouse that can render swifter results than others. n3 Rule 23(b)(1)(B) is thus designed to preserve a limited fund for the benefit of the entire class, against individual claims of class members that could exhaust the fund and leave subsequent claimants with no remedy. n4

[2] Limited Fund Cases Are Equitable in Nature

Limited fund cases are considered to be equitable in nature, even though they involve money damages. n5

[3] Courts Differ Over Extent of Risk That Must Be Shown to Obtain Limited Fund Certification

Rule 23(b)(1)(B) requires a plaintiff to show some risk that a limited fund would subvert the rights of some plaintiffs if individual litigation were to proceed. However, courts have differed over the extent of risk that plaintiffs must establish. The Ninth Circuit has adopted the most stringent standard. That court has expressly barred limited fund certification under Rule 23(b)(1)(B) unless a party shows that separate actions will inescapably or necessarily result in the exhaustion of a limited fund prior to the satisfaction of all class members' claims. n6

Other courts, however, have concluded that the proponent of class certification need only show a substantial probability that limitations on the fund's resources will affect the plaintiffs' claims. n7 Under this standard, the plaintiff must establish more than a mere possibility, but less than an absolute likelihood, that, if damages are awarded, the claims of earlier litigants will exhaust the defendant's assets. n8

[4] Specific Evidence Must Be Provided Regarding Limited Fund

To obtain Rule 23(b)(1)(B) certification on the basis of a limited fund, a party must submit specific evidence showing that the fund may be depleted through individual litigation before all members' claims can be satisfied. n9

Bare allegations that the fund at issue may be insufficient to pay all claims are not enough to support class certification. n10

Fact-finding hearings may be required to determine whether certification should be granted on a limited fund theory. n11

[5] Certification Granted If Likelihood That Earlier Plaintiff's Claims Will Exhaust Defendant's Assets

Class certification pursuant to Rule 23(b)(1)(B) is appropriate if evidence establishes a likelihood that if damages are awarded in individual litigation, the claims of the earlier plaintiffs will exhaust the defendants' assets. n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *In re Dennis Greenman Sec. Litigation, 829 F.2d 1539, 1546 (11th Cir. 1987)* .

(n2)Footnote 2. *See In re Joint E. & S. Dist. Asbestos Litig., 982 F.2d 721, 738 (2d Cir. 1992)* , *modified on other grounds*, *993 F.2d 7 (1993)* .

(n3)Footnote 3. *In re Joint E. & S. Dist. Asbestos Litig., 982 F.2d 721, 738 (2d Cir. 1992)* , *modified on other grounds*, *993 F.2d 7 (1993)* .

(n4)Footnote 4. *County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1303 (2d Cir. 1990)* ; *Waldron v. Raymark Indus., 124 F.R.D. 235, 238 n.1 (N.D. Ga. 1989)* .

(n5)Footnote 5. *In re Joint E. & S. Dist. Asbestos Litig., 982 F.2d 721, 738 (2d Cir. 1992)* , *modified on other grounds*, *993 F.2d 7 (1993)* .

(n6)Footnote 6. *In re Northern Dist. of Cal., Dalkon Shield IUD. Prod. Liab. Litig., 693 F.2d 847, 851-852 (9th Cir. 1982)* .

(n7)Footnote 7. *Trautz v. Weisman, 846 F. Supp. 1160, 1169 (S.D.N.Y. 1994)* ; *In re* "Agent Orange" *Prod. Liab. Litig., 100 F.R.D. 718, 724-725 (E.D.N.Y. 1983)* , *aff'd*, *818 F.2d 145 (2d Cir. 1987)* , *cert. denied sub nom.*, *Pinkney v. Dow Chem. Co., 484 U.S. 1004 (1988)* .

(n8)Footnote 8. *In re Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 765 (S.D.N.Y. & E.D.N.Y. 1991)* , *vacated on other grounds*, *982 F.2d 721 (2d Cir. 1992)* .

(n9)Footnote 9. *County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1303 (2d Cir. 1990)* ; *In re Northern Dist. of Cal., Dalkon Shield IUD. Prod. Liab. Litig., 693 F.2d 847, 852 (9th Cir. 1982)* .

(n10)Footnote 10. *Trautz v. Weisman, 846 F. Supp. 1160, 1168-1169 (S.D.N.Y. 1994)* .

(n11)Footnote 11. *In re Bendectin Prod. Liab. Litig., 749 F.2d 300, 306 (6th Cir. 1984)* ; *In re Northern Dist. of Cal., Dalkon Shield IUD. Prod. Liab. Litig., 693 F.2d 847, 852 (9th Cir. 1982)* .

(n12)Footnote 12. *In re Joint E. & S. Dist. Asbestos Litig., 982 F.2d 721, 738 (2d Cir. 1992)* .

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CHAPTER 42 Class Actions
H. Establishing That Class Action Falls Within One of Three Subdivisions of Rule 23(b)
3. Maintaining Class Action Under Rule 23(b)(1)(B)

3-42 Federal Litigation Guide § 42.134

§ 42.134 Separate Punitive Damages Classes May Be Certified Under Limited Fund and "Limited Generosity" Theories

In a number of cases, courts have considered certifying, pursuant to Rule 23(b)(1)(B), separate classes covering only claims for punitive damages. Plaintiffs have offered two theories in support of such certification. Under the first theory, a "limited fund" approach, certification of a punitive damages class is appropriate because the defendants may not have sufficient assets to satisfy multiple large punitive damage awards. n1 If plaintiffs provide insufficient evidence that the defendants will be unable to pay multiple punitive damage awards, certification under the limited fund theory will be denied. n2

The "limited generosity theory" operates under the assumption that there is a limit to the number of times a defendant should be punished for a single transgression. Under this theory, certification is considered appropriate if a court, a jury, a state law, or the Due Process Clause of the U.S. Constitution would limit repetitive awards of punitive damages so that later plaintiffs essentially would be ineligible for such awards. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureRemediesDamagesGeneral OverviewCivil ProcedureRemediesDamagesPunitive Damages

FOOTNOTES:
(n1)Footnote 1. *In re First Commodity Corp. of Boston Customer Accounts Litig., 119 F.R.D. 301, 312 (D. Mass. 1987)* ; *In re Federal Skywalk Cases, 93 F.R.D. 415, 424 (W.D. Mo. 1982)* , *vacated on other grounds*, *680 F.2d 1175 (8th Cir. 1982)* .

(n2)Footnote 2. *See Simon II Litig. v. Philip Morris USA Inc. (In re Simon II Litig.), 407 F.3d 125, 134-138 (2d Cir. 2005)* ; *see also In re Northern Dist. of Cal., Dalkon Shield IUD. Prod. Liab. Litig., 693 F.2d 847, 852 (9th Cir. 1982)* .

(n3)Footnote 3. *In re* "Agent Orange" *Prod. Liab. Litig., 818 F.2d 145, 166 (2d Cir. 1987)* ; *In re School Asbestos*

School Litigation, 789 F.2d 996, 1004 (3d Cir. 1986) .

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H. Establishing That Class Action Falls Within One of Three Subdivisions of Rule 23(b)
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3-42 Federal Litigation Guide § 42.135

§ 42.135 Certification of Defendant Classes Under Rule 23(b)(1)(B)

For a defendant class to be certified under Rule 23(b)(1)(B), the individual defendants' interests must be impaired or impeded by separate litigation. Unlike the certification of a plaintiff class, courts rarely certify defendant classes in limited fund cases, because plaintiffs, rather than defendants, are likely to seek money damages from a limited fund. Nevertheless, courts have certified defendant classes on limited fund grounds in two situations. First, one court has certified a defendant class in an interpleader action, in which the plaintiff sought to distribute monies to the defendants from the proceeds of a settlement involving bonds held by members of the defendant class. n1

Second, defendant classes have been certified if the class consists of partners holding common professional liability insurance policies that could be exhausted through separate lawsuits, leaving subsequently-tried partners to pay their legal fees and any money judgments out of their own pockets. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass MembersDefendantsCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *United States Trust Co. of N.Y. v. Alpert, 163 F.R.D. 409, 418-419 (S.D.N.Y. 1995)* .

(n2)Footnote 2. *In re Chambers Development Sec. Litig., 912 F. Supp. 822, 836 (W.D. Pa. 1995)* ; *Alexander Grant & Co. v. McAlister, 116 F.R.D. 583, 590 (S.D. Ohio 1987)* .

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3. Maintaining Class Action Under Rule 23(b)(1)(B)

3-42 Federal Litigation Guide § 42.136

§ 42.136 No Right to Notice or to Opt Out Under Rule 23(b)(1)(B)

[1] Members of Rule 23(b)(1)(B) Class Have No Absolute Right to Notice

Members of a class certified under Rule 23(b)(1)(B) do not have an absolute right to be notified about the action. n1 However, for any class certified under Rule 23(b)(1) the court may direct appropriate notice to the class. n2

[2] Court Has Discretion to Require Notice

The court in its discretion may issue an order requiring that notice be given to some or all of the members of a Rule 23(b)(1)(B) class informing them of a particular step in the action, and affording them the opportunity to participate in the action or otherwise make their views known. n3

[3] Members of Rule 23(b)(1)(B) Class Have No Absolute Right to Opt Out

Like members of a class certified pursuant to Rule 23(b)(1)(A), members of a Rule 23(b)(1)(A) class do not have an absolute right to opt out of the action. n4

[4] Courts Have Permitted Opt Out Under Rule 23(b)(1)(B)

Rule 23 does not contain any provision specifically authorizing the court to exercise discretion to permit members of a Rule 23(b)(1)(B) class to opt out of the action. Nevertheless, some courts have stated that because Rule 23 does not expressly *preclude* an exercise of discretion, members of a Rule 23(b)(1)(B) class may be permitted to opt out under appropriate circumstances. These courts have held that although the court *usually* should not allow a Rule 23(b)(1)(B) class member to opt out, this does not mean that the court should *never* permit it. For example, the right to opt out may not be exercised solely at the instance of the party seeking to opt out, but a class member may opt out at the invitation of the district court. n5

[5] Due Process May Require Notice and Opportunity to Opt Out of Rule 23(b)(1)(B) Class Action

Although Rule 23(b)(1)(B) does not entitle members of a class to notice of the action or the opportunity to opt out, class members may have a right to these mechanisms under the Due Process Clause of the U.S. Constitution. In 1985, the

Supreme Court held that a class member lacking minimum contacts with the forum state has a due process right to an opportunity to remove himself or herself from the class in an action seeking money damages. n6

Courts have generally agreed that a class member's due process right to opt out applies only in a case seeking primarily money damages. n7

In applying the Supreme Court's 1985 decision in *Phillips Petroleum*, some courts have refused to certify mandatory classes; n8 some courts have held that the putative class members must be afforded notice and an opportunity to contest the facts underlying the certification, but that exclusion from a properly certified class is not available; n9 and other courts have held that a judgment obtained in a class action does not bar an absent member's damage claims through the operation of res judicata. n10 Some courts have found that class members' due process rights are not implicated because the members had sufficient contacts with the forum. n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsNoticesCivil ProcedureClass ActionsOpt-Out ProvisionsCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 23(c)(2)*; *In re Dennis Greenman Sec. Litig., 829 F.2d 1539, 1544 (11th Cir. 1987)* ; *Walsh v. Great Atlantic & Pacific Tea Co., 726 F.2d 956, 963 n.3 (3d Cir. 1983)* ; *United States Trust Co. v. Alpert, 163 F.R.D. 409, 419 (S.D.N.Y. 1995)* (citing **Moore's Federal Practice**).

(n2)Footnote 2. *Fed. R. Civ. P. 23(c)(2)(A).*

(n3)Footnote 3. *Fed. R. Civ. P. 23(d)(1)(B).*

(n4)Footnote 4. *See United States Trust Co. v. Alpert, 163 F.R.D. 409, 419 (S.D.N.Y. 1995)* (citing **Moore's Federal Practice**).

(n5)Footnote 5. *Eubanks v. Billington, 110 F.3d 87, 94-96 (D.C. Cir. 1997)* ; *County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1302-1304 (2d Cir. 1990)* ; *In re Temple, 851 F.2d 1269, 1272 n.5 (11th Cir. 1988)* .

(n6)Footnote 6. *See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-812, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985)* .

(n7)Footnote 7. *See, e.g., White v. NFL, 41 F.3d 402, 407 (8th Cir. 1994)* .

(n8)Footnote 8. *See Waldron v. Raymark Indus., 124 F.R.D. 235, 238 (N.D. Ga. 1989)* .

(n9)Footnote 9. *See In re Temple, 851 F.2d 1269, 1272 (11th Cir. 1988)* .

(n10)Footnote 10. *See Brown v. Ticor Title Ins. Co., 982 F.2d 386, 392 (9th Cir. 1992)* .

(n11)Footnote 11. *See White v. NFL, 41 F.3d 402, 407 (8th Cir. 1994)* ; *In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 292 (2d Cir. 1992)* .

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3-42 Federal Litigation Guide §§ 42.137 through 42.149

[Reserved]

§§ 42.137[Reserved]

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3-42 Federal Litigation Guide § 42.150

§ 42.150 Overview of Rule 23(b)(2)

Rule 23(b)(2) provides that a class action may be maintained if: n1

- The requirements of Rule 23(a) are satisfied
- The party opposing the class has acted or refused to act on grounds generally applicable to the class as a whole
- Final injunctive relief or corresponding declaratory relief is appropriate with respect to the class as a whole

Rule 23(b)(2) was promulgated in 1966 primarily as a tool for facilitating civil rights actions. Since its enactment, the Rule has been applied to many types of discrimination and civil rights claims. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 23(b)(2).*

(n2)Footnote 2. *Dukes v. Wal-Mart, Inc., 474 F.3d 1214, 1222 (9th Cir. 2007)* (gender discrimination); *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* (race-based claims); *Spinka v. Brill, 750 F. Supp. 306, 308-309 (N.D. Ill. 1990)* (voting rights violations).

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3-42 Federal Litigation Guide § 42.151

§ 42.151 Party Opposing Class Must Have Acted or Refused to Act on Grounds "Generally Applicable" to Class

A class action under Rule 23(b)(2) is only appropriate if conduct of the party opposing the class is generally applicable to the entire class of persons. n1

Courts have held that some members of a class may seek relief under Rule 23(b)(2), even if the conduct of the party opposing the class did not harm every member. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 23(b)(2)*; *Hiatt v. County of Adams, 155 F.R.D. 605, 609 (S.D. Ohio 1994)* .

(n2)Footnote 2. *See Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439, 454-455 (N.D. Cal. 1994)* .

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3-42 Federal Litigation Guide § 42.152

§ 42.152 Rule 23(b)(2) Class Certification Improper If Primary Relief Sought Is Money Damages

Parties seeking to commence actions under Rule 23(b)(2) must request final declaratory or injunctive relief. n1

As a general rule, class certification under Rule 23(b)(2) is improper if the primary relief sought by the action is money damages. n2 However, if money damages are incidental to the plaintiff's request for injunctive or declaratory relief, the class may still be certified. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureRemediesDamagesMonetary Damages

FOOTNOTES:
(n1)Footnote 1. *See, e.g., Bower v. Bunker Hill Co., 114 F.R.D. 587, 596 (E.D. Wash. 1986)* .

(n2)Footnote 2. *See Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 329-332 (4th Cir. 2006)* .

(n3)Footnote 3. *See In re Allstate Ins. Co., 400 F.3d 505, 506-508 (7th Cir. 2005)* ; *see also Molski v. Gleich, 318 F.3d 937, 946-950 (9th Cir. 2002)* .

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3-42 Federal Litigation Guide § 42.153

§ 42.153 Defendant Class Actions Under Rule 23(b)(2)

There is a conflict of authority over whether defendant classes may be certified under Rule 23(b)(2). It is difficult to reconcile the certification of defendant classes with the language of the Rule. The language of the provision--"the party opposing the class has acted or refused to act on grounds generally applicable to the class"--seemingly envisions that the defendant is the party opposing the class. In general, plaintiffs charge defendants with having "acted," rather than vice versa, and plaintiffs seek to enjoin actions by the defendants. Accordingly, several courts have held that defendant classes under Rule 23(b)(2) are untenable and may not be maintained. n1

However, some courts have held that defendant class actions are permitted under Rule 23(b)(2). n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsClass MembersDefendantsCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Tilley v. TJX Cos., Inc., 345 F.3d 34, 39-40 (1st Cir. 2003)* ; *Henson v. East Lincoln Township, 814 F.2d 410, 413-417 (7th Cir. 1987)* ; *Thompson v. Board of Educ. 709 F.2d 1200, 1203-1204 (6th Cir. 1983)* ; *Paxman v. Campbell, 612 F.2d 848, 854 (4th Cir. 1980)* (en banc).

(n2)Footnote 2. *Marcera v. Chinlund, 595 F.2d 1231, 1238 (2d Cir. 1979) , vacated on other grounds sub nom., Lombard v. Marcera, 442 U.S. 915 (1979)* ; *McKay v. County Election Comm'rs, 158 F.R.D. 620, 625 (E.D. Ark. 1994)* ; *United States v. Rainbow Family, 695 F. Supp. 314, 320-321 (E.D. Tex. 1988)* ; *Doss v. Long, 93 F.R.D. 112, 118-119 (N.D. Ga. 1981) .*

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3-42 Federal Litigation Guide § 42.154

§ 42.154 No Right to Notice or to Opt Out Under Rule 23(b)(2)

In class actions under Rule 23(b)(2) that seek equitable relief only, class members have no absolute right to notice of the pending class action. n1

However, for any class certified under Rule 23(b)(2), the court may direct appropriate notice to the class. n2 In "hybrid" class actions under Rule 23(b)(2), which seek equitable and monetary relief, class members may have a due process right to notice of the pending action. n3

Likewise, class members have no absolute right to opt out of actions under Rule 23(b)(2) that seek equitable relief only. n4 Nevertheless, a court may grant members the opportunity to opt out in "hybrid" class actions, in which money damages are sought in addition to injunctive or declaratory relief. n5

However, due process generally does not require that class members in a hybrid class action be given an opportunity to opt out, if absent class members are given notice of their rights in the pending action. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsNoticesCivil ProcedureClass ActionsOpt-Out ProvisionsCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Stoetzner v. U.S. Steel Corp., 897 F.2d 115, 119 (3d Cir. 1990)* .

(n2)Footnote 2. *Fed. R. Civ. P. 23(c)(2)(A).*

(n3)Footnote 3. *Allen v. Isaac, 100 F.R.D. 373, 376-377 (N.D. Ill. 1983)* .

(n4)Footnote 4. *Dosier v. Miami Valley Broadcasting Corp., 656 F.2d 1295, 1299 (9th Cir. 1981)* ; *White v. NFL, 822 F. Supp. 1389, 1411 (D. Minn. 1993)* ; *Williams v. Lane, 129 F.R.D. 636, 640 (N.D. Ill. 1990)* .

(n5)Footnote 5. *Avagliano v. Sumitomo Shoji America, Inc., 107 F.R.D. 748, 749-750 (S.D.N.Y. 1985)* .

(n6)Footnote 6. *Williams v. Burlington Northern, Inc., 832 F.2d 100, 103-104 (7th Cir. 1987)* , *cert. denied*, *485 U.S. 991 (1988)* ; *Stewart v. Rubin, 948 F. Supp. 1077, 1089-1091 (D.D.C. 1996)* .

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CHAPTER 42 Class Actions
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3-42 Federal Litigation Guide §§ 42.155 through 42.159

[Reserved]

§§ 42.155[Reserved]

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5. Maintaining Class Action Under Rule 23(b)(3)

3-42 Federal Litigation Guide § 42.160

§ 42.160 Overview of Rule 23(b)(3)

Under Rule 23(b)(3), a class action may be maintained if the court finds both of the following: n1

- Common questions of law or fact predominate over questions affecting only individual members
- A class action is superior to other available methods for resolving the controversy

Although commonality is a prerequisite to *all* class actions, the *predominance* and *superiority* requirements are unique to Rule 23(b)(3) class actions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesCommonality

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 23(b)(3).*

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3-42 Federal Litigation Guide § 42.161

§ 42.161 Determining Whether Common Issues Predominate for Rule 23(b)(3) Class Certification

[1] Various Standards Have Been Applied to Determine Whether Common Issues Predominate

A Rule 23(b)(3) class action requires common questions of law or fact to predominate over questions affecting only individual members. n1

The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. n2 No precise test governs the determination of whether common questions of law or fact predominate. Instead, the Rule requires a pragmatic assessment of the entire action and of all the issues involved. n3 In making this assessment, courts have enunciated a number of standards, finding that a predominantly commonly legal grievance is present if:

- The substantive elements of the class members' claims would require the same proof for each class member n4
- The proposed class was bound together by a mutual interest in resolving common questions more than it was divided by individual interests n5
- The resolution of an issue common to the class would significantly advance the litigation n6
- The common issue constitutes a significant part of each of the class members' individual cases n7
- The common questions are central to all of the members' claims n8
- Common questions predominate regarding liability n9

Courts generally agree that the predominance of common issues does not mean that the common issues merely outnumber individual issues. n10 Nor should a court determine predominance by comparing the time that the common issues can be anticipated to consume in the litigation to the time that individual issues will require. n11 Otherwise, only the most complex common questions could predominate since such issues tend to require more time to litigate than less

complex issues.

The predominance analysis must be made in light of all relevant factual and legal issues, including issues that are conceded by the defendant. The predominance inquiry tests whether a proposed class is sufficiently cohesive to warrant adjudication by representation. An issue that is conceded or otherwise resolved continues to bear on whether the proposed class is a legally coherent unit of representation by which absent class members may be fairly bound. A different conclusion would undermine the Rule 23 goal of greater efficiency through collective adjudication, because claims of similarly situated parties would be less amenable to class treatment in those situations in which liability was so clear that it would be conceded by the defendants. n11.1

[2] Money Damages Actions: Predominance Satisfied Even If Individual Damages Issues Remain

In actions for money damages under Rule 23(b)(3), courts usually require individual proof of the amount of damages each member incurred. Nevertheless, if common questions predominate over individual questions as to liability, courts generally find the predominance standard of Rule 23(b)(3) to be satisfied even if individual damages issues remain. n12

Courts often bifurcate trials into liability and damages phases in order to sever common liability questions from individual damages issues. n13 A court will not bifurcate a proceeding, however, if the court determines that judicial economy would not be served by holding more than one trial. n14 Moreover, if the liability and damages issues are so closely linked that severance is not practical, certification may be denied. n15

[3] Differences in Application of Statute of Limitations to Individual Class Members Will Not Preclude Rule 23(b)(3) Certification

The fact that a statute of limitations may bar the claims of some but not all class members does not compel a finding that individual issues predominate over common ones. Rather, as long as there is a sufficient nucleus of common issues, differences in the application of a statute of limitations to individual class members will not preclude certification under Rule 23(b)(3). n16

[4] Merits of Case May Be Considered But Not Decided

The facts necessary to decide predominance often are intertwined with facts going to the merits of the action, so that some inquiry into the underlying factual issues is required at the certification stage. n17 The general rule, however, is that on a motion for class certification, a court may not decide the merits of the case or consider the likelihood of success or failure on the merits. n18 Nonetheless, courts may go beyond the pleadings and may allow discovery and hear evidence when necessary to make the factual determinations that Rule 23 requires. n19

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesCommonality

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 23(b)(3).*

(n2)Footnote 2. *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623-624, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997) .*

(n3)Footnote 3. *In re Nassau County Strip Search Cases, 461 F.3d 219, 227-229 (2d Cir. 2006)* ; *Rodriguez v. Carlson, 166 F.R.D. 465, 477 (E.D. Wash. 1996) .*

(n4)Footnote 4. *Rosario v. Livaditis, 963 F.2d 1013, 1018 (7th Cir. 1992)* ; *Anderson v. Bank of the South, N.A., 118 F.R.D. 136, 150 (M.D. Fla. 1987)* .

(n5)Footnote 5. *Doe v. Guardian Life Ins. Co., 145 F.R.D. 466, 476 (N.D. Ill. 1992)* .

(n6)Footnote 6. *McClendon v. Continental Group, Inc., 113 F.R.D. 39, 43-44 (D.N.J. 1986)* .

(n7)Footnote 7. *Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 470 (5th Cir. 1986)* .

(n8)Footnote 8. *Commonwealth of Puerto Rico v. M/V Emily S, 158 F.R.D. 9, 15 (D. P.R. 1994)* ; *Edgington v. R.G. Dickinson and Co., 139 F.R.D. 183, 190 (D. Kan. 1991)* .

(n9)Footnote 9. *Smilow v. Southwestern Bell Mobile Sys., Inc., 323 F.3d 32, 40 (1st Cir. 2003)* (citing **Moore's**); *Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 428-430 (4th Cir. 2003)* .

(n10)Footnote 10. *Buford v. H & R Block, Inc., 168 F.R.D. 340, 356 (S.D. Ga. 1996)* ; *Deutschman v. Beneficial Corp, 132 F.R.D. 359, 375 (D. Del. 1990)* .

(n11)Footnote 11. *Coleman v. Cannon Oil Co., 141 F.R.D. 516, 526-527 (M.D. Ala. 1992)* ; *In re Workers' Comp., 130 F.R.D. 99, 108 (D. Minn. 1990)* .

(n12)Footnote 11.1. *In re Nassau County Strip Search Cases, 461 F.3d 219, 227-229 (2d Cir. 2006)* .

(n13)Footnote 12. *Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 428-430 (4th Cir. 2003)* ; *Sterling v. Velsicol Chem Corp., 855 F.2d 1188, 1197 (6th Cir. 1988)* ; *Ardrey v. Federal Kemper Ins. Co., 142 F.R.D. 105, 114 (E.D. Pa. 1992)* .

(n14)Footnote 13. *Hilao v. Estate of Marcos, 103 F.3d 767, 782 (9th Cir. 1996)* ; *Sterling v. Velsicol Chem Corp., 855 F.2d 1188, 1197 (6th Cir. 1988)* ; *Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 470-471 (5th Cir. 1986)* .

(n15)Footnote 14. *McEwen v. Digitran Sys., Inc., 160 F.R.D. 631, 641 (D. Utah 1994)* .

(n16)Footnote 15. *Brown v. Cameron-Brown Co., 92 F.R.D. 32, 45 (E.D. Va. 1981)* .

(n17)Footnote 16. *See Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 924 (3d Cir. 1992)* .

(n18)Footnote 17. *See Coopers & Lybrand v. Livesay, 437 U.S. 463, 469, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978)* .

(n19)Footnote 18. *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-178, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)* .

(n20)Footnote 19. *General Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)* .

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3-42 Federal Litigation Guide § 42.162

§ 42.162 Determining Whether Common Issues Predominate in Securities Fraud Cases

[1] Requirement That Each Member Be Subject to Common Scheme of Fraudulent Conduct

In securities fraud cases, each member must have been subject to a common scheme of fraudulent conduct for a class to be certified. n1

[2] Factors Indicating Common Scheme

[2.--1] Nondisclosure of Material Facts

Courts have held that the requirement that each member of a class in a securities fraud case be subject to a common scheme of fraudulent conduct n2 is satisfied based on allegations that the defendants fraudulently failed to disclose material facts. n3

[2.--2] Same or Similar Written Misrepresentations

Courts generally find that a common scheme presenting predominantly common questions exists if securities purchasers allege that the defendants acted wrongfully through the use of the same or similar written misrepresentations. n4

All class members need not have relied on the same document in order for common questions to predominate, provided the documents relied upon present a core of facts common to the class. n5

Certification of a class based on the existence of *oral* misrepresentations is generally denied on the ground that such representations are likely to vary from one purchaser to another, so that such a case involves predominantly individual questions. n6

[3] Proof of Reliance Not Required

Positive proof of reliance on a nondisclosure or misrepresentation of material information is unnecessary in cases primarily involving a failure to disclose. Rather, if the plaintiffs allege that the defendants failed to disclose material information, the plaintiffs are presumed to have relied on the defendants' failure to disclose. n7

There is also a rebuttable presumption of reliance in misrepresentation cases based on "fraud on the market" theory. The "fraud on the market" theory is based on the assumption that, in an open and developed market, the price of a company's stock is determined by all material information that is available about the company, so that misrepresentations will defraud stock purchasers by affecting the stock's price even though the purchasers do not directly rely on those misrepresentations. The Supreme Court has held that, in *Rule 10b-5* actions, the fraud on the market theory creates a presumption that stock purchasers relied on the defendant's misrepresentation of material facts. n8

To invoke the "fraud on the market" presumption of reliance, plaintiffs must prove that: n9

- The defendants made public misrepresentations;
- The misrepresentations were material;
- The stock was traded on an efficient market;
- The misrepresentations were sufficiently credible and material as to induce a reasonable, relying investor to misjudge the value of the stock; and
- The plaintiff class traded in the stock between the time the misrepresentations were made and the time the truth was revealed.

If plaintiffs properly invoke the fraud on the market theory, they need not prove each class member's direct reliance on the substance of the seller's omissions or misrepresentations. Under the theory, the market itself is presumed to have relied on the omissions or misrepresentations. n10

The fraud on the market theory has been invoked frequently by courts that certify classes of allegedly defrauded securities purchasers. n11 Although the Supreme Court has endorsed the use of the fraud on the market theory in *Rule 10b-5* actions, the Court has suggested that the theory does not necessarily apply to securities actions based on common-law fraud. n12 Nonetheless, lower courts have, occasionally, applied the theory in common-law securities-fraud actions. n13

Although a plaintiff may use the fraud on the market theory to establish a presumption of reliance, the presumption may be rebutted. Evidence that severs the link between a misrepresentation and either (1) the price the plaintiff paid or received, or (2) the plaintiff's decision to trade at the market price undercuts the theory and rebuts the presumption. n14 Specifically, the presumption may be rebutted by evidence showing that: n15

- The plaintiff was privy to the truth, or
- The alleged misrepresentations did not distort the market price, or
- The purchasers were motivated to trade the securities by reasons unrelated to the market price.

If a defendant does not satisfy any of those criteria, the presumption applies and courts may certify a class action based on the fraud on the market theory. n16 As noted above, the fraud on the market theory applies only when the securities in question are traded in a developed and efficient market. It is only in a developed and efficient market that misrepresentations made to fewer than all purchasers will affect the market price, because only that type of market efficiently relays information. n17 An "efficient" market is one that rapidly reflects all new, material information about a stock issuer in the price of the stock. n18

[4] Individual Issues of Reliance Alone Usually Do Not Preclude Certification

When plaintiffs allege a common course of wrongdoing based on the same or similar representations and omissions, individual issues of reliance alone will not preclude certification of the class. n19

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesCommonality

FOOTNOTES:
(n1)Footnote 1. *See generally Fed. R. Civ. P. 23(b)(3).*

(n2)Footnote 2. *See* [1], *above.*

(n3)Footnote 3. *See Bresson v. Thomson McKinnon Sec., Inc., 118 F.R.D. 339, 343 (S.D.N.Y. 1988)* ; *Goldwater v. Alston & Bird, 116 F.R.D. 342, 349 (S.D. Ill. 1987)* ; *Anderson v. Bank of the South, N.A., 118 F.R.D. 136, 150 (M.D. Fla. 1987)* ; *Austell v. Smith, 634 F. Supp. 326, 334 (W.D.N.C. 1986) .*

(n4)Footnote 4. *See Maywalt v. Parker & Parsley Petroleum Co., 147 F.R.D. 51, 55 (S.D.N.Y. 1993)* ; *Goldwater v. Alston & Bird, 116 F.R.D. 342, 349 (S.D. Ill. 1987)* ; *Anderson v. Bank of the South, N.A., 118 F.R.D. 136, 150 (M.D. Fla. 1987)* ; *Austell v. Smith, 634 F. Supp. 326, 334 (W.D.N.C. 1986) .*

(n5)Footnote 5. *See Mayer v. Mylod, 988 F.2d 635, 640 (6th Cir. 1993)* ; *Kennedy v. Tallant, 710 F.2d 711, 717 (11th Cir. 1983) .*

(n6)Footnote 6. *See Marcial v. Coronet Ins. Co., 880 F.2d 954, 957 (7th Cir. 1989)* ; *Grainger v. State Sec. Life Ins. Co., 547 F.2d 303, 307 (5th Cir. 1977) , cert. denied, 436 U.S. 932 (1978)* ; *Soper v. Valone, 110 F.R.D. 8, 10 (W.D.N.Y. 1985)* ; *Kaser v. Swann, 141 F.R.D. 337, 339-340 (M.D. Fla. 1991) .*

(n7)Footnote 7. *See Affiliated Ute Citizens v. United States, 406 U.S. 128, 153-154, 92 S. Ct. 1456, 31 L. Ed 2d 741 (1972) .*

(n8)Footnote 8. *See Basic, Inc. v. Levinson, 485 U.S. 224, 248-249 (1988) .*

(n9)Footnote 9. *See Gariety v. Grant Thornton, LLP, 368 F.3d 356, 364 (4th Cir. 2004) .*

(n10)Footnote 10. *See Nelsen v. Craig-Hallum, Inc., 659 F. Supp. 480, 484-485 (D. Minn. 1987) .*

(n11)Footnote 11. *See In re Laser Arms Corp. Sec. Litig., 794 F. Supp. 475, 495 (S.D.N.Y. 1989) .*

(n12)Footnote 12. *See Basic, Inc. v. Levinson, 485 U.S. 224, 244 (1988) .*

(n13)Footnote 13. *See In re Am. Continental/Lincoln Sav. & Loan Sec. Litig., 140 F.R.D. 425, 434 (D. Ariz. 1992) .*

(n14)Footnote 14. *See Basic, Inc. v. Levinson, 485 U.S. 224, 248-249 (1988) .*

(n15)Footnote 15. *See Basic, Inc. v. Levinson, 485 U.S. 224, 248-249 (1988) .*

(n16)Footnote 16. *See Hanon v. Dataprods. Corp., 976 F.2d 497, 506 (9th Cir. 1992) .*

(n17)Footnote 17. *See Hayes v. Gross, 982 F.2d 104, 107 (3d Cir. 1992)* .

(n18)Footnote 18. *See In re Polymedica Corp. Sec. Litig., 432 F.3d 1, 4-19 (1st Cir. 2005)* ; *see also Gariety v. Grant Thornton, LLP, 368 F.3d 356, 368 (4th Cir. 2004)* .

(n19)Footnote 19. *See Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 722-724 (11th Cir. 1987)* ; *Eisenberg v. Gagnon, 766 F.2d 770, 786 (3d Cir. 1985)* , *cert. denied*, *474 U.S. 946 (1985)* .

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CHAPTER 42 Class Actions
H. Establishing That Class Action Falls Within One of Three Subdivisions of Rule 23(b)
5. Maintaining Class Action Under Rule 23(b)(3)

3-42 Federal Litigation Guide § 42.163

§ 42.163 Determining Whether Common Issues Predominate in Mass Tort Cases

[1] Traditional Reluctance to Certify Classes in Mass Tort Cases

Traditionally, courts have been reluctant to certify mass tort class actions under Rule 23(b)(3) because the nature of personal injury suits suggests that individual issues would predominate. n1

[2] Predominance of Common Issues Has Been Found Increasingly in Mass Tort Litigation

In long-term toxic tort cases, some courts have certified classes under Rule 23(b)(3), finding that the evidence necessary to establish each of the plaintiff's claims is sufficiently alike as to establish the predominance of common issues. n2 Other courts have certified classes under Rule 23(b)(3) because of the predominance of a common defense. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesCommonality

FOOTNOTES:
(n1)Footnote 1. *See In re Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 805 (E.D.N.Y. 1991) , vacated on other grounds, 982 F.2d 721 (2d Cir. 1992) , modified on other grounds, 993 F.2d 7 (1993) .*

(n2)Footnote 2. *See, e.g., Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1197 (6th Cir. 1988)* ; *see also In re School Asbestos Litig., 789 F.2d 996, 1010 (3d Cir. 1986) .*

(n3)Footnote 3. *See, e.g., In re* "Agent Orange" *Prod. Liab. Litig., 818 F.2d 145, 165-167 (2d Cir. 1987)* ; *see also Jenkins v. Raymark Indus., 782 F.2d 468, 473 (5th Cir. 1986) .*

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3-42 Federal Litigation Guide § 42.164

§ 42.164 Determining Whether Class Action Is Superior to Other Available Methods

[1] Superiority Requirement

In addition to requiring that common questions predominate over individual questions, Rule 23(b)(3) mandates that a class action must be the superior method for litigating the case. n1 Under the superiority test of Rule 23(b)(3), a class action must be better than, and not merely just as good as, other methods of adjudication. n1.1 However, it is well-settled that the adjudication of a matter through a class action is superior to no adjudication of the matter at all. n1.2

The question of whether potential class members have both the incentive and the capability to pursue claims individually without the benefit of a class action is central to the superiority requirement of Rule 23(b)(3). n2

[2] Similar Issues Suggest Superiority

In determining whether a class action would be superior to multiple individual lawsuits, courts consider the similarity of the issues at stake. The more similar the issues, the more likely it is that a class action would be superior to multiple individual lawsuits. n3

[3] Size of Anticipated Recovery

In determining whether a class action would be superior to multiple individual lawsuits, courts consider the size of the anticipated recovery for each individual plaintiff. A small anticipated recovery weighs in favor of the superiority of a class action. n4

On the other hand, a large anticipated recovery weighs against the superiority of a class action. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See Fed. R. Civ. P. 23(b)(3).*

(n2)Footnote 1.1. *Johnston v. HBO Film Mgmt., 265 F.3d 178, 194 (3d Cir. 2001)* (class action must represent best available method for fair and efficient adjudication of controversy).

(n3)Footnote 1.2. *See In re Tetracycline Cases, 107 F.R.D. 719, 732 (W.D. Mo. 1985)* (citing **Moore's**).

(n4)Footnote 2. *See Johns v. DeLeonardis, 145 F.R.D. 480, 482 (N.D. Ill. 1992)* (Gypsies unlikely to pursue claims individually against law enforcement officers); *see also Rodriguez v. Carlson, 166 F.R.D. 465, 479-480 (E.D. Wash. 1996)* (superiority of class action for migrant workers unlikely to pursue individual litigation because of lack of English and limited understanding of legal system).

(n5)Footnote 3. *See Epifano v. Boardroom Bus. Prods., 130 F.R.D. 295, 299 (S.D.N.Y. 1990)* ; *Sala v. National R.R. Passenger Corp., 120 F.R.D. 494, 500 (E.D. Pa. 1988)* .

(n6)Footnote 4. *Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 338, 100 S. Ct. 1166, 63 L. Ed. 2d 427, 439 (1980)* .

(n7)Footnote 5. *See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* .

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CHAPTER 42 Class Actions
H. Establishing That Class Action Falls Within One of Three Subdivisions of Rule 23(b)
5. Maintaining Class Action Under Rule 23(b)(3)

3-42 Federal Litigation Guide § 42.165

§ 42.165 Evaluating Predominance and Superiority Guidelines Specified in Rule 23(b)(3)

[1] Rule 23(b)(3) Specifies Four Nonexhaustive Guidelines

Rule 23(b)(3) specifies that a court, in determining predominance and superiority, consider four factors: n1

- The interests of class members in controlling their own litigation n2
- The nature and extent of any relevant, pending litigation brought by or against members of the class n3
- The desirability of concentrating the litigation in the particular forum n4
- Any management difficulties the class action is likely to present n5

The four criteria are suggestive, nonexhaustive guidelines; there is no requirement that a court review each factor in every case, or make a finding with respect to them. n6

[2] Individual Interest in Controlling Separate Litigation

One of the statutory factors that courts consider in determining predominance and superiority is the interests of class members in controlling their own litigation. n7

The presence of large individual damage awards has been viewed as supporting separate litigation. n8

Additionally, when individual class members have an interest in tailoring trial tactics to their individual needs, each class member should be permitted to pursue separate litigation. n9

[3] Extent and Nature of Litigation Already Commenced

Another statutory factor that courts consider in determining predominance and superiority is the extent and nature of any litigation concerning the controversy already commenced by or against members of the class. n10

The more parallel lawsuits there are, the more likely it is that other methods of litigation are feasible, and that a class action would contribute little to the resolution of the issues. n11

[4] Desirability of Concentrating All Claims in Single Forum

A third statutory factor that courts consider in determining predominance and superiority is the desirability or undesirability of concentrating the litigation of the claims in the particular forum. n12

The desirability of concentrating all claims of a class action in a single forum is usually assessed by reference to criteria similar to those applied in change of venue determinations: the accessibility of witnesses and evidence, the burden on the parties, and the existence of a more appropriate forum. n13

[5] Manageability of Class Action

[5.--1] Factors Typically Considered in Determining Manageability

The final statutory factor that courts consider in determining predominance and superiority is the difficulties likely to be encountered in the management of a class action. n14 Generally, courts consider manageability of class actions by comparison with alternative methods of adjudication. Under that approach, difficulties in the management of a class action should not defeat certification unless the difficulties render a class action a less fair and efficient procedure than another available method. n15

Courts have identified a number of factors as relevant to whether the proposed class action is manageable. Those factors include the difficulty and expense of communicating with members of the class, including providing notice to each of the members. If the members of the class are not identifiable, managing of the action may pose insurmountable problems. n16 Similarly, if the names and addresses of all members are not known, the case will be difficult to manage. n17

While the size of a class and the location of its members are certainly relevant, the fact that a class may be large and many of its members may come from different states does not necessarily render an action unmanageable. n18 However, if class members who live in different states raise pendent state claims, certification of the state claims may be denied on the ground that application of the varying standards of state-law liability would render the class action unmanageable. n19

Difficulty in computing damages is also a factor in determining manageability. n20 The presence of individual issues increases the difficulty of assessing injury and calculating damages. Accordingly, courts have held that if individual issues in the case will require a significant number of separate trials, the class action will be unmanageable. n21 However, if a court can calculate damages by using a mathematical formula or statistical techniques, the existence of individualized damage claims does not pose a barrier to certification. n22

[5.--2] Solution to Manageability Problem Through Fluid Recovery Method

Even when the calculation of damages on an individual basis would otherwise be prohibitively burdensome, the fluid recovery method may permit a court to manage the class action. Under the fluid recovery method, a court awards damages to the class as a whole, without requiring any member to prove injury. n23 Individual claims are then satisfied out of this total. n24

In addition, a court may order defendants to effectuate a fluid recovery by distributing money to class members indirectly through an arrangement such as reducing future charges or funding a project likely to benefit the members. n25

Some courts have rejected the fluid recovery method as an illegal solution to manageability problems. According to those courts, a fluid recovery violates due process by ignoring the claims of individuals and improperly relieving plaintiffs classes of the burden of proving individual damages. In some cases, however, courts have held that the fluid recovery method may be used if it advances the objectives of the particular statute on which plaintiffs base their claims. n26

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 23(b)(3)*; *see e.g., Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1190-1192 (9th Cir. 2001)* (application of four factors demonstrated that class action was not superior method of adjudication).

(n2)Footnote 2. *See § 42.165[2].*

(n3)Footnote 3. *See § 42.165[3].*

(n4)Footnote 4. *See § 42.165[4].*

(n5)Footnote 5. *See § 42.165[5].*

(n6)Footnote 6. *See Fed. R. Civ. P. 23(b)(3).*

(n7)Footnote 7. *See Fed. R. Civ. P. 23(b)(3)(A).*

(n8)Footnote 8. *See Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1190-1191 (9th Cir. 2001) .*

(n9)Footnote 9. *See In re* "Agent Orange" *Prod. Liab. Litig., 818 F.2d 145, 166 (2d Cir. 1987)* ; *In re Northern Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 853 (9th Cir. 1982) , cert. denied sub nom., A.H. Robins Co. v. Abed, 459 U.S. 1171 (1983) .*

(n10)Footnote 10. *See Fed. R. Civ. P. 23(b)(3)(B)*; *see also In re Crazy Eddie Sec. Litig., 135 F.R.D. 39, 41 (E.D.N.Y. 1991)* ; *Pennsylvania v. Budget Fuel Co., 122 F.R.D. 184, 185 (E.D. Pa. 1988) .*

(n11)Footnote 11. *See Kurczi v. Eli Lilly & Co., 160 F.R.D. 667, 680 (N.D. Ohio 1995) .*

(n12)Footnote 12. *See Fed. R. Civ. P. 23(b)(3)(C).*

(n13)Footnote 13. *See Ikonen v. Hartz Mountain Corp., 122 F.R.D. 258, 266 (S.D. Cal. 1988) .*

(n14)Footnote 14. *See Fed. R. Civ. P. 23(b)(3)(D).*

(n15)Footnote 15. *Carnegie v. Household Int'l, Inc., 376 F.3d 656, 660-661 (7th Cir. 2004)* ; *Klay v. Humana, Inc., 382 F.3d 1241, 1272-1273 (11th Cir. 2004) .*

(n16)Footnote 16. *Tedesco v. Mishkin, 689 F. Supp. 1327, 1337 (S.D.N.Y. 1988) .*

(N17)Footnote 17. *Riordan v. Smith Barney, 113 F.R.D. 60, 66 (N.D. Ill. 1986) .*

(n18)Footnote 18. *Werner v. Satterlee, Stephens, Burke & Burke, 797 F. Supp. 1196, 1217 (S.D.N.Y. 1992)* ; *but*

see In re LifeUSA Holding, Inc., 242 F.3d 136, 147-148 (3d Cir. 2001) (class action was not superior when the size of the class and the number of individualized determinations that were necessary were so great that a class action could not be fairly and efficiently managed).

(n19)Footnote 19. *Castano v. American Tobacco Co., 84 F.3d 734, 743-744 (5th Cir. 1996)* ; *Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996)* .

(n20)Footnote 20. *Zapata v. IBP, Inc. 167 F.R.D. 147, 169 (D. Kan. 1996)* ; *Jackshaw Pontiac v. Cleveland Press Pub. Co., 102 F.R.D. 183, 195 (N.D. Ohio 1984)* .

(n21)Footnote 21. *Castano v. American Tobacco Co., 84 F.3d 734, 745 n.19 (5th Cir. 1996)* ; *In re American Med. Sys., Inc., 75 F.3d 1069, 1085 (6th Cir. 1996)* ; *Andrews v. American Tel. & Tel. Co., 95 F.3d 1014, 1023 (11th Cir. 1996)* .

(n22)Footnote 22. *Hilao v. Estate of Marcos, 103 F.3d 767, 782-786 (9th Cir. 1996)* .

(n23)Footnote 23. *See Hilao v. Estate of Marcos, 103 F.3d 767, 782-786 (9th Cir. 1996)* .

(n24)Footnote 24. *See Pruitt v. Allied Chem. Corp., 85 F.R.D. 100, 114 (E.D. Va. 1980)* .

(n25)Footnote 25. *See Nelson v. Greater Gadsden Hous. Auth., 802 F.2d 405, 409 (11th Cir. 1986)* .

(n26)Footnote 26. *See Abrams v. Interco, Inc., 719 F.2d 23, 31 (2d Cir. 1983)* ; *see also Haywood v. Barnes, 109 F.R.D. 568, 583 (E.D.N.C. 1986)* .

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CHAPTER 42 Class Actions
H. Establishing That Class Action Falls Within One of Three Subdivisions of Rule 23(b)
5. Maintaining Class Action Under Rule 23(b)(3)

3-42 Federal Litigation Guide § 42.166

§ 42.166 Rule 23(b)(3) Applies to Money Damages and to Injunctive or Declaratory Relief

Rule 23(b)(3) applies to actions seeking money damages, as well as those seeking injunctive or declaratory relief. A class will be certified as long as the class action achieves an economy of time, effort, and expense without sacrificing procedural fairness. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureRemediesDamagesMonetary Damages

FOOTNOTES:
(n1)Footnote 1. *See In re Prudential Ins. Co., 962 F. Supp. 450, 525 (D. N.J. 1997)* .

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3-42 Federal Litigation Guide § 42.167

§ 42.167 Rule 23(b)(3) Applies Equally to Certification of Defendant Classes

A defendant class may be certified under Rule 23(b)(3). Unlike Rule 23(b)(1), Rule 23(b)(3) does not expressly contemplate defendant classes. Nevertheless, nothing in the language of the Rule bars defendant classes.

Certification of a defendant class under Rule 23(b)(3) must meet the same requirements as certification of a plaintiff class under the same Rule. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsClass MembersDefendantsCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Northwestern Nat'l Bank of Minneapolis v. Fox & Co., 102 F.R.D. 507, 515 (S.D.N.Y. 1984)* .

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CHAPTER 42 Class Actions
H. Establishing That Class Action Falls Within One of Three Subdivisions of Rule 23(b)
5. Maintaining Class Action Under Rule 23(b)(3)

3-42 Federal Litigation Guide § 42.168

§ 42.168 Members of Rule 23(b)(3) Class Have Right to Notice and to Opt Out

In 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: n1

- The nature of the action
- The definition of the class certified
- The class claims, issues, or defenses
- That a class member may enter an appearance through an attorney if the member so desires
- That the court will exclude from the class any member who requests exclusion
- The time and manner for requesting exclusion
- The binding effect of a class judgment on members under Rule 23(c)(3)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsNoticesCivil ProcedureClass ActionsOpt-Out ProvisionsCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 23(c)(2).*

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CHAPTER 42 Class Actions
H. Establishing That Class Action Falls Within One of Three Subdivisions of Rule 23(b)
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3-42 Federal Litigation Guide §§ 42.169 through 42.179

[Reserved]

§§ 42.169[Reserved]

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CHAPTER 42 Class Actions
H. Establishing That Class Action Falls Within One of Three Subdivisions of Rule 23(b)
6. CHECKLISTS: Establishing That Class Action Falls Within One of Three Subdivisions of Rule 23(b)

3-42 Federal Litigation Guide § 42.180

§ 42.180 CHECKLIST: Determining Whether Class Action Satisfies Rule 23(b)(1)(A) Requirements

If all four prerequisites of Rule 23(a) have been satisfied, n1 a class action may be maintained as long as the action falls within one of the categories provided by Rule 23(b). The following checklist may be used to determine whether the class action satisfies the requirements of Rule 23(b)(1)(A):

☐ Realistic possibility of separate litigation in the absence of class certification.

☐ Risk that separate litigation will result in varying adjudications that would establish incompatible or varying standards of conduct for the party opposing the class.

☐ Defendant could be sued for different and incompatible affirmative relief, as opposed to seeking damages.

☐ Class seeks injunctive or declaratory relief to alter an ongoing course of conduct that is either legal or illegal as to all members of the class.

☐ Case does not seek compensatory damages.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See §§ 42.30-42.32.*

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CHAPTER 42 Class Actions
H. Establishing That Class Action Falls Within One of Three Subdivisions of Rule 23(b)
6. CHECKLISTS: Establishing That Class Action Falls Within One of Three Subdivisions of Rule 23(b)

3-42 Federal Litigation Guide § 42.181

§ 42.181 CHECKLIST: Determining Whether Class Action Satisfies Rule 23(b)(1)(B) Requirements

If all four prerequisites of Rule 23(a) have been satisfied, n1 a class action may be maintained as long as the action falls within one of the categories provided by Rule 23(b). The following checklist may be used to determine whether the class action satisfies the requirements of Rule 23(b)(1)(B):

☐ Case focuses on members of putative class and seeks to protect them against situations in which they would be prejudiced by separate litigation, such as in limited fund cases.

☐ Evidence establishes a likelihood that if damages are awarded in individual litigation, the claims of the earlier plaintiffs will exhaust the defendants' assets.

☐ Case seeks declaratory or injunctive relief in which one member's joint or common right is affected by other members' litigation.

☐ No individual or unique facts exist.

☐ Case does not seek only money damages.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See §§ 42.30-42.32.*

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CHAPTER 42 Class Actions
H. Establishing That Class Action Falls Within One of Three Subdivisions of Rule 23(b)
6. CHECKLISTS: Establishing That Class Action Falls Within One of Three Subdivisions of Rule 23(b)

3-42 Federal Litigation Guide § 42.182

§ 42.182 CHECKLIST: Determining Whether Class Action Satisfies Rule 23(b)(2) Requirements

If all four prerequisites of Rule 23(a) have been satisfied, n1 a class action may be maintained as long as the action falls within one of the categories provided by Rule 23(b). The following checklist may be used to determine whether the class action satisfies the requirements of Rule 23(b)(2):

☐ Defendant has acted or refused to act on grounds generally applicable to the class, making final injunctive relief or corresponding declaratory relief with respect to the class as a whole appropriate.

☐ Defendant's conduct or failure to act is "generally applicable" to an entire class of persons.

☐ Case does not seek money damages only.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See §§ 42.30-42.32.*

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CHAPTER 42 Class Actions
H. Establishing That Class Action Falls Within One of Three Subdivisions of Rule 23(b)
6. CHECKLISTS: Establishing That Class Action Falls Within One of Three Subdivisions of Rule 23(b)

3-42 Federal Litigation Guide § 42.183

§ 42.183 CHECKLIST: Determining Whether Class Action Satisfies Rule 23(b)(3) Requirements

If all four prerequisites of Rule 23(a) have been satisfied, n1 a class action may be maintained as long as the action falls within one of the categories provided by Rule 23(b). The following checklist may be used to determine whether the class action satisfies the requirements of Rule 23(b)(3):

☐ Case achieves an economy of time, effort, and expense without sacrificing procedural fairness.

☐ Both of the following are present:

☐ Common questions of law or fact predominate over questions affecting only individual members.

☐ Class action is superior to other available methods for resolving the controversy.

☐ Case is for monetary, declaratory, or injunctive relief.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See §§ 42.30-42.32.*

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CHAPTER 42 Class Actions
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3-42 Federal Litigation Guide §§ 42.184 through 42.189

[Reserved]

§§ 42.184[Reserved]

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CHAPTER 42 Class Actions
I. Drafting Class Action Complaint; Pre-Certification Procedural Issues; Filing Dispositive Motion

3-42 Federal Litigation Guide § 42.190

§ 42.190 General Pleading Requirements of Rule 8 Apply to Class Actions

Rule 23 does not set forth any specific pleading requirements for class actions. n1

Rule 8, which sets forth general rules of pleading in federal actions, applies to pleadings in class actions. Specifically, Rule 8 provides that a pleading which sets forth a claim for relief must contain: n2

- A short and plain statement of the grounds upon which the court's jurisdiction depends
- A short and plain statement of the claim showing that the pleader is entitled to relief
- A demand for judgment for the relief the pleader seeks

A complaint filed in federal court must include sufficient factual matter to state a claim to relief that is plausible on its face, and all claims must be accompanied by facts which allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." n3 This "facial plausibility" cannot be supported by "mere conclusory statements" and a reviewing court is required to "draw on its experience and common sense" in its determination of plausibility. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 23.*

(n2)Footnote 2. *See Fed. R. Civ. P. 8(a).*

(n3)Footnote 3. *See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) .*

(n4)Footnote 4. *Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 884-885 (2009)* ; *see also* al-*Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009)* (pleaded facts sufficient to state plausible claim); *Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1261-1270 (11th Cir. 2009)* (pleaded facts failed to state plausible claim).

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CHAPTER 42 Class Actions
I. Drafting Class Action Complaint; Pre-Certification Procedural Issues; Filing Dispositive Motion

3-42 Federal Litigation Guide § 42.191

§ 42.191 Alleging Facts Demonstrating That Class Action Requirements Are Met

The class action complaint must allege facts demonstrating that all of the requirements for bringing a class action have been fulfilled. Although the plaintiff, as the party seeking class certification, bears the burden of demonstrating that the requirements for class certification have been met, the plaintiff is not required to make an extensive evidentiary showing. n1 More is required than mere conclusory allegations in the complaint which track the language of Rule 23. Where there is merely a recitation in the complaint that each of the requirements of Rule 23 is satisfied, the court is not bound to find that class treatment is proper. n2

The complaint should allege facts demonstrating the following: n3

- An identifiable class exists
- The named representatives are members of the proposed class
- Numerosity of parties
- Commonality of legal and factual issues
- Typicality of claims and defenses of the class representatives
- Adequacy of representation
- The class action falls into at least one of the three subsections of Rule 23(b).

In diversity class actions subject to the Class Action Fairness Act, the aggregate amount of the plaintiffs' claims must be at least $5 million, the claims must be asserted on behalf of at least 100 proposed class members, and at least one member of a proposed class must be from a state other than that of any defendant. n4 In diversity class actions which are not governed by the Class Action Fairness Act, the capacity of the representative of the class must be alleged, because the citizenship of the representative controls for diversity jurisdiction purposes. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. LaFlamme v. Carpenters Local # *370 Pension Plan, 212 F.R.D. 448, 452 (N.D.N.Y. 2003)* .

(n2)Footnote 2. *See In re American Med. Sys., Inc., 75 F.3d 1069, 1079 (6th Cir. 1996)* ; *Stambaugh v. Kansas Dep't of Corrections, 151 F.R.D. 664, 671 (D. Kan. 1993)* .

(n3)Footnote 3. *See Fed. R. Civ. P. 23.*

(n4)Footnote 4. *28 U.S.C. § 1332(d)(2)*; *28 U.S.C. § 1332(d)(5)(B).*

(n5)Footnote 5. *See Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 366, 41 S. Ct. 338, 65 L. Ed. 673 (1921)* , *overruled in part on other grounds, 314 U.S. 118 (1941)* .

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CHAPTER 42 Class Actions
I. Drafting Class Action Complaint; Pre-Certification Procedural Issues; Filing Dispositive Motion

3-42 Federal Litigation Guide § 42.192

§ 42.192 Additional Requirements in Securities Class Actions

[1] Plaintiff's Signed Certification Must Accompany Complaint

The complaint in a class action alleging violation of the Securities Act of 1933 or the Securities Exchange Act of 1934 must be accompanied by a certification signed by the plaintiff. n1

Setting forth all of the transactions of the plaintiff in the security that is the subject of the complaint during the class period specified in the complaint.

Identifying any other action for securities law violation filed during the three year period preceding the date on which the certification is signed by the plaintiff, in which the plaintiff sought to serve, or actually served, as a class representative.

Stating that the plaintiff:

- Has read the complaint and authorized its filing
- Did not purchase the security that is the subject of the complaint at the direction of plaintiff's counsel, or in order to participate in any private action for securities law violation
- Is willing to serve as a representative of the class, including providing testimony at deposition and trial, if necessary
- Will not accept any payment for serving as class representative beyond his or her pro rata share of any recovery, except as otherwise ordered or approved by the court

[2] Notice to Class

Within 20 days after the date on which the complaint is filed, the plaintiff must cause to be published in a widely circulated national business-oriented publication or wire service a notice advising members of the purported class: n2

- Of the pendency of the action, the claims asserted, and the purported class period

- That not later than 60 days after the date on which the notice is published, any member of the purported class may move the court to serve as lead plaintiff of the purported class

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsDerivative ActionsGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. P.L. 104-67, § 101(a), (b).

(n2)Footnote 2. P.L. 104-67, § 101(a)(3)(a).

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CHAPTER 42 Class Actions
I. Drafting Class Action Complaint; Pre-Certification Procedural Issues; Filing Dispositive Motion

3-42 Federal Litigation Guide § 42.193

§ 42.193 Attending Pre-Certification Scheduling Conferences

Case scheduling conferences pursuant to Rule 16 and local rules are often scheduled prior to the filing of a motion for class certification. The court has broad discretion regarding the topics and issues to be discussed at any pretrial conference. n1

Topics typically discussed at scheduling conferences in class actions include:

- Pre-certification discovery
- Timing of motion seeking class certification
- Timing of any pre-certification dispositive motions

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsJudicial DiscretionCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial Conferences

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 16(c)(2)(P).*

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CHAPTER 42 Class Actions
I. Drafting Class Action Complaint; Pre-Certification Procedural Issues; Filing Dispositive Motion

3-42 Federal Litigation Guide § 42.194

§ 42.194 Conducting Pre-Certification Discovery

A motion seeking class certification may be stayed pending pre-certification discovery.

Pre-certification discovery typically is an issue discussed at the case scheduling conference held pursuant to Rule 16 and local rules. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedurePretrial MattersConferencesScheduling Conferences

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 16(a)-(c).*

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CHAPTER 42 Class Actions
I. Drafting Class Action Complaint; Pre-Certification Procedural Issues; Filing Dispositive Motion

3-42 Federal Litigation Guide §§ 42.195 through 42.209

[Reserved]

§§ 42.195[Reserved]

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CHAPTER 42 Class Actions
J. Moving for Class Certification

3-42 Federal Litigation Guide § 42.210

§ 42.210 Court Must Determine at an Early Practicable Time Whether to Certify the Action

When a person sues or is sued as a representative of a class, the court must, at an early practicable time, determine by order whether to certify the action as a class action. n1

The filing of a class action tolls the statute of limitations on the claims of individual class members, and the statute of limitations begins to run again on an individual claim on denial of certification or on decertification of the class. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 23(c)(1)(A)*; *see also Leonard v. Southwestern Bell Corp. Disability Income Plan, 408 F.3d 528, 533-534 (8th Cir. 2005)* .

(n2)Footnote 2. *Yang v. Odom, 392 F.3d 97, 103-108 (3d Cir. 2004)* .

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CHAPTER 42 Class Actions
J. Moving for Class Certification

3-42 Federal Litigation Guide § 42.211

§ 42.211 Obligation of Court to Address Certification Sua Sponte

If the plaintiff representative does not file a motion seeking class certification, is the court obligated sua sponte to address the issue? A number of courts have held that the district judge has an obligation on his or her own motion to determine whether an action may proceed as a class action. n1

Other courts have held that if the plaintiff representative does not move to have the action certified, the action will not be permitted to be maintained as a class action. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See, e.g., Senter v. General Motors Corp., 532 F.2d 511, 520-521 (6th Cir. 1976)* , *cert. denied*, *429 U.S. 870 (1976)* ; *Castro v. Beecher, 459 F.2d 725, 731 (1st Cir. 1972)* .

(n2)Footnote 2. *See, e.g., Robinson v. First Nat'l City Bank, 482 F. Supp. 92, 99-100 (S.D.N.Y. 1979)* .

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CHAPTER 42 Class Actions
J. Moving for Class Certification

3-42 Federal Litigation Guide § 42.212

§ 42.212 Burden of Demonstrating That Requirements for Class Action Have Been Met Is on Party Seeking Certification

The party seeking class certification has the burden of demonstrating that all the requirements for a class action have been met. n1 Class certification also may not be obtained by default judgment. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)* .

(n2)Footnote 2. *See Partington v. American Int'l Specialty Lines Ins. Co., 443 F.3d 334, 340-341 (4th Cir. 2006)* .

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CHAPTER 42 Class Actions
J. Moving for Class Certification

3-42 Federal Litigation Guide § 42.213

§ 42.213 Drafting Motion and Supporting Papers

[1] Provide Advance Notice of Motion

The movant must provide advance notice of the Rule 23(c) motionseeking class certification. n1

[2] Submit Supporting Affidavits and Memorandum of Law

Local rules and individual judge's rules should be consulted for requirements pertaining to affidavits and memorandum of law.

[3] Proposed Order May Be Required

The practitioner should consult the local rules, as well as individual judge's rules, with respect to submitting proposed orders.

[4] Contents of Order

An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g). n2

An order certifying a class action may be altered or amended before final judgment. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 7(b).*

(n2)Footnote 2. *Fed. R. Civ. P. 23(c)(1)(B).*

(n3)Footnote 3. *Fed. R. Civ. P. 23(c)(1)(C).*

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CHAPTER 42 Class Actions
J. Moving for Class Certification

3-42 Federal Litigation Guide § 42.214

§ 42.214 Ruling on Class Certification Motion

[1] Meeting Rule 23 Certification Requirements

To certify a class action, all of the requirements of Rule 23(a) must be met as well as those of one of the subsections of Rule 23(b). n1 The court has broad discretion with regard to certification, and will be reversed on appeal only for abuse of discretion. n2

Given the fact that the court's decision is discretionary, a federal court decision denying certification has virtually no preclusive effect on a subsequent state court's determination to certify or not certify the same or a similar class action in state court. Each court has the broad discretion to determine independently whether its own class action requirements are met. n3

[2] Court Accepts as True Substantive Allegations in Complaint

In evaluating a motion for class certification, the court accepts as true the substantive allegations in the complaint, and does not conduct an inquiry into the merits of the plaintiff's claims. n4 However, the court does not accept the class allegations in the complaint as true, as would be the case in a Rule 12(b)(6) motion to dismiss. n5

[3] Hearing on Certification Motion

If the pleadings set forth sufficient facts from which a court can determine whether the requirements of Rule 23 are satisfied, then the court may decide whether a class should be certified without a hearing. n6 In most circuits, the district court is not limited to the complaint in making its certification decision, and the court should make whatever legal and factual inquiries are necessary to determine whether a class should be certified. n7 However, in some circuits the district court is not permitted to conduct a preliminary inquiry into the merits of the case at the class certification stage. n8

Courts often need more information than is provided by the pleadings, and therefore, courts commonly conduct evidentiary hearings on the class certification issue. The district court should hold an evidentiary hearing if there is any doubt regarding the issue of class certification. n9

A district court's certification decision may be reversed as an abuse of discretion if the court fails to hold an evidentiary hearing on the issue. n10 However, the failure of a court to hold a hearing does not require reversal unless the party

claiming that a hearing was necessary can demonstrate that it suffered prejudice. n11

Parties may waive their right to an evidentiary hearing by failing to request that the district court hold such a hearing. n12

[4] Discovery May Be Permitted With Respect to Class Certification Issues

The district court has considerable discretion in determining whether, and to what extent, to allow discovery with respect to class certification issues. However, a district court may abuse its discretion by failing to allow discovery on issues necessary to determine whether class certification is proper. n13

Often, district courts will limit precertification discovery to class certification issues, and postpone discovery on the merits of the action until after the certification decision. n14

[5] Alternate Forms of Certification Permissible

The court is empowered to define an appropriate class, whether by accepting the proposed class, conditionally certifying a class for a limited portion of the litigation, n15 limiting the class to particular issues, n16 or creating subclasses. n17

A complaint's proposed class definition does not bind the court. n18

[6] Appealing Class Certification Order

[6.--1] Filing Petition for Permission to Appeal

A court of appeals may permit an appeal from an order granting or denying class-action certification 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. n19

The deadline to file a Rule 23(f) petition is tolled by the filing of a timely and proper motion to reconsider the grant or denial of class certification. n19.1

[6.--2] Court May Certify Issue for Interlocutory Appeal

The district court may certify its decision to grant class action certification for interlocutory appeal, especially in large class actions such as mass tort cases. n20

Review of class certification decisions generally will be most appropriate when: n21

- There is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable

- The certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review

- The district court's class certification decision is manifestly erroneous

[6.--3] Review Through Writ of Mandamus

To grant mandamus, the appellate court must find that the decision will inflict irreparable harm in that an appeal at the end of the case would be ineffectual, and that the order must so far exceed the proper bounds of judicial discretion as to be legitimately considered usurpative in character, or in violation of a clear and indisputable legal right, or, at the very least, patently erroneous. n22 Mandamus is usually denied because most decisions involved in class action certification may be effectively reviewed on appeal. n23

[6.--4] Order of Dismissal Without Addressing Class Certification Is Appealable

If the district court dismisses a suit on summary judgment or on a motion to dismiss, and fails to rule on class certification, finality is not lacking and the dismissal is appropriate for appellate review. n24

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsJudicial DiscretionCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureSummary JudgmentAppellate ReviewAppealability

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 23* (advisory committee notes of 1966).

(n2)Footnote 2. *See, e.g., Retired Chicago Police Association v. City of Chicago, 7 F.3d 584, 596 (7th Cir. 1993)* , *cert. denied, 117 S. Ct. 305 (1996)* .

(n3)Footnote 3. *Clearwater v. Ashland Oil Co., 93 F.3d 176, 180 (5th Cir. 1996)* .

(n4)Footnote 4. *See Shelter Realty Corp. V. Allied Maintenance Corp., 574 F.2d 656, 661 n.15 (2d Cir. 1978)* ; *In re Frontier Ins. Group, Inc. Secs. Litig., 172 F.R.D. 31, 39 (E.D.N.Y. 1997)* .

(n5)Footnote 5. *Gariety v. Grant Thornton, LLP, 368 F.3d 356, 365-367 (4th Cir. 2004)* ; *Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 675-676 (7th Cir. 2001)* .

(n6)Footnote 6. *John v. National Sec. Fire & Cas. Co., 501 F.3d 443, 445 (5th Cir. 2007)* (citing **Moore's**); *In re American Med. Sys., Inc., 75 F.3d 1069, 1079 (6th Cir. 1996)* .

(n7)Footnote 7. *See In re Polymedica Corp. Sec. Litig., 432 F.3d 1, 4-6, 17-18 (1st Cir. 2005)* .

(n8)Footnote 8. *See Heerwagen v. Clear Channel Communications, 435 F.3d 219, 231-233 (2d Cir. 2006)* ; *but see Oscar Private Equity Invs. v. Allegiance Telecom, Inc., 487 F.3d 261, 268-269 (5th Cir. 2007)* .

(n9)Footnote 9. *Merrill v. Southern Methodist Univ., 806 F.2d 600, 608 (5th Cir. 1986)* ; *Morrison v. Booth, 730 F.2d 642, 644 (11th Cir. 1984)* .

(n10)Footnote 10. *Morrison v. Booth, 730 F.2d 642, 644 (11th Cir. 1984)* .

(n11)Footnote 11. *See Grayson v. K Mart Corp., 79 F.3d 1086, 1099 (11th Cir. 1996)* .

(n12)Footnote 12. *Morrison v. Booth, 730 F.2d 642, 644 (11th Cir. 1984)* ; *Marcera v. Chinlund, 565 F.2d 253, 255 (2d Cir. 1977)* .

(n13)Footnote 13. *In re American Med. Sys., Inc., 75 F.3d 1069, 1086 (6th Cir. 1996)* ; *Chateau de Ville Productions, Inc. v. Tams-Witmark Music Library, Inc., 586 F.2d 962 (2d Cir. 1978)* .

(n14)Footnote 14. *Heerwagen v. Clear Channel Communications, 435 F.3d 219, 233-234 (2d Cir. 2006)* ; *Washington v. Brown & Williamson Tobacco Corp., 959 F.2d 1566, 1571 (11th Cir. 1992)* .

(n15)Footnote 15. *Fed. R. Civ. P. 23(c)(1).*

(n16)Footnote 16. *Fed. R. Civ. P. 23(c)(4)*; *see also In re Nassau County Strip Search Cases, 461 F.3d 219, 226-230 (2d Cir. 2006)* .

(n17)Footnote 17. *Fed. R. Civ. P. 23(c)(5).*

(n18)Footnote 18. *Lundquist v. Sec. Pac. Auto. Fin. Servs. Corp., 993 F.2d 11, 14 (2d Cir. 1993)* , *cert. denied, 510 U.S. 959 (1993)* .

(n19)Footnote 19. *Fed. R. Civ. P. 23(f).*

(n20)Footnote 19.1. *See Gutierrez v. Johnson & Johnson, 523 F.3d 187, 193 (3d Cir. 2008)* .

(n21)Footnote 20. *See Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 471 (5th Cir. 1986)* , *reh'g denied, 785 F.2d 1034 (5th Cir. 1986)* .

(n22)Footnote 21. *See Chamberlan v. Ford Motor Co., 402 F.3d 952, 957-960 (9th Cir. 2005)* .

(n23)Footnote 22. *Grady v. Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1295 (7th Cir. 1995)* , *cert. denied, 516 U.S. 867, (1995)* ; *In re Temple, 851 F.2d 1269, 1271 (11th Cir. 1988)* ; *In re Bendectin Prods. Liab. Litig., 749 F.2d 300, 303-304 (6th Cir. 1984)* .

(n24)Footnote 23. *See In re* "Agent Orange" *Prod. Liab. Litig., 818 F.2d 145, 169 (2d Cir. 1987)* .

(n25)Footnote 24. *See DeBruyne v. Equitable Life Assurance Soc'y, 920 F.2d 457, 463 (7th Cir. 1990)* .

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CHAPTER 42 Class Actions
J. Moving for Class Certification

3-42 Federal Litigation Guide § 42.215

§ 42.215 Filing Class Action Tolls Statutes of Limitation on Claims of Individual Class Members

[1] Tolling Continues Until Certification Is Denied

The commencement of a class action tolls the applicable statute of limitations for all putative class members who file individual actions after a court denies class certification. n1

This rule promotes judicial economy. If the running of the statute of limitations were not tolled, numerous class members would be obliged to file separate individual actions or motions to ensure that their actions were not barred. n2

Once the statute of limitations is tolled, it remains tolled for all members of the putative class until the question of certification has been resolved. If certification is denied, the period begins to run again. n3

Putative class members must then either file their own suits or move to intervene as plaintiffs in the existing action before the remaining limitations expires. n4

Decertification of a class action will also start the statute of limitations running again. n5

The tolling rule applies to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action. n6

Ordinarily, courts look to the complaint to determine the scope of the asserted class. However, one court has ruled that the scope of a class for tolling purposes is that class for which there was fair notice as to both the substantive claims and the number and generic identities of the potential class members. n7

The rules that permit tolling of limitations may not be abused by stacking two or more class actions to continue to toll the statute of limitations after certification has been denied once. Thus, if certification is denied in one class action, the statute of limitations will not be extended further by filing another, virtually identical class action; nor will a second class action filed while the first action was pending further toll the limitations period after certification is denied in the first class action. n8

To hold otherwise would enable class plaintiffs to toll the statute of limitations indefinitely by repeatedly seeking

certification of the same class. n9

[2] If Certification Is Granted, Tolling Ceases for Members Who Opt Out

The tolling rule also applies to actions in which certification is granted. Thus, purported class members who opt out of a class action are entitled to the tolling of the statute of limitations from the commencement of the original class suit until the class members participation ends by means of the opt-out. The opt-out renders the question of whether the class is eventually certified irrelevant as to the individual plaintiffs who opt out. n10

The statute of limitations then begins to run again from the date the class member opts out. n11

Application of the tolling rule to class members who choose to opt out is justified because, without tolling, the statute of limitations would most often have run before the class members received notice of the class action, so that the provisions of Rule 23 that require notice and an opportunity to opt out would be pointless. n12

Allowing tolling of the statute with respect to those who opt out also prevents needless duplication of motions and protective filings by parties seeking to preserve their rights during the pendency of the class action. n13

[3] Evaluating Whether Tolling Applies to Members Who File Individual Suits Pending Certification Decision

While tolling applies to all class members who seek to file their own suits after class certification is denied or granted, there is a circuit split as to whether the statute of limitations is tolled with respect to putative class members who file separate suits while the class certification decision is pending. The Sixth Circuit, as well as some district courts in other circuits, have ruled that tolling does not apply in this circumstance. n14

Judicial economy is not furthered when plaintiffs file independent actions before the decision on class certification. These courts, therefore, do not allow a plaintiff to file an individual suit, which signals that the plaintiff is opting out of a class, and simultaneously claim class action tolling benefits.

Other circuits, however, have taken the opposite view, holding that putative class members' time to file is tolled on the filing of a class action purporting to assert their claims, regardless of whether they also file individual actions asserting the same claims. In adopting this view, the Second Circuit reasoned that the purpose of the tolling rule is to protect class members from being forced to file individual suits in order to preserve their claims, not to reduce the number of suits filed or to force individual plaintiffs to make an early decision whether to proceed by individual suit or rely on a class action. n15 The Ninth Circuit noted that applying traditional tolling to plaintiffs who filed individual suits before certification is consistent with the purpose underlying the statutes of limitations, given that statutes of limitation are intended to provide notice to defendants of a claim before the underlying evidence becomes stale. n16 The Tenth Circuit has held that an individual plaintiff is entitled to rely on the representative suit as long as it lasts. The policy underlying statutes of limitations is not harmed by this approach, as the defendant effectively has been on notice of the substantive claims of the individual plaintiff through the class action, and application of the tolling rule would not substantially impede the efficiency and economy of the class action mechanism. n17

FOOTNOTES:

(n1)Footnote 1. *See Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 354, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983)* .

(n2)Footnote 2. *See Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 350-354, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983)* .

(n3)Footnote 3. *See Yang v. Odom, 392 F.3d 97, 102 (3d Cir. 2004)* .

(n4)Footnote 4. *See Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 346-347, 354, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983)* .

(n5)Footnote 5. *See In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1295 (7th Cir. 1995)* .

(n6)Footnote 6. *See American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974)* .

(n7)Footnote 7. *See Smith v. Pennington, 352 F.3d 884, 891-894 (4th Cir. 2003)* .

(n8)Footnote 8. *See Basch v. Ground Round, Inc., 139 F.3d 6, 11 (1st Cir. 1998)* .

(n9)Footnote 9. *See Korwek v. Hunt, 827 F.2d 874, 879 (2d Cir. 1987)* .

(n10)Footnote 10. *See Realmonte v. Reeves, 169 F.3d 1280, 1284, 1287 (10th Cir. 1999)* .

(n11)Footnote 11. *See Adams Pub. Sch. Dist. v. Asbestos Corp., 7 F.3d 717, 718 n.1 (8th Cir. 1993)* .

(n12)Footnote 12. *See Realmonte v. Reeves, 169 F.3d 1280, 1284, 1287 (10th Cir. 1999)* .

(n13)Footnote 13. *See Adams Pub. Sch. Dist. v. Asbestos Corp., 7 F.3d 717, 718 (8th Cir. 1993)* .

(n14)Footnote 14. *See Wyser-Pratte Mgmt. Co. v. Telxon, 413 F.3d 553, 569 (6th Cir. 2005)* ; *Chinn v. Giant Food, Inc., 100 F. Supp. 2d 331, 335 (D. Md. 2000)* ; *Rahr v. Grant Thornton LLP, 142 F. Supp. 2d 793, 800 (N.D. Tex. 2000)* ; *Stutz v. Minnesota Mining Mfg. Co., 947 F. Supp. 399, 403-404 (D. Ind. 1996)* .

(n15)Footnote 15. *See California Pub. Employees Ret. Sys. v. Caboto-Gruppo Intesa BCI (In re WorldCom Sec. Litig.), 496 F.3d 245, 252-256 (2d Cir. 2007)* .

(n16)Footnote 16. *See Phillips v. E.I. DuPont de Nemours & Co. (In re Hanford Nuclear Reservation Litig.), 521 F.3d 1028, 1038 (9th Cir. 2008)* .

(n17)Footnote 17. *See State Farm Mut. Auto. Ins. Co. v. Boellstorff, 540 F.3d 1223, 1235 (10th Cir. 2008)* .

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CHAPTER 42 Class Actions
J. Moving for Class Certification

3-42 Federal Litigation Guide §§ 42.216 through 42.219

[Reserved]

§§ 42.216[Reserved]

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CHAPTER 42 Class Actions
K. Providing Notice to Potential Class Members

3-42 Federal Litigation Guide § 42.220

§ 42.220 Determining Whether Notice Is Required

[1] Mandatory Notice to Class Members Required Only in Rule 23(b)(3) Actions

Mandatory notice is required only in Rule 23(b)(3) actions. n1

[2] Due Process May Require Notice in Certain Rule 23(b)(1)(B) and 23(b)(2) Actions

Although Rule 23 does not entitle members of a Rule 23(b)(1)(B) or 23(b)(2) class to notice of the action, class members may have a right to notice under the Due Process Clause of the U.S. Constitution.

[3] Court Has Discretion to Require Notice in Other Class Actions

For any class certified under Rule 23(b)(1) or Rule 23(b)(2), the court may direct appropriate notice to the class. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsNoticesCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 23(c)(2).*

(n2)Footnote 2. *Fed. R. Civ. P. 23(c)(2)(A).*

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CHAPTER 42 Class Actions
K. Providing Notice to Potential Class Members

3-42 Federal Litigation Guide § 42.221

§ 42.221 Determining Content of Notice to Rule 23(b)(3) Class Members

[1] Describing Clearly the Action and Opt-Out Rights

For any class certified under Rule 23(b)(3), the notice must concisely and clearly state in plain, easily understood language: n1

- The nature of the action
- The definition of the class certified
- The class claims, issues, or defenses
- That a class member may enter an appearance through counsel if the member so desires
- That the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded
- The binding effect of a class judgment on class members under Rule 23(c)(3)

Although Rule 23(b)(3) contains an opt-out requirement, the language of Rule 23 does not recognize any type of class in which members of a class may or must affirmatively act to opt into membership. Nor is an opt-in provision ever required by due process considerations. n2

[2] Balanced Notice

The notice should be balanced, and should neither encourage nor discourage the class members from asserting claims. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass

ActionsNoticesCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 23(c)(2)(B).*

(n2)Footnote 2. *Kern v. Siemens Corp., 393 F.3d 120, 124-129 (2d Cir. 2004)* .

(n3)Footnote 3. *Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 174, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989)* .

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CHAPTER 42 Class Actions
K. Providing Notice to Potential Class Members

3-42 Federal Litigation Guide § 42.222

§ 42.222 Determining Method of Providing Notice to Rule 23(b)(3) Class Members

[1] "Best Notice Practicable" Must Be Provided

In any Rule 23(b)(3) class action, the class members must be provided with the "best notice practicable under the circumstances". n1

The notice must be reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action, and to afford them an opportunity to present their objections. n2 The relevant question is not whether every absent class member actually receives notice, but whether the notice that the court orders is reasonably calculated to reach absent members. n3

[2] Notice by First Class Mail

[2.--1] Notice by First Class Mail to Members Who Can Be Identified Through Reasonable Effort

Individual notice must be given to all members who can be identified through reasonable effort. n4

Notice of the class action is typically sent to the identified individual class member by first class mail. n5

[2.--2] Parties Must Procure Obtainable Information

If the names and last known addresses of class members are either known to the parties or capable of being identified from records available to theparties, the parties must obtain the information. n6

The general rule is that the representative plaintiff must perform the task of identifying class members. n7 However, if a defendant is able to perform a necessary task with less difficulty or expense than the representative plaintiff, the court may order the defendant to perform it. n8

[3] Publishing Notice

Publication of notice is often the best notice practicable for class members who cannot be identified or located specifically through reasonable efforts. n9

Courts will consider the circumstances of each case, including the size and geographical diversity of the class, and the characteristics of the class members that are relevant to determining which publications they would read. However, courts cannot rely solely on notice by publication to satisfy the requirements of Rule 23(c)(2); there must be direct notice to identified individuals as well. n10

[4] Supplementing Notice

The court may order that publication or individual notice be supplemented through additional means, such as broadcasting on radio or television networks, providing a toll-free telephone number, or giving notice to various state agencies that class members would be likely to contact. n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsNoticesCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 23(c)(2).*

(n2)Footnote 2. *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985) .*

(n3)Footnote 3. *Reppert v. Marvin Lumber & Cedar Co., Inc., 359 F.3d 53, 57 (1st Cir. 2004) .*

(n4)Footnote 4. *Fed. R. Civ. P. 23(c)(2);* *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177, 94 S. Ct. 2140, 40 L. Ed. 2d 732, 748 (1974) .*

(n5)Footnote 5. *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985) .*

(n6)Footnote 6. *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974) .*

(n7)Footnote 7. *Oppenheimer Fund, Inc., v. Sanders, 437 U.S. 340, 355 n.22, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978) .*

(n8)Footnote 8. *Oppenheimer Fund, Inc., v. Sanders, 437 U.S. 340, 355, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978) .*

(n9)Footnote 9. *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 536-537 (3d Cir. 2004)* ; *In re* "Agent Orange" *Prod. Liab. Litig., 818 F.2d 145, 168-169 (2d Cir. 1987)* ; *In re Domestic Air Transp. Antitrust Litig., 141 F.R.D. 534, 548-553 (N.D. Ga. 1992) .*

(n10)Footnote 10. *Silber v. Mabon, 18 F.3d 1449, 1455 (9th Cir. 1994) .*

(n11)Footnote 11. *In re* "Agent Orange" *Prod. Liab. Litig., 818 F.2d 145, 168-169 (2d Cir. 1987) .*

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CHAPTER 42 Class Actions
K. Providing Notice to Potential Class Members

3-42 Federal Litigation Guide § 42.223

§ 42.223 "Clearly Erroneous" Standard of Appellate Review Regarding Notice

Rule 23 accords considerable discretion to the district court in fashioning notice to a class. The standard of review on appeal is whether the district court was clearly erroneous in its factual findings, and whether it abused its discretion. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureAppealsStandards of ReviewClearly Erroneous Review

FOOTNOTES:
(n1)Footnote 1. *Albemarle Paper Co. v. Moody, 422 U.S. 405, 424, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975)* .

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CHAPTER 42 Class Actions
K. Providing Notice to Potential Class Members

3-42 Federal Litigation Guide § 42.224

§ 42.224 Cost of Providing Notice

The plaintiff class representative is generally obligated to bear the cost of notice to class members. n1 However, if the court orders a defendant to perform certain tasks associated with providing notice, the defendant may also be ordered to bear the cost if the defendant's cost would be insubstantial, such as in a case where notice could be included with the defendant's periodic mailings. n2

Courts have also required defendants to bear the costs if the defendant has conducted itself improperly, n3 has requested certification of the plaintiff class, n4 or has assumed those costs as part of a settlement agreement. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsNoticesCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureSettlementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 171, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)* .

(n2)Footnote 2. *Oppenheimer Fund, Inc., v. Sanders, 437 U.S. 340, 355 n.22, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978)* .

(n3)Footnote 3. *Nagy v. Jostens, Inc., 91 F.R.D. 431, 433 (D. Minn. 1981)* .

(n4)Footnote 4. *Argo v. Hills, 425 F. Supp. 151, 159 (E.D.N.Y. 1977)* , *aff'd*, *578 F.2d 1366 (2d Cir. 1978)* .

(n5)Footnote 5. *Milstein v. Huck, 600 F. Supp. 254, 256 (E.D.N.Y. 1984)* .

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CHAPTER 42 Class Actions
K. Providing Notice to Potential Class Members

3-42 Federal Litigation Guide §§ 42.225 through 42.229

[Reserved]

§§ 42.225[Reserved]

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CHAPTER 42 Class Actions
L. Prosecuting or Defending Action Following Class Certification

3-42 Federal Litigation Guide § 42.230

§ 42.230 Action Proceeds in Same Fashion as Any Other Civil Action

After a class has been certified, the action proceeds in the same fashion as any other action. The same discovery devices available in civil actions are available in class actions; Rule 23 does not contain any separate discovery provisions. The Supreme Court has held that the Federal Arbitration Act (FAA) prohibits arbitrators from imposing class arbitration on parties unless an arbitration agreement specifically provides for it. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass CounselGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureDiscoveryGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Stolt-Nielsen S.A. v. AnimalFeeds International Corp., __ U.S. __, 130 S. Ct. 1758, 176 L. Ed. 2d 605, 624 (2010)* .

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CHAPTER 42 Class Actions
L. Prosecuting or Defending Action Following Class Certification

3-42 Federal Litigation Guide § 42.231

§ 42.231 Court May Make Appropriate Orders for Conduct of Action

[1] Rule 23(d) Authorizes Court to Make Appropriate Orders

In any class action, the court may make appropriate orders regarding: n1

- The course of the proceedings
- Notice to class members
- Conditions on representative parties or intervenors
- Amendments of pleadings
- Other procedural matters

Any court order in a class action may be combined with an order under Rule 16, which governs pretrial conferences, scheduling, and case management. n2

[2] Orders May Be Amended

Rule 23(d) orders may be altered or amended from time to time, as desirable, permitting a court to vacate its prior orders in a class action when appropriate. n3

[3] Court Not Limited to Listed Orders

The purpose of Rule 23(d) is to provide the court with the means for facilitating the "fair and efficient conduct of the action," and courts apply the Rule's general provision for orders "dealing with other procedural matters" liberally. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass

ActionsNoticesCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial Orders

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 23(d)(1).*

(n2)Footnote 2. *See Fed. R. Civ. P. 16.*

(n3)Footnote 3. *See Fed. R. Civ. P. 23(d)(2).*

(n4)Footnote 4. *County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1304 (2d Cir. 1990) .*

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CHAPTER 42 Class Actions
L. Prosecuting or Defending Action Following Class Certification

3-42 Federal Litigation Guide § 42.232

§ 42.232 Orders Permitting Intervention

[1] Adequacy of Representation

The court may give absentee class members the opportunity to intervene and present claims or defenses, or otherwise come into the action. n1

The primary purpose of intervention is to assure that the class is adequately represented within the meaning of Rule 23(a)(4). Thus, in a ruling on a motion for intervention, a court will typically undertake an analysis of the adequacy of the proposed representation. n2

[2] Court Applies Intervention Standards of Rule 24

Although intervention is usually granted liberally, a court may require that the requirements of Rule 24 are satisfied before intervention is permitted. n3

Rule 24 distinguishes between intervention as of right and permissive intervention. n4 To intervene as of right, the applicant must file a timely application, show an interest in the action, demonstrate that the applicant's interest may be impaired by the disposition of the action, and show that the applicant's interest is not adequately protected by the parties to the action. n5

Under the permissive intervention rule, a court has discretion to permit intervention if the applicant files a timely application, demonstrates that the proposed intervenor's claims and the existent class action share common questions of law or fact, and shows that the intervention will not unduly delay or prejudice any party. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionTimelinessCivil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesAdequacy of Representation

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 23(d)(1)(A).*

(n2)Footnote 2. *See, e.g., Vollmer v. Publrs. Clearing House, 248 F.3d 698, 706-707 (7th Cir. 2001)* (district court properly denied intervention when class member seeking to intervene failed to show that existing class counsel would not adequately represent his interests in settlement); *Gottlieb v. Wiles, 11 F.3d 1004, 1008 n.4 (10th Cir. 1993)* .

(n3)Footnote 3. *See Diduck v. Kasycki & Sons Contractors, Inc., 149 F.R.D. 55, 57-58 (S.D.N.Y. 1993)* ; *see also Wyatt By and Through Rawlins v. Poundstone, 169 F.R.D. 155, 167 (M.D. Ala. 1995)* ; *Ardrey v. Federal Kemper Ins. Co., 142 F.R.D. 105, 116 (E.D. Pa. 1992)* .

(n4)Footnote 4. *See Fed. R. Civ. P. 24(a), 24(b).*

(n5)Footnote 5. *See Dillard v. City of Foley, 926 F. Supp. 1053, 1060 (M.D. Ala. 1995)* ; *see also Diduck v. Kasycki & Sons Contractors, Inc., 149 F.R.D. 55, 58 (S.D.N.Y. 1993)* .

(n6)Footnote 6. *See Fed. R. Civ. P. 24(b)*; *Comer v. Cisneros, 37 F.3d 775, 801 (2d Cir. 1994)* ; *Dillard v. City of Foley, 926 F. Supp. 1053, 1062 (M.D. Ala. 1995)* ; *Ardrey v. Federal Kemper Ins. Co., 142 F.R.D. 105, 116 (E.D. Pa. 1992)* .

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CHAPTER 42 Class Actions
L. Prosecuting or Defending Action Following Class Certification

3-42 Federal Litigation Guide § 42.233

§ 42.233 Orders Requiring Amendment of Pleadings

The court may order pleadings to be amended to eliminate allegations regarding the representation of absent persons. n1

This provision may be used to:

- Purge class allegations from a complaint following denial of a motion for class certification n2
- Excise portions of a complaint's class allegations if, for example, the court determines that the plaintiffs cannot possibly prove those claims n3
- "Decertify" a class if the court determines that the plaintiffs no longer satisfy all of the requirements for maintaining a class action n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 23(d)(1)(D).*

(n2)Footnote 2. *Narwick v. Wexler, 912 F. Supp. 342, 344 (N.D. Ill. 1995)* ; *White v. State Farm Mut. Auto. Ins. Co., 153 F.R.D. 639, 641 (D. Neb. 1993)* ; *Kingsepp v. Wesleyan Univ., 142 F.R.D. 597, 603 (S.D.N.Y. 1992)* .

(n3)Footnote 3. *Vulcan Society v. Fire Dep't, 82 F.R.D. 379, 403 (S.D.N.Y. 1979)* .

(n4)Footnote 4. *See Bresson v. Thomson McKinnon Sec., Inc., 118 F.R.D. 339, 342 (S.D.N.Y. 1988)* ; *see also Smith v. Heckler, 595 F. Supp. 1173, 1176 (E.D. Cal. 1984)* .

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CHAPTER 42 Class Actions
L. Prosecuting or Defending Action Following Class Certification

3-42 Federal Litigation Guide § 42.234

§ 42.234 Appellate Review of Rule 23(d) Orders

Orders issued pursuant to Rule 23(d) generally are not final appealable orders because they do not finally and entirely dispose of the rights of the parties in the action. n1 However, courts of appeal have reviewed such orders under the collateral order doctrine. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsAppellate ReviewCivil ProcedureClass ActionsCertification

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1291.*

(n2)Footnote 2. *See In re Paine Webber Inc. Ltd Partnership Litig., 94 F.3d 49, 52 (2d Cir. 1996)* ; *see also In re School Asbestos Litig., 842 F.2d 671, 677 (3d Cir. 1988)* .

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CHAPTER 42 Class Actions
L. Prosecuting or Defending Action Following Class Certification

3-42 Federal Litigation Guide §§ 42.235 through 42.239

[Reserved]

§§ 42.235[Reserved]

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CHAPTER 42 Class Actions
M. Settling Class Actions

3-42 Federal Litigation Guide § 42.240

§ 42.240 Court Approval Required for Dismissal or Settlement

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: n1

- The court must direct notice in a reasonable manner to all class members who would be bound by the proposal
- 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
- The parties seeking approval must file a statement identifying any agreement made in connection with the proposal
- 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
- 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

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsJudicial DiscretionCivil ProcedureClass ActionsOpt-Out Provisions

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 23(e).*

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CHAPTER 42 Class Actions
M. Settling Class Actions

3-42 Federal Litigation Guide § 42.241

§ 42.241 Settlement Standard

[1] Settlement Must Be Fundamentally Fair, Adequate, and Reasonable

The court may approve a settlement, voluntary dismissal, or compromise that would bind the class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate. n1

[2] Factors Considered in Determining Fairness of Proposed Settlement

Many cases discuss class action settlements and list various factors to be considered in determining whether a proposed settlement is "fair, reasonable, and adequate." Some lists are lengthy, some concise, and the factorsvary from circuit to circuit. n2 The most significant of these factors may be categorized under the following four concerns: n3

- The strength of the plaintiff's case on the merits balanced against the amount offered in settlement
- The possibility of collusion in reaching a settlement
- The reaction of members of the class to the settlement
- The stage of the proceedings and the amount of discovery completed

[3] Strength of Plaintiff's Case Compared to Amount Offered in Settlement

In determining the fairness of a proposed class action settlement, the court must balance the probable result at trial against the likely costs, in both time and money, of continued litigation. n4

[4] Reaction of Class Members to Proposed Settlement

The reaction of class members to a proposed settlement is a proper consideration for the trial court, although a settlement is not deemed unfair simply because a large number of class members object to it. n5

Indeed, even majority opposition does not bar approval. n6

[5] Stage of Proceedings at Which Settlement Is Reached

A court is more likely to approve a settlement if most of the discovery is completed, because it suggests that the parties arrived at a compromise based on a full understanding of the issues surrounding the case. n7

[6] Providing New Opportunity to Opt-Out

In an action previously certified as a class action 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. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsCompromisesCivil ProcedureClass ActionsOpt-Out ProvisionsCivil ProcedureClass ActionsVoluntary Dismissals

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 23(e)(2).*

(n2)Footnote 2. *See In re General Motors Corp. Pick-up Truck Fuel Tank Litig., 55 F.3d 768, 785 (3d Cir. 1995)* , *cert. denied sub nom. General Motors Corp. v. French, 516 U.S. 824 (1995)* ; *Gottlieb v. Wiles, 11 F.3d 1004, 1014 (10th Cir. 1993)* ; *County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1323 (2d Cir. 1990)* ; *In re Fleet/Norstar Sec. Litig., 935 F. Supp. 99, 105 (D.R.I. 1996)* ; *Manchaca v. Chater, 927 F. Supp. 962, 966 (E.D. Tex. 1996)* .

(n3)Footnote 3. *See UAW v. GMC, 497 F.3d 615, 631 (6th Cir. 2007)* ; *see also Ayers v. Thompson, 358 F.3d 356, 369 (5th Cir. 2004)* .

(n4)Footnote 4. *See In re Marine Midland Motor Vehicle Leasing Litig., 155 F.R.D. 416, 420 (W.D.N.Y. 1994)* .

(n5)Footnote 5. *See In re Fleet/Norstar Sec. Litig., 935 F. Supp. 99, 107 (D.R.I. 1996)* ; *see also Manchaca v. Chater, 927 F. Supp. 962, 966 (E.D. Tex. 1996)* ; *Dillard v. City of Foley, 926 F. Supp. 1053, 1063 (M.D. Ala. 1995)* ; *In re Marine Midland Motor Vehicle Leasing Litig., 155 F.R.D. 416, 420 (W.D.N.Y. 1994)* .

(n6)Footnote 6. *County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1304 (2d Cir. 1990)* .

(n7)Footnote 7. *See, e.g., In re Fleet/Norstar Sec. Litig., 935 F. Supp. 99, 106 (D.R.I. 1996)* ; *see also Manchaca v. Chater, 927 F. Supp. 962, 966 (E.D. Tex. 1996)* ; *In re Marine Midland Motor Vehicle Leasing Litig., 155 F.R.D. 416, 420 (W.D.N.Y. 1994)* .

(n8)Footnote 8. *Fed. R. Civ. P. 23(e)(4).*

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CHAPTER 42 Class Actions
M. Settling Class Actions

3-42 Federal Litigation Guide § 42.242

§ 42.242 Court Not Permitted to Modify Settlement Agreement

The court is not permitted to modify the terms of a settlement agreement. Rather, it must approve or disapprove of the settlement as a whole. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsCompromisesCivil ProcedureClass ActionsOpt-Out ProvisionsCivil ProcedureSettlementsSettlement AgreementsModifications

FOOTNOTES:
(n1)Footnote 1. *See Evans v. Jeff D., 475 U.S. 717, 726-727, 106 S. Ct. 1531, 89 L. Ed. 2d 747 (1986)* .

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CHAPTER 42 Class Actions
M. Settling Class Actions

3-42 Federal Litigation Guide § 42.243

§ 42.243 Typical Settlement Process

After the parties agree on a proposed settlement, the following steps are usually taken in cases in which the class has been certified prior to settlement:

- The proposed settlement is submitted to the court
- Often, a hearing is held in which the court will make a preliminary determination regarding the fairness of the settlement
- If appropriate, notice is drafted, approved, and delivered
- At least one fairness hearing is held allowing affected persons to be heard with respect to the proposed settlement
- The court approves or disapproves the settlement, sometimes including a statement of its findings and conclusions, and initiates any necessary claims process

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsCompromises

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CHAPTER 42 Class Actions
M. Settling Class Actions

3-42 Federal Litigation Guide § 42.244

§ 42.244 Settling Class Action Prior to Class Certification

[1] Settlement Prior to Certification Permitted

Parties to a class action are permitted to negotiate a proposed settlement before certification of the class. However, to guard against the possibility of collusion and undue pressure, settlement negotiations prior to certification are subjected to a higher degree of scrutiny than is usual in assessing later settlements. n1

[2] Class May Be Certified for Settlement Purposes

A class action may be certified solely for purposes of settlement. n2 Certification of classes for settlement purposes is consistent with Rule 23, provided the district court thoroughly evaluates whether the proposed class fully satisfies the requirements of Rule 23(a) and (b). n3

Although the fact of the settlement is relevant to the class certification decision, the requirements of Rule 23 must still be met. While courts have wide discretion in assessing fairness, they "lack the authority to substitute for Rule 23's certification criteria a standard never adopted--that if a settlement is 'fair,' then certification is proper". n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsCompromises

FOOTNOTES:
(n1)Footnote 1. *County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1422, 1424 (E.D.N.Y. 1989)* .

(n2)Footnote 2. *In re General Motors Corp. Pick-Up Truck Fuel Tank Litig., 55 F.3d 768, 777-778 (3d Cir. 1995)* .

(n3)Footnote 3. *See In re Cmty. Bank of N. Va., 418 F.3d 277, 300-302 (3d Cir. 2005)* .

(n4)Footnote 4. *Amchem Products, Inc. v. Windsor, 521 U.S. 591, 614, 117 S. Ct. 2231, 2235, 138 L. Ed. 2d 689*

(1997) .

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CHAPTER 42 Class Actions
M. Settling Class Actions

3-42 Federal Litigation Guide § 42.245

§ 42.245 Obtaining Preliminary Court Approval of Settlement

Although not required by Rule 23(e), the court will typically conduct a preliminary review of the proposed settlement before ordering that notice be sent to the class members providing an opportunity to be heard. The preliminary review is conducted for the following purposes: n1

- To establish an initial presumption of fairness through a cursory review of the settlement's terms
- To determine whether the negotiations occurred at arm's length
- To establish whether there was sufficient discovery
- To determine whether the proponents of the litigation are experienced in similar litigation
- To establish that the number of actual or anticipated objections to the settlement is not large when compared to the class size

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsCompromises

FOOTNOTES:
(n1)Footnote 1. *In re General Motors Corp. Pick-Up Truck Fuel Tank Litig., 55 F.3d 768, 785 (3d Cir. 1995)* .

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CHAPTER 42 Class Actions
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3-42 Federal Litigation Guide § 42.246

§ 42.246 Providing Notice of Proposed Settlement to Class Members

[1] Directing Notice in a Reasonable Manner

The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise. n1 A "reasonable" notice need not include all of the details of the proposed settlement or dismissal; rather, the notice must fairly apprise the class members of the terms of the settlement or dismissal. n2

[2] Form and Manner of Notice of Proposed Settlement

The court has broad discretion in directing the manner and form of notice. Notice by mail to individual class members is the most common manner of effecting notice. n3

However, there is no rigid requirement of individual notice under Rule 23(e). The Due Process clause also guarantees to class members the right to notice. However, this right does not require that every class member actually receive notice. The question is whether the court directed the best notice practicable under the circumstances, including individual notice to class members who can be identified with reasonable effort. n4

[3] Costs and Necessary Tasks of Notice of Proposed Settlement

Although the general rule is that the representing plaintiff should perform all tasks and bear all costs related to sending the notice of proposed settlement, defendants may be required to perform necessary tasks if the defendant has the ability to perform them more efficiently. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsCompromisesCivil ProcedureClass ActionsNoticesCivil ProcedureClass ActionsVoluntary Dismissals

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 23(e)(1).*

(n2)Footnote 2. *UAW v. GMC, 497 F.3d 615, 630 (6th Cir. 2007)* .

(n3)Footnote 3. *See County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1422, 1424 (E.D.N.Y. 1989)* .

(n4)Footnote 4. *See DeJulius v. New Eng. Health Care Employees Pension Fund, 429 F.3d 935, 943-947 (10th Cir. 2005)* .

(n5)Footnote 5. *Oppenheimer Fund, Inc., v. Sanders, 437 U.S. 340, 359-360, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978)* .

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CHAPTER 42 Class Actions
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3-42 Federal Litigation Guide § 42.247

§ 42.247 Participating in Fairness Hearing

The court may approve a settlement, voluntary dismissal, or compromise that would bind the class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate. n1 Sometimes multiple hearings are held in different locations to facilitate a wider degree of participation by those objecting to the settlement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsCompromisesCivil ProcedureClass ActionsNoticesCivil ProcedureDismissalsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 23(e)(2) ; see, e.g., UAW v. GMC, 497 F.3d 615, 631 (6th Cir. 2007) .*

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CHAPTER 42 Class Actions
M. Settling Class Actions

3-42 Federal Litigation Guide § 42.248

§ 42.248 Objecting to Proposed Settlement

Any class member may object to a proposed settlement, voluntary dismissal, orcompromise that requires court approval, and such an objection may be withdrawn only with the court's approval. n1

The court is obligated to consider class members' objections in its determination of whether a proposed settlement agreement is fair, adequate, and reasonable. n2 Even a non-named class member, who has timely objected to a settlement at a fairness hearing, may appeal the approval of the settlement without first intervening. n3

In an action previously certified as a class action 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. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCompromisesCivil ProcedureClass ActionsNoticesCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersGeneral OverviewCivil ProcedureSettlementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 23(e)(5).*

(n2)Footnote 2. *See In re Fleet/Norstar Sec. Litig., 935 F. Supp. 99, 107 (D.R.I. 1996)* ; *see also Manchaca v. Chater, 927 F. Supp. 962, 966 (E.D. Tex. 1996)* ; *see also Dillard v. City of Foley, 926 F. Supp. 1053, 1063 (M.D. Ala. 1995)* ; *In re Marine Midland Motor Vehicle Leasing Litig., 155 F.R.D. 416, 420 (W.D.N.Y. 1994)* .

(n3)Footnote 3. *Devlin v. Scardelletti, 536 U.S. 1, 13-14, 122 S. Ct. 2005, 153 L. Ed. 2d 27 (2002)* .

(n4)Footnote 4. *Fed. R. Civ. P. 23(e)(4).*

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CHAPTER 42 Class Actions
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3-42 Federal Litigation Guide § 42.249

§ 42.249 Computing Attorney's Fees in Cases Not Involving Coupon Settlements

[1] Court Review of Fee Settlements

In an action certified as a class action, the court may award reasonable attorney's fees and nontaxable costs authorized by law or by agreement of the parties. n1 A claim for an award of attorney's fees and nontaxable costs must be made by motion under Rule 54(d)(2) at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner. n2

A class member, or a party from whom payment is sought, may object to the motion. n3 The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a) at a time set by the court. n4

[2] Fee Calculations

[2.--1] Percentage-of-the-Fund Approach

Most courts apply the percentage-of-the-fund approach to class actions. Although courts have granted fee awards ranging between 15 and 50 percent of the entire settlement fund, 30 percent of the fund is seen as presumptively reasonable, subject to adjustment upward or downward in extraordinary circumstances. n5

Courts have retreated from the lodestar approach, in which courts determine the number of hours reasonably expected, multiply them by a reasonable hourly rate, and then multiply the total by a multiplier to increase or decrease the award as circumstances warrant. n6

[2.--2] Factors Considered on Fee Applications

Courts consider the following factors in determining whether to approve fee applications: n7

- The time and labor expended by counsel
- The magnitude and complexity of the litigation
- The risk of the litigation

- The quality of the representation
- The requested fee in relation to the settlement
- Public policy considerations

[3] Court Approval is Limited in Settlements Requiring Class Members to Make Payments to Counsel

Courts have only limited authority to approve a class action settlement that requires class members to make payments to counsel. n8 The limitation on the court's discretion to approve such settlements is contained in the Class Action Fairness Act of 2005 (CAFA), and applies to class actions commenced on or after February 18, 2005. n9

Whenever a proposed class action settlement obligates any class member to pay an amount to class counsel that would result in a class member suffering a monetary loss, the court may approve the settlement only if the court makes a written finding that nonmonetary benefits conferred by the settlement on the class member substantially outweigh the amount paid to counsel. n10 The Act thus requires the court first to determine the value of nonmonetary benefits (such as an injunction or other equitable relief) with respect to the individual class member, and then to weigh that value against the sum paid by the class member so as to determine whether the nonmonetary value is "substantially" greater. n11

[4] Court May Not Approve Settlements That Discriminate Based on Geographical Location

A court may not approve a proposed settlement that provides for greater payments to some class members than to others, when the difference is attributable solely to the fact that some members are located in closer geographic proximity to the court than others. n12 This limitation was enacted as part of the CAFA and applies to class actions commenced on or after February 18, 2005. n13

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsClass CounselGeneral OverviewCivil ProcedureClass ActionsClass CounselFeesCivil ProcedureClass ActionsCompromisesCivil ProcedureClass ActionsJudicial DiscretionCivil ProcedureClass ActionsNoticesLegal EthicsClient RelationsAttorney FeesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 23(h).*

(n2)Footnote 2. *Fed. R. Civ. P. 23(h)(1).*

(n3)Footnote 3. *Fed. R. Civ. P. 23(h)(2).*

(n4)Footnote 4. *Fed. R. Civ. P. 23(h)(3).*

(n5)Footnote 5. *See In re AT&T Corp., 455 F.3d 160, 167-173 (3d Cir. 2006)* ; *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 121-124 (2d Cir. 2005)* ; *see also In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 300-307 (3d Cir. 2005)* .

(n6)Footnote 6. *See In re Fleet/Norstar Sec. Litig., 935 F. Supp. 99, 107 (D.R.I. 1996)* .

(n7)Footnote 7. *See In re Marine Midland Motor Vehicle Leasing Litig., 155 F.R.D. 416, 422 (W.D.N.Y. 1994)* .

(n8)Footnote 8. *See 28 U.S.C. § 1713*.

(n9)Footnote 9. *See Pritchett v. Office Depot, Inc., 2005 U.S. Dist. LEXIS 5166, at *15 (D.Colo. Mar. 9, 2005)* (the commencement date of the action refers to the date the action is filed in a court of proper jurisdiction, not the date it is removed to federal court).

(n10)Footnote 10. *28 U.S.C. § 1713*.

(n11)Footnote 11. *See 28 U.S.C. § 1713*.

(n12)Footnote 12. *28 U.S.C. § 1714*.

(n13)Footnote 13. *See Pritchett v. Office Depot, Inc., 2005 U.S. Dist. LEXIS 5166, at *15 (D.Colo. Mar. 9, 2005)* (the commencement date of the action refers to the date the action is filed in a court of proper jurisdiction, not the date it is removed to federal court).

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CHAPTER 42 Class Actions
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3-42 Federal Litigation Guide § 42.250

§ 42.250 Court Approval of Coupon Settlements

[1] Class Action Fairness Act Governs Coupon Settlements

There are specific provisions under the Class Action Fairness Act which limit court approval of "coupon settlements." n1 The provisions apply to class actions commenced on or after February 18, 2005. n2

Under the CAFA, a court may approve a proposed coupon settlement only after the court holds a hearing to determine whether, and makes a written finding that, the coupon settlement is fair, reasonable, and adequate for class members. n3 The CAFA does not define "coupon" or "coupon settlement." n4 Parties should presume that the CAFA applies to any settlement in which some or all of the recovery consists of coupons or vouchers that may be redeemed for any form of goods or services.

[2] Coupon Settlement May Be Conditioned on Charitable Distribution of Unredeemed Coupon Value

Courts may require that a coupon settlement agreement provide that a portion of the value of unredeemed or unclaimed coupons be distributed to one or more charitable or governmental organizations, the number and identity of which are to be agreed to by the parties. n5

[3] Attorney's Fees Are Limited in Cases Involving Coupon Settlements

Courts must base the portion of the award of attorney's fees attributable to the recovery of coupons on the value to class members of the coupons that are actually redeemed. n6 A court, in its discretion and on motion of a party, may receive expert testimony from a witness qualified to provide information on the actual value to class members of the redeemed coupons. n7 In a case involving an award of coupons, any portion of the fee award that is not attributable to the award of coupons must be based on the amount of time class counsel reasonably expended on the work. n8 Any fee for work to obtain equitable or injunctive relief must be based on the amount of time expended by class counsel. The CAFA specifically authorizes use of the "lodestar with a multiplier" method for compensating counsel.

Any court-ordered charitable distribution may not be used to calculate attorney's fees. n9 The fee award may not be computed (and may not be paid) until after the redemption period for the coupons has elapsed, because until that time no one can know how many coupons will be redeemed. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCompromisesCivil ProcedureClass ActionsNoticesCivil ProcedureSettlementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1712.*

(n2)Footnote 2. *See Pritchett v. Office Depot, Inc., 2005 U.S. Dist. LEXIS 5166, at *15 (D.Colo. Mar. 9, 2005)* (the commencement date of the action refers to the date the action is filed in a court of proper jurisdiction, not the date it is removed to federal court).

(n3)Footnote 3. *28 U.S.C. § 1712(e).*

(n4)Footnote 4. *See generally 28 U.S.C. §§ 171, 1712.*

(n5)Footnote 5. *28 U.S.C. § 1712(e).*

(n6)Footnote 6. *28 U.S.C. § 1712(a).*

(n7)Footnote 7. *28 U.S.C. § 1712(d).*

(n8)Footnote 8. *28 U.S.C. § 1712(b)(1).*

(n9)Footnote 9. *28 U.S.C. § 1712(e).*

(n10)Footnote 10. *28 U.S.C. § 1712(a).*

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CHAPTER 42 Class Actions
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3-42 Federal Litigation Guide § 42.251

§ 42.251 Defendants Must Notify Appropriate Federal and State Officials of Proposed Settlement

[1] Defendants Must Give Notice Within 10 Days After Filing Proposed Settlement

Under the Class Action Fairness Act, each defendant participating in a proposed settlement of a class action must serve appropriate federal and state officials with a notice of the proposed settlement within 10 days after a proposed settlement is filed in court. n1

[2] Selecting the Appropriate Federal and State Officials for Service of Notice

In the vast majority of cases, the "appropriate federal official" is the United States Attorney General. n2 However, in a case in which the defendant is a federal depository institution, a state depository institution, a depository institution holding company, a foreign bank, or a nondepository institution subsidiary of one of these, n3 the notice requirements are satisfied by serving the person who has the primary federal regulatory or supervisory responsibility with respect to the defendant, provided some or all of the matters alleged in the class action are subject to regulation or supervision by that person. n4

The selection of the "appropriate state official" is more complex. The defendant must serve the person in the state who either: n5

- Has the primary regulatory or supervisory responsibility with respect to the defendant, or
- Licenses or otherwise authorizes the defendant to conduct business in the state.

However, these two alternatives apply only if some or all of the matters alleged in the class action are subject to regulation by such a person. If there is no primary regulatory, supervisory, or licensing authority, or if the matters alleged in the class action are not subject to regulation or supervision by such a person, then the appropriate state official is the state attorney general. n6

Different rules apply for determining the appropriate state official when a state depository institution is a settling defendant. n7 A defendant state depository institution satisfies its obligation to give notice of a proposed class action settlement by serving notice on the state bank supervisor (as defined by *12 U.S.C. § 1813*) of the state in which the defendant is incorporated or chartered, if some or all of the of the matters alleged in the class action are subject to

regulation or supervision by that person. n8 In addition to serving the state bank supervisor, state depository institutions must also serve the appropriate federal official. n9

Class members will not be bound by any class settlement with respect to any defendant who failed to give the required notice to the appropriate federal and state officials. n10 However, if the defendant selects the wrong state official, class members will remain bound so long as the defendant served the appropriate federal official and either the state attorney general or the primary regulatory, supervisory, or licensing authority. n11

[3] Contents of the Notice of Proposed Settlement

Each defendant's notice must include all of the following: n12

- A copy of the complaint and any materials filed with the complaint and any amended complaints. These materials may be omitted if they are made available electronically on the internet and the notice indicates how to electronically access such material n13

- Notice of any scheduled judicial hearing in the class action n14

- Any proposed or final notice to class members informing them of their right to opt out, or informing them that no right to opt out exists in the case; and any proposed or final notice of a class settlement n15

- Any proposed or final class action settlement n16

- Any settlement or other agreement contemporaneously made betweenclass counsel and counsel for the defendants n17

- Any final judgment or notice of dismissal n18

- If feasible, the names of class members who reside in each state and the estimated proportionate share of the claims of the state's class members to the entire settlement. The information with respect to each state needs to be provided only to the appropriate state official for that state. If it is not feasible to provide this information, the notice must include a reasonable estimate of the number of class members residing in each state and the estimated proportionate share of the claims of those members to the entire settlement. n19

- Any written judicial opinion relating to notice to the class concerning their opt-out rights or a proposed settlement; relating to any proposed or final settlement; relating to any settlement or agreement between class counsel and counsel for the defendants; or relating to any final judgment n20

[4] Notice Requirement May Delay Court Approval of Class Action Settlement

The court may not give final approval of a proposed settlement until at least 90 days have elapsed since the last date on which the last defendant completed serving notice on the appropriate state and federal officials. n21

[5] If Notice Not Provided, Class Members Might Not Be Bound

A class member may refuse to comply with and may choose not to be bound by a settlement agreement or consent decree if the class member demonstrates that a defendant has not served the required notice on the appropriate federal and state officials. n22

However, a class member may not refuse to comply with or be bound by the settlement agreement or consent decree if a defendant merely erred as to who is an appropriate state official, provided the defendant served notice on both: n23

- The appropriate federal official
- Either the state attorney general or the person who has primary regulatory, supervisory, or licensing authority over the defendant

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCompromisesCivil ProcedureClass ActionsNoticesCivil ProcedureSettlementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1715(b).*

(n2)Footnote 2. *28 U.S.C. § 1715(a)(1)(A).*

(n3)Footnote 3. *See 12 U.S.C. § 1813* (definitions).

(n4)Footnote 4. *28 U.S.C. § 1715(a)(1)(B)*; *28 U.S.C. § 1715(c)(1).*

(n5)Footnote 5. *28 U.S.C. § 1715(a)(2).*

(n6)Footnote 6. *28 U.S.C. § 1715(a)(2).*

(n7)Footnote 7. *28 U.S.C. § 1715(c)(2).*

(n8)Footnote 8. *28 U.S.C. § 1715(c)(2).*

(n9)Footnote 9. *28 U.S.C. § 1715(c)(2).*

(n10)Footnote 10. *28 U.S.C. § 1715(e)(1).*

(n11)Footnote 11. *28 U.S.C. § 1715(e)(2).*

(n12)Footnote 12. *28 U.S.C. § 1715(b).*

(n13)Footnote 13. *28 U.S.C. § 1715(b)(1).*

(n14)Footnote 14. *28 U.S.C. § 1715(b)(2).*

(n15)Footnote 15. *28 U.S.C. § 1715(b)(3).*

(n16)Footnote 16. *28 U.S.C. § 1715(b)(4).*

(n17)Footnote 17. *28 U.S.C. § 1715(b)(5).*

(n18)Footnote 18. *28 U.S.C. § 1715(b)(6).*

(n19)Footnote 19. *28 U.S.C. § 1715(b)(7).*

(n20)Footnote 20. *28 U.S.C. § 1715(b)(8).*

(n21)Footnote 21. *28 U.S.C. § 1715(d)*.

(n22)Footnote 22. *28 U.S.C. § 1715(e)(1)*.

(n23)Footnote 23. *28 U.S.C. § 1715(e)(2)*.

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CHAPTER 42 Class Actions
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3-42 Federal Litigation Guide § 42.252

§ 42.252 Drafting Class Action Judgment

[1] Drafting Crucial to Determining Who Is Bound

The drafting of the judgment in a class action is crucial to determining who is bound by that judgment.

[2] Drafting Requirements in Rule 23(b)(1) or 23(b)(2) Actions

The judgment in a Rule 23(b)(1) or (b)(2) class action must, whether or not it is favorable to the class, include and describe those whom finds to be members of the class. It need not, however, specify the individual members. n1

[3] Drafting Requirements in Rule 23(b)(3) Actions

The judgment in a Rule 23(b)(3) action must, whether or not it is favorable to the class, include and specify or describe those to whom the notice provided in Rule 23(c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class. Thus, the judgment must specify the individual members who have been identified and describe the others. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsCompromisesCivil ProcedureClass ActionsNoticesCivil ProcedureJudgmentsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 23(c)(3)(A).*

(n2)Footnote 2. *Fed. R. Civ. P. 23(c)(3)(B).*

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3-42 Federal Litigation Guide § 42.253

§ 42.253 Judgment in Class Action Must Describe Those Bound by Judgment

A judgment in a Rule 23(b)(1) or (b)(2) class action, regardless of whether it is favorable or unfavorable to the class, must include and describe those whom the court finds to be members of the class. n1

Similarly, a judgment in a Rule 23(b)(3) class action, regardless of whether it is favorable or unfavorable to the class, must include and specify or describe those to whom the court directed certification notice under Rule 23(c)(2), including all class members who have not requested exclusion and whom the court finds are members of the class. n2

In other words, in a Rule 23(b)(1) or (b)(2) action, the judgment must describe the members of the class, but need not specify the individual members; in a Rule 23(b)(3) action, the judgment must specify the individual members who have been identified and must describe the others. n3

If a judgment improperly includes and describes the class membership, the court may correct this clerical error of omission or oversight in the judgment under Rule 60(a). n4

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 23(c)(3)(A).*

(n2)Footnote 2. *Fed. R. Civ. P. 23(c)(3)(B).*

(n3)Footnote 3. *See Fed. R. Civ. P. 23(c)* Advisory Committee Note (1966).

(n4)Footnote 4. *See Vaughter v. Eastern Air Lines, Inc., 817 F.2d 685, 690 (11th Cir. 1987) .*

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CHAPTER 42 Class Actions
M. Settling Class Actions

3-42 Federal Litigation Guide § 42.254

§ 42.254 Preclusive Effect of Judgments and Orders in Class Actions

[1] Evaluating Whether Order Denying Certification Has Preclusive Effect

The Fifth Circuit has ruled that an order denying class certification should not have preclusive effect by reasoning that the district court's certification decision results from the court's exercise of broad discretion, and on the further ground that the certification decision is merely a procedural one. n1

According to the Fifth Circuit, each court has the broad discretion to determine independently whether the class-action requirements applicable in that jurisdiction have been met. n2

The Seventh Circuit, on the other hand, held that its judgment reversing certification of a nationwide class was a final adjudication of that issue and had the conclusive effect necessary for issue preclusion. The unnamed class members were bound by the judgment, regardless of whether the court would have had personal jurisdiction over them, just as they would have been bound by a final judgment if the class had been certified. n3

A later decision by the Seventh Circuit held that not every ruling denying class certification is entitled to collateral estoppel effect. The binding effect of such a ruling depends on whether the class members who would be affected by it had been adequately protected by the class representatives and class counsel in the proceeding in which the ruling was made. Also, collateral estoppel is an affirmative defense that is forfeited if not raised in a timely manner. n4

[2] Final Judgment Has Preclusive Effect on All Class Members Who Did Not Opt Out

A judgment in a properly maintained class action is binding on all class members, as well as named parties, in any subsequent litigation. The principles of claim preclusion and issue preclusion apply. n5

The general rule that class action judgments have preclusive effects must be qualified for Rule 23(b)(3) class actions. In those cases, the judgment will have preclusive effect only if the class action procedures used to reach it have comported with certain constitutional due process requirements. Due process requires that in Rule 23(b)(3) cases, cases in which the predominant request for relief is for money damages, absent class members must be given the best practicable notice, an opportunity to be heard, an opportunity to opt out of the action, and adequate representation by the named plaintiff. n6

Rule 23(c)(2) requires a court to comply with all of those due process requirements. n7

Class members who are not properly notified of certification and the right to opt out will be able to pursue their claims individually as if they had opted out, without regard to the judgment in the class action. n8

By contrast, if the requirements of Rule 23(c)(2) have been satisfied, all Rule 23(b)(3) class members who were given proper notice and did not opt out are bound by the judgment. n9

Due process concerns play a smaller role in connection with the preclusive effects of final judgments in Rule 23(b)(1) or (b)(2) classes. Members of those classes generally do not have the choice to opt out, as do members of Rule 23(b)(3) classes, n10 and they may be bound by the judgment reached in the action even though they did not receive individual notice or an opportunity to opt out. n11 Accordingly, in such actions class members must rely on the class representative to protect their interests. The preclusive effect of a judgment from a prior action depends on whether the absent class members were adequately represented by the named plaintiffs in that action. n12

A class member given an opportunity to opt out, but who did not opt out, has very limited due process arguments to prevent a final class judgment from being preclusive. The class member may file an objection with the district court or, in appropriate circumstances, appeal a final judgment or an order approving a settlement. n13

Under those circumstances, however, the only ground for challenging the preclusive effect of a final class judgment will be an assertion that the class representatives and class counsel inadequately represented the class interests. n14

FOOTNOTES:

(n1)Footnote 1. *See Clearwater v. Ashland Oil Co., 93 F.3d 176, 180 (5th Cir. 1996)* .

(n2)Footnote 2. *See Clearwater v. Ashland Oil Co., 93 F.3d 176, 180 (5th Cir. 1996)* .

(n3)Footnote 3. *See In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 333 F.3d 763, 768-769 (7th Cir. 2003)* .

(n4)Footnote 4. *See Carnegie v. Household Int'l, Inc., 376 F.3d 656, 662-663 (7th Cir. 2004)* .

(n5)Footnote 5. *See Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 874, 104 S. Ct. 2794, 81 L. Ed. 2d 718 (1984)* .

(n6)Footnote 6. *See Adams v. Southern Farm Bureau Life Ins. Co., 493 F.3d 1276, 1285-1287 (11th Cir. 2007)* .

(n7)Footnote 7. *Fed. R. Civ. P. 23(c)(2).*

(n8)Footnote 8. *See Pate v. United States, 328 F. Supp. 2d 62, 72-74 (D.D.C. 2004)* .

(n9)Footnote 9. *See In re Diet Drugs Prods. Liab. Litig., 431 F.3d 141, 145-149 (3d Cir. 2005)* .

(n10)Footnote 10. *Fed. R. Civ. P. 23(c)(2).*

(n11)Footnote 11. *See In re Greenman Sec. Litig., 829 F.2d 1539, 1542 (11th Cir. 1987)* .

(n12)Footnote 12. *See Pelt v. Utah, 539 F.3d 1271, 1284-1287 (10th Cir. 2008)* .

(n13)Footnote 13. *See Bash v. Firstmark Standard Life Ins. Co., 861 F.2d 159, 164 (7th Cir. 1988)* .

(n14)Footnote 14. *See Stephenson v. Dow Chem. Co., 273 F.3d 249, 259 (2d Cir. 2001)* , *revd in part, affd in part*

by equally divided court, *539 U.S. 111, 112 (2003)* (per curiam).

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CHAPTER 42 Class Actions
M. Settling Class Actions

3-42 Federal Litigation Guide §§ 42.255 through 42.299

[Reserved]

§§ 42.255[Reserved]

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CHAPTER 42 Class Actions
N. Forms

3-42 Federal Litigation Guide § 42.300

§ 42.300 Class Action Complaint

[1] FORM

Class Action Complaint

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

1. [*Allegations of jurisdiction and venue (see Ch. 1, Pleadings)*].

2. This action is brought by the plaintiffs as a class action, on their own behalf and on behalf of all others similarly situated, pursuant to the provisions of *Federal Rules of Civil Procedure, Rule 23(a)* and [*insert additional Rule 23 subdivisions*], on behalf of themselves and all others similarly situated.

3. The relief sought in this action is as follows:

[*set forth relief sought; for example, an injunction to enjoin the defendants from (specify conduct to be enjoined)*]

4. The class represented by the plaintiffs in this action consists of individuals who [*state characteristics of class*].

5. The exact number of members of the class is not known, but it is estimated that the number is in excess of [*insert estimate of number of class members*]. The class is so numerous that joinder of all members is impracticable.

6. There are questions of law or fact presented in this action that are common to the entire class, and that affect the rights of the class. Those issues include the following: [*specify common questions*].

7. The claims of the named plaintiffs are typical of the claims of the class, and the named plaintiffs will fairly and adequately protect the interests of the class.

8. The named plaintiffs are able to and will fairly and adequately protect the interests of the class.

9. Counsel for the named plaintiffs is qualified, experienced, able to conduct this litigation, and will fairly and adequately protect the interests of the class.

[*CHOOSE ONE OF THE FOLLOWING, AS APPROPRIATE*]

10. [*If class action is predicated upon subdivision (1)(A) of Rule 23(b), allege the following:*] This action is properly maintained as a class action in that the prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the defendants herein.

[*OR*]

10. [*If class action is predicated upon subdivision (1)(B) of Rule 23(b), allege the following:*] This action is properly maintained as a class action in that the prosecution of separate actions by individual members of the class would create a risk of adjudications with respect to individual members of the class which would as practical matter be dispositive of the interests of the other members not parties to the adjudications, or would substantially impair or impede their ability to protect their interests.

[*OR*]

10. [*If class action is predicated upon subdivision (2) of Rule 23(b), allege the following:*] This action is properly maintained as a class action in that the defendants herein have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

[*OR*]

10. [*If class action is predicated upon subdivision (3) of Rule 23(b), allege the following:*] This action is properly maintained as a class action in that questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

[*CONTINUE*]

WHEREFORE, plaintiffs respectfully request that judgment be entered in this action, on behalf of themselves and all other class members similarly situated, as follows:

1. [*insert relief requested, consistent with paragraph no. 3 of this form*]

2. That plaintiffs be awarded attorney's fees in accordance with [*insert authority for award of attorney's fees*]

3. That plaintiffs be awarded such other and further relief as may be appropriate, including costs and expenses.

[*Date*]

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for Plaintiffs, [*names of plaintiffs*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

[2] Use of Form

This is a form of class action complaint pursuant to Rule 23.

Complaints in securities fraud actions have additional requirements under the Private Securities Litigation Reform Act of 1995. n1 The Act applies to all securities fraud actions commenced on or after December 22, 1995. For discussion of those requirements, see *§ 42.87*.

A complaint in a class action alleging violation of the Securities Act of 1933 or the Securities Exchange Act of 1934 n2 must be accompanied by a certification signed by the plaintiff [*see* § 7.192[1]].

[3] Complaint Must Set Forth Prerequisites for Class Action

The complaint must set forth all the prerequisites for a class action suit, which are as follows: n3

- **Numerosity:** the class is so numerous that joinder of all parties is impracticable
- **Commonality:** there are questions of law or fact common to the class
- **Typicality:** the claims or defenses of the representative parties are typical of the class
- **Adequacy of representation:** the representative parties will fairly and adequately protect the interest of the class

[4] Proper Description of Plaintiffs in Case Caption

The case caption in a class action should be set up so that the names of the plaintiff representatives reads as follows: "[*Names of representative plaintiffs*], on behalf of themselves and all others similarly situated'

FOOTNOTES:

(n1)Footnote 1. Pub. L. 104-67, 109 Stat. 737.

(n2)Footnote 2. P.L. 104-67, § 101(a), (b).

(n3)Footnote 3. *Fed. R. Civ. P. 23(a)*; *see § 42.191*.

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CHAPTER 42 Class Actions
N. Forms

3-42 Federal Litigation Guide § 42.301

§ 42.301 Notice of Motion for Class Action Certification

[1] FORM

Notice of Motion for Class Action Certification

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

NOTICE IS HEREBY GIVEN that on [*date*] at [*time of day (specify a.m. or p.m.)*], or as soon thereafter as counsel may be heard, [*party designation and name of moving party*] will move this Court at the United States Courthouse located at [*address of Court*], Courtroom [*courtroom number*], for an order pursuant to *Federal Rules of Civil Procedure, Rule 23(c)(1)*:

(a) permitting the within action to be maintained as a class action for the benefit of the class consisting of [*state characteristics of class, e.g., persons exposed to asbestos manufactured by XYZ Corporation*], of which the named plaintiffs are members;

(b) setting forth the requisite form and manner of notice, if any, to be provided to members of the class; and

(c) granting [*moving party*] such other relief as may be appropriate.

This motion is based on this Notice of Motion, the accompanying Declaration (*or affidavit or other affidavit substitute; generally required*) of [*name of signatory*] dated (*or sworn to*) [*date*], the accompanying Memorandum of Law (*if required*) dated [*date*], and upon all of the pleadings and papers on file in this action.

[*Date*]

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for Plaintiffs, [*names of plaintiffs*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

TO: [*Name of opposing counsel*], Attorney for [*name of party*]

[2] Use of Form

This is a form of notice of motion for class action certification in accordance with the provisions of Rule 23(c)(1). For complete discussion of motions seeking class action certification, see *§§ 42.210 -42.214*.

[3] Deadline for Seeking Class Action Certification

When a person sues or is sued as a representative of a class, the court must, at an early practicable time, determine by order whether to certify the action as a class action [*see § 42.210[1]*]. n1

Local rules often impose deadlines for seeking class action certification.

[4] Burden Is on Party Seeking Certification

The party seeking class certification has the burden of demonstrating that all the requirements for a class action have been met. n2

[5] Determining Whether Notice to Class Members Is Required

For discussion of class action notice requirements, see *§§ 42.220 -42.224*. For a form of Notice to Class Members, see *§ 42.302*.

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 23(c)(1)(A)*.

(n2)Footnote 2. *See § 42.212*.

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CHAPTER 42 Class Actions
N. Forms

3-42 Federal Litigation Guide § 42.302

§ 42.302 Notice to Class Members

[1] FORM

Notice to Class Members

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

To all [*identify members of class*]:

You are hereby advised, pursuant to order of the above court dated [*date of order*], of the pendency of the above action commenced [*date action commenced*], wherein [*summarize in detail the definition of the class certified; the nature of the action; and the claims, issues, or defenses involved*].

You are further advised, in accordance with the provisions of *Federal Rules of Civil Procedure, Rule 23(c)(2)*, that:

(1) you will be excluded as a member of the class [*describe class*] if you make a request for exclusion by [*specify date and manner for requesting exclusion*];

(2) the judgment in this action, whether favorable or not, will include all members of the class [*describe class*] who do not request exclusion; and

(3) if you do not request exclusion from the class, you may, if you so desire, enter an appearance through your counsel.

[*Date*]

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for Plaintiffs, [*names of plaintiffs*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

[2] Use of Form

This is a form of notice for use by plaintiffs' counsel to notify potential class members of the pendency of the action.

Potential class members *must* be notified of the pendency of the action when the class is maintained pursuant to Rule 23(b)(3). A court *may* order notification to potential class members when the class is maintained under Rules 23(b)(1) or 23(b)(2).

[3] Providing Notice

In any Rule 23(b)(3) class action, the class members must be provided with the "best notice practicable under the circumstances". n1 The notice must be reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action, and to afford them an opportunity to present their objections. n2

Individual notice must be given to all members who can be identified through reasonable effort. n3 Notice of the class action is typically sent to the identified individual class member by first class mail. n4

To determine whether notice by publication is appropriate, courts will consider the circumstances of each case, including the size and geographical diversity of the class, and the characteristics of the class members that are relevant to determining which publications they would read. However, courts cannot rely solely on notice by publication to satisfy the requirements of Rule 23(c)(2); there must be direct notice to identified individuals as well. n5

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 23(c)(2).*

(n2)Footnote 2. *See* § 7.221[1].

(n3)Footnote 3. *Fed. R. Civ. P. 23(c)(2).*

(n4)Footnote 4. *See* § 7.222.

(n5)Footnote 5. *See* § 7.222[3].

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CHAPTER 43 Damages *

3-43 Federal Litigation Guide 43.syn

§ 43.syn Synopsis to Chapter 43: Damages *

§ 43.01 Evaluating Types of Damages
[1] Considering General Damages
[2] Considering Nominal Damages
[3] Considering Exemplary or Punitive Damages
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§ 43.02 Evaluating Law Governing Damages in Federal Court
[1] Applying Federal Law in Federal Question Cases
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§ 43.03 Evaluating Law Governing Damages in Transferred Actions
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[1] Claiming Damages for Civil Rights Violations Under Color of State Law
[2] Recovering Compensatory Damages Under § 1983
[3] Recovering Punitive Damages Under § 1983

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CHAPTER 43 Damages *

3-43 Federal Litigation Guide Scope

Scope

SCOPE

This chapter discusses damages issues in the federal courts. Part A provides an overview of the types of damages available, and includes discussion of the following topics and principles:

- **The law governing damages in federal question cases, diversity cases, transferred actions, and multidistrict litigation cases**
- **Jurisdictional requirements concerning damages in diversity cases**
- **Pleading damages under the Federal Rules**
- **Obtaining damages information through mandatory disclosure and subsequent discovery**
- **Calculating damages**
- **Proving damages and other trial concerns**
- **Taxation of damages awards**

Part B covers post-trial considerations including:

- **Moving for new trial based on an excessive award of damages**
- **Use of remittitur and additur in federal courts**
- **Appealing damages awards**

Finally, Part C provides a brief overview of the damages available under specific federal statutes including some of those governing:

- **Antitrust and securities litigation**

- **Copyright, trademark, and patent infringement**
- **Employment and discrimination actions**

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CHAPTER 43 Damages *
A. Seeking Damages in Federal District Court

1-43 Federal Litigation Guide § 43.01

§ 43.01 Evaluating Types of Damages

[1] Considering General Damages

General damages are defined as the actual damages that are the natural consequence of the wrongful act. n1 For example, damages for personal injury may be sought as general damages in an automobile accident case, while lost profits may be sought as general damages in a breach of contract case. n2

Although general damages may be recovered without proof of an exact amount, proof of the extent of damages is required. n3

[2] Considering Nominal Damages

Nominal damages are not compensatory in nature, but rather serve as a token recognition of a "technical" violation of rights. n4 Courts have held that where actual injury is found, but damages are not proven, nevertheless there must be some damages awarded. n5 In tort cases in general, if only the fact of damages but not their extent is proven, nominal damages may be awarded. n6

A plaintiff is limited to the recovery of nominal damages when the existence of actual damage is uncertain or speculative. n7 A number of courts have held, or implied in dicta, that nominal damages may not exceed $1 in amount. n8

[3] Considering Exemplary or Punitive Damages

Punitive damages, also known as "exemplary" damages, are those damages generally designed to punish and to deter. In order to receive punitive damages, the plaintiff must usually prove that the defendant's conduct was malicious or outrageous.

One of the first cases to make explicit reference to exemplary damages explained the principle behind them: "Damages are designed not only as a satisfaction to the injured person, but likewise as punishment to the guilty, to deter from any such proceeding in the future and as a proof of the detestation of the jury to the action itself." n9 Punitive damages are quasi-criminal insofar as they are not awarded to compensate for injury, but rather to further the aims of the criminal law: "to punish reprehensible conduct and to deter its future occurrence." n10 Because of their public policy dimension,

punitive damages may not be indemnified by insurance in many states.

Most punitive damage awards are discretionary. Under the traditional common-law approach, the amount awarded is determined by a jury instructed to consider both the gravity of the act and the need to deter similar conduct.

[4] Considering Special Damages

Special damages are defined as those damages that do not necessarily or invariably flow from the particular wrong. Special damages vary with the circumstances peculiar to the infliction of the injury and are not implied by law from the wrong complained of. n11 In short, special damages are those that, although resulting from the commission of the wrong, are unusual for the claim in question and not normally associated with the claim. n12

Special damages must be reasonably foreseeable at the time of the injury in order to be recoverable. n13

[5] Considering Liquidated Damages

Liquidated damages are damages specified in a contract as a remedy in the event of a breach. n14 Damages for breach by either party may be liquidated in an agreement but only at an amount that is reasonable in light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. n15

Liquidated damages clauses are not binding and enforceable if the amount designated imposes a penalty on the breaching party. n16

[6] Considering Statutory Damages

Statutory damages are damages that are specifically provided for by statute. n17

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesGeneral OverviewCivil ProcedureRemediesDamagesCompensatory DamagesCivil ProcedureRemediesDamagesGeneral DamagesCivil ProcedureRemediesDamagesPunitive DamagesCivil ProcedureRemediesDamagesSpecial Damages

FOOTNOTES:
(n1)Footnote 1. *Cotton Bros. Baking Co. v. Industrial Risk Insurers, 102 F.R.D. 964, 966 (W.D. La. 1984)* .

(n2)Footnote 2. *See Avitia v. Metropolitan Club, Inc., 49 F.3d 1219, 1226 (7th Cir. 1995)* .

(n3)Footnote 3. *Hayes v. Irwin, 541 F. Supp. 397 (N.D. Ga. 1982)* , *aff'd without opinion, 729 F.2d 1466 (11th Cir. 1984)* .

(n4)Footnote 4. *Redding v. Fairman, 717 F.2d 1105, 1119 (7th Cir. 1983)* , *cert. denied, 465 U.S. 1025 (1984)* .

(n5)Footnote 5. *Powell v. Ward, 643 F.2d 924 (2d Cir. 1981)* , *cert. denied, 454 U.S. 832 (1981)* .

(n6)Footnote 6. *Ustrak v. Fairman, 781 F.2d 573, 578 (7th Cir. 1986)* , *cert. denied, 479 U.S. 824 (1986)* .

(n7)Footnote 7. *Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 926 (2d Cir. 1977)* . *See also Zim v. Western Pub. Co., 573 F.2d 1318, 1326 (5th Cir. 1978)* (nominal damages are recoverable when a breach of contract has been established but no damages have been shown).

(n8)Footnote 8. *See Carey v. Piphus, 435 U.S. 247, 266, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978)* ; United States *ex rel. Tyrrell v. Speaker, 535 F.2d 823, 829 (3d Cir. 1976)* ; *Magnett v. Pelletier, 488 F.2d 33, 35 (1st Cir. 1973)* ; *Mayberry v. Robinson, 427 F. Supp. 297, 301 (M.D. Pa. 1977)* .

(n9)Footnote 9. Wilkes v. Wood, 98 Eng. Rep. 489, 498-499 (K.B. 1963), *quoted in Browning-Ferris Indus. v. Kelco Disposal Inc., 492 U.S. 257, 274 n.20, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989)* .

(n10)Footnote 10. *Browning-Ferris Indus. v. Kelco Disposal Inc., 492 U.S. 257, 297, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989)* (O'Connor, J., concurring in part and dissenting in part) (citing *Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 87, 108 S. Ct. 1645, 100 L. Ed. 2d 62 (1988)* (O'Connor, J., concurring in part and concurring in judgment)).

(n11)Footnote 11. *FDIC v. Fidelity & Deposit Co., 118 F.R.D. 435, 436 (M.D. La. 1988)* .

(n12)Footnote 12. *See, e.g., Cotton Bros. Baking Co. v. Industrial Risk Insurers, 102 F.R.D. 964, 966 (W.D. La. 1984)* .

(n13)Footnote 13. *See, e.g., Roberson v. Dale, 464 F. Supp. 680, 683 (M.D.N.C. 1979)* .

(n14)Footnote 14. *E.g., In re Community Med. Ctr., 623 F.2d 864, 867 (3d Cir. 1980)* .

(n15)Footnote 15. *Space Master Int'l, Inc. v. City of Worcester, 940 F.2d 16, 17-18 (1st Cir. 1991)* .

(n16)Footnote 16. *Governor's Island v. Eways, 1991 U.S. App. LEXIS 19695 (4th Cir. Aug. 23, 1991)* ; *Interstate Markings, Inc. v. Mingus Constructors, Inc., 941 F.2d 1010, 1014 (9th Cir. 1991)* ; *Space Master Int'l, Inc. v. City of Worcester, 940 F.2d 16, 17 (1st Cir. 1991)* .

(n17)Footnote 17. *Alewine v. City Council, 505 F. Supp. 880 (S.D. Ga. 1981)* , *rev'd on other grounds, 699 F.2d 1060 (11th Cir. 1983)* .

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CHAPTER 43 Damages *
A. Seeking Damages in Federal District Court

1-43 Federal Litigation Guide § 43.02

§ 43.02 Evaluating Law Governing Damages in Federal Court

[1] Applying Federal Law in Federal Question Cases

In cases in which jurisdiction is based on a federal question, particularly when the claim for relief is based on a federal statute or regulation, issues regarding damages generally are governed by federal law.

[2] Applying State Law in Diversity Cases

In diversity cases, state law governs damage awards because damages are a matter of substantive law. n1 Under *Erie Railway Co. v. Tompkins*, n2 federal courts must apply the conflict of laws rules of the state in which they sit to determine which state damages principles apply in federal diversity actions. n3

The *Erie* doctrine is rooted in a realization that it would be unfair for the result of litigation to depend on whether the suit is brought in state or federal court. n4

[3] Applying Federal Law in Review of Jury Awards

Although state law applies on issues of damages in diversity cases, federal law governs the role of the federal trial and appellate courts in reviewing jury verdicts and awards. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil ProcedureFederal & State InterrelationshipsErie DoctrineCivil ProcedureRemediesDamagesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 278-279, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989)* .

(n2)Footnote 2. *Erie Railway Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 11 Ohio Op. 246*

(1938) .

(n3)Footnote 3. *See* *Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)* (an action brought in federal court in Delaware based on breach of a New York contract presents a question of conflict of laws to be determined under the law of Delaware).

(n4)Footnote 4. *See* *Guaranty Trust Co. v. York, 326 U.S. 99, 109, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945)* .

(n5)Footnote 5. *Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 278-279, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989)* ; *Donovan v. Penn Shipping Co., 429 U.S. 648, 649-650, 97 S. Ct. 835, 51 L. Ed. 2d 112 (1977)* .

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CHAPTER 43 Damages *
A. Seeking Damages in Federal District Court

1-43 Federal Litigation Guide § 43.03

§ 43.03 Evaluating Law Governing Damages in Transferred Actions

[1] Considering Damages in Actions Transferred Based on Convenience

A district court may transfer any civil action to any other district or division where it might have been brought for the convenience of parties and witnesses, and in the interest of justice. n1 Thus, under the convenience-transfer statute, even though venue is proper in the court in which the plaintiff brought the action, in general the court is empowered to transfer the action to another federal forum if two requirements are met:

- The court must determine that transfer of the action will enhance the convenience of the parties and witnesses, and is in the interest of justice n2

- The proposed transferee district must be one in which the action "might have been brought" originally n3

In diversity cases, following a transfer for convenience, the court to which the action has been transferred generally must apply the same state law, including any applicable choice of law rules, that the transferor court would have applied had the action remained there. n4 Pursuant to the *Erie* doctrine, the transferor court, as a court sitting in diversity, generally would have applied the law, including the choice of law rules, of the state in which it is sitting. n5 A convenience transfer is merely a "housekeeping measure" that does not carry with it a change in the applicable law. n6 The statute deals with the "placement of litigation in the federal courts," and merely authorizes "a change of courtrooms," n7 not a change in applicable law. Damages issues, therefore, will be determined pursuant to the law applicable in the transferor district court.

Following a convenience transfer in a federal question case, the transferee court ordinarily should apply the law as interpreted by its own circuit, and should not be required to apply the precedent of the transferor circuit. n8 Accordingly, the law applicable in the transferee court governs damages in federal question cases.

[2] Considering Damages in Actions Transferred Based on Improper Venue

An action may be transferred from one district court to another in order to cure improper venue, provided the case is transferred to a district or division in which it could have been brought initially. n9 A district court has no power to transfer an action based on improper venue unless it has subject matter jurisdiction--that is, diversity, federal question,

or some other basis for subject matter jurisdiction over the action--and must dismiss the action if jurisdiction is lacking. n10 However, a district court may transfer the action to another district under Section 1406(a) whether or not the transferor court has personal jurisdiction over the defendant. n11

Following a transfer based on improper venue, "the transferee court should apply whatever law it would have applied had the action been properly commenced there," n12 including the choice of law rules of the state in which the transferee court sits. n13 Accordingly, damages will be determined pursuant to the law of the transferee court.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueFederal Venue TransfersGeneral OverviewCivil ProcedureVenueFederal Venue TransfersConvenience TransfersCivil ProcedureVenueFederal Venue TransfersImproper Venue TransfersCivil ProcedureFederal & State InterrelationshipsChoice of LawForum & PlaceCivil ProcedureFederal & State InterrelationshipsErie DoctrineCivil ProcedureRemediesDamagesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1404(a).*

(n2)Footnote 2. *Findley v. Blinken (In re Joint E. & S. Dists. Asbestos Litig.), 22 F.3d 755, 762 (7th Cir. 1994) .*

(n3)Footnote 3. *Van Dusen v. Barrack, 376 U.S. 612, 634, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964) .*

(n4)Footnote 4. *Van Dusen v. Barrack, 376 U.S. 612, 627, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964) .*

(n5)Footnote 5. *Erie R.R. v. Tompkins, 304 U.S. 64, 78-80, 58 S. Ct. 817, 82 L. Ed. 1188, 11 Ohio Op. 246 (1938) .*

(n6)Footnote 6. *Van Dusen v. Barrack, 376 U.S. 612, 636, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964) .*

(n7)Footnote 7. *Van Dusen v. Barrack, 376 U.S. 612, 627, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964) .*

(n8)Footnote 8. *EEOC v. Northwest Airlines, Inc., 188 F.3d 695, 700-701 (6th Cir. 1999) .*

(n9)Footnote 9. *28 U.S.C. § 1406(a).*

(n10)Footnote 10. *Grand Blanc Educ. Ass'n v. Grand Blanc Bd. of Educ., 624 F.2d 47, 49 (6th Cir. 1980) .*

(n11)Footnote 11. *Cameron v. Thornburgh, 983 F.2d 253, 257 (D.C. Cir. 1993) .*

(n12)Footnote 12. *Schaeffer v. Village of Ossining, 58 F.3d 48, 49 (2d Cir. 1995) .*

(n13)Footnote 13. *Adam v. J.B. Hunt Transp., Inc., 130 F.3d 219, 230 (6th Cir. 1997) .*

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CHAPTER 43 Damages *
A. Seeking Damages in Federal District Court

1-43 Federal Litigation Guide § 43.04

§ 43.04 Evaluating Law Governing Damages in Multidistrict Litigation Cases

[1] Consolidating Cases Under the Multidistrict Litigation Act

The Multidistrict Litigation Act n1 provides that "civil actions involving one or more common questions of fact ... may be transferred to any district for coordinated or consolidated pretrial proceedings." n2 The purpose of the Act is to promote "the convenience of parties and witnesses and ... the just and efficient conduct of such actions." n3 At the conclusion of pretrial proceedings in the transferee district court, each action is remanded to its original district for trial. n4

[2] Applying the Damages Laws of the Transferor Forum

In general, the choice of law rules that must be applied by the transferee court that receive cases under the multidistrict litigation statute are consistent with the rules to be applied by transferee courts that receive cases under the convenience-transfer statute. n5 Thus, in diversity-of-citizenship cases, the general rule is that the transferee court must apply the law that the transferor court would have applied; but in federal-question cases, the transferee court may apply the law of its own circuit.

In multidistrict litigation that has been transferred to a central forum for coordinated or consolidated pretrial proceedings, the transferee federal district court must apply the substantive state law of the transferor district, n6 including its choice of law rules. n7

This rule is designed to ensure that parties may not use a transfer to receive a result in federal court that would have been unavailable in the courts of the state in which the action was filed. It follows from these cases that the issue of damages, being one of substantive law, is to be determined according to the law which would be applied by the original district court in multidistrict litigation actions.

In cases of transferred federal claims, courts have held that while "the law of a transferor forum on a federal question ... merits close consideration, [it] does not have stare decisis effect in a transferee forum situated in another circuit." n8

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureVenueFederal Venue TransfersGeneral OverviewCivil ProcedureVenueFederal Venue TransfersConvenience TransfersCivil ProcedureVenueMultidistrict LitigationCivil ProcedureFederal & State InterrelationshipsChoice of LawForum & PlaceCivil ProcedureRemediesDamagesGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *28 U.S.C. § 1407.*

(n2)Footnote 2. *28 U.S.C. § 1407(a).*

(n3)Footnote 3. *Id.*

(n4)Footnote 4. *Id.*

(n5)Footnote 5. *28 U.S.C. § 1404(a).*

(n6)Footnote 6. *In re Silicone Gel Breast Implants Prods. Liab. Litig., 887 F. Supp. 1463, 1465 (N.D. Ala. 1995)* .

(n7)Footnote 7. *In re Nucorp Energy Sec. Litig., 772 F.2d 1486, 1492 (9th Cir. 1985)* .

(n8)Footnote 8. *In re Korean Air Lines Disaster, 829 F.2d 1171, 1175-1176 (D.C. Cir. 1987)* , *aff'd, 490 U.S. 122, 109 S. Ct. 1676, 104 L. Ed. 2d 113 (1989)* ("because there is ultimately a single proper interpretation of federal law, the attempt to ascertain and apply diverse circuit interpretations simultaneously is inherently self-contradictory"). *See also Wegbreit v. Marley Orchards Corp., 793 F. Supp. 965 (E.D. Wash. 1992)* ; *In re Litig. Involving Alleged Loss of Cargo, 772 F. Supp. 707 (D.P.R. 1991)* ; *Eckstein v. Balcor Film Investors, 740 F. Supp. 572 (E.D. Wis. 1990)* .

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CHAPTER 43 Damages *
A. Seeking Damages in Federal District Court

1-43 Federal Litigation Guide § 43.05

§ 43.05 Establishing Adequate Damages in Diversity Actions

[1] Determining Amount in Controversy Is Question of Federal Law

There is diversity jurisdiction only if the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs. n1

In a diversity case, the court must look to state law to determine the nature and extent of the damages to be awarded. n2 However, determination of the value of the matter in controversy for purposes of federal jurisdiction is determined by application of federal standards. n3 This conclusion derives from the fact that in establishing the standards for determining jurisdictional amount, a court is in actuality interpreting a federal statute, Section 1332(a). Hence, state law will dictate what is actually financially at stake in the case, and federal standards will determine whether those financial stakes are sufficient to satisfy the statutory requirement.

[2] Recovering Less Than Jurisdictional Amount

If a plaintiff who originally filed in federal court is finally adjudged to be entitled to recover less than the jurisdictional minimum, computed without regard to any set-off or counterclaim and exclusive of interests and costs, the trial court may both deny costs to the plaintiff and impose costs on the plaintiff. n4 However, such a penalty is discretionary. Courts have generally fashioned a bad-faith test before costs are assessed. n5

[3] Claiming Amount in Controversy in Good Faith

The damages claimed by the plaintiff will control in a diversity case for purposes of meeting the jurisdictional damages threshold of at least $75,000 if the claim for damages is apparently made in good faith. n6 A rebuttable presumption exists that the face of the complaint is a good faith representation of the actual amount in controversy. n7 It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. n8

[4] Failing to Meet Threshold Damages Based on Statutory or Contractual Cap on Damages

The clearest example of a case in which the damage claim fails to meet the "legal certainty" test is one in which by law, the allowable damages are capped at an amount below the jurisdictional minimum. Such a legally imposed limitation may derive either from a statute or a contractual agreement. Thus, a number of cases have indicated that a court has the

power to dismiss for want of jurisdiction after deciding that a limitation-of-liability clause in a contract (or a state statute) caps damages at less than the jurisdictional amount. n9

[5] Including Punitive Damages in Calculation of Threshold Damages

Punitive damages are properly considered in determining whether the amount in controversy exceeds the jurisdictional minimum. n10 Therefore, punitive and actual damages may be aggregated to meet the amount in controversy requirement. n11 In considering punitive damages in order to satisfy the jurisdictional minimum in a diversity case, a two-part inquiry is necessary:

- First, the plaintiff must establish that punitive damages are recoverable as a matter of governing substantive law. n12

- Second, the plaintiff must present some factual evidence of entitlement to punitive damages. n13

It is a question of law for the court, not for the jury, to decide whether a plaintiff has established that punitive damages are available. n14

Claims for punitive damages are subjected to closer scrutiny than claims for actual damages. n15 This is particularly true if the claim for punitive damages comprises the bulk of the amount in controversy and may have been asserted solely or primarily for the purpose of conferring jurisdiction. n16

[6] Proving Jurisdictional Damages in Diversity Cases

If the existence of the jurisdictional amount in controversy is disputed, the person asserting jurisdiction bears the burden of proof on the issue. Thus, a plaintiff who files in federal court bears the burden, and a defendant who seeks removal to federal court bears the burden. n17

If the plaintiff bears the burden, it is not a heavy one. A plaintiff need demonstrate only that it is not impossible that he or she will recover more than the jurisdictional amount. n18 If a defendant or the court challenges the plaintiff's allegations concerning the amount in controversy, the plaintiff must produce sufficient evidence to meet the requirements of the "legal certainty" test n19 by a preponderance of the evidence n20 supported by competent proof. n21 "Competent proof" has been defined as proof to a reasonable probability that jurisdiction exists. n22 Absolute certainty in valuation of the rights involved is not required n23 if an amount in controversy exceeding the jurisdictional minimum can be ascertained according to some realistic formula. n24

[7] Pleading Jurisdictional Amount

A complaint is fatally defective if it fails to contain a proper allegation of the amount in controversy. n25 In applying the "legal certainty" test, however, resort to matters outside the pleadings may be relied on in order to amplify the meaning of the complaint's allegations. n26

In addition, when the applicable jurisdictional grant imposes a jurisdictional minimum, defendants should also allege an amount in controversy in their counterclaims. n27

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyDeterminationsCivil ProcedureRemediesDamagesGeneral OverviewCivil ProcedureRemediesDamagesPunitive DamagesConstitutional

LawThe JudiciaryJurisdictionDiversityTortsDamagesPunitive DamagesAward CalculationsJurisdictional Amounts

FOOTNOTES:

(n1)Footnote 1. *28 U.S.C. § 1332(a).*

(n2)Footnote 2. *Horton v. Liberty Mut. Ins. Co., 367 U.S. 348, 352, 81 S. Ct. 1570, 6 L. Ed. 2d 890 (1961) .*

(n3)Footnote 3. *See Luckett v. Delta Airlines, Inc., 171 F.3d 295, 298 (5th Cir. 1999) .*

(n4)Footnote 4. *28 U.S.C. § 1332(b); Fischer v. First Chicago Capital Mkts., Inc., 195 F.3d 279, 285 (7th Cir. 1999) .*

(n5)Footnote 5. *See Dr. Franklin Perkins Sch. v. Freeman, 741 F.2d 1503, 1525 (7th Cir. 1984) .*

(n6)Footnote 6. *See St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-289, 58 S. Ct. 586, 82 L. Ed. 845 (1938) .*

(n7)Footnote 7. *Wolde-Meskel v. Vocational Instruction Project Community Servs., Inc., 166 F.3d 59, 63 (2d Cir. 1999) .*

(n8)Footnote 8. *St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-289, 58 S. Ct. 586, 82 L. Ed. 845 (1938) ; see Barrett v. Lombardi, 239 F.3d 23, 30-31 (1st Cir. 2001) .*

(n9)Footnote 9. *See Pratt Cent. Park Ltd. Partnership v. Dames & Moore, 60 F.3d 350, 353 (7th Cir. 1995) .*

(n10)Footnote 10. *J.W. Petroleum, Inc. v. Lange, 787 F. Supp. 975, 976 (D. Kan. 1992) .*

(n11)Footnote 11. *Watson v. Blankinship, 20 F.3d 383, 386 (10th Cir. 1994) .*

(n12)Footnote 12. *Cadek v. Great Lakes Dragaway, Inc., 58 F.3d 1209, 1212 (7th Cir. 1995) .*

(n13)Footnote 13. *Larkin v. Brown, 41 F.3d 387, 388-389 (8th Cir. 1994) .*

(n14)Footnote 14. *Kenebrew v. Connecticut Gen. Life Ins. Co., 882 F. Supp. 749, 752 (N.D. Ill. 1995) .*

(n15)Footnote 15. *Larkin v. Brown, 41 F.3d 387, 389 (8th Cir. 1994) .*

(n16)Footnote 16. *Anthony v. Security Pac. Fin. Servs., 75 F.3d 311, 315-318 (7th Cir. 1996) .*

(n17)Footnote 17. *Trimble v. Asarco, Inc., 232 F.3d 946, 959 (8th Cir. 2000) .*

(n18)Footnote 18. *Ahearn v. Fibreboard Corp., 162 F.R.D. 505, 522 (E.D. Tex. 1995) .*

(n19)Footnote 19. *St. Paul Reinsurance Co. v. Greenberg, 134 F.3d 1250, 1253 (5th Cir. 1998) .*

(n20)Footnote 20. *Trimble v. Asarco, Inc., 232 F.3d 946, 959 (8th Cir. 2000) .*

(n21)Footnote 21. *St. Paul Reinsurance Co. v. Greenberg, 134 F.3d 1250, 1253 (5th Cir. 1998) .*

(n22)Footnote 22. *Rexford Rand Corp. v. Ancel, 58 F.3d 1215, 1218 (7th Cir. 1995) .*

(n23)Footnote 23. *Tongkook Am., Inc. v. Shipton Sportswear Co., 14 F.3d 781, 784 (2d Cir. 1994) .*

(n24)Footnote 24. *Moore v. Betit, 511 F.2d 1004, 1006 (2d Cir. 1975) .*

(n25)Footnote 25. *We Care Hair Dev., Inc. v. Engen, 180 F.3d 838, 841 (7th Cir. 1999)* .

(n26)Footnote 26. *Giangrande v. Shearson Lehman/E.F. Hutton, 803 F. Supp. 464, 467 (D. Mass. 1992)* .

(n27)Footnote 27. *Iglesias v. Mutual Life Ins. Co., 156 F.3d 237, 242-243 (1st Cir. 1998)* , *cert. denied*, *528 U.S. 812 (1999)* .

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CHAPTER 43 Damages *
A. Seeking Damages in Federal District Court

1-43 Federal Litigation Guide § 43.06

§ 43.06 Pleading Damages

[1] Pleading Under Federal Rules of Civil Procedure

For federal question claims, federal law governs the nature of damages and the procedure for pleading. For claims based on diversity of citizenship or supplemental jurisdiction, state law governs the nature of the damages, while the procedure for pleading damages is governed by the Federal Rules of Civil Procedure. n1 A pleading setting forth a claim for relief must contain "a demand for judgment for the relief the pleader seeks." n2 Therefore, any affirmative pleading, whether a complaint, third-party complaint, or answer containing a cross-claim or counterclaim must contain a demand for judgment. The demand for judgment may be stated in general terms. For example, a single sum of money can be the requested relief sought for an act of negligence resulting in physical injury, pain of body and mind, and loss of business. n3 Demand for relief in the alternative or for several different types of relief is permitted. n4

[2] Establishing Limit for Default Judgments

The demand for judgment will not limit the relief that may be ordered by the court, except for awards arising from default judgments. A default judgment may not be different in kind or exceed the amount requested in the demand for judgment. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyDeterminationsCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedureRemediesDamagesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Parker v. Aetna Life & Cas., 791 F. Supp. 175, 178 (W.D. Mich. 1991)* .

(n2)Footnote 2. *Fed. R. Civ. P. 8(a)(3).*

(n3)Footnote 3. *See* Fed. R. Civ. P., Appendix of Forms, Form 9 (demand for judgment in the amount of $1,000.00 for bodily injury, pain and suffering, loss of business, and medical expenses).

(n4)Footnote 4. *Fed. R. Civ. P. 8(a).*

(n5)Footnote 5. *See Fed. R. Civ. P. 54(c).*

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CHAPTER 43 Damages *
A. Seeking Damages in Federal District Court

1-43 Federal Litigation Guide § 43.07

§ 43.07 Pleading General Damages

General damages do not need to be specially pleaded, and may be supported simply by the facts alleged in a claim. n1 Other damages (for example, special damages, liquidated damages, and damages claimed pursuant to statutory authority), however, must be specially pleaded.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesDamagesGeneral OverviewCivil ProcedureRemediesDamagesGeneral DamagesCivil ProcedureRemediesDamagesSpecial Damages

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 8(a).*

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CHAPTER 43 Damages *
A. Seeking Damages in Federal District Court

1-43 Federal Litigation Guide § 43.08

§ 43.08 Pleading Punitive Damages

As a general rule, a plaintiff need not specifically state a claim for punitive damages in the pleadings. As punitive damages are not special damages, they do not need to be specifically pleaded in federal complaints.

A plaintiff should, however, allege that defendant acted with a culpable state of mind sufficient to justify an award of punitive damages. A finding of malice usually justifies a punitive damages award, as does "willful and wanton misconduct," "intentional misconduct," or "reckless disregard for the rights of others when such conduct is tantamount to "evil intent." n1

In addition to stating the facts of the case and alleging the applicable state of mind of defendant, plaintiff's complaint must state a claim for non-punitive damages, as punitive damages do not constitute a separate cause of action under Federal Rule 54(b). n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsHeightened Pleading RequirementsGeneral OverviewCivil ProcedureRemediesDamagesGeneral OverviewCivil ProcedureRemediesDamagesPunitive Damages

FOOTNOTES:
(n1)Footnote 1. 1 L. Schlueter & K. Redden, Punitive Damages 102 (The Michie Co. 2d ed. 1989). *See, e.g., Bremenkamp v. Beverly Enterprises-Kansas, Inc., 762 F. Supp. 884 (D. Kan. 1991)* .

(n2)Footnote 2. *Mason v. Texaco, Inc., 948 F.2d 1546 (10th Cir. 1991)* , *cert. denied, 504 U.S. 910 (1992)* .

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CHAPTER 43 Damages *
A. Seeking Damages in Federal District Court

1-43 Federal Litigation Guide § 43.09

§ 43.09 Pleading Special Damages

[1] Stating Special Damages Specifically

Items of special damages must be "specifically stated" in a claim for relief. n1 When a claim may result in the recovery of both general and special damages, general damages are defined as the actual damages that are the natural consequence of the wrongful act, n2 while special damages are those that, although resulting from the commission of the wrong, are unusual for the claim in question and not normally associated with the claim. n3

[2] Pleading Special Damages May Be Required in Certain Cases

In some states, special damages are required to be stated in all defamation claims, n4 in libel per quod claims, n5 and in slander claims. n6 Attorney's fees have been held to constitute special damages in some settings. n7

[3] Pleading Special Damages With Specificity Gives Opposing Party Notice

Heightened notice of special damage claims that accompany general damage claims is required because special damages are unusual and not normally associated with the claim presented. n8 The requirement that special damages essential to claims be specifically stated serves not only to provide greater notice, but also to permit groundless claims to be discovered and dismissed earlier in litigation. n9

There is no "hard and fast" formula for determining whether an averment of special damages has been stated with sufficient particularity under Rule 9(g), n10 although conclusory allegations will be insufficient, n11 as will allegations based on mere speculation or conjecture. n12

Allegations of special damage must be sufficient to permit a defending party to begin preparing a defense. Since the purpose of Rule 9(g) is to give adequate notice to a defending party of the alleged damages, the more natural or likely or probable the damages are in connection to the claimed breach of duty, the less particularity is needed. n13

Once items are deemed special damages, an indispensable allegation in a demand for relief is at least a general statement of the causes giving rise to the special damages. n14 Special damages should be set forth in an itemized form rather than in a lump sum. For example, when plaintiffs alleged special damages of $500,000 in lost profits from several businesses, the court required the plaintiffs to amend the complaint to itemize the amount of damage suffered by each

business. n15 Itemization, however, is not required beyond the point at which it becomes too evidentiary. n16 Further, if the injuries are of a nature as to preclude precise allegations as to the amount of special damages at the time of the initial pleading, relief will not be denied simply because the damage or loss computation or manner of proof was not alleged with certainty. n17 In these instances, it will be sufficient for a claimant to state the general nature of the special damages, in anticipation that the damage issue will be further explored in discovery. n18

[4] Acting on Insufficient Statement of Relief

A failure to plead special damages pursuant to Rule 9(g) may be raised in a number of ways:

- **Motion for more definite statement.** Inadequate pleading of special damages could, at least theoretically, be raised by a Rule 12(e) motion for a more definite statement. n19 However, a motion for a more definite statement should be granted only when "a pleading to which a responsive pleading is permitted is so vague and ambiguous that a party cannot reasonably be required to frame a responsive pleading." n20

- **Motion to dismiss.** A violation of Rule 9(g), a failure to adequately plead special damages, could theoretically be raised by a motion to dismiss for failure to state a claim on which relief may be granted. n21 There is only one common exception, only one type of claim in which courts frequently note that special damages are an essential element of a valid claim for relief. n22 In defamation per quod actions, a motion to dismiss would lie if the pleader failed to adequately allege special damages. n23 However, even when a valid claim for relief is not stated because of the failure to adequately plead special damages, a motion to dismiss under Rule 12(b)(6) will not be granted until the pleader is given leave to amend his or her pleading. n24

- **Motion for summary judgment.** A motion for summary judgment n25 may be brought for failure to adequately allege special damages, but only in the same limited circumstances as would support a Rule 12(b)(6) motion to dismiss. As with a motion to dismiss, an opportunity to amend would be granted before the rendering of any actual summary judgment. Summary judgment would be granted only if the pleader refused to amend or was incapable of alleging the required special damages. n26

- **Motion in limine or motion to exclude evidence.** A party who wishes to complain or preserve a complaint about the inadequate pleading of special damages must, at the very least, object at trial to the introduction of evidence concerning those special damages. Failure to object amounts to a waiver of any complaint concerning the inadequate pleading. The matter will be deemed to have been tried by consent or implied consent, and treated as if it had been properly raised in the pleadings.

[5] Failing to Plead Special Damages Properly

Recovery of special damages may be denied because of a violation of the pleading requirements of Rule 9(g). n27 However, it is important to note that in virtually all of the cases stating that special damages may be denied for the failure to adequately plead them, the claim for the special damages was raised for the first time in a post-trial motion. n28 or at trial, n29 particularly when evidence of those special damages was subject to a vigorous objection. n30

When the inadequate pleading of special damages is raised in a pretrial motion or at pretrial, the most usual remedy is to order the pleader to amend his or her pleading. Furthermore, if evidence on inadequately pleaded damages is offered at trial and there is no objection, the matter is deemed tried by consent and the inadequate pleading is no obstacle to the recovery of inadequately pleaded special damages. n31 Therefore, it is only when the inadequately pleaded special damages surprise a party at trial and the surprised party objects, or when the unpleaded special damages are raised for the first time in a post-trial motion, that inadequately pleaded special damages are likely to be denied. In almost every

other case, even when the failure to adequately allege special damages renders the entire claim for relief defective, the courts will give the defaulting pleader an opportunity to amend. n32

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsHeightened Pleading RequirementsGeneral OverviewCivil ProcedureRemediesDamagesGeneral OverviewCivil ProcedureRemediesDamagesSpecial Damages

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 9(g).*

(n2)Footnote 2. *Cotton Bros. Baking Co. v. Industrial Risk Insurers, 102 F.R.D. 964, 966 (W.D. La. 1984) .*

(n3)Footnote 3. *Avitia v. Metropolitan Club of Chicago, Inc., 49 F.3d 1219, 1226 (7th Cir. 1995) .*

(n4)Footnote 4. *Woodmont Corp. v. Rockland Ctr. Partnership, 811 F. Supp. 1478, 1484 (D. Kan. 1993) .*

(n5)Footnote 5. *Management Servs. v. Health Management Sys., 907 F. Supp. 289, 294 (C.D. Ill. 1995) .*

(n6)Footnote 6. *Thompson v. Kiekhaefer, 71 F.R.D. 115, 117 (E.D. Wis. 1976) .*

(n7)Footnote 7. *National Liberty Corp. v. Wal-Mart Stores, Inc. 120 F.3d 913, 916 (8th Cir. 1997) .*

(n8)Footnote 8. *Brennan v. Minneola, 723 F. Supp. 1442, 1444 (M.D. Fla. 1989) .*

(n9)Footnote 9. *Brown & Williamson Tobacco Corp. v. Jacobson, 713 F.2d 262, 270 (7th Cir. 1983) .*

(n10)Footnote 10. *Spelson v. CBS, Inc., 581 F. Supp. 1195, 1201 (N.D. Ill. 1984) , aff'd without opinion, 757 F.2d 1291 (7th Cir. 1985) .*

(n11)Footnote 11. *KBT Corp. v. Ceridian Corp., 966 F. Supp. 369 (E.D. Pa. 1997) .*

(n12)Footnote 12. *Everco Indus., Inc. v. O.E.M. Prods. Co., 63 F.R.D. 662, 666 (N.D. Ill. 1974) .*

(n13)Footnote 13. *Suarez Matos v. Ashford Presbyterian Community Hosp., Inc., 4 F.3d 47, 51 (1st Cir. 1993) .*

(n14)Footnote 14. *Burlington Transp. Co. v. Josephson, 153 F.2d 372, 377 (8th Cir. 1946) .*

(n15)Footnote 15. *Kuenzell v. United States, 20 F.R.D. 96, 100 (N.D. Cal. 1957) .*

(n16)Footnote 16. *Kuenzell v. United States, 20 F.R.D. 96, 100 (N.D. Cal. 1957) .*

(n17)Footnote 17. *Action Repair, Inc. v. ABC, Inc., 776 F.2d 143, 150 (7th Cir. 1985) .*

(n18)Footnote 18. *Everco Indus., Inc. v. O.E.M. Prods. Co., 63 F.R.D. 662, 666 (N.D. Ill. 1974) .*

(n19)Footnote 19. *Lebeda v. A.H. Robins Co., 101 F.R.D. 689, 690-691 (D. Me. 1984) .*

(n20)Footnote 20. *Fed. R. Civ. P. 12(e).*

(n21)Footnote 21. *Fed. R. Civ. P. 12(b)(6).*

(n22)Footnote 22. *See KBT Corp. v. Ceridian Corp., 966 F. Supp. 369, 374, 378 (E.D. Pa. 1997) .*

(n23)Footnote 23. *Woodmont Corp. v. Rockland Ctr. Partnership, 811 F. Supp. 1478, 1484 (D. Kan. 1993)* .

(n24)Footnote 24. *KBT Corp. v. Ceridian Corp., 966 F. Supp. 369, 374, 378 (E.D. Pa. 1997)* .

(n25)Footnote 25. *Fed. R. Civ. P. 56.*

(n26)Footnote 26. *See Parker v. Aetna Life & Cas., 791 F. Supp. 175, 178 (W.D. Mich. 1991)* .

(n27)Footnote 27. *United Indus. v. Simon-Hartley, Ltd., 91 F.3d 762, 764-765 (5th Cir. 1996)* .

(n28)Footnote 28. *44 Liquormart, Inc. v. Rhode Island, 940 F. Supp. 437, 439-440 (D.R.I. 1996)* .

(n29)Footnote 29. *National Liberty Corp. v. Wal-Mart Stores, Inc., 120 F.3d 913, 917 (8th Cir. 1997)* .

(n30)Footnote 30. *See Campbell v. Thornton, 644 F. Supp. 103, 105 & n.4 (W.D. Mo. 1986)* .

(n31)Footnote 31. *See Niedland v. United States, 338 F.2d 254, 258-259 (3d Cir. 1964)* .

(n32)Footnote 32. *See Action Repair, Inc. v. ABC, Inc., 776 F.2d 143, 149-150 (7th Cir. 1985)* .

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CHAPTER 43 Damages *
A. Seeking Damages in Federal District Court

1-43 Federal Litigation Guide § 43.10

§ 43.10 Pleading Statutory Damages

Some state statutes require that certain types of damages be specially pleaded. n1 A party claiming such damages in federal court under a pendant state law claim must therefore specifically plead these damages.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionPendent ClaimsCivil ProcedureRemediesDamagesGeneral OverviewCivil ProcedureRemediesDamagesSpecial Damages

FOOTNOTES:
(n1)Footnote 1. *Alewine v. City Council, 505 F. Supp. 880 (S.D. Ga. 1981) , rev'd on other grounds, 669 F.2d 1060 (11th Cir. 1983) .*

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CHAPTER 43 Damages *
A. Seeking Damages in Federal District Court

1-43 Federal Litigation Guide § 43.11

§ 43.11 Obtaining Damages Information Through Disclosure and Discovery

[1] Disclosing Computation of Damages

At the outset of a case and without waiting for a formal discovery request, each party is required to disclose to the other a computation of any category of damages claimed by the disclosing party. The disclosing party also must make available to the other party the documents or other evidentiary material, not privileged or protected from disclosure, on which the computation is based, including materials relating to the nature and extent of injuries suffered. n1

[2] Disclosing Best Information Available

A party claiming damages must have some evidence that an injury occurred and some basis for calculating the damages the party suffered as the result of that injury before filing suit. n2 The party making such a claim, therefore, has the obligation, when it makes its initial disclosures, to disclose to the other parties the best information then available to it concerning that claim, however limited and potentially changing it may be. n3

The initial disclosures may be sufficiently specific if they, coupled with other information made available to the other parties earlier during the course of the proceedings, provide the other parties with an adequate basis to evaluate the injury the disclosing party claims to have suffered. Moreover, the initial disclosure of the amount of damages the party allegedly suffered may be sufficient even though the disclosing party failed to disclose the precise method by which it calculated the specified amount, if the method of calculation is appropriately the subject of expert evidence and the parties are under the obligation to provide disclosures of expert evidence in the future. n4 Under such circumstances, the disclosing party's obligation to disclose the method of calculating damages would be controlled by the expert testimony disclosure rules. n5

[3] Making Discovery Requests for Damages Information

Mandatory disclosure provisions do not preclude the parties from making further traditional discovery requests about the information that is the subject of mandatory disclosure. n6 Therefore, it is proper for a party to seek discoverable material or testimony relevant to damages. Thus, in one district court case, interrogatories were permitted that sought the amount of the defendant's gross sales and total revenues to determine punitive damages, as well as the defendant's authorized and issued stock and its par value, even though, as the court pointed out, par value may be a bad indicator of net worth. n7 Another district court has similarly held that it is proper for a defendant to request, in interrogatories, that

the plaintiff provide a specific description of any non-pecuniary relief it seeks in the case. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresGeneral OverviewCivil ProcedureRemediesDamagesGeneral OverviewCivil ProcedureRemediesDamagesGeneral DamagesCivil ProcedureRemediesDamagesSpecial Damages

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 26(a)(1)(C).*

(n2)Footnote 2. *Fed. R. Civ. P. 11(b).*

(n3)Footnote 3. *See StairMaster Sports/Med. Prods., Inc. v. Groupe Procycle, Inc., 182 F.R.D. 117, 119 (D. Del. 1998) .*

(n4)Footnote 4. *See Pine Ridge Recycling, Inc. v. Butts County, 889 F. Supp. 1526, 1527 (M.D. Ga. 1995) .*

(n5)Footnote 5. *See Fed. R. Civ. P. 26(a)(2).*

(n6)Footnote 6. *See Fed. R. Civ. P. 26(a)(5).*

(n7)Footnote 7. *Wauchop v. Domino's Pizza, Inc., 138 F.R.D. 539, 550 (N.D. Ind. 1991) .*

(n8)Footnote 8. *Continental Ill. Nat'l Bank & Trust Co. v. Caton, 136 F.R.D. 682, 687 (D. Kan. 1991) .*

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CHAPTER 43 Damages *
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1-43 Federal Litigation Guide § 43.12

§ 43.12 Calculating Damages

A host of practical dollars-and-cents questions may arise in judicial "fine-tuning" of a damages calculation above and beyond pinpointing an out-of-pocket loss or placing a reasonable value on intangible losses. To actually make a plaintiff whole, or prevent making the plaintiff more than whole, the court may have to consider a number of collateral issues. These issues include:

- Prejudgment interest
- Costs and litigation expenses
- Tax issues
- Reduction of future damages elements to present value
- The impact of inflation
- Issues relating to the involvement of foreign parties and currency in the lawsuit

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesGeneral OverviewCivil ProcedureRemediesDamagesGeneral DamagesCivil ProcedureRemediesDamagesSpecial Damages

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1-43 Federal Litigation Guide § 43.13

§ 43.13 Calculating Interest as Portion of Damages

Prejudgment interest, generally awarded from the date the claim for relief accrued through the date of judgment, aims to compensate plaintiff for the loss of the use of money while the claim was being adjudicated. n1 State law determines whether a successful litigant in a diversity action is entitled to prejudgment interest. n2 Conversely, the availability of prejudgment interest in an action arising under a federal statute is generally governed by federal and not state law. n3 Yet, federal courts have applied state law on prejudgment interest even to damages claims under federal statutes.

In *SEC v. Musella*, n4 the court declared that prejudgment interest on damages awarded pursuant to the federal securities law is a matter of judicial discretion and the court could use the forum state's legal rate of interest to calculate the prejudgment interest award. The federal trial courts generally have great discretion in awarding prejudgment interest, n5 both as to the rate used, and the time period for which the award is made. n6

Finally, the practitioner should note the following warning regarding prejudgment interest. Because the Supreme Court views prejudgment interest as "an element of [plaintiff's] complete compensation," it has held that a motion under *Rule 59(e) of the Federal Rules of Civil Procedure* to alter a judgment to include a discretionary award of prejudgment interest raises a question sufficiently tied to reconsideration of the merits of the litigation that such a Rule 59(e) motion may vitiate a previously filed notice of appeal. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesGeneral OverviewCivil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesJudgment InterestPrejudgment Interest

FOOTNOTES:
(n1)Footnote 1. *See West Virginia v. United States, 479 U.S. 305, 310 n.2, 107 S. Ct. 702, 93 L. Ed. 2d 639 (1987)* .

(n2)Footnote 2. *Kona Enters. v. Estate of Bishop, 229 F.3d 877, 883, 887 (9th Cir. 2000)* .

(n3)Footnote 3. *Poleto v. Conrail Corp., 826 F.2d 1270, 1274 (3d Cir. 1987)* (citing cases).

(n4)Footnote 4. *SEC v. Musella 748 F. Supp. 1028, 1042-1043 (S.D.N.Y. 1989) , aff'd, 898 F.2d 138 (2d Cir.*

1990) , *cert. denied,* *498 U.S. 816 (1990)* .

(n5)Footnote 5. *Kaufman Co. v. Lantech, Inc., 926 F.2d 1136 (Fed. Cir. 1991)* ; *Reeled Tubing, Inc. v. M/V Chad G, 794 F.2d 1026 (5th Cir. 1986)* ; *Danna v. New York Tel. Co., 755 F. Supp. 615 (S.D.N.Y. 1991)* ; *SEC v. Musella, 748 F. Supp. 1028 (S.D.N.Y. 1989)* , *aff'd,* *898 F.2d 138 (2d Cir. 1990)* .

(n6)Footnote 6. Independent Bulk Transp., Inc. v. Vessel "Morania Abaco," *676 F.2d 23, 26 (2d Cir. 1982)* ; *Royal Ins. Co. of Am. v. S/S Robert E. Lee, 756 F. Supp. 757 (S.D.N.Y. 1991)* .

(n7)Footnote 7. *Osterneck v. Ernst & Whinney, 489 U.S. 169, 175, 109 S. Ct. 987, 103 L. Ed. 2d 146 (1989)* .

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1-43 Federal Litigation Guide § 43.14

§ 43.14 Calculating Future Damages Awards

[1] Discounting Interest Earned on Lump Sum

Plaintiffs often receive damage awards that include payments attributable to future losses or amounts which would have been received in the future. Damages for lost future earnings, for example, are generally paid in one lump sum rather than in a stream over time. This means that the plaintiff receiving a future damages award may invest the entire award at the conclusion of the litigation and may therefore earn interest on money the plaintiff would not yet have received in the absence of the award. Because of this "time value of money" issue, the Supreme Court has held that "in all cases where it is reasonable to suppose that interest may safely be earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award." n1

Although the Supreme Court has said that the discount rate used should be based on the rate of interest that "the best and safest investments" would earn over the period covered by the award, n2 it has not designated one rate as preferred. In fact, the Court has noted that there is no single mandated method for determining present value. n3 Regardless of the method or rate used, however, a judge has an obligation to prevent the present value determination from becoming unnecessarily complicated or prolonged. The judge may therefore recommend one or more calculation methods to the jury, so long as the jury's function is not preempted. n4 Once the trier of fact has determined the appropriate discount rate, it should apply the rate to each of the estimated installments in the stream of future damages. It should then add the discounted installments to determine the total damages award. n5

[2] Taking Future Inflation Into Account

Discounting to present value alone does not make a lump-sum payment economically equal in value to a stream of future payments. To equalize the lump sum payment with a stream of future payments, inflation must be taken into account. In other words, consideration must be given to the fact that as a consequence of inflation the future payments would presumably be larger than they would have needed to be if they were payments designed to compensate the plaintiff for the loss which preceded calculation of the judgment.

Another alternative would be to use an inflation-free discount rate. In this case, no inflation-based increase would be made to the stream of earnings; the recipient of the sum (discounted at a low, inflation-free rate) could invest the money at a higher prevailing interest rate, which is assumed to compensate for cost-of-living (inflation) increases that the worker would have received.

As in the case of discounting, there is no consensus as to how inflation should be accounted for. Courts may choose to calculate future damages on an increasing scale, on the basis that they would have increased over time due to inflation. Another alternative would be for the plaintiff to present expert testimony as to what future inflation would be. Or courts may decide that inflation and discount rates will cancel each other out, and inflation will not be accounted for. What is certain, however, is that the way inflation is treated should affect the discount rate used. Both methods should yield the same results. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesGeneral OverviewCivil ProcedureRemediesDamagesCompensatory DamagesCivil ProcedureRemediesDamagesMonetary DamagesCivil ProcedureRemediesDamagesPunitive DamagesCivil ProcedureRemediesDamagesSpecial Damages

FOOTNOTES:
(n1)Footnote 1. *Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 537, 103 S. Ct. 2541, 76 L. Ed. 2d 768 (1983)* (quoting *Chesapeake & Ohio Ry. Co. v. Kelly, 241 U.S. 485, 36 S. Ct. 630, 60 L. Ed. 1117 (1916))* . *See also Conde v. Starlight I, Inc., 103 F.3d 210, 215-216 n.8 (1st Cir. 1997)* (while "the most detailed inquiry can at best produce an approximate" percentage with which to reduce an award to present value, "absent extraordinary circumstances the fact finder normally should essay some measure of 'present value' reduction' ").

(n2)Footnote 2. *Chesapeake & Ohio Ry. Co. v. Kelly, 241 U.S. 485, 491, 36 S. Ct. 630, 60 L. Ed. 1117 (1916)* .

(n3)Footnote 3. *St. Louis Southwestern Ry. Co. v. Dickerson, 470 U.S. 409, 412, 105 S. Ct. 1347, 84 L. Ed. 2d 303 (1985)* .

(n4)Footnote 4. *Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330, 342, 108 S. Ct. 1837, 100 L. Ed. 2d 349 (1988)* . *See also McKay v. Wiltel Commun. Sys., 87 F.3d 970, 977-978 (8th Cir. 1996)* (court did not err in failing to instruct jury to reduce award to present value as defendant's closing argument sufficiently stressed importance of using present value to calculate award).

(n5)Footnote 5. *Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 538, 103 S. Ct. 2541, 76 L. Ed. 2d 768 (1983)* .

(n6)Footnote 6. *See In re Connecticut Nat'l Bank, 928 F.2d 39, 42 (2d Cir. 1991)* .

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CHAPTER 43 Damages *
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1-43 Federal Litigation Guide § 43.15

§ 43.15 Converting Foreign Currency In Damages Calculations

It is a commonly accepted principle that money judgments must be rendered in the currency of the forum. n1 Thus, in American courts, when damages are owed in foreign currency, they are calculated in that currency, then the damage award is converted to American currency. Two general rules govern the proper conversion: n2

- **Breach-day rule.** Plaintiff recovers the value in dollars that the currency had on the day of the defendant's breach n3

- **Judgment day rule.** Plaintiff recovers the value of the currency on the day of the court's judgment. n4

Two main approaches to determine the applicable rule have evolved. The first approach focuses on the place of payment. If on the date of breach the payment of a debt was due in a foreign country, in that country's currency, the judgment-day rule applies. If the payment was to be made in the United States, the breach-day rule applies. n5

The second approach to the conversion issue focuses on the jurisdiction in which the cause of action arose. If, at the time of breach, the plaintiff had a cause of action under American law, the breach day rule applies. The judgment-day rule applies only when the cause of action arose wholly under foreign law. Most courts, however, have found that the jurisdiction approach conforms better with the weight of authority. n6

As currencies fluctuate, the rule applied may significantly affect the amount of recovery. For example, under the breach-day rule, the creditor will benefit from an appreciation of the dollar but will receive a smaller recovery if the value of the dollar has dropped. Under the judgment-day rule, the reverse is true.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesGeneral OverviewCivil ProcedureRemediesDamagesCompensatory DamagesCivil ProcedureRemediesDamagesMonetary DamagesCivil ProcedureRemediesDamagesPunitive DamagesCivil ProcedureRemediesDamagesSpecial Damages

FOOTNOTES:

(n1)Footnote 1. *See Sainz Gonzalez v. Banco de Santander-Puerto Rico, 932 F.2d 999 (1st Cir. 1991)* .

(n2)Footnote 2. *Zimmermann v. Sutherland, 274 U.S. 253, 255-256 47 S. Ct. 625, 71 L. Ed. 1034 (1927)* .

(n3)Footnote 3. *See Hicks v. Guinness, 269 U.S. 71, 46 S. Ct. 46, 70 L. Ed. 168 (1925)* .

(n4)Footnote 4. *See Die Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U.S. 517, 47 S. Ct. 166, 71 L. Ed. 383 (1926)* .

(n5)Footnote 5. *See, e.g., Trinh v. Citibank, N.A., 623 F. Supp 1526, 1537 (D.C. Mich. 1985)* , *aff'd, 850 F.2d 1164 (6th Cir. 1988)* ("[W]here a debt in foreign currency is payable in a foreign country, the judgment day rule applies. ... [H]owever, where the obligation is payable in the United States, conversion is proper at the rate current at the time of breach. ...").

(n6)Footnote 6. *See, e.g., In re Good Hope Chem. Corp., 747 F.2d 806, 811 (1st Cir. 1984)* .

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1-43 Federal Litigation Guide § 43.16

§ 43.16 Proving Damages

[1] Establishing Extent of Damages

The burden of establishing the existence and extent of damages generally rests with the person seeking those damages. n1 Once damages are so pleaded, a defendant may assert mitigation of damages as an affirmative defense to the claim. At this point, however, the burden of proof shifts to the defendant. The defendant must show, in a responsive pleading, that plaintiff failed to take reasonable steps to mitigate damages. n2

[2] Proving General Damages

The law of damages accords plaintiffs considerable leeway in establishing damages through a variety of methods of inference. However, courts demand that damages proof rises above the level of speculation.

The general rule holds that while the amount of recoverable damages is a question of fact, the measure of damages upon which the factual computation is based is a question of law. n3

[3] Proving Lost Profits

Some jurisdictions do not allow damages awards for lost profits in commercial contexts. n4 In those jurisdictions that do allow lost profits awards, the standard of proof generally includes a requirement that plaintiffs establish the existence and extent of lost profits with "reasonable" or "rational" certainty. n5 This often means that plaintiffs can meet their burden by providing the "best evidence available." n6 Regardless of the standard used, however, courts often base awards of lost profits on estimates or projections. These figures may be based on past profits, n7 projections from sales of similar products, n8 subsequent comparable business experience, n9 or even comparable business experience of others n10 in the industry as a whole. n11

Plaintiffs often present these projections and estimates through the testimony of experts. Possible experts include persons in the same business as plaintiff and professional consultants and economists. Experts must do more than just testify as to a final damages figure. They must show that their projections or estimates proceed logically from plaintiff's business records. n12

[4] Proving Punitive Damages

A finding of malice usually justifies a punitive damages award, as does "willful and wanton misconduct," "intentional misconduct," or "reckless disregard for the rights of others when such conduct is tantamount to "evil intent." n13 Some states even allow punitive damages in cases of gross negligence, fraud, or oppression. n14 Simple negligence alone, however, is not enough to justify an award of punitive damages. n15

When the complaint asserts a claim that will sustain an award of punitive damages if proven, a majority of federal courts permit discovery of the net worth and financial condition of the defendant, without requiring the plaintiff to establish a prima facie case on the issue of punitive damages. n16 Financial information is relevant to punitive damages claims because one of the questions the finder of fact frequently considers in arriving at the amount of its award is how high the award should be, considering the defendant's financial condition, to punish it for engaging in the misconduct that led to the punitive damages award and to deter it from doing so again in the future. n17 In addition to the defendant's financial condition, the amount of an award is also limited by the *Due Process Clause of the Fourteenth Amendment*. n18

[5] Proving Liquidated Damages

When deciding on the enforceability of a liquidated damages provision, courts generally consider the following: n19

- The difficulty of proving that a loss has occurred or of establishing the amount of the loss
- Whether the amount sought is a reasonable estimate of difficult to ascertain damages

The primary issue of proof concerns whether the liquidated damages provision is designed to compensate for a hard-to-quantify loss, or whether the provision is instead intended to be a "penalty to spur timely performance." n20

Most courts hold that the party seeking to avoid a liquidated damages clause bears the burden of proving that the clause should be invalidated. n21 Since liquidated damages must compensate for loss, it may be determined that an otherwise reasonable liquidated damages provision is unenforceable if no loss is sustained. n22

[6] Using Damages Experts

One of the best ways to buttress the plaintiff's evidence of losses is through expert testimony. Indeed, these days a court almost takes it for granted that a plaintiff with a significant claim will have one or more damages experts.

In fact, the court often plays more than a passive role in the process of using a damages expert. First, *Rule 706 of the Federal Rules of Evidence* gives the court the power to select its own, court-appointed expert. Second, discovery of the expert's opinion and its basis, under *Rule 26(b)(4) of the Federal Rules of Civil Procedure*, is a vital and often hotly contested phase of litigation, which is subject to the court's rulings. Finally, of course, just what expert testimony is deemed admissible--even which experts are allowed to testify--is up to the court.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesGeneral OverviewCivil ProcedureRemediesDamagesGeneral DamagesEvidenceProcedural ConsiderationsBurdens of ProofAllocationEvidenceTestimonyExpertsGeneral OverviewTortsDamagesPunitive DamagesGeneral OverviewTortsDamagesPunitive DamagesAward CalculationsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See* Schiller v. *Schmidt, Inc. v. Nordisco Corp., 969 F.2d 410, 415 (7th Cir. 1992)* ("people who want

damages have to prove them"); *Worthem v. Gillette Co., 774 F. Supp. 514, 517 (N.D. Ill. 1991)* ("plaintiff has the burden of showing a reasonable basis for computation of all damages"); *Riofrio Anda v. Ralston Purina Co., 772 F. Supp. 46 (D.P.R. 1991)* (plaintiff must establish existence of damages).

(n2)Footnote 2. *See Kensington Rock Island v. American Eagle Historic Partners, 921 F.2d 122 (7th Cir. 1990)* (defendant required to affirmatively plead mitigation or defense waived); *Allied Int'l, Inc. v. International Longshoremen's Ass'n, 814 F.2d 32, 38-39 (1st Cir. 1987)* ("it is the defendants who bear the burden of proving by a fair preponderance that an injured party failed to take reasonable steps to hold down its losses").

(n3)Footnote 3. *Wolff & Munier Inc. v. Whiting-Turner Contracting Co., 946 F.2d 1003, 1009 (2d Cir. 1991)* ; United States *ex rel. N. Maltese & Sons v. Juno Constr. Corp., 759 F.2d 253, 255 (2d Cir. 1985)* .

(n4)Footnote 4. *See Handi Caddy, Inc. v. American Home Prods. Corp., 557 F.2d 136 (8th Cir. 1977)* (allowing recovery for loss of profits under Missouri law); *CCMS Pub. Co. v. Dooley-Maloof, Inc., 645 F.2d 33 (10th Cir. 1981)* (allowing loss of profits as a proper element of damages under Oklahoma law). *But see Cargill, Inc. v. Taylor Towing Serv., Inc., 642 F.2d 239 (8th Cir. 1981)* (expected profits of a commercial business are generally too remote, speculative, and uncertain to be a proper element of damages under Missouri Law, but profits may be recoverable where evidence brings issue out of the realm of speculation); *Horizons, Inc. v. Avco Corp., 714 F.2d 862 (8th Cir. 1983)* (expected profits are not recoverable under South Dakota law because they are too remote, speculative and uncertain).

(n5)Footnote 5. *See Uniroyal Inc. v. Rudkin-Wiley Corp., 939 F.2d 1540 (Fed. Cir. 1991)* .

(n6)Footnote 6. *Miami Int'l Realty Co. v. Paynter, 841 F.2d 348 (10th Cir. 1988)* (documentary evidence unnecessary if testimony is sufficiently credible and detailed).

(n7)Footnote 7. *E.g., Security Dev. Co. v. Fedco, Inc., 23 Utah 2d 306, 462 P.2d 706 (1969)* .

(n8)Footnote 8. *E.g., United Cal. Bank v. Eastern Mountain Sports, Inc., 546 F. Supp. 945 (D. Mass. 1982)* .

(n9)Footnote 9. *E.g., Lewis v. Mobil Oil Corp., 438 F.2d 500 (8th Cir. 1971)* .

(n10)Footnote 10. *Randy's Studebaker Sales, Inc. v. Nissan Motor Corp., 533 F.2d 510 (10th Cir. 1976)* ; *Walker v. City of Kansas City, Mo., 697 F.Supp. 1088 (W.D. Mo. 1988)* .

(n11)Footnote 11. *Cf. Bob Willow Motors, Inc. v. General Motors Corp., 872 F.2d 788 (7th Cir. 1989)* .

(n12)Footnote 12. Complex calculations may call for the use of charts or schedules, which are admissible under *Fed. R. Evid. 1006* and *803(6)* as summaries of voluminous business records, or under *Fed. R. Evid. 701* and *702* as opinion testimony (provided that the underlying data is introduced into evidence and is available for inspection by opposing counsel).

(n13)Footnote 13. 1 L. Schlueter & K. Redden, Punitive Damages 102 (The Michie Co. 2d ed. 1989). *See, e.g., Bremenkamp v. Beverly Enterprises-Kansas, Inc., 762 F. Supp. 884 (D. Kan. 1991)* .

(n14)Footnote 14. *See, e.g., Glasscock v. Armstrong Cork Co., 946 F.2d 1085 (5th Cir. 1991)* (finding of gross negligence justifies award of punitive damages under Texas law); *Hatrock v. Edward D. Jones & Co., 750 F.2d 767 (9th Cir. 1984)* (Idaho state law permits granting of punitive damages in cases of fraud); *Dugan v. EMS Helicopters, Inc., 915 F.2d 1428 (10th Cir. 1990)* (gross negligence justifies assessment of punitive damages under state law of New Mexico).

(n15)Footnote 15. 1 L. Schlueter & K. Redden, Punitive Damages 393-394 (The Michie Co. 2d ed. 1989).

(n16)Footnote 16. *See Caruso v. Coleman Co., 157 F.R.D. 344, 348 (E.D. Pa. 1994)* .

(n17)Footnote 17. *Vollert v. Summa Corp., 389 F. Supp. 1348, 1349 (D. Haw. 1975)* .

(n18)Footnote 18. *See State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S. Ct. 1513, 1519-1520, 155 L. Ed. 2d 585 (2003)* .

(n19)Footnote 19. *Space Master Int'l, Inc. v. City of Worcester, 940 F. 2d 16, 17-18 (1st Cir. 1991)* .

(n20)Footnote 20. *Space Master Int'l, Inc. v. City of Worcester, 940 F. 2d 16, 19 (1st Cir. 1991)* .

(n21)Footnote 21. *See Zidell, Inc. v. Pacific N. Marine Corp., 744 F. Supp. 982, 987 (D. Or. 1990)* .

(n22)Footnote 22. *Space Master Int'l, Inc. v. City of Worcester, 940 F. 2d 16, 18 (1st Cir. 1991)* (quoting *Priebe & Sons, Inc. v. United States, 332 U.S. 407, 413, 68 S. Ct. 123, 92 L. Ed. 32 (1947))* .

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CHAPTER 43 Damages *
A. Seeking Damages in Federal District Court

1-43 Federal Litigation Guide § 43.17

§ 43.17 Conducting Separate Trials on Issues of Liability and Damages

For convenience, to avoid prejudice, to expedite litigation, or to reduce expense, a 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. n1

Cases where liability and damages may be effectively separated often have been held to be proper subjects for bifurcation. n1.1 A number of courts have indicated that the bifurcation of liability and damages is a decision that must be made on a case-by-case basis. n2 Bifurcation of liability and damages is more likely to be granted when both issues are complex, there would be no significant overlap of issues that would result in duplication of effort, and bifurcation would encourage judicial economy and efficiency because it could narrow the claims for which damages are recoverable. n3

Rule 42(b) authorizes presentation of evidence relating to punitive damages after the jury's determination of other issues, thereby insulating the jury from considering that evidence while determining liability and compensatory damages. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSeparate TrialsCivil ProcedureRemediesDamagesGeneral OverviewCivil ProcedureRemediesDamagesPunitive Damages

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 42(b).*

(n2)Footnote 1.1. *See Princeton Biochems., Inc. v. Beckman Instruments, Inc., 180 F.R.D. 254, 257-259 (D.N.J. 1998) .*

(n3)Footnote 2. *See Lis v. Robert Packer Hospital, 579 F.2d 819, 824 (3d Cir. 1978) , cert. denied, 439 U.S. 955 (1978) .*

(n4)Footnote 3. *Princeton Biochems., Inc. v. Beckman Instruments, Inc., 180 F.R.D. 254, 257-259 (D.N.J. 1998) .*

(n5)Footnote 4. *See Mattison v. Dallas Carrier Corp., 947 F.2d 95, 110 (4th Cir. 1991)* .

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CHAPTER 43 Damages *
A. Seeking Damages in Federal District Court

1-43 Federal Litigation Guide § 43.18

§ 43.18 Awarding Damages Through General and Special Verdicts

Federal juries either return unexplained general verdicts or special verdicts consisting of responses to specific fact questions submitted by the court, or they use a mixed procedure whereby a general verdict will be reached and special interrogatories answered at the same time. The trial court has considerable discretion in deciding which procedure to use, n1 and how to phrase the questions put to the jury. n2 Even in diversity cases, federal law governs verdict procedures. n3

A general verdict for damages must conform to the pleadings, evidence, and instructions in the case. Although in a general verdict a jury is not necessarily required to set out its computation of damages, it must assess the total damages with reasonable certainty, or make a sufficient finding of the damages data on which the court may make an assessment. n4 The general verdict has the advantage of certainty, but suffers from the disadvantage of being either all wrong or all right. n5

The special verdict is authorized by Rule 49 as a more detailed alternative to the more commonly used general verdict. n6 There are situations in which special verdicts or interrogatories are necessary. For example, in a diversity personal injury action in which state law requires itemization of or places limits on certain types of damages, there must be a special verdict. Under the Age Discrimination and Employment Act, n7 willfulness must be specially found to entitle the plaintiff to liquidated damages in an amount equal to the plaintiff's award for back pay and benefits. Counsel should urge that the form of the verdict be settled before closing arguments and that form should be used by counsel in closing arguments to guide the jury through it.

Damages issues are often complex, and are often the subject of jury compromise. Defendants may generally look with favor on special verdicts and interrogatories insofar as these devices may reduce a jury's tendency to overestimate difficult to calculate damages or to compromise on difficult damages issues by returning an unexplained lump sum verdict favorable to plaintiff. Defendants may also view a series of interrogatories as deadening the jury's interest in plaintiff's case and posing a series of obstacles for plaintiff to surmount. Nonetheless, these devices must always be evaluated with the particular facts of a given case in mind.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCivil ProcedureRemediesDamagesGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See Chiarello v. Domenico Bus Serv., Inc., 542 F.2d 883 (2d Cir. 1968)* ; *Martin v. Texaco, Inc., 726 F.2d 207 (5th Cir. 1984)* ; *U.S. Fire Ins. Co. v. Pressed Steel Tank Co., 852 F.2d 313 (7th Cir. 1988)* . For a detailed discussion of verdicts and jury deliberations, see ch. 40 *supra*.

(n2)Footnote 2. *Cann v. Ford Motor Co., 658 F.2d 54 (2d Cir. 1981)* , *cert. denied, 456 U.S. 960 (1982)* ; *Dreiling v. General Elec. Co., 511 F.2d 768 (5th Cir. 1974)* (listing factors trial judge should consider in composing special interrogatories to jury).

(n3)Footnote 3. *Jewell v. Holzer Hosp. Found., Inc., 899 F.2d 1507 (6th Cir. 1990)* .

(n4)Footnote 4. *See Johnson v. Consolidated Rail Corp., 797 F.2d 1440 (7th Cir. 1986)* (damages are discretionary with the jury and the verdict will be upheld if it is within the scope of the evidence presented at trial); *In re Wolverton Assoc., 909 F.2d 1286 (9th Cir. 1990)* (trier of fact's damages calculation must find support in the record).

(n5)Footnote 5. *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co., 370 U.S. 19, 29-30, 82 S. Ct. 1130, 8 L. Ed. 2d 305 (1962)* .

(n6)Footnote 6. *See Guidry v. Kem Mfg. Co., 598 F.2d 402, 405 (5th Cir. 1979)* , *cert. denied, 445 U.S. 929 (1980)* .

(n7)Footnote 7. *29 U.S.C. § 626(B)*.

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CHAPTER 43 Damages *
A. Seeking Damages in Federal District Court

1-43 Federal Litigation Guide § 43.19

§ 43.19 Considering Taxation of Damages Awards

[1] Excluding Award From Taxable Income Is Exception

Section 61(a) of the Internal Revenue Code states, "[e]xcept as otherwise provided ..., gross income means all income from whatever source derived." n1 Any income is therefore presumed to be gross income, unless the taxpayer can show that it fits into one of the specific exclusions of the Code. n2 Certain damage awards, usually those for injuries of a personal nature, fit into those exclusions.

[2] Evaluating Taxation of Personal Injury Awards

Section 104(a)(2) of the Internal Revenue Code provides that gross income does not include damages received "on account of personal injuries or sickness." n3 Courts have interpreted "personal injuries" in this context as including nonphysical consequences of a physical injury. n4

[3] Evaluating Taxation of Workers' Compensation Awards

Amounts received as workers' compensation for an occupational sickness or injury are fully exempt from tax if they are paid under a workers' compensation act or a statute in the nature of a workers' compensation act. n5 A statute that does not restrict benefits to work-related injuries is not considered a worker's compensation act. n6

[4] Evaluating Taxation of Business-Related Damages

Damage awards designed to compensate plaintiffs for lost profits are fully taxable as ordinary income. n7 Since the lost profits represent amounts that have never been taken into the income stream, they are not deductible when they are lost or fail to be realized. Recovery for damage to goodwill, however, is a return of capital, and a plaintiff that has established a tax "basis" for goodwill may treat the damages as tax free until they exceed the basis. n8

[5] Evaluating Taxation of Punitive Damages

Punitive damages awarded on account of physical injury or sickness are excludable from gross income under *I.R.C. § 104(a)(2)*. Other punitive damages are taxable. n9

[6] Evaluating Taxation of Attorney's Fees Award

Attorney's fees recovered by an individual are generally considered to be personal income and not excludable from gross income. For example, attorney's fees recovered in personal injury cases are not excludable, although *I.R.C. § 104* allows exclusion of the injury damages from gross income. Attorney's fees are deductible, however, if they are paid in litigation involving the activities of a trade or business or if they are paid for a claim resulting in taxable damage compensation. n10 Section 162 does not allow deduction of legal expenses that are only indirectly related to a taxpayer's business.

[7] Instructing the Jury Regarding Taxation

A defendant in a federal personal injury case is entitled to an instruction that damages awards for personal injury are not subject to federal income taxation. n11

Most states, however, have held that jury instructions should not include mention of taxation. n12 Questions have thus arisen regarding jury instructions in diversity cases. The majority of circuits have reached the conclusion that whether to give or withhold a taxability instruction is a question of state law, which they are bound to follow. n13

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesGeneral OverviewCivil ProcedureRemediesDamagesPunitive DamagesTax LawFederal Income Tax ComputationGeneral OverviewTax LawFederal Income Tax ComputationGross Income (IRC sec. 61)

FOOTNOTES:
(n1)Footnote 1. *26 U.S.C. § 61(a).*

(n2)Footnote 2. *Rickel v. C.I.R., 900 F.2d 655 (3d Cir. 1990) .*

(n3)Footnote 3. *26 U.S.C. § 104(a)(2).*

(n4)Footnote 4. *See Threlkeld v. C.I.R., 848 F.2d 81, 84 (6th Cir. 1988) .*

(n5)Footnote 5. *I.R.C. § 104(a)(1).*

(n6)Footnote 6. *See Take v. Commissioner, 804 F.2d 553, 557 (9th Cir. 1986)* (a firefighter was not allowed to exclude disability retirement benefits from gross income since disability benefit was not tied only to work-related injuries).

(n7)Footnote 7. *Gilbertz v. United States, 808 F.2d 1374 (10th Cir. 1987)* ; *Schnadig Corp. v. Gaines Manufacturing Co., 620 F.2d 1166 (6th Cir. 1980)* ; *Taracido v. Commissioner, 72 T.C. 1014 (1979) .*

(n8)Footnote 8. *Gilbertz v. United States, 808 F.2d 1374 (10th Cir. 1987)* ; *Schnadig Corp. v. Gaines Manufacturing Co., 620 F.2d 1166 (6th Cir. 1980)* ; *Taracido v. Commissioner, 72 T.C. 1014 (1979) .*

(n9)Footnote 9. *See Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 75 S. Ct. 473, 99 L. Ed. 483 (1955) .*

(n10)Footnote 10. *26 U.S.C.A. § 162. See also* L. Frolik, *Federal Tax Aspects of Injury, Damage and Loss* (1987).

(n11)Footnote 11. *Norfolk & W. Ry. Co. v. Liepelt, 444 U.S. 490, 492, 100 S. Ct. 755, 62 L. Ed. 2d 689 (1980) .*

(n12)Footnote 12. *See Vasina v. Grumman Corp., 644 F.2d 112 (2d Cir. 1981)* (applying New York law);

Gander v. FMC Corp., 892 F.2d 1373 (8th Cir. 1990) , *cert. denied*, *498 U.S. 878 (1990)* (applying Missouri law).

(n13)Footnote 13. *See, e.g., Adams v. Fuqua Indus., Inc., 820 F.2d 271 (8th Cir. 1987)* .

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CHAPTER 43 Damages *
A. Seeking Damages in Federal District Court

1-43 Federal Litigation Guide §§ 43.20 through 43.30

[Reserved]

§§ 43.20[Reserved]

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CHAPTER 43 Damages *
B. Seeking Review of Damages Awards

1-43 Federal Litigation Guide § 43.31

§ 43.31 Moving for New Trial Based on Excessive Award of Damages

An award of excessive damages may serve as legitimate grounds for a new trial under Rule 59. n1 No fixed standard applies to the grant or denial of Rule 59 relief; rather, the applicable standard applied by the trial court in its exercise of discretion varies with the grounds for which relief is sought. n2 A district court has broad discretion to grant a new trial when necessary to prevent injustice. n3

As a general rule, courts will not disturb jury verdicts in the absence of extreme circumstances, such as a case of manifest injustice or abuse of the jury's function. Courts will sustain jury verdicts if reasonable bases exist to uphold the verdict. In ruling on a Rule 59 motion, the court will search the record for evidence that could reasonably lead the jury to reach its verdict, drawing all reasonable inferences in favor of the verdict winner. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureRemediesDamagesGeneral OverviewCivil ProcedureAppealsReviewabilityGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251, 61 S. Ct. 189, 85 L. Ed. 147 (1940)* .

(n2)Footnote 2. *Henry v. Hess Oil Virgin Islands Corp., 163 F.R.D. 237, 242 (D.V.I. 1995)* .

(n3)Footnote 3. *Government Fin. Servs. v. Peyton Place, 62 F.3d 767, 774 (5th Cir. 1995)* .

(n4)Footnote 4. *Nissim v. McNeil Consumer Prods. Co., 957 F. Supp. 600, 602-604 (E.D. Pa. 1997)* , *aff'd without opinion, 135 F.3d 765 (3d Cir. 1997)* .

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CHAPTER 43 Damages *
B. Seeking Review of Damages Awards

1-43 Federal Litigation Guide § 43.32

§ 43.32 Reducing Excessive Damages By Remittitur

[1] Electing to Remit a Portion of the Damages Awarded In Lieu of New Trial

When the court finds that a verdict is excessive, it may overturn the verdict and order a new trial outright, or may order a new trial conditioned on the verdict winner's refusal to accept a "remittitur." n1 Remittitur is defined as the process by which a court compels a plaintiff to choose between the reduction of an excessive verdict and a new trial. n2 If the plaintiff rejects the specified reduction in the amount of damages, the court must grant a new trial; the court does not have the option of entering judgment for the reduced amount without the plaintiff's consent. n3

When ruling on a motion for a new trial on the ground of excessiveness, the judge should use his or her independent judgment, after weighing all the evidence and other relevant factors, to determine whether the verdict is against the clear weight of the evidence or otherwise results in a miscarriage of justice. n4

[2] Evaluating Whether Award is Excessive in Federal Question Cases

The determination of whether or not an award is excessive is a question of law. n5 In a federal question case, a district court will ordinarily deem an award excessive if it "shocks the judicial conscience." n6 Courts have also used similar language, such as "when one's sense of justice is outraged." n7 Alternatively, it has been said that the question in whether the amount of damages found by the jury is so excessive and exorbitant as to show passion and prejudice on the part of the jury. n8

[3] Evaluating Whether Award is Excessive in Diversity Cases

In cases in which the federal rule for determining damages is furnished by state law, such as is the case in diversity actions, the federal rule for determining excessiveness is also furnished by state law. n9 However, once state substantive law is used to determine the excessiveness of the award, "federal case law [will] then [determine] whether a new trial or remittitur should be granted." n10

Many states use a standard for excessiveness that is generally similar to the federal standard. n11 Although the Supreme Court has not specifically addressed the application of state statutory limits on damages in diversity cases, appellate courts have held that the application of state limits by district courts does not violate the *Seventh Amendment*. n12

[4] Determining Amount of Remittitur

Once a court has determined that a verdict is excessive, it must decide the amount to be remitted. Three approaches have been applied to the difficult issue of determining the proper amount of remittitur:

- Awarding the lowest amount of damages supported by the record (the "minimum recovery" rule) n13
- Awarding the highest legal amount of damages (the "maximum recovery" rule) n14
- Awarding damages that the court deems reasonable n15

Because the remittitur procedure allows the court to simply "lop off" excess verdict amounts, n16 setting the final judgment amount at anything less than the maximum legal award may violate the *Seventh Amendment*. n17

In defense of the "maximum recovery" rule, the Second Circuit has argued that "[t]o obtain a 'fair' judgment on damages in a case such as this, the law has traditionally deferred to the decision of a jury of laymen drawn from the community at large, and not to the 'seasoned judgment' of the trial judge." n18 On the other hand, while the "minimum recovery" standard could arguably be viewed as an undue invasion of the jury's province, it has been defended as necessary "in order to protect the party obliged to pay against a judge's assessment of damages." n19

[5] Accepting Remittitur Precludes Subsequent Appeal of Remittitur Order

It is well established that when a party agrees to remittitur, that party may not thereafter appeal the remittitur order. n20 Despite the general prohibition on appeal of a remittitur, however, if the defendant argues on appeal that items were inappropriately included in the damage award, the plaintiff may be entitled to raise the inappropriateness of a remittitur that he or she has accepted. n21

Finally, the decision of whether to order a remittitur "clearly falls within the discretion of the trial judge, whose decision cannot be disturbed by [an appellate court] absent a manifest abuse of discretion." n22

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentAdditurs & RemittitursRemittitursCivil ProcedureRemediesDamagesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Gasperini v. Center for Humanities, 518 U.S. 415, 116 S. Ct. 2211, 2222, 135 L. Ed. 2d 659 (1996)* .

(n2)Footnote 2. *Earl v. Bouchard Transp. Co., 917 F.2d 1320, 1328 (2d Cir. 1990)* .

(n3)Footnote 3. *Cline v. Wal-Mart Stores, Inc., 144 F.3d 294, 305-306 (4th Cir. 1998)* .

(n4)Footnote 4. *Bates v. Hensley, 414 F.2d 1006, 1011 (8th Cir. 1969)* .

(n5)Footnote 5. *Mazyck v. Long Island R. R. Co., 896 F. Supp. 1330, 1336 (E.D.N.Y. 1995)* .

(n6)Footnote 6. *BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568, 116 S. Ct. 1589, 1595, 134 L. Ed. 2d 809 (1996)* .

(n7)Footnote 7. *See Dagnello v. Long Island R.R., 289 F.2d 797, 802, 806 (2d Cir. 1961)* .

(n8)Footnote 8. *See Gorsalitz v. Olin Mathieson Chem. Corp., 429 F. 2d 1033, 1042-1043 (5th Cir. 1970)* .

(n9)Footnote 9. *Pescatore v. Pan Am. World Airways, Inc., 97 F.3d 1, 18 (2d Cir. 1996)* .

(n10)Footnote 10. *Pescatore v. Pan Am. World Airways, Inc., 97 F.3d 1, 18 (2d Cir. 1996)* (citing *TDS, Inc. v. Shelby Mut. Ins. Co., 760 F.2d 1520, 1530 n.8 (11th Cir. 1985)* ; *Quality Foods, Inc. v. U.S. Fire Ins. Co., 715 F.2d 539, 542 n.2 (11th Cir. 1983)* ; *Lowe v. General Motors Corp., 624 F.2d 1373, 1383 (5th Cir. 1980)* .

(n11)Footnote 11. *See Gasperini v. Center for Humanities, 518 U.S. 415, 116 S. Ct. 2211, 2218, 135 L. Ed. 2d 659 (1996)* .

(n12)Footnote 12. *Boyd v. Bulala, 877 F.2d 1191, 1196 (4th Cir. 1989)* .

(n13)Footnote 13. *See Meissner v. Papas, 35 F. Supp. 676, 677 (E.D. Wis. 1940)* , *modified on other grounds, 124 F.2d 720 (7th Cir. 1941)* .

(n14)Footnote 14. *See Osburn v. Anchor Labs., 825 F.2d 908, 919 (5th Cir. 1987)* , *cert. denied, 485 U.S. 1009* .

(n15)Footnote 15. *See Lanfranconi v. Tidewater Oil Co., 376 F.2d 91, 97 (2d Cir. 1967)* , *cert. denied, 389 U.S. 951 (1967)* .

(n16)Footnote 16. *See Dimick v. Schiedt, 293 U.S. 474, 485, 55 S. Ct. 296, 79 L. Ed. 603 (1935)* .

(n17)Footnote 17. *See Earl v. Bouchard Transp. Co., 917 F.2d 1320, 1328-1330 (2d Cir. 1990)* .

(n18)Footnote 18. *Earl v. Bouchard Transp. Co., 917 F.2d 1320, 1329 (2d Cir. 1990)* .

(n19)Footnote 19. *Meissner v. Papas, 35 F. Supp. 676, 677 (E.D. Wis. 1940)* .

(n20)Footnote 20. *Spence v. Board of Educ., 806 F.2d 1198, 1206 n.6 (3d Cir. 1986)* .

(n21)Footnote 21. *See Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821, 839 (7th Cir. 1978)* , *cert. denied, 440 U.S. 930 (1979)* .

(n22)Footnote 22. *Spence v. Board of Educ. of Christina School Dist., 806 F.2d 1198, 1201 (3d Cir. 1986)* (citing cases).

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CHAPTER 43 Damages *
B. Seeking Review of Damages Awards

1-43 Federal Litigation Guide § 43.33

§ 43.33 Additur Generally Not Permissible

[1] Defining Additur

Additur is the practice of denying a plaintiff's motion for a new trial based on a claim of an insufficient amount of damages awarded by a jury, conditioned on the defendant's agreement to pay damages in an amount greater than the verdict returned by the jury. For example, a plaintiff who is unhappy with the amount of damages awarded by the jury moves in the trial court for a new trial based on the insufficiency of the verdict. The trial judge, agreeing with the argument but wanting to avoid the cost and delay involved in granting a new trial, even one limited to the issue of damages, denies the motion in favor of the defendant. The denial, however, is conditioned on the defendant's agreement to pay damages in an amount greater than that awarded by the jury. Alternatively, the court's decision could be structured to grant the plaintiff's motion for a new trial unless the defendant agrees to pay an amount greater than that awarded by the jury. In either case, additur is the method by which a court would require the defendant to pay a sum in addition to that awarded by the jury.

Inadequate damage cases often arise when a plaintiff is awarded some types of damages but not others. For example, when a jury finds liability by the defendant but does not make an award for pain and suffering, courts may, but are not required to, order a new trial; the underlying argument is that the verdict is contrary to law and contrary to the weight of the evidence. n1

[2] Additur Is Constitutionally Impermissible

With some exceptions, when a verdict is inadequate, a federal trial court may not constitutionally offer additur and is limited to the option of ordering a new trial. n2 In *Dimick v. Schiedt*, the Supreme Court found that the practice of additur violated the *Seventh Amendment's* proscription against "reexamining" facts tried by a jury. n3 The Court reached this conclusion, because it found that the practice of additur did not exist at common law and therefore violated the clause of the *Seventh Amendment* prohibiting the reexamination of any fact found by a jury at common law. n4

[3] Evaluating the Limited Use of Additur

Despite the Supreme Court's well established rejection of additur on constitutional grounds, its application has not died out altogether. Under certain circumstances, and not necessarily with notable distinction, federal courts of appeal have on various occasions approved of the use of additur, or techniques strikingly similar to additur, in addressing claims of

insufficient damages. n5

A question remains as to the applicability of the constitutional prohibition against additur in cases where there is no constitutional right to a jury trial, but a jury trial is provided under some statutory authority. For example, in a condemnation case in which a trial judge ordered additur, the Fifth Circuit upheld the trial court on two distinct bases: n6

- First, because the right to a jury trial in a condemnation case is not derived from the *Seventh Amendment*
- Second, because there was no basis in the case for the granting of a new trial

Not all federal courts agree with this outcome, either distinguishing their facts, n7 or disagreeing outright with the Fifth Circuit's conclusion. n8

A practice analogous to additur may properly be employed when damages are incorrectly low as a matter of law. For example, use of additur has been upheld in the following circumstances:

- The judge instructed the jury to credit the defendant a sum certain as a matter of law, and that ruling was incorrect as a matter of law n9
- The increase in damages was required simply to correct a clerical error n10
- The amount of damages was not in issue or was stipulated n11

In these situations, because the jury's error is one of law rather than fact, the *Seventh Amendment* does not act as a bar. Such cases do not technically involve additur, because the correct figure is divined as a matter of law, and the plaintiff is not made to choose between the increased damage award and a new trial. One court has held that additur may be permissible when the plaintiff requests the additur and the additur was based on a state law. n12

Additur may be appropriate if nominal damages are required by appropriate statute and have not been awarded, n13 although if nominal damages are not absolutely required, their award may well be considered impermissible additur. n14 The rationale for this rule is clear: "It would be a mere formality to order a partial new trial limited to the issue of damages when the court could immediately thereafter grant summary judgment for the undisputed amount." n15 An interesting question arises whether a court, on appeal or on a motion for a new trial, may change the percentage of liability of a plaintiff or a defendant. Because the proposed change would increase the percentage of liability of the defendant, it would effectively act as an additur, and as such, would seem to violate the Supreme Court's proscription of the use of additur. Nevertheless, in special circumstances the Seventh Circuit Court of Appeals ordered additur in a case in which it determined the district court had improperly apportioned the comparative negligence of the parties. Distinguishing *Dimick*, the Court noted: "This rule is triply inapplicable in this case: we have the additur conditional on the plaintiff's consent; the amount of damages is not in dispute; there is no jury trial in Federal Tort Claims Act cases." n16

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentAdditurs & RemittitursAdditursCivil ProcedureRemediesDamagesGeneral OverviewConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

FOOTNOTES:

(n1)Footnote 1. *Zarow-Smith v. New Jersey Transit Rail Operations, 953 F. Supp. 581, 591 (D.N.J. 1997)* .

(n2)Footnote 2. *Dimick v. Schiedt, 293 U.S. 474, 486-487, 55 S. Ct. 296, 79 L. Ed. 603 (1935)* .

(n3)Footnote 3. *Dimick v. Schiedt, 293 U.S. 474, 482-483, 55 S. Ct. 296, 79 L. Ed. 603 (1935)* .

(n4)Footnote 4. *U.S. Const. amend. VII*, cl. 2.

(n5)Footnote 5. *See TCBY Sys. v. RSP Co., Inc., 33 F.3d 925, 930-931 (1994)* .

(n6)Footnote 6. *United States v. Kennesaw Mountain Battlefield Ass'n, 99 F.2d 830, 833-835 (5th Cir. 1938)* , *cert. denied, 306 U.S. 646 (1939)* .

(n7)Footnote 7. *See, e.g., United States v. 93.970 Acres of Land, 258 F.2d 17, 31 (7th Cir. 1958)* , *rev'd on other grounds, 360 U.S. 328, 3 L. Ed. 1275 (1959)* .

(n8)Footnote 8. *See United States v. 340 Acres of Land, 54 F. Supp. 457, 459 (S.D. Ga. 1944)* .

(n9)Footnote 9. *Mumma v. Reading Co., 247 F. Supp. 252, 260 (E.D. Pa. 1965)* .

(n10)Footnote 10. *Zarow-Smith v. New Jersey Transit Rail Operations, 953 F. Supp. 581, 590-591 (D.N.J. 1997)* .

(n11)Footnote 11. *See Jones v. Wal-Mart Stores, Inc., 870 F.2d 982, 985-986 (5th Cir. 1989)* (when plaintiff stipulates to amount of damages, plaintiff waives right to jury verdict on amount; plaintiff's argument that trial court's action constitutes additur requiring new trial is not valid); *see also Liriano v. Hobart Corp., 170 F.3d 264, 272-273 (2d Cir. 1999)* (district court adjusted jury's damage award to include hospital bill that was undisputed and that manifestly should have been part of jury's damage calculations; such adjustment was not true additur, because district judge had not divined figure and then made defendants choose between increased damage award and new trial).

(n12)Footnote 12. *McCoy v. Wean United, Inc., 67 F.R.D. 495, 498 (D. Tenn. 1975)* (applying Tennessee law permitting suggestion of additur).

(n13)Footnote 13. *See Gibeau v. Nellis, 18 F.3d 107, 111 (2d Cir. 1994)* .

(n14)Footnote 14. *See Gentile v. County of Suffolk, 926 F.2d 142, 155 (2d Cir. 1991)* .

(n15)Footnote 15. *Taylor v. Green, 868 F.2d 162, 165 (5th Cir. 1989)* , *cert. denied, 493 U.S. 841 (1989)* .

(n16)Footnote 16. *Davis v. United States, 716 F.2d 418, 430 (7th Cir. 1983)* .

* Chapter 43 was rewritten in 2002 by Andrew E. Westley, Esq., of San Francisco, California.

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CHAPTER 43 Damages *
B. Seeking Review of Damages Awards

1-43 Federal Litigation Guide § 43.34

§ 43.34 Appealing Damages Awards

[1] Evaluating the Standard of Review

Great deference is paid to the trial court's factual findings in the area of damages. n1 Damages are treated as findings of fact and reviewed under the clearly erroneous standard. n2 This rule is applied to the trial court's conclusions regarding both the amount n3 and the apportionment n4 of compensatory and punitive damages. n5 Factors in mitigation of damages are also questions of fact to be reviewed under the clearly erroneous standard. n6 The review of a district court's findings as to damages in a bench trial under the clearly erroneous standard should not be confused with the review of the trial judge's rulings regarding acceptable damages made following a motion for a new trial in a jury trial.

[2] Specific Findings Required

Specific findings must be made regarding the issue of damages. Appellate courts do not want the entire damages award presented as a lump sum. Instead, they expect the total amount of damages to be itemized and an amount assigned to each individual element of damages. n7 Specific findings regarding damages must also be made in default judgments. n8 If the trial court fails to specify the basis for the award, thereby making informed review impossible, the appellate court may find it necessary to remand for further findings. For example, remand may be required if:

- The reviewing court is unable to tell how or whether the damages were reduced to present value n9
- It is impossible to tell if the trial court considered the proper factors in mitigation of damages n10
- Two items of damages appear to overlap n11
- The award appears to be excessive or inadequate, and the reviewing court cannot determine how the trial court arrived at the final figure n12
- The reviewing court is unable to determine the propriety of the award n13

However, if the record as a whole provides a sufficient basis for appellate review of the award of damages, the court is unlikely to remand even if a damages award is not broken down. n14 If the total award seems proper in light of the totality of the facts presented, the reviewing court may be reluctant to remand for itemization of the award. n15

[3] Reviewing a Trial Judge's Award of Punitive Damages

If no constitutional issue is raised, punitive damages awards are reviewed under an abuse-of-discretion standard. n16 However, when constitutional issues are raised on appeal, a *de novo* standard of review is required. n17

[4] Reducing Excessive Punitive Damages on Appeal

Appellate courts may, on review, reduce the amount of punitive damages awarded, provided that the award is "clearly excessive." n18 In determining whether a punitive damages award is clearly excessive, federal courts look to four factors: n19

- The nature and enormity of the wrong
- The financial status of the defendant
- The potential liability of the defendant resulting from multiple claims
- Whether the jury's award is out of line with awards in analogous cases

[5] Constitutional Challenges to Punitive Damages Awards

Punitive damages "have long been a part of traditional state tort law." n20 Under the traditional common-law approach, the amount of such an award is "initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable." n21

The common-law method for assessing punitive damages does not in itself violate due process since there is nothing so inherently unfair in the process as to make it *per se* unconstitutional. Although unlimited jury or judicial discretion may invite extreme results bordering on the unconstitutional, the Supreme Court has determined that it is not necessary to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." n22 Rather, all that is required, is adequate guidance from the court when the case is tried to a jury and general adherence to reasonable procedures and review. n23

Due process requires the availability of judicial review of the *amount* of a punitive damages award, n24 and the Due Process Clause prohibits punitive damages awards that are "grossly excessive." n25 A *de novo* standard of review is required when reviewing the constitutionality of a punitive damages award. n26

When reviewing awards of punitive damages under the due process clause of the *Federal Constitution's Fourteenth Amendment*, courts must consider three guideposts: n27

- The degree of reprehensibility of the defendant's misconduct
- The disparity between the actual or potential harm suffered by the plaintiff and the punitive damages awarded
- The difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases

The Supreme Court held that punitive damages cannot be based a jury's desire to punish the defendant for harming nonparties to the litigation. n28 In a maritime action involving an oil spill, the Supreme Court held that punitive

damages should be reasonably predictable in severity, and the punitive damages award was reduced to create an even ratio between compensatory and punitive damages. n29 The rational of the decision may be limited to maritime cases.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesGeneral OverviewCivil ProcedureRemediesDamagesPunitive DamagesCivil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsStandards of ReviewClearly Erroneous ReviewTortsDamagesPunitive DamagesAward CalculationsAppellate & Posttrial ReviewTortsDamagesPunitive DamagesAward CalculationsConstitutional Requirements

FOOTNOTES:
(n1)Footnote 1. *Vermont Microsystems, Inc. v. Autodesk, Inc., 88 F.3d 142, 151 (2d Cir. 1996)* .

(n2)Footnote 2. *Hayes v. United States, 899 F.2d 438, 450 (5th Cir. 1990)* .

(n3)Footnote 3. *Cowan v. Prudential Ins. Co., 852 F.2d 688, 689-690 (2d Cir. 1988)* .

(n4)Footnote 4. *Soto v. United States, 11 F.3d 15 (1st Cir. 1993)* .

(n5)Footnote 5. *Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1198 (6th Cir. 1988)* .

(n6)Footnote 6. *Sellers v. Delgado College, 902 F.2d 1189, 1194 (5th Cir. 1990)* , *cert. denied*, *498 U.S. 987 (1990)* , *reh'g denied*, *498 U.S. 1075 (1991)* .

(n7)Footnote 7. *Cole v. United States, 861 F.2d 1261, 1264 (11th Cir. 1988)* .

(n8)Footnote 8. *Adriana Int'l Corp. v. Thoeren, 913 F.2d 1406, 1414 (9th Cir. 1990)* , *cert. denied sub nom. Lewis & Co. v. Thoeren, 498 U.S. 1109 (1991)* .

(n9)Footnote 9. *Pierce v. New York C. R. Co., 409 F.2d 1392, 1399 (6th Cir. 1969)* .

(n10)Footnote 10. *Rapisardi v. United Fruit Co., 441 F.2d 1308, 1313 (2d Cir. 1971)* .

(n11)Footnote 11. *Neill v. Diamond M. Drilling Co., 426 F.2d 487, 491-492 (5th Cir. 1970)* .

(n12)Footnote 12. *Adkins v. GAF Corp., 923 F.2d 1225, 1232 (6th Cir. 1991)* .

(n13)Footnote 13. *Adkins v. GAF Corp., 923 F.2d 1225, 1232 (6th Cir. 1991)* .

(n14)Footnote 14. *Gibbs v. United States, 599 F.2d 36, 39 (2d Cir. 1979)* .

(n15)Footnote 15. *Sines v. United States, 430 F.2d 644, 645 (9th Cir. 1970)* .

(n16)Footnote 16. *Browning-Ferris Indus. v. Kelco Disposal Inc., 492 U.S. 257, 276-277, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989)* .

(n17)Footnote 17. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc, 532 U.S. 424, 121 S. Ct. 1678, 1685-1686, 149 L. Ed. 2d 674 (2001)* .

(n18)Footnote 18. *West v. Western Gas & Sur. Co., 846 F.2d 387, 399-400 (7th Cir. 1988)* .

(n19)Footnote 19. *Id.*

(n20)Footnote 20. *Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 111 S. Ct. 1032, 1041, 113 L. Ed. 2d 1 (1991)* (quoting from *Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 104 S. Ct. 615, 625, 78 L. Ed. 2d 443 (1984))* .

(n21)Footnote 21. *Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 111 S. Ct. 1032, 1042, 113 L. Ed. 2d 1 (1991)* .

(n22)Footnote 22. *Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 111 S. Ct. 1032, 1043, 113 L. Ed. 2d 1 (1991)* .

(n23)Footnote 23. *TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 113 S. Ct. 2711, 2722, 125 L. Ed. 2d 366 (1993)* .

(n24)Footnote 24. *Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 114 S. Ct. 2331, 2334, 129 L. Ed. 2d 336 (1994)* .

(n25)Footnote 25. *BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589,134 L. Ed. 2d 809 (1996)* .

(n26)Footnote 26. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc, 532 U.S. 424, 121 S. Ct. 1678, 1685-1686, 149 L. Ed. 2d 674 (2001)* .

(n27)Footnote 27. *State Farm Mutual Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419-428, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003)* (citing *BMW of N. Am. v Gore, 517 US 559, 116 S Ct 1589, 134 L Ed 2d 809 (1996))* .

(n28)Footnote 28. *Philip Morris USA, Inc. v. Williams, 549 U.S. 346, 127 S. Ct. 1057, 1063, 166 L. Ed. 2d 940 (2007)* .

(n29)Footnote 29. *Exxon Shipping Co. v. Baker, 554 U.S. --, 2008 U.S. LEXIS 5263 (2008)* .

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CHAPTER 43 Damages *
B. Seeking Review of Damages Awards

1-43 Federal Litigation Guide §§ 43.35 through 43.40

[Reserved]

§§ 43.35[Reserved]

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CHAPTER 43 Damages *
C. Evaluating Federal Statutory Damages

1-43 Federal Litigation Guide § 43.41

§ 43.41 Seeking Damages In Antitrust Cases

[1] Considering Possible Damages Under Antitrust Law

The antitrust laws make illegal certain business combinations and activities in restraint of trade. n1 Generally, an antitrust plaintiff may recover:

- Its increased costs from an overcharge in price-fixing cases
- Lost profits
- Reduction in the value of its business or loss of goodwill

Punitive damages apart from the damages prescribed in the statute are not allowable. n2 Finally, nominal damages may be awarded in antitrust cases, n3 in which case the disappointed plaintiff may be consoled by the award of statutory attorney's fees. n4

A person who has been injured in business or property by reason of a violation of the antitrust laws may sue for treble damages under Section 4 of the Clayton Act. n5

[2] Making a Reasonable and Fair Estimate of Damages

The Supreme Court has stated that the "vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of defendant's antitrust violation." n6 Although the fact finder generally may not base its verdict on speculation or guesswork, it may make a reasonable and fair estimate of damages sustained based on the evidence admitted at trial. n7

[3] Proving Antitrust Damages

[3.--1] Showing Injury and Actual Loss

There are two different aspects to a plaintiff's damages case under the antitrust laws. Plaintiff must prove both:

- Fact of injury
- Amount of damages

In sum, plaintiff must first prove that it has suffered antitrust injury n8 and must do so with a fair degree of certainty. n9

[3.--2] Establishing Fact of Injury

"Fact of injury" means injury caused by the type of conduct that the antitrust laws prohibit. n10 "Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." n11

Even though a business may suffer loss from the lower prices of its competitors, mere competition in price setting does not constitute an antitrust violation, and the losses that result from lawful competition in the market do not constitute antitrust injuries. n12 Low prices (unless predatorily low) virtually always benefit the consumer and are pro-competitive, and a competing dealer complaining about another dealer's low prices in effect is complaining about competition. Plaintiff's proof of damages must "reflect only the losses directly attributable to unlawful competition." n13

[3.--3] Establishing Net Damages

The plaintiff must also prove that its claimed antitrust damages are "net" damages, offsetting any benefits which plaintiff may have derived from the defendant's illegal conduct. n14 Offsets made to arrive at a net damage figure are deducted before the judgment is trebled, n15 while deductions for settlement amounts plaintiff received from co-defendants are made after trebling. n16

[4] Recovering Overcharges in Price-Fixing Cases

When a plaintiff has paid an artificially high price because of defendant's illegal price-fixing, the plaintiff may recover the difference between the price paid and the price that would have been paid absent the illegal price-fixing. n17 This is true even though the overcharge may have been passed on to plaintiff's customers. n18

Customers do not have standing to recover overcharges under federal antitrust law. n19 However, customers may be allowed to recover overcharges in connection with state law antitrust claims pursued in federal court. n20

[5] Recovering Overcharges in Tying Cases

Unlawful tying arrangements are those in which a seller forces a buyer to take a second (tied) product along with the desired (tying) product. If this sale results in the buyer paying more than it would have for just the tying product it may recover the amount of this overcharge (presumably the cost of the tied product if the buyer had no use for the tied product). n21

This overcharge has been measured in several ways, including the difference between the price paid for the tying product and the price of similar products sold by other sellers, and the difference between the total price (paid for both products) and the fair market value of both products.

In cases in which buyers have asked to purchase only the tying product but sellers have refused to sell them separately, some courts have held that the buyers may recover the costs incurred by going elsewhere for the goods. n22 This may not be allowed, however, if the price asked for the tied and tying products did not exceed their fair market value. n23

[6] Recovering Damages in Price Discrimination Cases

Price discrimination, as defined by the Supreme Court is the contemporaneous sale at different prices to different buyers of the same goods. n24 In price discrimination cases, damages are measured by evaluating "what plaintiff's situation would have been in the absence of defendant's antitrust violation." n25 Courts often use lost profits as the measure of these damages.

[7] Calculating Lost Profits

[7.--1] Determining Net Profit

Claimants in antitrust actions may recover only their lost net profits (not lost gross profits). Business expenses and interest are deductible in determining lost profits. n26 Lost profits awards are not reduced by the amount of income tax that would have been owed on the profits, however, and they are not adjusted for inflation. n27

[7.--2] Using the "Before and After" Method

The "before and after" method of computing lost profits allows a claimant to recover the difference between: (1) net profits during a period (reflecting a fair measure of claimant's profits) n28 in which claimant's business was unaffected by antitrust violations, and (2) net profits during the period in which the business suffered due to the violations. n29

[7.--3] Using the "Yardstick" Method

The yardstick method computes lost profits by measuring the difference between: (1) net profits earned by the claimant during the damage period, and (2) net profits earned during the same period by a comparable business unaffected by the antitrust violations. n30 It has been held, however, that if this measure is to be upheld, it must fairly reflect profits claimant would have earned absent the antitrust violations. n31

A third method, the "sales projection" method, measures damages by multiplying the claimant's net profit per unit by the number of sales units lost due to antitrust violations. n32

[7--4] Establishing Loss of Goodwill, "Going Concern" or Capital Value

If a claimant's business is destroyed by antitrust violations, the claimant may recover the "going concern" value of the business. n33 This is designed to "compensate for the harm sustained when a business interest is unlawfully terminated as a result of an antitrust violation." n34

To receive these damages, a plaintiff must show:

- That the antitrust violation was the cause of the particular loss (*e.g.,* the defendant engaged in predatory price cutting, forcing the plaintiff to lower prices as a result)
- That plaintiff's business was destroyed
- That the loss is measured from the date that plaintiff's business was terminated, destroyed, or sold as a result of the violations. n35

In the alternative, a plaintiff may recover any reasonably anticipated future profits lost due to the antitrust violations. It may not, however, recover both lost future profits and going concern value. n36

If the plaintiff's business has been damaged but not completely destroyed, it may recover any loss of fair market value of the business caused by the violations. n37 Damages to goodwill are determined by taking into consideration "factors

such as a business's age, profit, history, customers, and potential for future earnings." n38 The standard of proof required for damages is generally not difficult to meet, although the plaintiff's assertion of damages must be unsupported factually or analytically. Finally, even a business that had operated at a loss may receive lost future profits damages. n39

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawClayton ActRemediesGeneral OverviewAntitrust & Trade LawClayton ActRemediesDamagesCivil ProcedureRemediesDamagesGeneral OverviewCivil ProcedureRemediesDamagesPunitive Damages

FOOTNOTES:
(n1)Footnote 1. *See generally 15 U.S.C. § 1-27* (Sherman and Clayton Acts in their modern form).

(n2)Footnote 2. *Hansen Packing Co. v. Armour & Co., 16 F. Supp. 784 (D.N.Y. 1936)* (court struck complainant's request for punitive damages holding that statute, in trebling actual damages, carried its own provision for punishment).

(n3)Footnote 3. *Sciambra v. Graham News Co., 892 F.2d 411 (5th Cir. 1990)* ; *United States Football League v. National Football League, 842 F.2d 1335 (2d Cir. 1988)* ($1 trebled to $3).

(n4)Footnote 4. *United States Football League v. National Football League, 842 F.2d 1335 (2d Cir. 1988)* .

(n5)Footnote 5. *15 U.S.C. § 15*.

(n6)Footnote 6. *J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 566, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981)* .

(n7)Footnote 7. *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)* ; *Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 66 S. Ct. 574, 90 L. Ed. 652 (1946)* . *See also Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors, 850 F.2d 803 (1st Cir. 1988)* , *cert. denied, 488 U.S. 955 (1988)* (damages speculative); *Household Goods Carriers' Bureau v. Terrell, 452 F.2d 152 (5th Cir. 1971)* (courts must not allow damages verdicts based on speculation).

(n8)Footnote 8. *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* .

(n9)Footnote 9. *McClure v. Undersea Indus., Inc., 671 F.2d 1287 (11th Cir. 1982)* , *cert. denied, 460 U.S. 1037 (1983)* .

(n10)Footnote 10. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* .

(n11)Footnote 11. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* .

(n12)Footnote 12. *See Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* .

(n13)Footnote 13. *MCI Communications Corp. v. AT&T Co., 708 F.2d 1081, 1161 (7th Cir. 1983)* .

(n14)Footnote 14. *Los Angeles Memorial Coliseum Comm'n v. National Football League, 791 F.2d 1356, 1367 (9th Cir. 1986)* , *cert. denied, 484 U.S. 826 (1987)* ; *Minpeco, S.A. v. Conticommodity Servs., Inc., 676 F. Supp. 486*

(S.D.N.Y. 1987) .

(n15)Footnote 15. *Id.*

(n16)Footnote 16. *Id. See also Auwood v. Harry Brandt Booking Office, Inc., 850 F.2d 884 (2d Cir. 1988)* .

(n17)Footnote 17. *In re Mid-Atlantic Toyota Antitrust Litig., 560 F. Supp. 760 (D. Md. 1983)* (overcharge measured as difference between price paid for products and price that would have been charged if there had been no conspiracy). *See also Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)* ; *Burlington Indus. v. Milliken & Co., 690 F.2d 380 (4th Cir. 1982)* .

(n18)Footnote 18. *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968) . See also New York v. Hendrickson Bros., Inc., 840 F. 2d 1065 (2d Cir. 1988)* .

(n19)Footnote 19. *Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 n.16, 97 S. Ct. 2061, 52 L. Ed. 2d. 707 (1977)* ; *Hanover Shoe Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)* .

(n20)Footnote 20. *California v. ARC America Corp., 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)* .

(n21)Footnote 21. *Bouldis v. U.S. Suzuki Motor Corp., 711 F.2d 1319 (6th Cir. 1983)* ; *Selchow & Righter Co. v. Goldex Corp., 612 F. Supp. 19 (S.D. Fla. 1985) . Cf. De Jesus v. Sears, Roebuck & Co., 87 F.3d 65, 71 (2d Cir. 1996)* (employment as "Neighborhood Office Agents," a *service* for which plaintiffs were compensated, could not constitute a "tying product" within the antitrust laws).

(n22)Footnote 22. *Knutson v. Daily Review, Inc., 664 F.2d 1120 (9th Cir. 1981)* ; *Flintkote Co. v. Lysfjord, 246 F.2d 368 (9th Cir. 1957) , cert. denied, 355 U.S. 835 (1957)* .

(n23)Footnote 23. *E.g., Will v. Comprehensive Accounting Corp., 776 F.2d 665 (7th Cir. 1985)* ; *Kypta v. McDonald's Corp., 671 F.2d 1282 (11th Cir. 1982) , cert. denied, 459 U.S. 857 (1982)* .

(n24)Footnote 24. *FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 80 S. Ct. 1267, 4 L. Ed. 2d 1385 (1960)* .

(n25)Footnote 25. *J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 566, 101 S. Ct. 1923, 1929, 68 L. Ed. 2d 442, 451 (1981)* .

(n26)Footnote 26. *Ad-Vantage Tel. Directory Consultants, Inc. v. GTE Directories Corp., 943 F.2d 1511 (11th Cir. 1991)* .

(n27)Footnote 27. *See Locklin v. Day-Glo Color Corp., 429 F.2d 873 (7th Cir. 1970)* ; *U-Haul Int'l, Inc. v. Jartran, Inc., 601 F. Supp. 1140 (D. Ariz. 1984) , rev'd in part on other grounds, 793 F.2d 1034 (9th Cir. 1986)* .

(n28)Footnote 28. *Pacific Coast Agr. Export Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196 (9th Cir. 1975)* ; *D&R Distributing Co., Inc. v. Chambers Corp., 608 F. Supp. 1290 (E.D. Cal. 1984) . See also Bascom Food Prods. Corp. v. Reese Finer Foods, Inc., 715 F. Supp. 616 (D.N.J. 1989)* .

(n29)Footnote 29. *See Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 66 S. Ct. 574, 90 L. Ed. 652 (1946)* ; *Pacific Coast Agr. Export Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196 (9th Cir. 1975)* .

(n30)Footnote 30. *See Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft, 828 F.2d 1033 (4th Cir. 1987)* ; *G.M. Brod & Co. v. U.S. Home Corp., 759 F.2d 1526 (11th Cir. 1985)* .

(n31)Footnote 31. *See Home Placement Serv., Inc. v. Providence Journal Co., 819 F.2d 1199 (1st Cir. 1987)* .

(n32)Footnote 32. *See Ford Motor Co. v. Webster's Auto Sales, Inc., 361 F.2d 874 (1st Cir. 1966)* ; *Tunis Bros. Co., Inc. v. Ford Motor Co., 952 F.2d 715 (3d Cir. 1991)* .

(n33)Footnote 33. *See Malley-Duff & Assoc., Inc. v. Crown Life Ins. Co., 734 F.2d 133 (3d Cir. 1984)* ; *Trimed, Inc. v. Sherwood Medical Center, 977 F.2d 885 (4th Cir. 1992)* ; *Sciambra v. Graham News Co., 841 F.2d 651 (5th Cir. 1988)* , *cert. denied, 488 U.S. 855 (1988)* .

(n34)Footnote 34. *Bonjorno v. Kaiser Aluminum & Chem. Corp., 559 F.Supp. 922, 936 (E.D. Pa. 1983)* , *rev'd in part on other grounds, 752 F.2d 802 (3d Cir. 1984)* .

(n35)Footnote 35. C. Knapp, Commercial Damages § 55.05[3] (Matthew Bender 1991).

(n36)Footnote 36. *See Lehrman v. Gulf Oil Corp., 500 F.2d 659, 663-664 (5th Cir. 1974)* , *cert. denied, 420 U.S. 929 (1975)* ; *American Anodco, Inc. v. Reynolds Metal Co., 743 F.2d 417 (6th Cir. 1984)* ; *see also Malley-Duff & Assocs., Inc. v. Crown Life Ins. Co., 734 F.2d 133 (3d Cir. 1984)* .

(n37)Footnote 37. *Central Telecommunications, Inc. v. TCI Cablevision, Inc., 800 F.2d 711 (8th Cir. 1986)* .

(n38)Footnote 38. *Copper Liquor, Inc. v. Adolph Coors Co. ("Coors II"), 642 F.2d 875, 879 n.9 (5th Cir. 1980)* .

(n39)Footnote 39. *Graphic Prods. Distribs. v. Itek Corp.,717 F.2d 1560, 1580 (11th Cir. 1983)* .

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CHAPTER 43 Damages *
C. Evaluating Federal Statutory Damages

1-43 Federal Litigation Guide § 43.42

§ 43.42 Seeking Damages Under Section 11 of the 1933 Securities Act

[1] Recovering Damages Resulting From Untrue Fact in Registration Statement

Section 11 of the 1933 Securities Act applies to security offerings that are registered under the 1933 Act. It provides for civil liability arising from the registration statement of a security containing an untrue statement of a material fact or an omission to state a material fact unless the person acquiring the security knew of such untruth or omission. n1 If the buyer knows of these misrepresentations at the time of purchase, the buyer may not collect damages. n2

Moreover, the plaintiff must prove that the misstatement caused the loss. n3 The statute provides that if the defendant can prove that any portion of the plaintiff's claimed damages result from something other than the registration statement, those damages shall not be recoverable. n4 Therefore, it would be prudent for a defense attorney to pay close attention to all factors influencing the market in order to ensure that the client does not pay for damages caused by market conditions. Section 11 also contains provisions regarding the persons who may be held liable and provides for exemptions from liability. n5

[2] Calculating Damages Under Section 11

Under Section 11, a plaintiff may recover such damages that represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and either of the following:

- The value of the security as of the time such suit was brought
- The price at which such security shall have been disposed of in the market before suit
- The price at which such security shall have been disposed of after suit but before judgment if such damages are less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time the suit was brought n6

Under these provisions, exactly when a plaintiff disposes of stock can have a substantial effect on the recovery. This manner of calculating damages "forces the plaintiff to assess the market and decide whether it is in his/her best interests to retain the security, to sell prior to suit, or to sell during suit but prior to judgment." n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesGeneral OverviewSecurities LawLiabilityRemediesGeneral OverviewSecurities LawLiabilityRemediesPunitive DamagesSecurities LawLiabilitySecurities Act of 1933 ActionsCivil LiabilityFalse Registration StatementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *15 U.S.C. § 77k(a).*

(n2)Footnote 2. *McFarland v. Memorex Corp., 96 F.R.D. 357, 362 (N.D. Cal. 1982)* .

(n3)Footnote 3. *Akerman v. Oryx Communications Inc., 609 F. Supp. 363, 368 (S.D.N.Y. 1984)* , *aff'd,* 810 F.d 336 (2d Cir. 1987).

(n4)Footnote 4. *15 U.S.C. § 77(k)(e).*

(n5)Footnote 5. *See generally 15 U.S.C. §§ 77k(a)(1)-(5)* and *77k(b).*

(n6)Footnote 6. *15 U.S.C. § 77k(e).*

(n7)Footnote 7. R. Kaplan and A. Tadler, *Damages in Federal Securities Litigation,* Securities Litigation 1991: Strategies and Current Development 736-737 (PLI Litig. & Admin. Practice Course Handbook Series No. 417 (1991)).

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CHAPTER 43 Damages *
C. Evaluating Federal Statutory Damages

1-43 Federal Litigation Guide § 43.43

§ 43.43 Seeking Damages Under Section 12(2) of the 1933 Securities Act

[1] Bringing a Claim Based on Prospectus Fraud

Section 12(2) deals with civil liability in the case of prospectus fraud in the sale of any securities, whether or not they are registered. Section 12(2) prohibits the offer or sale of securities by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading. It is up to the defendant to sustain the burden of proof that it did not know, and in the exercise of reasonable care could not have known, of such untruth or omission. n1

A purchaser who is so defrauded may "sue either at law or in equity ... to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon upon the tender of such security, or for damages if he no longer owns the security." n2 Section 12(2) therefore allows for:

- Rescission as the appropriate remedy when the defrauded party still has the stock
- Damages as the remedy when the party no longer owns the stock

[2] Seeking Rescission Under Section 12(2)

If a party brings a suit under Section 12(2) of the 1933 Act and the party has retained the securities, the appropriate remedy is rescission. n3 The amount of plaintiff's remedy through rescission is determined by adding the consideration given for the security, plus any interest that such consideration would have earned, less any income received from the security. n4

[3] Recovering Damages Under Section 12(2)

If a party brings a suit under Section 12(2) of the 1933 Act when the party no longer owns the stock, then the appropriate remedy is damages and not rescission. n5 "[D]amages are to be measured so as to result in the substantial equivalent of rescission--namely, the difference between the purchase price and the plaintiff's resale price, plus interest, and less any income or return of capital (with interest) that the plaintiff received on the security." n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesGeneral OverviewSecurities LawLiabilityRemediesGeneral OverviewSecurities LawLiabilityRemediesPunitive DamagesSecurities LawLiabilitySecurities Act of 1933 ActionsCivil LiabilityCommunications & ProspectusesDamages

FOOTNOTES:
(n1)Footnote 1. *15 U.S.C. § 77l(2).*

(n2)Footnote 2. *15 U.S.C. § 77l.*

(n3)Footnote 3. *15 U.S.C. § 77l.*

(n4)Footnote 4. *See Randall v. Loftsgaarden, 478 U.S. 647, 659, 106 S. Ct. 3143, 3151, 92 L. Ed. 2d 525, 539 (1986) .*

(n5)Footnote 5. *See 15 U.S.C. § 771.*

(n6)Footnote 6. *See* Loss, Fundamentals of Securities Regulation 886 (Little Brown & Co. 2d ed. 1988).

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CHAPTER 43 Damages *
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§ 43.44 Seeking Damages Under Section 10(b) of the 1934 Securities Exchange Act

[1] Making a Claim for Securities Fraud Under Rule 10b-5

Probably the most familiar Section of the 1934 Securities Exchange Act is Section 10(b) and its accompanying regulation, *Rule 10b-5*. Section 10(b) n1 and *Rule 10b-5* prohibit fraud "in connection with the purchase or sale of any security."

The Securities and Exchange Commission has implemented Section 10(b) of the 1934 Act through its *Rule 10b-5*. In pertinent part, this Rule states that it is unlawful to use the means listed in Section 10(b) of the Act:

- To employ any device, scheme, or artifice to defraud
- To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security n2

Neither Section 10(b) nor *Rule 10b-5* expressly contains a civil remedy for the violation of their provisions. However, case law has established that there is an implied private action under this Section of the 1934 Act. n3

[2] Recovering Actual or Out-of-Pocket Damages

Because neither Section 10(b) nor *Rule 10b-5* state how damages are to be determined, the courts have used the actual economic loss damages standards of Section 28 of the 1934 Securities Exchange Act. n4

To have standing to bring suit to recover damages under 10(b) and 10b-5, the plaintiff must suffer actual money damages. It is insufficient for a plaintiff to plead "intangible economic injury" such as being influenced to not buy or not sell securities based on fraudulent misrepresentations. n5

If a plaintiff fails to demonstrate actual damages, then the plaintiff has failed to present a fraud cause of action under §

10(b). n6 This, however, is not to say that one must show the amount of damages with "mathematical precision." n7 Rather, what a plaintiff must do is submit enough evidence so that the trier of fact can come to an intelligent decision regarding the amount of damages. n8

The general "measure of damages under § 28 of the Act, *15 U.S.C. § 78bb(a)* is the difference between the fair value of all that the ... seller received and the fair value of what he would have received had there been no fraudulent conduct." n9 In other words, from the perspective of a defrauded purchaser, actual damages are "the difference between what [the purchaser] paid for the stock and what it was worth." n10 If, however, the security has increased in value since the date of purchase and the shares are later sold, the plaintiff will then have suffered no actual damages resulting from the defendant's action, and a § 10(b) cause of action may not be maintained. n11

[3] Recovering Defendant's Fraudulent Profits

The Supreme Court has held that there are times when an assessment of actual damages is not sufficient: "[W]here the defendant [receives] more than the seller's actual loss ... damages are the amount of the defendant's profit." n12 This measure of damages is "disgorgement of profits."

The reasoning behind permitting disgorgement is that "it is simple equity that a wrongdoer should disgorge his fraudulent enrichment." n13 To allow a defendant to retain profits illegally earned would amount to unjust enrichment. n14 Disgorgement clearly does more than simply make the plaintiff whole for the economic loss proximately caused by the defendant's fraud. Indeed, the accepted rationale underlying this alternative is simply that "[i]t is more appropriate to give the defrauded party the benefit even of windfalls than to let the fraudulent party keep them." n15

Courts have been confronted with the question of how to deal with a private action for disgorgement after a defendant has already paid to the SEC a disgorgement measure of damages. At least one court has held that if the "defendants did not disgorge the full extent of their illegal profits, the proper measure of disgorgement damages shall be the difference between each defendant's actual profits and the amount disgorged to the SEC." n16 The court reasoned: "Once ill-gotten profits have been disgorged to the SEC, further disgorgement as damages in a private action is clearly punitive in its effect and would constitute an impermissible penalty assessment." n17

[4] Recovering Benefit-of-the-Bargain Damages

A plaintiff bringing a cause of action under Section 10(b) may seek "benefit of the bargain damages," used in common law fraud actions. n18 The Court of Appeals for the Eleventh Circuit has held that in order for benefit-of-the-bargain damages to be awarded, there must be a bargain or contract for the "purchase or sale of securities." n19 Thus, if the contract is unenforceable, there can be no recovery under this theory. n20

Benefit-of-the bargain recovery provides for damages sufficient to give the recipient the benefit of the contract, if these damages are proved with reasonable certainty. n21 It is used when traditional out-of-pocket damages do not provide the injured party with "just and satisfactory" compensation. n22 This type of remedy, however, is controversial and many circuits do not approve of such a remedy.

Even circuits which generally disapprove of this remedy sometimes allow such relief in certain limited circumstances. One Second Circuit panel has ruled that plaintiffs generally may not recover benefit of the bargain damages in securities cases. n23 Nevertheless, a subsequent decision of that court carved out an exception to the rule and held that benefit-of-the-bargain damages should be allowed in the limited situation "where misrepresentation is made in the tender offer and proxy solicitation materials as to the consideration to be forthcoming upon an intended merger." n24 In such a case, the court reasoned, there was no speculation as to what the damages from the misrepresentation were, and therefore, benefit-of-the-bargain damages could be awarded. The measure of damages in this case was found to be "the difference between what was represented as coming to the ... shareholders and what they actually received." n25

[5] Recovering Consequential Damages

Some courts have held that suits under 10b-5 permit indirect or consequential damages when the defrauded party proves "with reasonable certainty that the fraud caused the damages." n26 However, once a plaintiff discovers the fraud, the plaintiff may not recover for consequential damages that could have been avoided through mitigation. n27

Consequential damages, however, may be recovered on the theory of recovery of capital contributions made to an enterprise after the plaintiff learns of the fraud if the following can all be shown: n28

- Each expenditure ... was a *reasonable* effort to, *e.g.,* minimize plaintiffs' losses
- The expenditures were an effort to save the company from a "pre-existing insolvency concealed by defendants"
- But for the defendant's misrepresentations, the plaintiff would not have made those expenditures

In such cases, the plaintiff may recover for the additional money expended.

[6] Seeking Rescission Under Rule 10b-5

Under *Rule 10b-5*, a plaintiff may also be able to obtain rescissory damages. However, the Supreme Court has warned that "[t]he issue whether and under what circumstances rescission or a rescissory measure of damages is available under § 10(b) is an unsettled one." n29 Rescission allows the injured party to be returned to the position in which he or she would have been had the transaction never occurred.

Some circuits require that there be "privity between plaintiff and defendant or some specific fiduciary duty owed" to the plaintiff by the defendant in order for a rescissory measure of damages to be awarded. n30 Those courts reason that if there is no privity, the defendant may be paying for losses that have resulted not from illegal conduct, but rather from some unrelated cause such as market forces. n31 However, other circuits do not hold that privity is required in all cases for rescissory damages to be awarded. n32 These courts follow a "but for" analysis arguing that if the illegal act had not occurred, no losses would have resulted. n33

Even with a remedy of rescission, the § 10(b) plaintiff is still limited to actual damages. What should be included as actual damages has been debated. One area of special concern is cases involving tax shelters.

[7] Punitive Damages Unavailable Under Federal Securities Law

Because § 28 of the Securities Act limits the amount of damages that a party may recover in a federal securities action to actual damages, punitive damages may not be recovered in a § 10(b) action. n34 However, pendent state law claims are an alternative basis for punitive damages, and this avenue should be explored by plaintiff's counsel. n35

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesGeneral OverviewSecurities LawAdditional Offerings & the Securities Exchange Act of 1934Jurisdiction & ScopeLimitations on RemediesSecurities LawLiabilityRemediesGeneral OverviewSecurities LawLiabilityRemediesActual DamagesSecurities LawLiabilityRemediesPunitive DamagesSecurities LawLiabilitySecurities Exchange Act of 1934 ActionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. Section 10(b) of the Act states that it is unlawful to use, directly or indirectly, the mails, the facilities of

any national security exchange, or any means of interstate commerce [or to] use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(n2)Footnote 2. 17 C.F.R. § 240.10b-5.

(n3)Footnote 3. *See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730, 95 S. Ct. 1917, 1922 44 L. Ed. 2d 539, 546 (1975)* (citing *Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9, 92 S. Ct. 165, 30 L. Ed. 2d 128 (1971)* ; *Affiliated Ute v. United States, 406 U.S. 128, 150-154, 92 S. Ct. 1456, 31 L. Ed. 2d 741 (1972))* .

(n4)Footnote 4. *See Pelletier v. Stuart-James Co., 863 F.2d 1550, 1557 (11th Cir. 1989)* (citing *Feldman v. Pioneer Petroleum, Inc., 813 F.2d 296, 301 (10th Cir. 1987)* , *cert. denied, 484 U.S. 954 (1987))* .

(n5)Footnote 5. *See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 734, 95 S. Ct. 1917, 1925, 44 L. Ed. 2d 539, 549 (1975)* .

(n6)Footnote 6. *See Pelletier v. Stuart-James Co., 863 F.2d 1550, 1557-1558 (11th Cir. 1989)* .

(n7)Footnote 7. *Feldman v. Pioneer Petroleum, Inc., 813 F.2d 296, 301 (10th Cir. 1987)* , *cert. denied, 484 U.S. 954 (1987)* (quoting *King & King Enters. v. Champlin Petroleum Co., 657 F.2d 1147, 1158 (10th Cir. 1981)* , *cert. denied, 454 U.S. 1164 (1982))* .

(n8)Footnote 8. *See Feldman v. Pioneer Petroleum, Inc., 813 F.2d 296, 301 (10th Cir. 1987)* , *cert. denied, 484 U.S. 954 (1987)* .

(n9)Footnote 9. *Affiliated Ute v. United States, 406 U.S. 128, 155, 92 S. Ct. 1456, 31 L. Ed. 2d 741 (1972)* .

(n10)Footnote 10. *Astor Chauffeured Limousine v. Runnfeldt Inv. Corp., 910 F.2d 1540, 1551 (7th Cir. 1990)* . *See also Foster v. Financial Technology, Inc., 517 F.2d 1068, 1071 (9th Cir. 1975)* ; *Pelletier v. Stuart-James Co., 863 F.2d 1550, 1557-1558 (11th Cir. 1989)* .

(n11)Footnote 11. *Rubenstein v. IU Int'l. Corp., 506 F. Supp. 311, 318 (E.D. Pa. 1980)* . *See also Gardner v. Surnamer, 608 F. Supp. 1385, 1388 (E.D. Pa. 1985)* .

(n12)Footnote 12. *Affiliated Ute v. United States, 406 U.S. 128, 155, 92 S. Ct. 1456, 31 L. Ed. 2d 741 (1972)* .

(n13)Footnote 13. *Litton Ind. v. Lehman Bros. Kuhn Loeb, Inc., 734 F. Supp. 1071, 1075 (S.D.N.Y. 1990)* (quoting *Janigan v. Taylor, 344 F.2d 781, 786 (1st Cir. 1965)* , *cert. denied, 382 U.S. 879 (1965))* .

(n14)Footnote 14. *See SEC v. MacDonald, 725 F.2d 9, 11 (1st Cir. 1984)* .

(n15)Footnote 15. *Randall v. Loftsgaarden, 478 U.S. 647, 663, 106 S. Ct. 3143, 3153, 92 L. Ed. 2d 525, 542 (1986)* (quoting *Janigan v. Taylor, 344 F.2d 781, 786 (1st Cir. 1965)* , *cert. denied, 382 U.S. 879 (1965))* .

(n16)Footnote 16. *Litton Ind. v. Lehman Bros. Kuhn Loeb Inc., 734 F. Supp. 1071, 1077 (S.D.N.Y. 1990)* .

(n17)Footnote 17. *Id.*

(n18)Footnote 18. *See Osofsky v. Zipf, 645 F.2d 107, 114 (2d Cir. 1981)* .

(n19)Footnote 19. *See Pelletier v. Stuart-James Co., 863 F.2d 1550, 1559 (11th Cir. 1989)* .

(n20)Footnote 20. *Id.*

(n21)Footnote 21. *Osofsky v. Zipf, 645 F.2d 107, 114 (2d Cir. 1981)* (quoting Restatement (Second) of Torts § 549(2) (1977)).

(n22)Footnote 22. *Id.*

(n23)Footnote 23. *Levine v. Seilon, Inc., 439 F.2d 328 (2d Cir. 1971)* .

(n24)Footnote 24. *Osofsky v. Zipf, 645 F.2d 107, 114 (2d Cir. 1981)* .

(n25)Footnote 25. *Id.*

(n26)Footnote 26. Consequential or indirect damages, akin to special damages, do not flow directly from the wrong but from its consequences. *See also Grubb v. Federal Deposit Ins. Corp., 868 F.2d 1151, 1165 (10th Cir. 1989)* (citing *James v. Meinke, 778 F.2d 200, 205 (5th Cir. 1985)* ; de *Haas v. Empire Petroleum Co., 435 F.2d 1223, 1228-1229 (10th Cir. 1970))* .

(n27)Footnote 27. *Madigan, Inc. v. Goodman, 498 F.2d 233 (7th Cir. 1974)* ; *Grubb v. Federal Deposit Ins. Corp., 868 F.2d 1151 (10th Cir. 1989)* .

(n28)Footnote 28. *Grubb v. Federal Deposit Ins. Corp., 868 F.2d 1151, 1165 (10th Cir. 1989)* (quoting *Madigan, Inc. v. Goodman, 498 F.2d 233, 238-239 (7th Cir. 1974))* .

(n29)Footnote 29. *Randall v. Loftsgaarden, 478 U.S. 647, 661, 106 S. Ct. 3143, 3152, 92 L. Ed. 2d 525, 540 (1986)* .

(n30)Footnote 30. *Huddleston v. Herman & MacLean, 640 F.2d 534, 554 (5th Cir. 1981)* , *rev'd in part on other grounds, 459 U.S. 375, 103 S. Ct. 683, 74 L. Ed. 2d 548 (1983)* .

(n31)Footnote 31. *Id. at 554-555* .

(n32)Footnote 32. *See Arthur Young & Co. v. Reves, 937 F.2d 1310, 1336 (8th Cir. 1991)* ; *Bruschi v. Brown, 876 F.2d 1526, 1532 (11th Cir. 1989)* .

(n33)Footnote 33. *See Huddleston v. Herman & MacLean, 640 F.2d 534, 555 (5th Cir. 1981)* , *rev'd in part on other grounds, 459 U.S. 375, 103 S. Ct. 683, 74 L. Ed. 2d 548 (1983)* .

(n34)Footnote 34. *Pelletier v. Stuart-James Co., 863 F.2d 1550, 1557 (11th Cir. 1989)* . *See also Huddleston v. Herman & MacLean, 640 F.2d 534, 559 (5th Cir. 1981)* , *rev'd in part on other grounds, 459 U.S. 375, 103 S. Ct. 683, 74 L. Ed. 2d 548 (1983)* ; *Grogan v. Garner, 806 F.2d 829, 838 (8th Cir. 1986)* .

(n35)Footnote 35. *See Cyrak v. Lemon, 919 F.2d 320 (5th Cir. 1990)* ; *Grogan v. Garner, 806 F.2d 829 (8th Cir. 1986)* ; *Nye v. Blyth Eastman Dillon & Co., 588 F.2d 1189 (8th Cir. 1978)* .

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CHAPTER 43 Damages *
C. Evaluating Federal Statutory Damages

1-43 Federal Litigation Guide § 43.45

§ 43.45 Seeking Damages Under Federal Copyright Law

[1] Electing Proper Remedy Under Copyright Statute

Remedies for copyright infringement are provided by statute. The copyright owner may seek an injunction to restrain the infringement, n1 or may sue for damages and profits, n2 or may join both remedies in a single action. When actual damages and profits are sought, the parties are entitled to a jury trial on that issue. n3

[2] Recovering Actual Damages for Copyright Infringement

A copyright owner who proceeds under § 504(b)(1) may recover actual damages resulting from the infringement. There are several methods of computing these damages, and courts within the same jurisdiction have used different methods from case to case, depending on the facts involved. The most frequently used measure of actual damages is the extent of injury to the market value of the copyrighted work. n4

The copyright owner's lost profits are perhaps the most helpful evidence of loss in market value and have been used as a primary source of guidance for the courts. n5 This figure is computed by deducting a copyright owner's saved or reduced production costs (presuming that the infringement has lessened demand for the copyright owner's product and that the owner has thus produced fewer products) from the owner's lost sales. n6

The causal link between the infringement and the alleged "lost profits" must also be adequately established; a comparison of before-infringement and (lower) after-infringement sales figures, standing alone, does not mean automatic recovery for the copyright owner. The most direct way to prove that lost sales are due to infringement is to show that defendant's post-infringement customers were former customers of plaintiff. n7

Another measure of actual damages is the market value of the work when misappropriated. If there have been previous transactions between the parties, this value may be easily computed. n8

[3] Recovering Profits of Infringer

A copyright owner electing to proceed under § 504(b) may also collect, in addition to actual damages, "any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages." n9 To establish these profits, the copyright owner need present proof "only of the infringer's gross revenue." The burden

then shifts to the infringer, who must "prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work." n10

To meet this shifted burden, defendant may show that some of its profits are attributable to factors other than the infringement. For example, defendant may have contributed original material to the infringing material, or defendant may have used marketing, sales, or other business skills, which are at least partially responsible for the profits. If the defendant makes such a showing of its contribution, the court must apportion the profits. n11

[4] Recovering Statutory Damages for Copyright Infringement

A copyright owner may elect to recover statutory damages (instead of actual damages and a portion of defendant's profits) "at any time before final judgment is rendered." n12 *17 U.S.C. § 504(c)(1)* provides that such damages may be awarded for "all infringements involved in the action, with respect to any one work, ... in a sum of not less than $500 or more than $20,000 as the Court considers just."

Statutory damages may also be awarded by the court when it is difficult or impossible to accurately compute actual damages. Statutory damages may not be awarded, however, for: n13

- Any infringement of copyright in an unpublished work commenced before the effective date of its registration; or

- Any infringement of copyright commenced after first publication of the work and before the effective date of its registration unless such registration is made within three months after the first publication of the work.

[5] Recovering Prejudgment Interest in Copyright Cases

Prejudgment interest is available to plaintiffs seeking relief under the Copyright Act. n14

[6] Punitive Damages Unavailable in Federal Copyright Cases

Punitive damages are not recoverable in federal copyright suits. The Act itself, however, provides for deterrence and punishment of "willful" conduct with its provision for increased statutory damages in such cases. n15

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesGeneral OverviewCopyright LawCivil Infringement ActionsRemediesDamagesGeneral OverviewCopyright LawCivil Infringement ActionsRemediesDamagesActual DamagesCopyright LawCivil Infringement ActionsRemediesDamagesDamage ComputationCopyright LawCivil Infringement ActionsRemediesDamagesStatutory Damages

FOOTNOTES:
(n1)Footnote 1. *17 U.S.C. § 502(a).*

(n2)Footnote 2. *17 U.S.C. § 504(b).*

(n3)Footnote 3. *Meeropol v. Nizer, 505 F.2d 232, 238 (2d Cir. 1974)* .

(n4)Footnote 4. *Manufacturers Technologies, Inc. v. Cams, Inc., 728 F. Supp. 75, 80 (D. Conn. 1989)* ; *Fitzgerald Pub. Co. v. Baylor Pub. Co., 670 F. Supp. 1133 (E.D.N.Y. 1987)* , *aff'd, 862 F.2d 304 (2d Cir. 1988)* .

(n5)Footnote 5. *Fitzgerald Pub. Co. v. Baylor Pub. Co., 670 F. Supp. 1133, 1138 (E.D.N.Y. 1987) , aff'd, 862 F.2d 304 (2d Cir. 1988) . See also Sunset Lamp Corp. v. Alsy Corp., 749 F. Supp. 520 (S.D.N.Y. 1990) .*

(n6)Footnote 6. *Taylor v. Meirick, 712 F.2d 1112 (7th Cir. 1983) .*

(n7)Footnote 7. *See, e.g., Stevens Linen Associates, Inc. v. Mastercraft & Corp., 656 F.2d 11 (2d Cir. 1981) .*

(n8)Footnote 8. *See Aitken v. Empire Constr. Co., 542 F. Supp. 252 (D. Neb. 1982)* (infringer purchased architectural plans and built two separate and identical buildings rather than the agreed-upon one, the court used the original price of the plans to determine their value to the defendants in the second use).

(n9)Footnote 9. *17 U.S.C. § 504(b).*

(n10)Footnote 10. *Id.*

(n11)Footnote 11. *See, e.g., Baldwin Cooke Co. v. Keith Clark, Inc., 420 F. Supp. 404, 406 (N.D. Ill. 1976) .*

(n12)Footnote 12. *17 U.S.C. § 504(c)(1).*

(n13)Footnote 13. *17 U.S.C. § 412.*

(n14)Footnote 14. *Kleier Advertising, Inc. v. Premier Pontiac, Inc., 921 F.2d 1036, 1041 (10th Cir. 1990) .*

(n15)Footnote 15. *See Hays v. Sony Corp. of America, 847 F.2d 412, 415 (7th Cir. 1988) .*

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CHAPTER 43 Damages *
C. Evaluating Federal Statutory Damages

1-43 Federal Litigation Guide § 43.46

§ 43.46 Seeking Damages Under Federal Patent Law

[1] Claiming Damages for Unauthorized Use of Patented Invention

Section 284 of Title 35 of the United States Code provides that on finding that a defendant has made, used, or sold any patented invention without authority within the United States during the term of the patent, a court must award to the owner of the patent damages "adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer." n1

[2] Recovering Profits Lost From Patent Infringement

Most claimants try to recover "damages adequate to compensate for the infringement," *i.e.,* damages equal to the loss suffered because of the infringement. The most common method of measuring such damages is by using the patentee's lost profits--profits on those sales that the patentee would have made but for the infringement. To recover lost profits, a claimant must prove the following: n2

- Demand for the patented product existed
- Absence of acceptable noninfringing substitutes
- Claimant's manufacturing and marketing capability to exploit the demand
- The amount of the profit claimant would have made

The first three elements combine to establish liability and resulting causation of damages; the fourth determines the amount of the award.

[3] Recovering Reasonable Royalty Damages

If a court finds for a patent owner, but there is insufficient evidence to establish actual damages, the court may use a "reasonable royalty" figure as the minimum damages that may be awarded. n3 The best measure of a reasonable royalty is usually an "established royalty," if one exists. An established royalty is one that is paid by a large enough number of consumers as to indicate that it is reasonable to those consumers in the market for the invention. n4 An established

royalty might be based on royalties previously received by the patentee. It could also be established by the royalties paid for comparable inventions, as illustrated through testimony of experts or others in the industry.

[4] Recovering Hypothetical Royalty Damages

If an established royalty is not available, the court must use other evidence to arrive at a royalty that is reasonable and adequate to compensate for the infringement. n5 The amount of a reasonable royalty after infringement turns on the facts of each case, including what plaintiff's property is (and its value) and to what extent defendant has taken it. n6

[5] Increasing Damages Award Based on Willful Infringement

35 U.S.C. § 248 provides that a court may increase patent damages "up to three times the amount found or assessed." Although the statute does not specify when such an increase is appropriate, the courts have held that enhancement of damages must be based on willful infringement or bad faith. n7 The question of whether infringement is willful is one of fact, and courts must analyze the "totality of the circumstances" in each case. n8 Several factors may be considered, including:

- The extent of the infringer's knowledge of the existing patent n9
- Whether the infringer sought legal counsel regarding use of the patented invention n10
- Whether the infringer blatantly disregarded the patent holder's rights in an effort to compete n11

[6] Recovering Prejudgment Interest in Patent Cases

35 U.S.C. § 284 also provides for an award of interest and costs to a prevailing claimant. Unlike attorney's fees, the awarding of interest and costs does not require exceptional circumstances. On the contrary, prejudgment interest, from the date of infringement to the date of judgment, should "ordinarily be awarded absent some justification for withholding" it. n12 Courts should not deny interest simply because the calculation is complex or difficult. n13

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesGeneral OverviewPatent LawRemediesGeneral OverviewPatent LawRemediesCollateral AssessmentsPrejudgment InterestPatent LawRemediesDamagesGeneral OverviewPatent LawRemediesDamagesMeasures

FOOTNOTES:
(n1)Footnote 1. *35 U.S.C. § 284.*

(n2)Footnote 2. *Panduit Corp. v. Stahlin Bros. Fibre Works, Inc., 575 F.2d 1152 (6th Cir. 1978)* ; *Minnesota Mining & Mfg. Co. v. Johnson & Johnson Orthopaedics, Inc., 976 F.2d 1559 (Fed. Cir. 1992)* ; *Standard Havens Prods., Inc. v. Gencor Indus., Inc., 953 F.2d 1360 (Fed. Cir. 1992)* ; *Micro Motion, Inc. v. Exac Corp., 761 F. Supp 1420 (N.D. Ca. 1991)* .

(n3)Footnote 3. *35 U.S.C. § 284.*

(n4)Footnote 4. *Hanson v. Alpine Valley Ski Area, Inc., 718 F.2d 1075, 1078 (Fed. Cir. 1983)* .

(n5)Footnote 5. *35 U.S.C. § 284.*

(n6)Footnote 6. *See TWM Manufacturing Co. v. Dura Corp., 789 F.2d 895 (Fed. Cir. 1986)* .

(n7)Footnote 7. *Yarway Corp. v. Eur-Control USA, Inc., 775 F.2d 268, 277 (Fed. Cir. 1985)* .

(n8)Footnote 8. *Central Soya Co. v. Geo. A. Hormel & Co., 723 F.2d 1573, 1577 (Fed. Cir. 1983)* .

(n9)Footnote 9. *Ryco Inc. v. Ag-Bag Corp., 857 F.2d 1418, 1428 (Fed. Cir. 1988)* .

(n10)Footnote 10. *See Uniroyal Inc. v. Rudkin-Wiley Corp., 939 F.2d 1540, 1546 (Fed. Cir. 1991)* .

(n11)Footnote 11. *Yarway Corp. v. Eur-Control USA, Inc., 775 F.2d 268, 278 (Fed. Cir. 1985)* .

(n12)Footnote 12. *General Motors Corp. v. Devex Corp., 461 U.S. 648, 657, 103 S. Ct. 2058, 76 L. Ed. 2d 211 (1983) . See also Oiness v. Walgreen Co., 88 F.3d 1025, 1033 (Fed. Cir. 1996)* (trial court erred in awarding interest on entire damages award, including projected future lost profits, with regard to which losses had not yet been suffered).

(n13)Footnote 13. *Lummus Indus., Inc. v. D.M.&E. Corp., 862 F.2d 267, 275 (Fed. Cir. 1988)* .

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CHAPTER 43 Damages *
C. Evaluating Federal Statutory Damages

1-43 Federal Litigation Guide § 43.47

§ 43.47 Seeking Damages Under Federal Trademark Law

[1] Claiming Damages for Trademark Infringement

The law of trademarks is governed by various statutes and common law rulings. The most frequently used statute is the Lanham Act. n1 *15 U.S.C. § 1117* sets out the monetary relief available when a trademark owner's rights are violated. Aggrieved plaintiffs may recover damages, defendant's profits, costs, and, in some cases, attorney's fees. These recoveries are cumulative, so while a finding of infringement does not guarantee monetary recovery, plaintiff may receive both its own damages and defendant's profits if recovery is allowed. n2

[2] Recovering Damages Based on Lost Earnings

Section 1117 provides that once trademark infringement is established, a plaintiff is entitled to "any damages sustained." These damages are usually those which flow from the specific wrong that the plaintiff can prove, plus lost profits plaintiff would have earned but for the infringement.

Plaintiff's lost profits are demonstrated by establishing the following: n3

- The infringer's sales volume of the infringing products
- But for the infringement, plaintiff would have made the sales

Plaintiff's damages may also be established by using royalties normally received for use of a trademark as the proper measure of damages for the trademark's misuse. This may mean looking to previous negotiations between parties or using current market rates. n4

Plaintiff may also recover "reasonable" damages to cover corrective advertising expenses incurred to counteract public confusion from defendant's infringement. n5

[3] Recovering Damages Based on Defendant's Profits

15 U.S.C. § 1117 provides that a trademark owner may recover defendant's profits if infringement is established. Two main theories are used to support an award of defendant's profits. One theory views a profits award as compensation to

the trademark owner for loss of diverted sales. This means that for a plaintiff to recover, there must be competition between the parties, so that sales diversion is plausible. n6

The second theory uses profits awards as redress for the infringer's unjust enrichment and as a deterrent to further enrichment. Because sales diversion is irrelevant, competition between the parties need not exist. n7

Under either approach, the plaintiff has to prove the amount of defendant's sales of the infringing product. The burden then shifts to defendant to demonstrate costs and/or deductions.

[4] Increasing Damages Award Based on Statutory Authority

Section 1117(a) provides that the court may, according to the circumstances of the case, award "any sum above the amount found as actual damages, not exceeding three times such amount." Once actual damages are established, courts may thus increase the award, subject to the treble maximum, "as justice shall require." Section 1117(a) also allows the court, if it finds the profit-based recovery "either inadequate or excessive," to award a sum it finds "just" under the circumstances. Significantly, the statute imposes no ceiling on such recovery.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesGeneral OverviewTrademark LawInfringement ActionsRemediesDamagesGeneral OverviewTrademark LawInfringement ActionsRemediesDamagesPunitive DamagesTrademark LawInfringement ActionsRemediesDamagesStatutory DamagesTrademark LawInfringement ActionsRemediesDamagesTreble Damages

FOOTNOTES:
(n1)Footnote 1. *15 U.S.C. §§ 1051-1127.*

(n2)Footnote 2. *Playboy Enters., Inc. v. P.K. Sorren Export Co., 546 F. Supp. 987, 998 (S.D. Fla. 1982) .*

(n3)Footnote 3. *Id.*

(n4)Footnote 4. *Howard Johnson Co. v. Khimani, 892 F.2d 1512, 1519 (11th Cir. 1990) .*

(n5)Footnote 5. *See Big O Tire Dealers v. Goodyear Tire & Rubber Co., 561 F.2d 1365, 1375 (10th Cir. 1977) .*

(n6)Footnote 6. *See Maltina Corp. v. Cawy Bottling Co., 613 F.2d 582, 584 (5th Cir. 1980) .*

(n7)Footnote 7. *Id. at 585 .*

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CHAPTER 43 Damages *
C. Evaluating Federal Statutory Damages

1-43 Federal Litigation Guide § 43.48

§ 43.48 Seeking Damages for Employment Discrimination Under Title VII

[1] Claiming Damages For Discrimination at the Workplace

Title VII of the Civil Rights Act of 1964 is a broad piece of legislation designed to protect people from discrimination in the work place. The Act prohibits discrimination on the basis of "race, color, religion, sex, or national origin." n1 All persons who work for an employer with 15 or more employees for "twenty or more calendar weeks in the current or preceding calendar year," are covered by this statute. n2 This statute also covers discrimination by labor unions and employment agencies.

[2] Recovering Back Pay Under Title VII

Reinstatement and back pay are the principal equitable remedies under Title VII. n3 Back pay is viewed as an attempt to "make whole" the victim of discrimination. n4 It is calculated as the difference between "what would have been earned by the plaintiff in the employment lost through discrimination ... less what was actually earned from other employment during the period," n5 or should have been earned with reasonable diligence, "after normal expenses incurred in seeking and holding the interim employment have been deducted." n6

Under Title VII, a plaintiff is required to mitigate damages by seeking alternative comparable employment. n7 While the plaintiff bears the burden of proving a prima facie case of discrimination, n8 the burden of proof is on the defendant to show that the mitigation is not adequate.

[3] Recovering Front Pay Under Title VII

Some circuits award "front pay" as a remedy for violations of Title VII. These courts award front pay when other relief is not sufficient to make the plaintiff whole.

"Front pay" in Title VII cases has been defined as a remedy for the postjudgment effects of discrimination. It compensates the plaintiff for lost income from the date of judgment to the date the plaintiff obtains the position that would have been accepted but for the discrimination. n9

Generally, front pay is awarded when reinstatement is either not possible or practical. "Front pay may be awarded when the 'antagonism between employer and employee is so great that reinstatement is not appropriate.' " n10 But the award

of front pay is generally not for an indefinite period. "Front pay is designed to make an employee whole for a reasonable future period, required for an employee to re-establish his rightful place in the job market." n11

Some decisions allowing front pay have emphasized that the courts have discretion in deciding whether or not to award front pay. One court held that failure to adequately seek out a new position to mitigate damages was sufficient justification to deny front pay. n12

[4] Recovering Compensatory and Punitive Damages Under Title VII

Plaintiffs who are the victims of intentional discrimination (as opposed to victims of unlawful "disparate impact" discrimination), and who have not already recovered damages under *42 U.S.C. § 1981*, may recover compensatory and punitive damages. n13

A plaintiff may recover punitive damages against any party, other than a government, governmental agency, or political subdivision, if the complaining party demonstrates that the respondent engaged in a discriminatory practice or practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual. n14 With respect to compensatory damages, the Act provides that such damages may not include "back pay, interest on back pay, or any type of relief authorized under section 706(g) of the Civil Rights Act of 1964." n15

Punitive damages and compensatory awards are limited to damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." n16 The limitation on the amount of damages varies with the size of the employer's workforce. n17

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesGeneral OverviewCivil Rights LawCivil Rights ActsCivil Rights Act of 1964Labor & Employment LawDiscriminationTitle VII of the Civil Rights Act of 1964RemediesCompensatory DamagesLabor & Employment LawDiscriminationTitle VII of the Civil Rights Act of 1964RemediesPunitive Damages

FOOTNOTES:
(n1)Footnote 1. *42 U.S.C. § 2000e-2(a)(1).*

(n2)Footnote 2. *42 U.S.C. § 2000e.*

(n3)Footnote 3. *42 U.S.C. § 2000e-5(g).*

(n4)Footnote 4. *Robinson v. Lake Station, 630 F. Supp. 1052, 1062 (N.D. Ind. 1986)* .

(n5)Footnote 5. 29 C.F.R. 1613 Appendix A (1991).

(n6)Footnote 6. *Id.*

(n7)Footnote 7. *Sennello v. Reserve Life Ins. Co., 667 F. Supp. 1498, 1513 (S.D. Fla. 1987)* , *aff'd, 872 F.2d 393 (11th Cir. 1989)* .

(n8)Footnote 8. *EEOC v. Delight Wholesale Co., 765 F. Supp. 583, 588 (W.D. Mo. 1991)* .

(n9)Footnote 9. *Sellers v. Delgado College, 902 F.2d 1189, 1196 (5th Cir. 1990)* , *cert. denied, 498 U.S. 987 (1990)* (quoting *Floca v. Homcare Health Servs., Inc., 845 F.2d 108, 112 (5th Cir. 1988))* .

(n10)Footnote 10. *Daniels v. Essex Group, Inc., 740 F. Supp 553, 562 (N.D. Ind. 1990)* , *aff'd, 937 F.2d 1264*

(7th Cir. 1991) , (quoting *Fadhl v. City & County of San Francisco, 741 F.2d 1163, 1167 (9th Cir. 1984))* .

(n11)Footnote 11. *Id.* (citing *Dillon v. Coles, 746 F.2d 998, 1006 (3d Cir. 1984)* .

(n12)Footnote 12. *Sellers v. Delgado College, 902 F.2d 1189, 1196 (5th Cir. 1990)* , *cert. denied, 498 U.S. 987 (1990)* .

(n13)Footnote 13. S. Res. 1745, § 1977A, 102d Cong., 2d Sess. (1991) (enacted).

(n14)Footnote 14. *Id.* at § 1977A(b)(1).

(n15)Footnote 15. *Id.* at § 1977A(b)(2).

(n16)Footnote 16. *Id.* at § 1977A(b)(3).

(n17)Footnote 17. *Id.* at § 1977A(b)(3)(A)-(D).

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CHAPTER 43 Damages *
C. Evaluating Federal Statutory Damages

1-43 Federal Litigation Guide § 43.49

§ 43.49 Seeking Damages for Age Discrimination Under the ADEA

[1] Claiming Damages Under the ADEA

Under the Age Discrimination in Employment Act (ADEA), it is unlawful for an employer, labor organization, or employment agency to discriminate against someone because of their age, n1 if the employee is over 40 years old. n2 Plaintiffs who bring civil actions for violations of these provisions are entitled to "such legal or equitable relief as will effectuate the purposes of this chapter." n3 The burden of proof on the issue of damages is on the plaintiff. n4

[2] Recovering Back Pay Under the ADEA

The standards that govern back pay under the ADEA are similar to those found in Title VII. Back pay is generally awarded in order to give full relief and courts generally do not have wide discretion to decline back pay to a prevailing plaintiff. The plaintiff is entitled to the wages the plaintiff would have received less any interim earnings. n5

The ADEA also requires that a plaintiff mitigate damages, by using reasonable efforts to obtain other employment after termination. n6

[3] Recovering Liquidated Damages Under the ADEA

The ADEA provides for more than equitable remedies, because the ADEA has incorporated parts of the Fair Labor Standards Act into its provisions. In pertinent part, the ADEA states that "liquidated damages shall be payable only in cases of willful violations of this chapter." n7

Under the ADEA, the term "liquidated damages" is not used in the same manner as in cases construing that term in contract clauses. Liquidated damages under the ADEA merely refers to the "double" damages that a plaintiff may be entitled to in certain situations. n8

Liquidated damages provide for double damages when there has been a "willful violation" of the ADEA since the employer will be liable not only for back pay, but also for an equal amount as liquidated damages. The key to being awarded liquidated damages is proof that the acts of the employer were willful.

Some courts have found that "evidence of outrageous conduct" is a predicate for liquidated damages, n9 while other

courts have declined to follow this standard. n10

Clearly, there can be no liability for liquidated damages if the employer "acted negligently, inadvertently, innocently, or even if the employer was aware of the applicability of the ADEA, and acted reasonably and in good faith." n11 Equally clear is the proposition that an employee would be awarded liquidated damages if the employer had an "evil motive" in discharging an employee. n12 Certainly, if "an employer consciously and deliberately does what it knows ... the ADEA prohibits, that employer has acted willfully." n13

The Supreme Court has stated that willful conduct will be found if "the employer ... knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." n14 However, an employee may even be entitled to liquidated damages when the employer acts in a way that is "indifferent to the requirements of the governing statute and acted in a purposeful deliberate and calculated fashion." n15

[4] Recovering Front Pay Under the ADEA

Front pay is awarded to compensate for lost future earnings. n16 Front pay is not a mandatory remedy, and there is considerable discretion in determining whether or not to award such relief. n17 Front pay presupposes that reinstatement is either impossible or impracticable and that the claimant has not been able to find comparable employment since being terminated. n18 The plaintiff has the burden of establishing that front pay is appropriate under the circumstances of the case. n19

[5] Recovering Punitive and Compensatory Damages Under The ADEA

The ADEA has established specific equitable and punitive remedies in the form of back pay, front pay, and liquidated damages. These remedies compensate the plaintiff for the actual loss of his or her job and punish the employer for any willful misconduct. However, under the ADEA, courts have held that a plaintiff may not recover compensatory damages for the injuries of "emotional suffering," n20"emotional distress, mental anguish, and injury to reputation." n21

At least one court has defended this position by stating, "[c]omputation of compensatory damages, could not be readily achieved in any administrative conciliation process," and that if compensatory damages of this nature were to be allowed, it would frustrate the Congressional intent to encourage conciliation. n22 Furthermore, the courts have held that a plaintiff may not be awarded punitive damages in excess of back pay and liquidated damages under the ADEA. n23 However, as in other areas of federal litigation, a party may be able to recover punitive and compensatory damages through pendent state claims.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesGeneral OverviewLabor & Employment LawDiscriminationAge DiscriminationRemediesGeneral OverviewLabor & Employment LawDiscriminationAge DiscriminationRemediesCompensatory DamagesLabor & Employment LawDiscriminationAge DiscriminationRemediesLiquidated DamagesLabor & Employment LawDiscriminationAge DiscriminationRemediesPunitive Damages

FOOTNOTES:
(n1)Footnote 1. *29 U.S.C. § 623.*

(n2)Footnote 2. *29 U.S.C. § 631.*

(n3)Footnote 3. *29 U.S.C. § 626(c)(1).*

(n4)Footnote 4. *Meschino v. International Tel. & Tel. Corp., 661 F. Supp. 254, 256 (S.D.N.Y. 1987)* .

(n5)Footnote 5. *See Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983)* .

(n6)Footnote 6. *Hansard v. Pepsi-Cola Bottling Co., 865 F.2d 1461, 1468 (5th Cir. 1989) , cert. denied, 493 U.S. 842 (1989)* .

(n7)Footnote 7. *29 U.S.C. § 626(b).*

(n8)Footnote 8. *Benjamin v. United Merchants & Mfrs., Inc., 873 F.2d 41, 43 (2d Cir. 1989)* .

(n9)Footnote 9. *Kelly v. Matlack, Inc., 903 F.2d 978, 982 (3d Cir. 1990)* (quoting *Dreyer v. Arco Chem. Co., 801 F.2d 651, 656-658 (3d Cir. 1986))* .

(n10)Footnote 10. *Lindsey v. American Cast Iron Pipe Co., 810 F.2d 1094, 1100 (11th Cir. 1987)* (divided panel).

(n11)Footnote 11. *Benjamin v. United Merchants & Mfrs., Inc., 873 F.2d 41, 44 (2d Cir. 1989)* (citing *McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133-135, 108 S. Ct. 1677, 100 L. Ed. 2d 115 (1988))* .

(n12)Footnote 12. *Id.* (citing *Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 123 n.17, 105 S. Ct. 613, 83 L. Ed. 2d 523 (1985))* .

(n13)Footnote 13. *Brown v. M&M/Mars, 883 F.2d 505, 514 (7th Cir. 1989)* .

(n14)Footnote 14. *Trans World Airlines v. Thurston, 469 U.S. 111, 128, 105 S. Ct. 613, 83 L. Ed. 2d 523 (1985)* .

(n15)Footnote 15. *Benjamin v. United Merchants & Mfrs., Inc., 873 F.2d 41, 44 (2d Cir. 1989)* .

(n16)Footnote 16. *Hansard v. Pepsi-Cola Bottling Co., 865 F.2d 1461, 1469 (5th Cir. 1989) , cert. denied, 493 U.S. 842 (1989)* .

(n17)Footnote 17. *See Chace v. Champion Spark Plug Co., 725 F. Supp. 868, 871 (D. Md. 1989)* (citing *Dominic v. Consolidated Edison Co., 822 F.2d 1249, 1257 (2d Cir. 1987))* .

(n18)Footnote 18. *Nobler v. Beth Israel Medical Ctr., 715 F. Supp. 570, 573 (S.D.N.Y. 1989)* .

(n19)Footnote 19. *Linn v. Andover Newton Theological School, Inc., 874 F.2d 1, 8 (1st Cir. 1989)* .

(n20)Footnote 20. *Patton v. University of Chicago Hosp., 706 F. Supp. 627 (N.D. Ill 1989)* .

(n21)Footnote 21. *Higdon v. Concast Cable Communications, Inc., 708 F. Supp. 1584 (N.D. Ala. 1987)* .

(n22)Footnote 22. *McLaren v. Emory Univ., 705 F. Supp. 563, 567 (N.D. Ga. 1988)* (citing *Rogers v. Exxon, 550 F.2d 834, 840-841 (3d Cir. 1977))* .

(n23)Footnote 23. *Espinueva v. Garrett, 895 F.2d 1164, 1165 (7th Cir. 1990) , cert. denied, 497 U.S. 1005 (1990)* .

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CHAPTER 43 Damages *
C. Evaluating Federal Statutory Damages

1-43 Federal Litigation Guide § 43.50

§ 43.50 Seeking Damages Under the Equal Pay Act

[1] Claiming Damages For Discrimination Based on Sex

The Equal Pay Act ("EPA") amended the Fair Labor Standards Act of 1938 ("FLSA") to address pay discrimination based on sex. The Equal Pay Act provides that an employer may not discriminate between employees on the basis of sex by paying unequal wages for equal work. n1

Either a private party or the Secretary of Labor may bring an action against an employer under the Equal Pay Act. n2 The Equal Pay Act provides for damage awards of unpaid wages, as well as an additional equal amount as liquidated damages. n3

The EPA and the Wage Hours Act, which is also a part of the FLSA, share the same remedial section. n4

[2] Recovering Back Pay Under the Equal Pay Act

Violations of the Equal Pay Act are compensable by a remedy of back pay. A party generally may bring suit for back pay within a two year period after the violation occurred. n5 However, under the EPA, if there is a willful violation by the employer, then the statute of limitations for bringing a suit for back pay is three years. n6 Under the EPA, as under the ADEA and Title VII, the back pay award will be reduced by the amount of mitigated interim earnings. n7

[3] Recovering Liquidated Damages Under the Equal Pay Act

Under the EPA, a prevailing plaintiff may be awarded liquidated damages. n8 These damages differ from liquidated damages discussed in the context of a breach of contract. Liquidated damages under the EPA merely double the amount of compensation that an EPA plaintiff has already been awarded.

While both the ADEA and EPA allow for liquidated damages, n9 it has been stated that the purpose of liquidated damages is different under the ADEA than under the EPA. Under the ADEA, many courts have found that the primary purpose of liquidated damages is to punish and deter employers from violating the Act, whereas under the FLSA, liquidated damages are used primarily to compensate for damages that are hard to calculate. n10

Under the EPA, liquidated damages are mandatory unless an employer has a good faith defense. That is, if the court

finds that the employer reasonably, and in good faith, thought it was acting in a lawful manner, then liquidated damages *may* be denied by the court in its discretion. n11 Otherwise, the award is mandatory. n12 On the other hand, even if good faith is found, the court in its discretion may still grant, in whole or in part, a request for liquidated damages. n13

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesGeneral OverviewCivil ProcedureRemediesDamagesPunitive DamagesLabor & Employment LawEqual PayEqual Pay ActRemediesLabor & Employment LawEqual PayRemedies

FOOTNOTES:
(n1)Footnote 1. *29 U.S.C. § 206(d)(I).*

(n2)Footnote 2. *29 U.S.C. §§ 216(b)* and *(c).*

(n3)Footnote 3. *29 U.S.C. § 216(b).*

(n4)Footnote 4. *Id.*

(n5)Footnote 5. *29 U.S.C. § 255(a).*

(n6)Footnote 6. *Id. See also EEOC v. First Citizens Bank, 758 F.2d 397, 401 (9th Cir. 1985) , cert. denied, 474 U.S. 902 (1985) .*

(n7)Footnote 7. *See EEOC v. White & Son Enters., 881 F.2d 1006, 1013 (11th Cir. 1989) .*

(n8)Footnote 8. *29 U.S.C. § 216(b).*

(n9)Footnote 9. *29 U.S.C. § 216(b)* and *29 U.S.C. § 626(b).*

(n10)Footnote 10. *Lindsey v. American Cast Iron Pipe Co., 810 F.2d 1094, 1102 (11th Cir. 1987)* (divided panel).

(n11)Footnote 11. *29 U.S.C. § 260.* (This section is commonly referred to as Section 11 of the Portal-to-Portal Act.)

(n12)Footnote 12. *EEOC v. Shelby County Gov't, Bd. of County Comm'rs, 707 F. Supp. 969 (W.D. Tenn. 1988)* (quoting *Laffey v. Northwest Airlines Inc., 567 F.2d 429, 464 (D.C. Cir. 1976) , cert. denied, 434 U.S. 1086 (1978)) .*

(n13)Footnote 13. *Martinez v. Food City, Inc., 658 F.2d 369 (5th Cir. 1981) ; Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976) , cert. denied, 434 U.S. 1086 (1978) . See also EEOC v. Altmeyer's Home Stores, Inc., 698 F. Supp. 594 (W.D. Pa. 1988) .*

* Chapter 43 was rewritten in 2002 by Andrew E. Westley, Esq., of San Francisco, California.

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CHAPTER 43 Damages *
C. Evaluating Federal Statutory Damages

1-43 Federal Litigation Guide § 43.51

§ 43.51 Seeking Damages Under 42 U.S.C. § 1981

[1] Claiming Damages for Civil Rights Violations Under Section 1981

Section 1981 protects against discrimination based on race and provides, in pertinent part:

[A]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of laws and proceedings for the security of persons and property as is enjoyed by white citizens. n1

Section 1981 protects civil rights in public and private facilities including schools, at the workplace, in housing, as well as in other areas when the violation is based on race.

Under § 1981, "[a]n individual who establishes a cause of action ... is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages." n2

[2] Recovering Compensatory Damages Under Section 1981

Under § 1981, a party may recover compensatory damages n3 for emotional pain and suffering. n4 However, to be eligible for compensatory damages for emotional or mental injuries, the plaintiff must present evidence of actual injury. n5

Courts have allowed recovery under § 1981 for emotional distress, but there must be sufficient evidence to support the award. n6

[3] Recovering Punitive Damages Under Section 1981

Federal standards govern the determination of punitive damages under Section 1981. n7 In general, a plaintiff seeking punitive damages must establish that the defendant acted maliciously, recklessly, or in gross disregard of plaintiff's rights. n8

Some courts have held in § 1981 cases that punitive damages must bear a reasonable relationship to the amount of compensatory damages awarded. n9 However, this proportionality rule generally does not apply to nominal damages

because only a very low punitive damages award could be said to bear a reasonable relationship to the amount of a nominal damages award. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesGeneral OverviewCivil ProcedureRemediesDamagesPunitive DamagesCivil Rights LawContractual Relations & HousingEqual Rights Under the Law (sec. 1981)Remedies

FOOTNOTES:
(n1)Footnote 1. *42 U.S.C. § 1981.*

(n2)Footnote 2. *Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460, 95 S. Ct. 1716, 1720, 44 L. Ed. 2d 295, 301 (1975) . See also Holt v. Michigan Dep't of Corrections, 771 F. Supp. 201, 204 (W.D. Mich. 1991) .*

(n3)Footnote 3. *Gunby v. Pennsylvania Elec. Co., 840 F.2d 1108, 1121 (3d Cir. 1988) , cert. denied, 492 U.S. 905 (1989)* (citing *Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460, 95 S. Ct. 1716, 1720, 44 L. Ed. 2d 295, 301 (1975)* ; *Easley v. Anheuser-Busch, Inc., 758 F.2d 251, 263 (8th Cir. 1985)) .*

(n4)Footnote 4. *Gunby v. Pennsylvania Elec. Co., 840 F.2d 1108, 1121 (3d Cir. 1988) , cert. denied, 492 U.S. 905 (1989)* (citing *Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460, 95 S. Ct. 1716, 1720, 44 L. Ed. 2d 295, 301 (1975)* ; *Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225, 1238 (D.C. Cir. 1984)* ; *Williams v. Trans-World Airlines, Inc., 660 F.2d 1267, 1272 (8th Cir. 1981)) .*

(n5)Footnote 5. *Id.*

(n6)Footnote 6. *Id.* (quoting *Erebia v. Chrysler Plastic Prods. Corp., 772 F.2d 1250, 1259 (6th Cir. 1985) , cert. denied, 475 U.S. 1015 (1986)) .*

(n7)Footnote 7. *Jackson v. Pool Mortg. Co., 868 F.2d 1178, 1181 (10th Cir. 1989)* (citing cases).

(n8)Footnote 8. *Id.*

(n9)Footnote 9. *Edwards v. Jewish Hosp. of St. Louis, 855 F.2d 1345, 1352 (8th Cir. 1988) .*

(n10)Footnote 10. *Id.*

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CHAPTER 43 Damages *
C. Evaluating Federal Statutory Damages

1-43 Federal Litigation Guide § 43.52

§ 43.52 Seeking Damages Under 42 U.S.C. § 1983

[1] Claiming Damages for Civil Rights Violations Under Color of State Law

Section 1983 of Title 42 of the United States Code protects citizens from constitutional torts committed under the color of state law. This statute was created to serve as " 'a species of tort liability' in favor of persons who are deprived of "rights, privileges or immunities secured' to them by the Constitution." n1

Section 1983 expressly provides for civil liability, and it has been stated that any liability imposed is primarily to compensate people who have been deprived of their constitutional rights. n2 Consequently, the most common type of damages awarded under § 1983 are compensatory. Plaintiffs may also be awarded punitive and nominal damages and attorney's fees.

[2] Recovering Compensatory Damages Under § 1983

Generally, under § 1983 a party must plead and prove actual injuries to be awarded compensatory damages. n3 If actual injuries are not proven, a party may only be entitled to nominal damages. Because compensatory damages are designed to compensate for an injury caused by defendant's actions, n4 it is not proper for a court to vary the level of compensatory damages based on the abstract "value" or "importance" of the constitutional right. n5

Compensatory damages for § 1983 purposes may be divided into two categories: special damages that compensate for out of pocket losses and other monetary harms n6 and general damages that include such things as impairment of reputation, personal humiliation, and mental anguish and suffering. n7 To be awarded compensatory damages on a § 1983 claim, a party must present adequate evidence regarding the monetary or emotional injury suffered. n8

[3] Recovering Punitive Damages Under § 1983

Punitive damages may also be recovered under § 1983, n9 even if the plaintiff has not been awarded compensatory damages but nominal damages were awarded. n10 But in order to be awarded punitive damages, the plaintiff must show that defendant acted in a way that was willful or malicious, that defendant acted with reckless or serious indifference for the rights of others, or there was bad faith or an improper motive behind the defendant's action. n11

However, even if the requisite elements for punitive damages are found, the court is not bound to award them because

punitive damages are discretionary. n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesGeneral OverviewCivil ProcedureRemediesDamagesCompensatory DamagesCivil ProcedureRemediesDamagesPunitive DamagesCivil Rights LawSection 1983 ActionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Carey v. Piphus, 435 U.S. 247, 253, 98 S. Ct. 1042, 1047, 55 L. Ed. 2d 252, 258 (1978)* (citation omitted).

(n2)Footnote 2. *Carey v. Piphus, 435 U.S. 247, 254, 98 S. Ct. 1042, 1047, 55 L. Ed. 2d 252, 259 (1978)* .

(n3)Footnote 3. *Carey v. Piphus, 435 U.S. 247, 253, 98 S. Ct. 1042, 1047, 55 L. Ed. 2d 252, 258 (1978)* .

(n4)Footnote 4. *Id. 435 U.S. at 254, 98 S. Ct. at 1047, 55 L. Ed. 2d at 259* .

(n5)Footnote 5. *Memphis Community School Dist. v. Stachura, 477 U.S. 299, 309-310, 106 S. Ct. 2537, 2544-2545, 91 L. Ed. 2d 249, 260-261 (1986)* .

(n6)Footnote 6. *Id. 477 U.S. at 307, 106 S. Ct. at 2543, 91 L. Ed. 2d at 258* .

(n7)Footnote 7. *Id.*, (quoting *Gertz v. Robert Welch, Inc., 418 U.S. 323, 350, 94 S. Ct. 2997, 3012, 41 L. Ed. 2d 789, 811 (1974))* .

(n8)Footnote 8. *See Lipsett v. University of Puerto Rico, 759 F. Supp. 40, 58 (D.P.R. 1991)* .

(n9)Footnote 9. *Smith v. Wade, 461 U.S. 30, 35-36, 103 S. Ct. 1625, 1629, 75 L. Ed. 2d 632, 638-639 (1983)* .

(n10)Footnote 10. *Brewer v. Chauvin, 938 F.2d 860, 864 (8th Cir. 1991)* ; *Davis v. Locke, 936 F.2d 1208, 1214 (11th Cir. 1991)* .

(n11)Footnote 11. *Smith v. Wade, 461 U.S. 30, 45-49, 103 S. Ct. 1625, 1634-1636, 75 L. Ed. 2d 632, 644-646 (1983)* .

(n12)Footnote 12. *Hale v. Fish, 899 F.2d 390, 404 (5th Cir. 1990)* .

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CHAPTER 44 Findings and Judgments *

4-44 Federal Litigation Guide 44.syn

§ 44.syn Synopsis to Chapter 44: Findings and Judgments *

§ 44.01 Analyzing When Findings of Fact and Conclusions of Law Are Required

§ 44.02 Analyzing When Findings of Fact and Conclusions of Law Are Not Required

§ 44.03 Considering the Importance of Findings and Conclusions for Rulings on Significant Motions

§ 44.04 Considering the Purpose of Findings of Fact

§ 44.05 Remanding the Action on Appeal for Failure to Make Necessary Findings

§ 44.06 Timing and Procedure Under Rule 52(a)
[1] Determining Whether Proposed Findings and Conclusions Should Be Submitted
[2] Preparing Proposed Findings and Conclusions After Trial
[3] Submitting Proposed Findings and Conclusions Before Decision Rendered

§ 44.07 Preparing Proposed Findings and Conclusions for the Court
[1] Aiding the Trial Court in Making a Sound and Reasoned Decision
[2] Clarifying the Res Judicata and Collateral Estoppel Effects of Judgment
[3] Assisting the Appellate Court on Review

§ 44.08 Evaluating the Appellate Court's Review of Findings and Conclusions
[1] Applying the "Clearly Erroneous" Standard
[2] Evaluating Mixed Questions of Law and Fact

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§ 44.20 Understanding Rule 52(b) Motions
[1] Correcting the Decision of the Trial Judge
[2] Analyzing the Objectives of a Motion Under Rule 52(b)
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[1] Filing Within 28 Days of Entry of Judgment
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§ 44.23 Evaluating Objectives of Rule 52(b) Motions for the Prevailing Party
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§ 44.24 Considering Factors Militating Against Use of Rule 52(b) Motions
[1] Accepting Adverse Findings That Weaken the Court's Decision
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§ 44.25 Determining Whether to Appeal the Sufficiency of the Evidence in Support of Factual Findings Rather Than Make a Rule 52(b) Motion
[1] Raising the Sufficiency of the Evidence on Appeal
[2] Challenging Findings on Appeal Requires Showing That Findings Are Clearly Erroneous
[3] Challenging Findings Based on Inadmissible or Incompetent Evidence
[4] Challenging Findings Based on Mistake

§ 44.26 Determining Whether to Make a Rule 52(b) Motion With Respect to Conclusions of Law

§§ 44.27 through 44.29 [Reserved]

§ 44.30 Considering the Separate Document Requirement Under Rule 58
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§ 44.31 Using Correct Terminology to Describe Entry of Judgment

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§ 44.33 Judgments Which Must Be Entered by Clerk Without Court Direction
[1] Judgment Following General Verdict
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§ 44.36 Determining Time of Entry of Judgment
[1] Timing of Entry When No Separate Document Required Under Rule 58(a)
[2] Timing of Entry When Separate Document Required Under Rule 58(a)

§ 44.37 Tolling Effect of Motion For Fees

§ 44.38 Providing Notice of Entry of Judgment
[1] Entry of Judgment Starts Time in Which to File Appeal Running
[2] Service of Notice of Entry of Judgment by Clerk
[3] Service of Notice of Entry of Judgment by Party

§ 44.39 Preparing the Judgment
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§ 44.40 Analyzing Scope of Rule 59(e)

§ 44.41 Seeking Specific Relief Under Rule 59(e)

§ 44.42 Labeling of Motion Not Determinative

§ 44.43 Using Rule 59(e) Motions Only to Correct Final Judgments

§ 44.44 Timing of Filing of Motion Under Rule 59(e)
[1] Filing Rule 59(e) Motion on Time Is Critical
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§ 44.45 Moving to Alter or Amend Judgment After Jury or Court Trial
[1] Aiming Motion at Specific Errors in Judgment
[2] Moving to Vacate Judgment Under Rule 59(e)
[3] Seeking Fees Under Rule 59(e)
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§ 44.46 Moving to Alter or Amend Judgments Entered Prior to Trial
[1] Understanding Pretrial Application of Rule 59(e)
[2] Using Rule 59(e) to Challenge Entry of Judgment of Dismissal on Summary Judgment
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§§ 44.47 through 44.49 [Reserved]

§ 44.50 Obtaining a Default Judgment Against Defendant for Failure to Appear or Defend
[1] Moving For Default Judgment Under Rule 55
[2] Determining Whether to Seek Entry of Default
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§ 44.51 Considering Threshold Issues Before Requesting Entry of Default
[1] Determining Whether Affirmative Relief Is Sought Against the Party Whose Default Is To Be Entered
[2] Determining Whether the Party Has Failed to Plead or Otherwise Defend
[3] Determining Whether the Court Has Jurisdiction
[4] Determining Whether the Party Whose Default Is To Be Entered is an Infant or an Incompetent Person
[5] Determining Whether the Party Whose Default Is To Be Entered Is in the Military
[6] Determining Whether There Are Other Factors Which Would Tend to Make Default Unjust

§ 44.52 Obtaining Entry of Default

§ 44.53 Obtaining a Judgment on the Default
[1] Preparing an Application to the Clerk for a Default Judgment

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[3] Appointing a Representative for a Minor, Incompetent Person, or Person in the Military Service
[4] Giving Seven-Days Notice to Person Who Has Appeared
[5] Establishing the Amount of Damages or the Merits of a Claim

§ 44.54 Setting Aside a Default or Default Judgment
[1] Resolving Doubts in Favor of Party Seeking Relief From Default Judgment
[2] Showing of Good Cause Required
[3] Moving to Set Aside Default Judgment in Reasonable Time

§§ 44.55 through 44.59 [Reserved]

§ 44.60 Correcting Clerical Mistakes Under Rule 60(a)

§ 44.61 Comparing Rule 60(a) and Rule 60(b)

§ 44.62 Determining Whether Error Is a "Clerical Mistake"
[1] Evaluating Nature of Error
[2] Seeking Amendment of Judgment to Include Prejudgment Interest
[3] Correcting Other Clerical Mistakes Under Rule 60(a)

§ 44.63 Preparing a Motion Under Rule 60(a)
[1] Providing Notice of Motion
[2] Making Motion in a Case on Appeal

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CHAPTER 44 Findings and Judgments *

4-44 Federal Litigation Guide Scope

Scope

SCOPE

This chapter covers findings and judgments. The chapter first discusses practice under Rule 52(a), including the circumstances under which findings of fact and conclusions of law are required, the timing and procedure for proposing such findings, and the preparation of proposed findings and conclusions.

An in-depth discussion of the Rule 52(b) motion to alter or amend findings and conclusions includes factors to be considered when deciding whether to make the Rule 52(b) motion, the timing and procedure of the motion, and the objectives to be attained by both the party that lost the trial court decision and the party that prevailed.

Next, entry of judgment under Rule 58 is analyzed. The chapter covers such topics as the preparation of the judgment form, the formal requirements of a judgment, and which judgments are automatically entered by the clerk. Certain problems counsel may encounter under Rule 58 are also considered.

The chapter includes a review of Rule 59(e) motions to alter or amend a judgment, as well as a discussion of default judgments under Rule 55. Various prerequisites to obtaining a default judgment are highlighted.

An analysis of the mechanisms for correcting clerical mistakes in judgments concludes the chapter.

For expanded coverage of findings and judgments, *see* Moore's Federal Practice, Ch. 52, *Findings by the Court; Judgment on Partial Findings* ; Ch. 58, *Entry of Judgment* ; Ch. 59, *New Trials; Amendment of Judgments* ; and Ch. 55, *Default* (Matthew Bender 3d ed.).

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CHAPTER 44 Findings and Judgments *
A. Understanding Findings of Fact and Conclusions of Law Under Rule 52(a)

4-44 Federal Litigation Guide § 44.01

§ 44.01 Analyzing When Findings of Fact and Conclusions of Law Are Required

In general, Rule 52(a) requires findings of fact and conclusions of law in three circumstances:

- When there is a bench trial;
- When an advisory jury is used; and n1
- When the court grants or denies an interlocutory injunction. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See, e.g., Skoldberg v. Villani, 601 F. Supp. 981, 982 (S.D.N.Y. 1985)* .

(n2)Footnote 2. *See, e.g., Inverness Corp. v. Whitehall Labs., 819 F.2d 48, 50 (2d Cir. 1987)* .

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CHAPTER 44 Findings and Judgments *
A. Understanding Findings of Fact and Conclusions of Law Under Rule 52(a)

4-44 Federal Litigation Guide § 44.02

§ 44.02 Analyzing When Findings of Fact and Conclusions of Law Are Not Required

Under Rule 52(a)(3), the court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless the Federal Rules provide otherwise, on any other motion. However, that does not mean that it is improper for a court to use appropriate findings of fact and conclusions of law as a means to explain the basis of its rulings on motions.

One of the more controversial contexts for the granting of a motion without a statement of findings and conclusions is the grant of a summary judgment motion under Rule 56. At least one court has said it would be "ill-advised" to make findings of fact in granting a Rule 56 motion for summary judgment because they "would carry an unwarranted implication that a fact question was presented." n1 Such an implication can easily be avoided, however, by identifying the findings as setting forth the material facts that the court finds are undisputed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *A R Inc. v. Electro-Voice, Inc., 311 F.2d 508, 513 (7th Cir. 1962)* .

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CHAPTER 44 Findings and Judgments *
A. Understanding Findings of Fact and Conclusions of Law Under Rule 52(a)

4-44 Federal Litigation Guide § 44.03

§ 44.03 Considering the Importance of Findings and Conclusions for Rulings on Significant Motions

Oftentimes, a court will explain the basis for a ruling on a significant motion, such as a motion for summary judgment, even though technically it may not be required to do so. n1 Some appellate courts have urged that it would be helpful if the district court set forth its findings and conclusions. n2 Findings and conclusions assist a reviewing court to understand the basis for the decision, particularly where the ruling required the evaluation of some evidence. n3 In spite of the language of Rule 52 stating that findings and conclusions are "not required" unless specifically required by a Federal Rule, courts of appeal have remanded some decisions for the district court to make findings and conclusions where they have concluded that such an explanation by the district court is necessary for meaningful review. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureAppealsRemands

FOOTNOTES:
(n1)Footnote 1. *Gaines v. Haughton, 645 F.2d 761, 768 n.13 (9th Cir. 1981)* , *cert. denied*, *454 U.S. 1145 (1982)* . For a detailed explanation of the reasons for providing findings of fact and conclusions of law when granting a motion for summary judgment, see *Garter-Bare Co. v. Munsingwear, Inc., 650 F.2d 975, 982-983 (9th Cir. 1980*) (concurring opinion).

(n2)Footnote 2. *See, e.g., W.L. Gore & Assocs., Inc. v. International Med. Prosthetics Research Assocs., Inc., 745 F.2d 1463, 1465-1466 (Fed. Cir. 1984)* .

(n3)Footnote 3. *E.g., Societe de Conditionnement en Aluminum v. Hunter Eng'g Co., 655 F.2d 938, 942 (9th Cir. 1981)* (review of a dismissal of a complaint for lack of subject matter jurisdiction "would have been significantly aided by findings of fact and conclusions of law"); *Dolgow v. Anderson, 438 F.2d 825, 833 (2d Cir. 1971)* (order granting summary judgment reversed and remanded "for the preparation of findings and conclusions in accordance with Judge Weinstein's original intention announced at the time of the ruling. ...").

(n4)Footnote 4. *E.g., Fogarty v. Piper, 767 F.2d 513, 515 (8th Cir. 1985)* (court of appeals remanded to district court because it was unable to review the parties' contentions on appeal from the district court's order denying a motion

to compel arbitration and denying a motion to stay pending arbitration where the district court made no findings of fact and conclusions of law); *In re FTC Line of Bus. Report Litig., 626 F.2d 1022, 1028 n.34 (D.C. Cir. 1980)* ("Though findings are not normally required, then we may properly remand for further elucidation when review would be substantially hindered without them. ... Indeed, that has long been standard practice in this circuit."); *Dolgow v. Anderson, 438 F.2d 825, 833 (2d Cir. 1971) . See also Carter v. Stanton, 405 U.S. 669, 671, 92 S. Ct. 1232, 31 L. Ed. 2d 569 (1972) .*

Cf. Bartsh v. Northwest Airlines, Inc., 831 F.2d 1297, 1304-1306 (7th Cir. 1987) (findings of fact in an oral opinion were adequate even though they did not resolve specific issues involving credibility, since the court discussed and resolved important factual issues).

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CHAPTER 44 Findings and Judgments *
A. Understanding Findings of Fact and Conclusions of Law Under Rule 52(a)

4-44 Federal Litigation Guide § 44.04

§ 44.04 Considering the Purpose of Findings of Fact

The main purposes of findings of fact are: n1

- To provide the appellate court with an adequate record for review; and
- To guarantee that the trial court carefully reviews the evidence.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. 9 Moore's Federal Practice, 3d. ed. § 52.02[1].

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CHAPTER 44 Findings and Judgments *
A. Understanding Findings of Fact and Conclusions of Law Under Rule 52(a)

4-44 Federal Litigation Guide § 44.05

§ 44.05 Remanding the Action on Appeal for Failure to Make Necessary Findings

If an appeal is taken and the trial court has failed to discharge its duty by making findings in accordance with Rule 52, the appellate court will normally vacate the judgment and remand the action for appropriate findings to be made. n1

However, findings are not a jurisdictional requirement of appeal and an appellate court may decide the appeal when there is a full understanding of the question presented without the aid of findings. Accordingly, if findings are incomplete, reversal and remand are not required if the findings are sufficient to enable appellate review. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureAppealsRemands

FOOTNOTES:
(n1)Footnote 1. *Security Farms v. International Bhd. of Teamsters, 124 F.3d 999, 1015-1016 (9th Cir. 1997)* (failure to make findings requires reversal if full understanding of issue presented on appeal is impossible without more specific findings).

(n2)Footnote 2. *United States v. $242,484.00, 389 F.3d 1149, 1154-1156 (11th Cir. 2004)* ; *Six Clinics Holding Corp., II v. Cafcomp Sys., Inc., 119 F.3d 393, 400 (6th Cir. 1997)* ; *Valley v. Rapides Parish Sch. Bd., 118 F.3d 1047, 1053 (5th Cir. 1997)* .

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CHAPTER 44 Findings and Judgments *
A. Understanding Findings of Fact and Conclusions of Law Under Rule 52(a)

4-44 Federal Litigation Guide § 44.06

§ 44.06 Timing and Procedure Under Rule 52(a)

[1] Determining Whether Proposed Findings and Conclusions Should Be Submitted

While the Rule 52(a) requirement of findings of fact and conclusions of law is addressed to the judge rendering a decision, counsel frequently play a role in their preparation.

In some districts, local rules of procedure require both parties to prepare proposed findings and conclusions and specify a deadline for their submission. Some districts require the parties to submit proposed findings and conclusions before trial, while other districts require the parties to submit them after trial.

In districts having no generally applicable rule, some individual judges issue standing orders to be followed in cases tried before them. Other judges have standard forms of orders governing trial procedures that they will enter in a typical case. n1 These orders may govern the submission of proposed findings and conclusions.

[2] Preparing Proposed Findings and Conclusions After Trial

As an advocacy tool, proposed findings and conclusions are likely to have their greatest impact when prepared after trial, when you know how the evidence came in, but before the judge has formulated a decision. At this point, properly prepared findings and conclusions can focus the judge's attention on the material issues of fact and law and make clear your position on those issues.

Proposed findings and conclusions can serve as a mini post-trial brief, which is particularly important where no post-trial briefs are filed. Accordingly, if there are no local rules governing the preparation of proposed findings and conclusions, you should offer to submit them.

[3] Submitting Proposed Findings and Conclusions Before Decision Rendered

Even where the local rule requires the prevailing party to submit proposed findings and conclusions at a later stage, it is not improper to request to submit proposed findings and conclusions before a decision is rendered. While it is within the power of the district court to ask the prevailing counsel to submit proposed findings after a decision has been reached, some judges routinely request findings from both sides prior to any decision.

Carefully crafted proposed findings and conclusions are critical, especially since the court may rely heavily (if not entirely) upon proposed submissions. The United States Supreme Court has held that the adoption of a party's proposed findings verbatim is not erroneous per se. The Court has held that so long as the findings are supported by the evidence, the fact that counsel is the source of the findings is of no consequence. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. Note that where there is no indication of deliberate disobedience, dismissal for failure to prosecute is too severe a sanction for plaintiffs' failure to file proposed findings of fact and law required by the court. *Jackson v. Schoemehl, 788 F.2d 1296, 1299 (8th Cir. 1986)* .

(n2)Footnote 2. *United States v. El Paso Natural Gas Co., 376 U.S. 651, 656-657, 84 S. Ct. 1044, 12 L. Ed. 2d 12 (1964)* .

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CHAPTER 44 Findings and Judgments *
A. Understanding Findings of Fact and Conclusions of Law Under Rule 52(a)

4-44 Federal Litigation Guide § 44.07

§ 44.07 Preparing Proposed Findings and Conclusions for the Court

[1] Aiding the Trial Court in Making a Sound and Reasoned Decision

Proposed findings and conclusions prepared by counsel should aid the trial court in making a sound and reasoned decision and assist the court in preparing its own findings and conclusions. In this respect, proposed findings and conclusions may serve some of the functions of a post-trial brief, but they should not be confused with a brief and their form should vary significantly from that of a brief.

In preparing proposed findings of fact and conclusions of law, the common and preferred practice is to state the proposed findings of fact first, followed by conclusions of law. Local rules may specify the format to follow and should be consulted. The proposed findings of fact generally should be numbered separately; should be concise and nonargumentative; and should avoid disparaging references and other formulations that would seem out of place if made by the judge. This format makes it easy for the judge to revise and incorporate the findings and conclusions into a decision.

[2] Clarifying the Res Judicata and Collateral Estoppel Effects of Judgment

Findings and conclusions required by Rule 52(a) clarify the *res judicata* and collateral estoppel effects of the judgment entered by the court. In many cases the collateral estoppel effects of a judgment can have significant impact in subsequent litigation.

The Supreme Court has emphasized the strict limitations placed on appellate review of findings of fact, holding that, despite the parties' assistance, the findings are those of the district court and may not be disturbed unless clearly erroneous. The Court acknowledged that the meaning of "clearly erroneous" is not immediately apparent, but requires that the appellate court, upon review of all the evidence, be left with the definite and firm conviction that a mistake has been made. In addition, the factfinder's choice between two reasonable interpretations of the evidence cannot be found to be clearly erroneous. n1

[3] Assisting the Appellate Court on Review

Proposed findings and conclusions should be prepared with an eye toward the possibility of appeal. Therefore, proposed findings and conclusions must be adequate to support a judgment.

The Supreme Court, in construing the obligation imposed on the district court by Rule 52(a), characterized the minimum findings required in this way:

We hold only that there must be findings, stated either in the court's opinion or separately, which are sufficient to indicate the factual basis for the ultimate conclusion. n2

Similarly, the Seventh Circuit has ruled:

We hold that substantial compliance with the fact-finding requirements of Rule 52(a) necessitates that the findings of fact on the merits include as many of the subsidiary facts as are necessary to disclose to the reviewing court the steps by which the trial court reached its ultimate conclusion on each factual issue. n3

The district court's ultimate finding of fact may be set aside if the factual findings on which it is based do not show a chain of reasoning leading to the result. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes Judicata

FOOTNOTES:
(n1)Footnote 1. *Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573-575, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985)* .

(n2)Footnote 2. *Kelley v. Everglades Drainage Dist., 319 U.S. 415, 422, 63 S. Ct. 1141, 87 L. Ed. 1485 (1943)* .

(n3)Footnote 3. *Denofre v. Transportation Ins. Rating Bureau, 532 F.2d 43, 45 (7th Cir. 1976)* . *See* Fluor Corp. v. United States *ex rel. Mosher Steel Co., 405 F.2d 823, 828-829 (9th Cir. 1969)* , *cert. denied, 394 U.S. 1014 (1969)* .

(n4)Footnote 4. *Andre v. Bendix Corp., 774 F.2d 786, 800-801 (7th Cir. 1985)* (district court adopted verbatim or with minor changes the bulk of plaintiff's post-trial brief).

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CHAPTER 44 Findings and Judgments *
A. Understanding Findings of Fact and Conclusions of Law Under Rule 52(a)

4-44 Federal Litigation Guide § 44.08

§ 44.08 Evaluating the Appellate Court's Review of Findings and Conclusions

[1] Applying the "Clearly Erroneous" Standard

When drafting proposed findings and conclusions, counsel should keep in mind the "clearly erroneous" standard of review specified in the Rule for findings of fact. The "clearly erroneous" standard applies to findings of fact "whether based on oral or other evidence." n1 Thus, the degree of deference accorded by the courts of appeal to findings of fact does not depend on the form of evidence supporting the finding. n2 Conclusions of law do not enjoy that protection and are freely reviewable by the appellate court. n3

Other things being equal, therefore, it is preferable to classify rulings as "findings of fact" rather than "conclusions of law" to increase the likelihood that the clearly erroneous standard of review would apply to a favorable ruling. It is important to keep in mind that the appellate court is not bound by the trial court's determination that a particular statement is a finding of fact rather than a conclusion of law. n4

[2] Evaluating Mixed Questions of Law and Fact

The difficulty of determining whether an issue is one of law or fact is complicated because some issues are actually mixed questions of law and fact. There is no clear consensus on the appropriate standard of review for such questions, though generally de novo review is accorded, unless the mixed question is particularly fact intensive.

Some circuits, for example, regard a finding of negligence as a finding of fact, at least insofar as the application of the "clearly erroneous" standard is concerned. n5 Other circuits classify a finding of negligence as a conclusion of law, not a finding of fact. n6 Counsel should research the law applicable in the specific district or circuit where the action is pending.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureAppealsStandards of ReviewClearly Erroneous Review

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 52(a)(6).*

(n2)Footnote 2. *Fed. R. Civ. P. 52*, Committee Note (1983).

(n3)Footnote 3. *United States v. Mississippi Valley Generating Co., 364 U.S. 520, 526, 81 S. Ct. 294, 5 L. Ed. 2d 268 (1961)* .

(n4)Footnote 4. *Cleary v. United States Lines Co., 411 F.2d 1009, 1010 (2d Cir. 1969)* .

(n5)Footnote 5. *Sierra Fria Corp. v. Donald J. Evans, P.C., 127 F.3d 175, 183-184 (1st Cir. 1997)* .

(n6)Footnote 6. *Cleary v. United States Lines Co., 411 F.2d 1009, 1010 (2d Cir. 1969)* .

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CHAPTER 44 Findings and Judgments *
A. Understanding Findings of Fact and Conclusions of Law Under Rule 52(a)

4-44 Federal Litigation Guide § 44.09

§ 44.09 Considering the Court's Adoption of Proposed Findings and Conclusions

Courts are not prohibited from adopting findings substantially or entirely as proposed by one party. n1 As the Supreme Court has stated: "Those findings, though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence." n2 In one notable case, the Court of Appeals for the District of Columbia declined to reverse, to conclude that the judge was biased, or to change the "clearly erroneous" standard of review, even though the district court copied the defendant's findings of fact and conclusions of law verbatim, including typographical errors and assessments of the witnesses' credibility. n3

While appellate courts have applied the "clearly erroneous" standard to review of findings of fact adopted verbatim from those submitted by the prevailing party, they have also said that such findings will receive special scrutiny. As one court put it in remanding a case for new findings: n4

Even though we may not summarily reject findings adopted verbatim, we must view the challenged findings and the record as a whole with a more critical eye to insure that the trial court has adequately performed its judicial function.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Andre v. Bendix Corp., 774 F.2d 786, 800 (7th Cir. 1985)* ; *Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 263 (7th Cir. 1981)* , *cert. denied, 455 U.S. 921 (1982)* .

(n2)Footnote 2. *United States v. El Paso Natural Gas Co., 376 U.S. 651, 656, 84 S. Ct. 1044, 12 L. Ed. 2d 12 (1964)* .

(n3)Footnote 3. *Southern Pac. Communications Co. v. A T & T, 740 F.2d 980, 983 (D.C. Cir. 1984)* , *cert. denied, 470 U.S. 1005 (1985)* .

(n4)Footnote 4. *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation, 616 F.2d 464, 467 (10th Cir. 1980)*

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CHAPTER 44 Findings and Judgments *
A. Understanding Findings of Fact and Conclusions of Law Under Rule 52(a)

4-44 Federal Litigation Guide §§ 44.10 through 44.19

[Reserved]

§§ 44.10[Reserved]

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CHAPTER 44 Findings and Judgments *
B. Moving to Alter or Amend Findings of Fact and Conclusions of Law Under Rule 52(b)

4-44 Federal Litigation Guide § 44.20

§ 44.20 Understanding Rule 52(b) Motions

[1] Correcting the Decision of the Trial Judge

Rule 52(b) motions are used to modify a trial court's findings of fact and conclusions of law. n1 Rule 52(b) motions are used to correct decisions rendered by judges, not to change jury verdicts. A Rule 52(b) motion to amend findings is appropriate only when findings of fact and conclusions of law are required under Rule 52(a). n2

[2] Analyzing the Objectives of a Motion Under Rule 52(b)

The objectives of a motion under Rule 52(b) are to make the best possible record for appeal, to clarify ambiguous findings or conclusions in a way helpful to your client, or to revise or delete findings of fact that could have adverse collateral estoppel or *res judicata* effects in other proceedings. A successful motion can strengthen a favorable but weak decision or mitigate the impact of an adverse one.

[3] Establishing a Proper Record for the Court of Appeals

The principal purpose of Rule 52(b) is to enable the court of appeals to obtain a correct understanding of the factual issues determined by the trial court as a basis for its conclusions of law and the ultimate judgment entered as a result. n3 As specified in the Rule, a motion to alter or amend a trial court's findings of fact and conclusions of law must be made within 28 days of the entry of judgment. Rule 52(b) motions can be particularly important and useful in seeking to modify findings of fact, because the "clearly erroneous" standard for appellate review of fact findings, imposed by Rule 52(a), makes the chance of changing such findings on appeal substantially less than the chance of changing the trial court's conclusions of law.

The possibility that a Rule 52(b) motion may fail should not necessarily deter you from making it, particularly if there are objections to be raised to findings of fact. Counsel may not raise on appeal correctable errors in the trial court's findings, apart from insufficiency of evidence to sustain the findings, unless the error has been challenged under Rule 52(b). n4 Appellate courts must accept any factual filings of the lower court which are not "clearly erroneous." n5 Thus, if the findings are not challenged and corrected before appeal, there is little opportunity to correct them later and, in all likelihood, the appellate court will rely on the lower court's fact findings in making its determinations. A party may, of course, assert on appeal that the evidence to support the findings is insufficient, but this makes for a difficult appeal.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 52(a)* permits the trial court to deliver its findings of fact and conclusions of law orally "may be stated on the record after the close of the evidence" rather than by written opinion. This practice is widespread. Oral findings may be less precise than those made in writing. For this reason, proposed findings will be increasingly important, as will the motion to amend findings under *Fed. R. Civ. P. 52(b)*.

(n2)Footnote 2. *All Hawaii Tours, Corp. v. Polynesian Cultural Ctr., 116 F.R.D. 645, 648 (D. Hawaii 1987)* , *aff'd and rev'd on other grounds, 855 F.2d 860* , *opinion at, 1988 U.S. App. LEXIS 19305, at *6 (9th Cir. 1988)* (Rule 11 sanctions for frivolous Rule 52(b) motion reversed on appeal).

(n3)Footnote 3. *United States v. Carolina E. Chem. Co., 639 F. Supp. 1420, 1423 (D.S.C. 1986)* .

(n4)Footnote 4. To illustrate: "[I]n a personal injury case the trial court may make a general finding that plaintiff has suffered general damages in X amount and special damages in Y amount. If the defendants do not request a breakdown of the elements of X and Y before the findings are signed, they cannot later complain on appeal." *Evans v. Suntreat Growers & Shippers, Inc., 531 F.2d 568, 570 (Temp. Emer. Ct. App. 1976)* . *Accord L.B. Lindbeck v. Wyatt Mfg. Co., 324 F.2d 807, 812 (10th Cir. 1963)* .

(n5)Footnote 5. *Fed. R. Civ. P. 52(a)*.

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CHAPTER 44 Findings and Judgments *
B. Moving to Alter or Amend Findings of Fact and Conclusions of Law Under Rule 52(b)

4-44 Federal Litigation Guide § 44.21

§ 44.21 Timing and Procedure of Rule 52(b) Motions

[1] Filing Within 28 Days of Entry of Judgment

Rule 52(b) states:

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 new trial under Rule 59.

Rule 52(b) only applies to court-tried cases or cases where an advisory jury is used. n1 The term "findings" in Rule 52(b) includes both findings of fact and conclusions of law, and includes any findings of the advisory jury adopted by the trial judge. n2 As with other postjudgment motions, the 28-day time limit on Rule 52(b) motions is mandatory, and cannot be extended. n3

While it is permissible to make a Rule 52(b) motion before the actual entry of judgment, n4 there is some disadvantage to such an early filing because of the ambiguity that may arise as to whether a subsequent entry of judgment constitutes denial of the motion. So long as service is effected within 28 days of judgment, the motion may be filed within a reasonable time thereafter. n5

[2] Filing Rule 52(b) Motion Extends Time to File Appeal

As with other postjudgment motions, the timely service of a Rule 52(b) motion will extend the time within which to file a notice of appeal. n6

If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and pending, the court may: n7

- Defer considering the motion
- Deny the motion
- 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

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. n8 The district court may decide the motion if the court of appeals remands for that purpose. n9 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. n10

[3] Filing Rule 52(b) Motion With Other Post-Trial Motions

Rule 52(b) expressly provides that a motion to alter or amend findings may be made jointly with a motion for a new trial pursuant to Rule 59(a). n11 It is also proper to make a Rule 52(b) motion in connection with one or more other post-trial motions, such as a motion for judgment as a matter of law under Rule 50(b), a motion for relief from judgment under Rule 60, and a motion to amend a judgment under Rule 59(e). n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Greenwood v. Greenwood, 234 F.2d 276, 278 (3d Cir. 1956)* .

(n2)Footnote 2. *Aetna Ins. Co. v. Paddock, 301 F.2d 807, 810-811 (5th Cir. 1962)* .

(n3)Footnote 3. *Fed. R. Civ. P. 6(b)*; *Gribble v. Harris, 625 F.2d 1173, 1174 (5th Cir. 1980)* .

(n4)Footnote 4. *Calculators Hawaii, Inc. v. Brandt, Inc., 724 F.2d 1332, 1335 (9th Cir. 1983)* ; *United States v. Pan Am. World Airways, Inc., 299 F.2d 74, 76 (5th Cir. 1962)* ; *Clark v. Edwards, 725 F. Supp. 285, 303 (M.D. La. 1988)* .

(n5)Footnote 5. *Fed. R. Civ. P. 5(d)*; *Keohane v. Swarco, Inc., 320 F.2d 429, 431-432 (6th Cir. 1963)* .

(n6)Footnote 6. *Fed. R. App. P. 4(a)*; *Gribble v. Harris, 625 F.2d 1173, 1174 n. 12 (5th Cir. 1980)* .

(n7)Footnote 7. *Fed. R. Civ. P. 62.1(a)*.

(n8)Footnote 8. *Fed. R. Civ. P. 62.1(b)*; *Fed. Rule. App. P. 12.1(a)*.

(n9)Footnote 9. *Fed. R. Civ. P. 62.1(c)*.

(n10)Footnote 10. *Fed. Rule. App. P. 12.1(b)*.

(n11)Footnote 11. *See Fed. R. Civ. P. 52(b)*. Also, when a party requests to add new evidence to clarify the court's findings, this should be done by motion for partial new trial. *Frantz Mfg. Co. v. Phenix Mfg. Co., 314 F. Supp. 99, 99-100 (E.D. Wis. 1970)* .

(n12)Footnote 12. *Cf. Hahn v. Becker, 551 F.2d 741, 742 (7th Cir. 1977)* (Rule 50(b), Rule 59(a), and Rule 59(e) motions brought jointly).

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CHAPTER 44 Findings and Judgments *
B. Moving to Alter or Amend Findings of Fact and Conclusions of Law Under Rule 52(b)

4-44 Federal Litigation Guide § 44.22

§ 44.22 Evaluating Objectives of Rule 52(b) Motions for the Party Losing the Decision

[1] Understanding General Use of Rule 52(b) Motions for the Losing Party

As a general matter, the losing party should:

- Move to alter or clarify any erroneous findings of fact or conclusions of law as to which there is any reasonable chance for relief from the trial judge and which are not challenged as a part of a motion for a new trial;

- Move to strike extraneous findings which could confuse the appeal, or prejudice other proceedings; and

- Move to have the court adopt further findings of fact or conclusions of law which would strengthen the case on appeal or which are necessary to inform the appellate court adequately of facts and issues central to the appeal.

[2] Moving to Alter or Clarify Erroneous Findings of Fact

Counsel should review whether any of the following classes of erroneous findings have been made by the trial court:

- Findings of fact based on stricken testimony or opinions of nonexperts;

- Findings of fact based on exhibits not admitted into evidence;

- Findings of fact in conflict with admissions or other discovery responses of one or more parties;

- Findings of fact contradicted by opposing counsel in opening or closing argument or in the trial brief (though arguments and briefs are not evidence, a party is bound by admissions or concessions made by its counsel);

- Findings of fact based on facts or information not in the record or judicially noticed in error;

- Findings of fact in conflict with the findings of an advisory jury (a trial judge is not required to adopt the advisory jury's findings, but such conflict provides a strong basis for a challenge); n1
- Findings of fact based on testimony recanted or impeached during cross-examination;
- Findings of fact in conflict with previous summary judgment determinations;
- Findings of fact based on evidence disallowed by pretrial motions *in limine*.

[3] Moving to Alter or Clarify Erroneous Conclusions of Law

Counsel should also consider whether any of the following classes of erroneous legal conclusions were adopted by the trial court:

- Conclusions of law, in diversity cases, based on federal law where state law should be applied, and vice versa;
- Conclusions of law, in diversity cases, based on application of law of the wrong state;
- Conclusions of law in conflict with instructions provided to an advisory jury;
- Conclusions of law in conflict with legal points conceded by opposing counsel in briefs or opening or closing arguments;
- Conclusions of law in conflict with previous determinations that should be given collateral estoppel effect;
- Conclusions of law in conflict with new case law handed down during the course of trial;
- Conclusions of law adopted with no associated findings of fact;
- In the case of trial after remand, conclusions of law in conflict with the determinations of the appellate court.

Although this list is far from complete, it highlights errors which have a good probability of being modified by the trial court.

[4] Moving to Strike Extraneous Findings

Extraneous findings may be just as damaging as erroneous findings. Extraneous findings may be technically correct, but they can both confuse the appellate court and prejudice other proceedings by way of collateral estoppel.

Extraneous findings may also constrain a losing party's argument on appeal or provide ammunition to an opponent. To the extent that extraneous findings prejudice a defendant by comparison, the findings should be challenged. In general, a losing party should be wary of findings of fact which, though consistent with the evidence, are not necessary to the judgment. Such findings have a way of being seized upon by the opponent and woven into a convincing factual defense of the adverse judgment.

[5] Moving For Adoption of Further Findings

In some cases, the court will have omitted findings of fact which, although relevant and justified by the evidence, might undercut the trial court's determination of various issues. This is particularly common where the trial court has simply adopted, in whole or in part, the proposed findings of the prevailing party.

In this circumstance, it is important that the losing party move under Rule 52(b) for the adoption of any omitted favorable findings which are justified by the evidence at trial. In this context, the fact that the omitted findings may not be "essential" to the judgment should not dissuade the losing party from seeking them. The losing party cannot rely on the appellate court to bring the findings into balance; an appellate court will not direct the district court to make additional findings in support of a party's position on appeal. n2 And even if the findings are plainly inadequate, the appellate court will not make further findings. n3 At best, the appellate court may determine that the findings are so inadequate that the case should be remanded. This result is unlikely, however, and it is not a sound justification for failure to seek district court adoption of findings which could improve the chances of prevailing on appeal.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote 1. *See generally Aetna Ins. Co. v. Paddock, 301 F.2d 807, 810-811 (5th Cir. 1962)* (regarding findings of advisory juries).

(n2)Footnote 2. *Kennedy v. United States, 115 F.2d 624, 625 (9th Cir. 1940)* .

(n3)Footnote 3. *Schilling v. Schwitzer-Cummins Co., 142 F.2d 82, 83-84 (D.C. Cir. 1944)* .

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CHAPTER 44 Findings and Judgments *
B. Moving to Alter or Amend Findings of Fact and Conclusions of Law Under Rule 52(b)

4-44 Federal Litigation Guide § 44.23

§ 44.23 Evaluating Objectives of Rule 52(b) Motions for the Prevailing Party

[1] Moving to Amend Findings of Fact

Perhaps the most important question from the standpoint of the prevailing party is whether the court has adopted findings not essential to the decision, but which could be used by the opponent on appeal. If so, the prevailing party should seek to delete the findings, or attempt to diffuse them by adding additional contrary findings. The prevailing party should not take the factual findings for granted. Although the findings may be favorable, they may be imprecise, or incorrect, and thus create a risk of reversal.

The findings of fact should be read in light of the following considerations:

- Are the findings clear, logical, and complete;
- Are additional findings necessary to inform the appellate court on all the issues on appeal;
- Are the findings internally inconsistent or inconsistent with the testimony or evidence; and
- Are the findings, although favorable, so confusing as to require further explanation to be useful to the appellate court?

Balanced against such considerations, will an unsuccessful motion highlight weaknesses in the decision or place the entire decision in an unfavorable light?

[2] Moving to Amend Conclusions of Law

The prevailing party may also seek to add any omitted conclusions of law which are supported by the evidence and which may be helpful in the event of an appeal. n1

Counsel should consider the following when deciding whether to file a motion under Rule 52(b):

- Are there favorable conclusions of law which, although correct, lack adequate foundation in factual findings? If so, consider seeking additional factual findings, unless the court is likely to deny the Rule

52(b) motion and bringing it would tip off your opponent to a weakness in your case.

- Are there any errant conclusions of law which could be deleted to protect the judgment on appeal without undercutting it? It may be best to move to delete the incorrect conclusions of law, to avoid even the appearance of error.

- Are there conclusions of law which, although not necessarily wrong, are unnecessary to the decision, and which could provide a basis for appeal by your opponent? It may be best to have them modified rather than leave an opening for attack on appeal.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

FOOTNOTES:
(n1)Footnote 1. There are practical limitations, of course, given the 10-day time limit, but the prevailing party would not ordinarily have the additional burden of preparing a motion for new trial (Rule 59(a)), or motion to amend judgment (Rule 59(e)), within those 10 days.

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CHAPTER 44 Findings and Judgments *
B. Moving to Alter or Amend Findings of Fact and Conclusions of Law Under Rule 52(b)

4-44 Federal Litigation Guide § 44.24

§ 44.24 Considering Factors Militating Against Use of Rule 52(b) Motions

[1] Accepting Adverse Findings That Weaken the Court's Decision

From the standpoint of counsel for the losing party, conclusions of law based on illogical or inconsistent findings of fact may be tainted and may make the judgment more vulnerable on appeal. In this situation, it may be better to accept the adverse findings which poison the whole decision. Similarly, where conclusions of law are mutually inconsistent, or at variance with findings of fact, there is reason to leave them alone since they can make the judgment appear incompetent and increase the likelihood of reversal.

[2] Accepting Omissions in Court's Findings

If the judge failed to make definitive findings on an issue that was not essential to render the judgment, but may play a role on appeal, a party need not voice objections so as to preserve the right to comment on the issue on appeal. n1 Instead, by keeping silent, a party preserves the ability to argue the issue broadly.

In short, if there is an issue you wish to argue on appeal, as to which the court has made no findings, do not seek findings. It is better to have no findings than to have to show that adverse findings are "clearly erroneous."

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureAppealsReviewabilityAdverse Determinations

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 52(a), (b).* However, some courts have indicated that omissions, as distinct from errors, *should* be called to the attention of the trial court. *See, e.g., Evans v. Suntreat Growers & Shippers, Inc., 531 F.2d 568, 571 (Temp. Emer. Ct. App. 1976)* . Still, keeping silent appears to be allowed by the generally recognized rule that a losing party is not required to propose counter-findings. *See, e.g., In re Imperial Irr. Dist., 38 F. Supp. 770, 772 (S.D. Cal. 1941)* , *aff'd sub nom Wells Fargo Bank & Union Trust Co. v. Imperial Irr. Dist. 136 F.2d 539 (9th Cir. 1943)* , *cert. denied, 321 U.S. 787 (1943)* .

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CHAPTER 44 Findings and Judgments *
B. Moving to Alter or Amend Findings of Fact and Conclusions of Law Under Rule 52(b)

4-44 Federal Litigation Guide § 44.25

§ 44.25 Determining Whether to Appeal the Sufficiency of the Evidence in Support of Factual Findings Rather Than Make a Rule 52(b) Motion

[1] Raising the Sufficiency of the Evidence on Appeal

Rule 52(a)(5) states:

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.

While this language appears very generous and may tempt a party to forego making a Rule 52(b) motion, challenging the sufficiency of the evidence in support of a finding is almost always a losing proposition. The trial court's findings of facts are presumptively correct. n1

[2] Challenging Findings on Appeal Requires Showing That Findings Are Clearly Erroneous

The findings may not be set aside unless they are "clearly erroneous," and the burden of proof is on the appellant. n2 The findings are "clearly erroneous" if they are not supported by substantial evidence and "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." n3 The appellate court is required to interpret the evidence and the inferences deducible therefrom in the light most favorable to the prevailing party at trial. n4 In practice, this means that findings of fact are very rarely set aside by a court of appeal. n5

[3] Challenging Findings Based on Inadmissible or Incompetent Evidence

The strategy of accepting the district court's findings, but challenging the sufficiency of the evidence to support them, may succeed in certain situations. For example, if the objectionable findings are based on inadmissible or incompetent evidence admitted through faulty rulings at trial, it may be best to forego a Rule 52(b) motion and take a chance with the appellate court. This is particularly true if the findings could be modified by the district court so as to eliminate their reliance on bad evidence, without changing their effect as to the judgment.

[4] Challenging Findings Based on Mistake

Errors in the factual findings may also be left alone at the district court level if the findings cannot reasonably be drawn

from the evidence, particularly if the relevant evidence is undisputed. Here, even if there is some competent evidence to support the findings, they may be rejected as "clearly erroneous" if the appellate court is "left with the definite and firm conviction that a mistake has been committed." n6

If the findings are unquestionably wrong, counsel may wish to leave the findings intact to make the poor judgment of the trial court obvious to the appellate court.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureAppealsGeneral OverviewEvidenceProcedural ConsiderationsWeight & Sufficiency

FOOTNOTES:
(n1)Footnote 1. *Mathis v. John Morden Buick, Inc., 136 F.3d 1153, 1154-1155 (7th Cir. 1998)* ; *Colorado Milling & Elevator Co. v. Terminal R.R. Ass'n of St. Louis, 350 F.2d 273, 277 (8th Cir. 1965)* , *cert. denied, 382 U.S. 989 (1966)* .

(n2)Footnote 2. *Estate of Davis v. Delo, 115 F.3d 1388, 1394-1395 (8th Cir. 1997)* ; *Bellevue Gardens, Inc. v. Hill, 297 F.2d 185, 187 (D.C. Cir. 1961)* .

(n3)Footnote 3. *United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948)* .

(n4)Footnote 4. *Aunt Mid, Inc. v. Fjell--Oranje Lines, 458 F.2d 712, 718 (7th Cir. 1972)* , *cert. denied, 409 U.S. 877 (1972)* .

(n5)Footnote 5. *See Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 581, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985)* .

(n6)Footnote 6. *United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948)* .

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CHAPTER 44 Findings and Judgments *
B. Moving to Alter or Amend Findings of Fact and Conclusions of Law Under Rule 52(b)

4-44 Federal Litigation Guide § 44.26

§ 44.26 Determining Whether to Make a Rule 52(b) Motion With Respect to Conclusions of Law

On appeal, conclusions of law are not protected by the "clearly erroneous" standard, as are findings of fact. n1 Additionally, the cases which hold that trial findings should not be challenged for the first time on appeal refer to findings of fact. Therefore, there is less risk in forgoing a Rule 52(b) motion as to adverse conclusions of law and relying on the appellate court to remedy those errors on appeal. But bear in mind that an adverse conclusion of law will often be based on adverse findings of fact which can and frequently should be challenged under Rule 52(b) *before* appeal.

There will be situations in which there is no reasonable basis to challenge the factual findings underlying a conclusion of law. In these situations, you must decide whether to attack the conclusion of law in the district court under Rule 52(b), or whether to wait for appeal. This decision depends on the likelihood that the trial court would grant the Rule 52(b) motion and requires an assessment of a number of points:

- How strong are the legal arguments that the conclusion of law is incorrect?
- Has the trial judge shown any doubt or uncertainty on the point of law?
- Has the particular legal issue been briefed sufficiently, or would an opportunity for separate briefing and argument likely bring new evidence and authorities to the trial judge's attention?
- Was the particular conclusion of law proposed by the opposing party, or was it independently adopted by the court?
- Would an alteration of the conclusion of law have the effect of reversing the judgment or substantially changing the relief offered?

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsReviewabilityGeneral

Overview

FOOTNOTES:

(n1)Footnote 1. *University Hills, Inc. v. Patton, 427 F.2d 1094, 1099 (6th Cir. 1970)* .

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CHAPTER 44 Findings and Judgments *
B. Moving to Alter or Amend Findings of Fact and Conclusions of Law Under Rule 52(b)

4-44 Federal Litigation Guide §§ 44.27 through 44.29

[Reserved]

§§ 44.27[Reserved]

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CHAPTER 44 Findings and Judgments *
C. Understanding Rule 58--Entry of Judgment

4-44 Federal Litigation Guide § 44.30

§ 44.30 Considering the Separate Document Requirement Under Rule 58

[1] Separate Document Not Required For Orders Disposing of Certain Motions

Rule 58 formerly required that a judgment was effective only when set forth on a separate document and entered as provided in Rule 79(a). The result of failure to enter judgment on a separate document under former Rule 58 was that the time for making motions under Rules 50, 52, 54(d)(2)(B), 59, and some motions under Rule 60, never began to run. n1 Moreover, the time to appeal under Appellate Rule 4(a) did not begin to run. n2

The December 2002 amendments to Rule 58 established that entry on a separate document is not required for an order disposing of the motions listed in Appellate Rule 4(a). n3 The amendments were designed to work in conjunction with Appellate Rule 4(a) to ensure that appeal time does not linger on indefinitely and to maintain the integration of the time periods set for Rules 50, 52, 54(d)(2)(B), 59, and 60 with Appellate Rule 4(a). n4

[2] Evaluating When Time for Appeal Begins to Run Based on Entry of Judgment

In general, a notice of appeal must be filed with the district court within 30 days after the judgment or order appealed from is entered. n5 If a party files any of the following motions, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion: n6

- For judgment under Rule 50(b)
- To amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment
- For attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58
- For a new trial, or to alter or amend the judgment, under Rule 59
- For relief under Rule 60 if the motion is filed no later than 28 days after judgment is entered

Since some courts have traditionally treated such orders as those that deny a motion for new trial as a judgment, the appeal time would not start to run until the order was entered on a separate document. n7 Without attempting to address

the question whether such orders are appealable, and thus judgments under Rule 54(a), the December 2002 amendment to Rule 58 provides that entry on a separate document is not required for an order disposing of the motions listed under Appellate Rule 4(a). Accordingly, entry on a separate document is not required for an order disposing of a motion: n8

- For judgment under Rule 50(b)
- To amend or make additional findings of fact under Rule 52(b)
- For attorney's fees under Rule 54
- For a new trial, or to alter or amend the judgment, under Rule 59
- For relief under Rule 60

The enumeration of motions drawn from Appellate Rule 4(a) is generalized by omitting details that are important for appeal time purposes but that would unnecessarily complicate the separate document requirement. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 58*, Committee Note (2002).

(n2)Footnote 2. *Fed. R. Civ. P. 58*, Committee Note (2002).

(n3)Footnote 3. *Fed. R. Civ. P. 58(a)*; *see also Fed. R. App. P. 4(a)*.

(n4)Footnote 4. *Fed. R. Civ. P. 58*, Committee Note (2002).

(n5)Footnote 5. *Fed. R. App. P. 4(a)*.

(n6)Footnote 6. *Fed. R. App. P. 4(a)(4)(A)*.

(n7)Footnote 7. *Fed. R. Civ. P. 58*, Committee Note (2002).

(n8)Footnote 8. *Fed. R. Civ. P. 58(a)(1)-(5)*.

(n9)Footnote 9. *Fed. R. Civ. P. 58*, Committee Note (2002).

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CHAPTER 44 Findings and Judgments *
C. Understanding Rule 58--Entry of Judgment

4-44 Federal Litigation Guide § 44.31

§ 44.31 Using Correct Terminology to Describe Entry of Judgment

Only *judgments* may be entered. *Judgment* includes both final orders, as well as interlocutory orders that are appealable. n1

A *final order* is one that disposes of all disputed issues, and leaves nothing for the court to do but execute it. n2

The terminology used in entering a judgment is sometimes confusing, and court opinions often add to the confusion by interchanging the terms *filing, recording,* and *entry of judgment*. The following explanations should help to clarify some of the confusion:

- *Filing* refers to delivery of the judgment document itself to the clerk. n3

- *Recording* a judgment refers to compliance with Rule 79(b), which directs the court clerk to keep "a correct copy of every final judgment or appealable order." n4

- *Entry of judgment* refers to compliance with Rule 79(a), which requires the court clerk to make a note of the judgment in the official court docket. n5

Entry is sometimes casually used to refer to the actual rendition of the judgment by the court. The distinction, however, is worth noting: rendition of a judgment is a *judicial* act, while *entry of a judgment* is a *ministerial* act, performed by the clerk.

The practitioner should avoid referring to a court's decision or opinion as a *judgment*. Findings of fact and conclusions of law do not constitute a judgment, but rather are the reasoning underlying the judgment. Thus, a written opinion explaining a ruling, and concluding with the words "so ordered" does not constitute a judgment. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionFinal Judgment RuleCivil

ProcedureAppealsAppellate JurisdictionInterlocutory Orders

FOOTNOTES:

(n1)Footnote 1. *See Fed. R. Civ. P. 54(a).*

(n2)Footnote 2. *Cooper v. Salomon Bros. Inc., 1 F.3d 82, 84-85 (2d Cir. 1993)* , *cert. denied, 510 U.S. 1063 (1994)* .

(n3)Footnote 3. *Fed. R. Civ. P. 5(e).*

(n4)Footnote 4. *Fed. R. Civ. P. 79(b).*

(n5)Footnote 5. *Fed. R. Civ. P. 79(a).*

(n6)Footnote 6. *RR Village Ass'n v. Denver Sewer Corp., 826 F.2d 1197, 1200-1201 (2d Cir. 1987)* (citing **Moore's Federal Practice**).

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CHAPTER 44 Findings and Judgments *
C. Understanding Rule 58--Entry of Judgment

4-44 Federal Litigation Guide § 44.32

§ 44.32 Understanding Role of District Court Clerk in Entering Judgment

It is the duty of the district court clerk to maintain a civil docket in which all judgments must be entered chronologically. Entries must show the substance of each order or judgment of the court, as well as the date of the entry. n1

The clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when any of the following occur: n2

- The jury returns a general verdict
- The court awards only costs or a sum certain
- The court denies all relief

The court must promptly approve the form of the judgment, which the clerk must promptly enter when either of the following occurs: n3

- The jury returns a special verdict or a general verdict accompanied by interrogatories
- The court grants other relief not described in Rule 58(b)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 79(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 58(b)(1).*

(n3)Footnote 3. *Fed. R. Civ. P. 58(b)(2).*

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CHAPTER 44 Findings and Judgments *
C. Understanding Rule 58--Entry of Judgment

4-44 Federal Litigation Guide § 44.33

§ 44.33 Judgments Which Must Be Entered by Clerk Without Court Direction

[1] Judgment Following General Verdict

After a general verdict by a jury, the clerk, unless the court otherwise orders, must prepare, sign, and enter the judgment without awaiting any direction by the court. n1

Rule 58 thus operates as a standing order to clerks for prompt action, fulfilled by the clerk's completion of Official Form 31 (judgment on jury verdict) or its equivalent. n2

After a special verdict or a general verdict accompanied by answers to interrogatories, the district judge must first approve the form of judgment prior to entry by the clerk. n3

In an action involving multiple parties, a judgment may be final as to some but not all parties. Generally, that will mean the clerk must await further action by the court before entering judgment, although the court may certify the judgment as final and direct the clerk to enter it if there is no just reason for delay. n4

If the court certifies a judgment as final as to some but not all parties, and directs the clerk to enter the judgment, the Rule 58(a) and Rule 79(a) requirements for entry of judgment still must be satisfied. n5

[2] Judgment Involving Only Sum Certain or Costs

If the court has decided that a party is to recover only a sum certain or costs, the clerk must promptly prepare and enter the judgment unless the court orders otherwise. n6

If both the plaintiff and the defendant have been awarded damages, it is often desirable to request that the court compute the net award and direct entry by the clerk of a single judgment.

[3] Judgment Denying All Relief

If the court has decided that all relief is to be denied, the clerk must promptly prepare and enter the judgment unless the court orders otherwise. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P 58(b)(1)(A).*

(n2)Footnote 2. *See* Moore's Federal Practice Rules Pamphlet, Part 1, Form 31 (Matthew Bender).

(n3)Footnote 3. *Fed. R. Civ. P. 58(b)(2)(A).*

(n4)Footnote 4. *Fed. R. Civ. P. 54(b).*

(n5)Footnote 5. *See, e.g., Willhauck v. Halpin, 953 F.2d 689, 701-702 (1st Cir. 1991) .*

(n6)Footnote 6. *Fed. R. Civ. P. 58(b)(1)(B).*

(n7)Footnote 7. *Fed. R. Civ. P. 58(b)(1)(C).*

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CHAPTER 44 Findings and Judgments *
C. Understanding Rule 58--Entry of Judgment

4-44 Federal Litigation Guide § 44.34

§ 44.34 District Judge May Order Clerk Not to Enter Judgment

The district judge retains the discretion to order the clerk not to enter a judgment. n1

For example, if the court has reserved decision on a motion for a directed verdict, n2 or a motion for a new trial has been made, n3 it may be appropriate to delay entry of judgment by the clerk until the motion is decided.

Delay of entry of judgment must be *explicitly* ordered by the court.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawDirected VerdictsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 58(b)(1).*

(n2)Footnote 2. *See Fed. R. Civ. P. 50(b).*

(n3)Footnote 3. *See Fed. R. Civ. P. 59.*

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CHAPTER 44 Findings and Judgments *
C. Understanding Rule 58--Entry of Judgment

4-44 Federal Litigation Guide § 44.35

§ 44.35 Judgments Which Must Be Approved by Court as to Form Prior to Entry by Clerk

[1] Judgment After Special Verdict or General Verdict Accompanied by Answers to Interrogatories

After a special verdict n1 or a general verdict accompanied by answers to interrogatories, n2 the district judge must first approve the form of judgment prior to entry by the clerk. n3

[2] Judgment on Decision by Court Granting Other Relief

The district judge must first approve the form of judgment prior to entry by the clerk if the judgment is predicated on a decision by the court granting relief other than the following: n4

- A general verdict of a jury
- A decision by the court that a party is to recover only a sum certain or costs, or that all relief is to be denied
- A special verdict
- A general verdict accompanied by answers to interrogatories

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 49(a).*

(n2)Footnote 2. *See Fed. R. Civ. P. 49(b).*

(n3)Footnote 3. *Fed. R. Civ. P. 58(b)(2)(A)*.

(n4)Footnote 4. *Fed. R. Civ. P. 58(b)(2)(B)*.

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CHAPTER 44 Findings and Judgments *
C. Understanding Rule 58--Entry of Judgment

4-44 Federal Litigation Guide § 44.36

§ 44.36 Determining Time of Entry of Judgment

[1] Timing of Entry When No Separate Document Required Under Rule 58(a)

If Rule 58(a) does not require a separate document for the judgment, the judgment is entered when the notation of judgment is made in the civil docket in the manner prescribed by Rule 79(a). n1

[2] Timing of Entry When Separate Document Required Under Rule 58(a)

If Rule 58(a) requires a separate document, judgment is entered when it is entered into the civil docket pursuant to Rule 79(a) and when the earlier of these events occurs: n2

- When it is set forth on a separate document
- When 150 days have run from entry in the civil docket under Rule 79(a)

Accordingly, even if the separate document requirement is not adhered to by the court and clerk, the motion time periods set by Rules 50, 52, 54, 59, and 60 begin to run after expiration of 150 days from entry of the judgment in the civil docket as required by Rule 79(a). n3 Likewise, the time period in which to appeal begins to run after expiration of 150 days from entry of the judgment in the civil docket as required by Rule 79(a). n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 58(c)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 58(c)(2).*

(n3)Footnote 3. *Fed. R. Civ. P. 58*, Committee Note (2002).

(n4)Footnote 4. *See Fed. R. App. P. 4(a)(7).*

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CHAPTER 44 Findings and Judgments *
C. Understanding Rule 58--Entry of Judgment

4-44 Federal Litigation Guide § 44.37

§ 44.37 Tolling Effect of Motion For Fees

The entry of judgment is not to be delayed in order to tax costs or award fees. n1 However, Rule 58 contains an exception to this principle. The rule provides that the court may deem a timely motion for attorney's fees to have the same tolling effect as a timely motion under Rule 59. n2

When a timely motion for attorney's fees is made under Rule 54(d)(2), the court, before a notice of appeal has been filed and has become effective, may order that the motion have the same effect under *Rule 4(a)(4) of the Federal Rules of Appellate Procedure* as a timely motion under Rule 59. n3

Under *Fed. R. App. P. 4(a)*, certain post-trial motions toll the running of the appeal period; among the specified motions are a motion to alter or amend the judgment under Rule 59, a motion for a new trial under Rule 59, and a motion for attorney's fees, provided the court extends the time for appeal under Rule 58. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 58(e).*

(n2)Footnote 2. *Fed. R. Civ. P. 58(e).*

(n3)Footnote 3. *Fed. R. Civ. P. 58(e).*

(n4)Footnote 4. *Fed. R. App. P. 4(a)(4)(A).*

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CHAPTER 44 Findings and Judgments *
C. Understanding Rule 58--Entry of Judgment

4-44 Federal Litigation Guide § 44.38

§ 44.38 Providing Notice of Entry of Judgment

[1] Entry of Judgment Starts Time in Which to File Appeal Running

It is the duty of the clerk to notify the parties that judgment has been entered. n1 However, it is *entry* of the judgment that starts the time in which to file an appeal running; *notice* of entry is not necessary to start the time for appeal running, and a clerk's failure to properly serve the notice of entry will not necessarily extend the deadline within which an appeal otherwise must be filed. n2

The district court may, however, reopen the time for appeal if it finds that a party entitled to notice of entry of a judgment or order did not receive notice from the clerk or any party within 21 days of its entry, and that no party would be prejudiced. n3 If the judgment is not properly entered, the time to file an appeal will not begin to run, although a party may still appeal from the judgment if no further proceedings are contemplated.

[2] Service of Notice of Entry of Judgment by Clerk

Immediately on the entry of an order or judgment, the clerk must serve a notice of the entry by mail on each party who is not in default for failure to appear, and must make a note in the docket of the mailing. Notice of the entry must be served by mail in the manner provided for in Rule 5. n4

[3] Service of Notice of Entry of Judgment by Party

Any party may serve a notice of entry of judgment in the manner provided in Rule 5 for the service of papers. n5

Appellate Rule 4(a)(6) encourages the prevailing party to serve its own notice of entry of judgment to the losing party, to minimize the possibility that a judge might reopen the time for appeal based on the losing party's non-receipt of the notice of entry. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureAppealsReviewabilityGeneral OverviewCivil

ProcedureAppealsReviewabilityTime Limitations

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 77(d)*; *see Fed. R. Civ. P. 5*.

(n2)Footnote 2. *Fed. R. Civ. P. 77(d)*.

(n3)Footnote 3. *Fed. R. App. P. 4(a)(6)*.

(n4)Footnote 4. *Fed. R. Civ. P. 77(d)*; *see Fed. R. Civ. P. 5*.

(n5)Footnote 5. *Fed. R. Civ. P. 77(d)*; *see Fed. R. Civ. P. 5*.

(n6)Footnote 6. *Fed. R. App. P. 4(a)(6)*, Committee Note (1991).

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CHAPTER 44 Findings and Judgments *
C. Understanding Rule 58--Entry of Judgment

4-44 Federal Litigation Guide § 44.39

§ 44.39 Preparing the Judgment

[1] Contents of Judgment

To be enforceable and appealable, a judgment generally must be set forth on a separate document. n1 However, entry on a separate document is not required for an order disposing of the motions listed in Appellate Rule 4(a). n2

A judgment should *not* contain a recital of pleadings, the report of a master, or the record of prior proceedings. n3 The judgment should be a self-contained document that:

- Does not contain findings or reasoning of the court
- Disposes of all claims
- Simply states which party has prevailed and what relief has been awarded, including any monetary or injunctive relief

[2] Drafting Considerations

The Federal Rules of Civil Procedure do not mandate a particular form of judgment. Official Forms 31 (judgment on very verdict) and 32 (judgment on decision by the court), which are intended for illustration only, highlight the simple language of a proposed form of judgment. n4

The form of judgment must comply with the separate document requirement of Rule 58(a) and should include the following information: n5

- Venue
- File or docket number
- Caption
- Heading: "Judgment"

- Relief granted (e.g., damages or injunctive relief)
- Prevailing party
- Appropriate reference to interest and costs
- Date
- Signature and name of clerk

If Rule 58(a) does not require a separate document for the judgment, the judgment is entered when the notation of judgment is made in the civil docket in the manner prescribed by Rule 79(a). If Rule 58(a) does require a separate document, judgment is entered when it is entered into the civil docket pursuant to Rule 79(a) and when the earlier of these events occurs: (1) when it is set forth on a separate document; or (2) when 150 days have run from entry in the civil docket under Rule 79(a). n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 58(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 58(a)*; *see also Fed. R. App. P. 4(a).*

(n3)Footnote 3. *Fed. R. Civ. P. 54(a).*

(n4)Footnote 4. *See* Moore's Federal Practice Rules Pamphlet, Part 1, Forms 31, 32 (Matthew Bender).

(n5)Footnote 5. *See Fed. R. Civ. P. 58(c)(1).*

(n6)Footnote 6. *Fed. R. Civ. P. 58(c)(2).*

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CHAPTER 44 Findings and Judgments *
D. Moving to Alter or Amend a Judgment Under Rule 59(e)

4-44 Federal Litigation Guide § 44.40

§ 44.40 Analyzing Scope of Rule 59(e)

Rule 59(e) provides, "A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." n1 The 28-day period is mandatory and may not be extended by the court or by agreement of the parties. n2 The timeliness of a Rule 59(e) motion is determined by the date of service, not by the date of filing. n3

The Rule was adopted to make clear that the district court possesses the power to rectify its own mistakes in the period immediately following the entry of judgment. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

FOOTNOTES:
(n1)Footnote 1. The notation of a judgment in the civil docket under *Fed. R. Civ. P. 79(a)* constitutes the entry of judgment.

(n2)Footnote 2. *United States Leather, Inc. v. H & W Partnership, 60 F.3d 222, 225 (5th Cir. 1995)* ; *Samuels v. American Motors Sales Corp., 969 F.2d 573, 578 (7th Cir. 1992)* .

(n3)Footnote 3. *Rivera v. M/T Fossarina, 840 F.2d 152, 154 (1st Cir. 1988)* .

(n4)Footnote 4. *White v. New Hampshire Dep't of Empl. Sec., 455 U.S. 445, 450, 102 S. Ct. 1162, 71 L. Ed. 2d 325 (1982)* .

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CHAPTER 44 Findings and Judgments *
D. Moving to Alter or Amend a Judgment Under Rule 59(e)

4-44 Federal Litigation Guide § 44.41

§ 44.41 Seeking Specific Relief Under Rule 59(e)

Motions under Rule 59(e) are normally used to correct specific errors or problems in a judgment order. For example, relief may be sought under Rule 59(e):

- To include an award of interest, and/or to add prejudgment interest; n1
- To quantify an indefinite award of attorney's fees; n2
- To delete reference to a party improperly made subject to the judgment; n3
- To add a conclusion of law previously adopted by the court; n4
- To challenge an award of costs; or n5
- To add a previously denied claim for relief. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendCivil ProcedureRemediesJudgment InterestGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Glick v. White Motor Co., 317 F. Supp. 42, 44 (E.D. Pa. 1970)* , *aff'd, 458 F.2d 1287 (3d Cir. 1972)* ; *Continental Fed. Sav. & Loan Ass'n v. Delta Corp. 425 F. Supp. 371, 372 (W.D. Okla. 1976)* .

(n2)Footnote 2. *Maristuen v. National States Ins. Co., 57 F.3d 673, 676-679 (8th Cir. 1995)* (trial court entered judgment with unquantified award of attorney fees; appeals court held that judgment was not a final decision, was not appealable until amended, and thus motion to alter judgment was timely).

(n3)Footnote 3. *Davis v. West, 71 F. Supp. 377, 378 (W.D. Mo. 1947)* , *aff'd, 74 F. Supp. 495, 496 (W.D. Mo.*

1947) (same case).

(n4)Footnote 4. *Lyman v. Remington Rand, 188 F.2d 306, 308 (2d Cir. 1951)* (addition of bond requirement).

(n5)Footnote 5. *Osterneck v. Ernst & Whinney, 489 U.S. 169, 173-178, 109 S. Ct. 987, 103 L. Ed. 2d 146 (1989)* ; *Munden v. Ultra-Alaska Assocs., 849 F.2d 383, 386-387 (9th Cir. 1988)* .

(n6)Footnote 6. *Hicks v. Town of Hudson, 390 F.2d 84, 87-88 (10th Cir. 1967)* ; *McGee v. United States, 62 F.R.D. 205, 209-210 (E.D. Pa. 1972)* (change in law subsequent to judgment).

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CHAPTER 44 Findings and Judgments *
D. Moving to Alter or Amend a Judgment Under Rule 59(e)

4-44 Federal Litigation Guide § 44.42

§ 44.42 Labeling of Motion Not Determinative

The labels given to post-judgment motions by the parties are not controlling. Therefore, any motion filed within 28 days of judgment that challenges the validity of that judgment is a Rule 59(e) motion to alter or amend the judgment, no matter what label may have been appended to the motion by the movant. n1 On the other hand, if the motion seeks relief that is collateral or incidental to the judgment, it is not a Rule 59(e) motion to alter or amend the judgment even if the movant incorrectly labels it as such. n2

If it is uncertain whether the motion is properly brought under Rule 59(e), the motion should be filed within 28 days after entry of judgment to avoid the risk having the motion dismissed as untimely. Attempts to characterize Rule 59(e) motions as being brought under Rule 60, which imposes no time limits, to avoid the strict time requirements of Rule 59(e) have generally been ineffective. n3 The rule has also been interpreted to provide for a motion to vacate, rather than merely change, a judgment. Rule 59(e) thus encompasses postjudgment motions for "reconsideration" or "rehearing" of a determination resulting in judgment. n4 Those uses of a Rule 59(e) motion most commonly occur in situations in which the court enters judgment prior to trial, disposing of a case on the basis of a motion by one of the parties.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

FOOTNOTES:
(n1)Footnote 1. *Osterneck v. Ernst & Whinney, 489 U.S. 169, 178-179, 109 S. Ct. 987, 103 L. Ed. 2d 146 (1989)* (motion to add prejudgment interest is one under Rule 59(e), because the question of prejudgment interest is part of the merits of the plaintiff's claim for relief and therefore the motion challenged the validity of the judgment); *St. Paul Mercury Ins. Co. v. Fair Grounds Corp., 123 F.3d 336, 339 (5th Cir. 1997)* (motion seeking "new trial" after grant of summary judgment construed as Rule 59(e) motion to reconsider summary judgment); *Phelps v. Hamilton, 122 F.3d 1309, 1323-1324 (10th Cir. 1997)* (motion filed within 10 days that sought alteration of judgment was Rule 59(e) motion); *Madison v. Vintage Petroleum, Inc. 114 F.3d 514, 516 (5th Cir. 1997)* (unlabeled motion was one under Rule 59(e), because it questioned correctness of court's judgment).

(n2)Footnote 2. *Budinich v. Becton Dickinson & Co., 486 U.S. 196, 199-203, 108 S. Ct. 1717, 100 L. Ed. 2d 178 (1988)* (post-judgment motion for attorney's fees is not motion under Rule 59(e) and so does not suspend time to judgment on the merits); *Pogor v. Makita U.S.A., Inc, 135 F.3d 384, 387-388 (6th Cir. 1998)* (when judgment mentions an award, but does not fix amount of prejudgment interest, motion to assess interest is Rule 60 motion, not motion under Rule 59(e)).

(n3)Footnote 3. *McConnell v. MEBA Medical & Benefits Plan, 778 F.2d 521, 526 (9th Cir. 1985)* (post-trial motion filed one year after entry of judgment which sought punitive damages and prejudgment interest at a rate greater than indicated in the judgment was untimely); *Elias v. Ford Motor Co., 734 F.2d 463, 465-466 (1st Cir. 1984)* .

(n4)Footnote 4. *Norman v. Arkansas Dep't of Educ., 79 F.3d 748, 750 (8th Cir. 1996)* (district court abused discretion in denying plaintiff's motion to alter or amend judgment, dismissing action when plaintiff pointed out in motion that court had erred in believing that plaintiff failed to comply in timely fashion with local court rules); *Lapeyrouse v. Texaco, Inc., 670 F.2d 503, 505 (5th Cir. 1982)* . However, a motion to reconsider the ruling on a post-trial motion is not a Rule 59(e) motion which tolls the appeal period. *American Sec. Bank v. John Y. Harrison Realty, Inc., 670 F.2d 317, 322 (D.C. Cir. 1982)* .

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CHAPTER 44 Findings and Judgments *
D. Moving to Alter or Amend a Judgment Under Rule 59(e)

4-44 Federal Litigation Guide § 44.43

§ 44.43 Using Rule 59(e) Motions Only to Correct Final Judgments

Rule 59(e) applies to all final judgments, both those rendered before trial and those rendered without trial. Ordinarily, the Rule 59(e) motion made after a trial should be a narrow one, addressed to specific errors in the judgment, such as in the calculation of interest. In contrast, a substantive challenge to the jury verdict or to the judgment of the trial judge should be made by alternative motions under Rule 59(a) (new trial), Rule 50(b) (judgment as a matter of law), or Rule 52(b) (motion to alter trial judge's findings of fact and conclusions of law).

This is the recommended practice, although various courts have ruled it permissible to make a motion to vacate a post-trial judgment under Rule 59(e) and seek broad relief by such a motion, even if a motion under another rule would be appropriate. n1 These courts reason that a party is not bound at its peril to give the proper nomenclature to a motion. n2 However, because a party may bring substantive motions under Rule 59(a) or Rule 52(b) jointly with a Rule 59(e) motion, each motion should be limited to its intended purpose and there is no need to apply Rule 59(e) overbroadly. Rule 59(e) should normally be used merely to correct, but not overturn the judgment.

Rule 59(e) plays a broader and more useful role with respect to judgments rendered without trial. As to these judgments, such as a judgment on a Rule 12(b) motion to dismiss, there are limited procedural alternatives short of appeal. Rule 59(a) and Rule 50(b) do not apply and the court is not required to make findings as to which a Rule 52(b) motion could be made. n3 In the pretrial context, a Rule 59(e) motion is commonly brought to seek reconsideration or vacation of a judgment and is, therefore, employed to attack the substance of the judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendCivil ProcedureAppealsAppellate JurisdictionFinal Judgment Rule

FOOTNOTES:
(n1)Footnote 1. *E.g., Steward v. Atlantic Ref. Co., 235 F.2d 570, 572 (3d Cir. 1956)* (motion to vacate and reverse judgment).

(n2)Footnote 2. *Gainey v. Brotherhood of Ry. & S.S. Clerks, 303 F.2d 716, 718 (3d Cir. 1962)* .

(n3)Footnote 3. *Fed. R. Civ. P. 52(a).*

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CHAPTER 44 Findings and Judgments *
D. Moving to Alter or Amend a Judgment Under Rule 59(e)

4-44 Federal Litigation Guide § 44.44

§ 44.44 Timing of Filing of Motion Under Rule 59(e)

[1] Filing Rule 59(e) Motion on Time Is Critical

A Rule 59(e) postjudgment motion must be filed no later than 28 days after the entry of the judgment. n1 As with all deadlines under the Federal Rules, Saturdays, Sundays, and legal holidays are counted as part of the 28-day period. n2

The district court does not possess the power to rectify its own mistakes after the period immediately following the entry of judgment has passed, except to the extent explicitly authorized in Rule 60. As with a new trial motion under Rule 59(a) or a motion to amend findings of fact and conclusions of law under Rule 52(b), the 28-day limit on Rule 59(e) motions is mandatory, and the court has no power to grant an extension of time. n3

[2] Filing Motion Tolls Time in Which to File Appeal

The Federal Rules of Appellate Procedure provide that a notice of appeal must ordinarily be filed within 30 days of a final judgment. n4 However, the filing of certain post-decisional motions (including a timely filed Rule 59(e) postjudgment motion) will defer the start of the appeal period until disposition of the last of those motions outstanding. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 59(e).*

(n2)Footnote 2. *Fed. R. Civ. P. 6(a)*; *see Hart v. Sheahan, 396 F.3d 887, 889-891 (7th Cir. 2005) .*

(n3)Footnote 3. *Green v. Bisby, 869 F.2d 1070, 1072 (7th Cir. 1989)* ; *Scola v. Boat Frances R., Inc., 618 F.2d 147, 154 (1st Cir. 1980) .*

(n4)Footnote 4. *Fed. R. App. P. 4(a)(1)*.

(n5)Footnote 5. *Fed. R. App. P. 4(a)(4)(A)(iv)*. For the text of Apellate Rule 4(a)(4)(A), *see § 44.32[3.--2]*.

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CHAPTER 44 Findings and Judgments *
D. Moving to Alter or Amend a Judgment Under Rule 59(e)

4-44 Federal Litigation Guide § 44.45

§ 44.45 Moving to Alter or Amend Judgment After Jury or Court Trial

[1] Aiming Motion at Specific Errors in Judgment

After trial, the Rule 59(e) motion should be aimed at specific errors in the judgment itself, although it is technically proper to request that the entire judgment be vacated. Substantive errors are usually addressed by a motion for a new trial (Rule 59(a)), by a motion for judgment as a matter of law in the case of a jury trial (Rule 50(b)), or by a motion to alter or amend the judge's findings of fact and conclusions of law in the case of a court trial (Rule 52(b)). In the post-trial context, therefore, the application of Rule 59(e) is rather limited. Although a party may seek to vacate a judgment under Rule 59(e), and possibly succeed, n1 other post-trial motions are specifically designed to overturn a judgment after trial and the better practice is to use Rule 59(e) to seek more limited relief. n2

[2] Moving to Vacate Judgment Under Rule 59(e)

There are situations in which a substantive Rule 59(e) motion to vacate a judgment, made without an accompanying motion for a new trial or for other relief, is appropriate. For example, when the judgment is clearly at variance with the findings of fact and conclusions of law, a new trial is unnecessary, but a motion to vacate the judgment would be appropriate.

A Rule 59(e) motion is also appropriate in a number of more common situations in which it is not necessary to vacate the entire judgment. For example, the motion may be used to delete a party named in a judgment if that party was not among the class of persons actually liable. n3 A Rule 59(e) motion may be made if the statement of damages is incorrect. n4 A Rule 59(e) motion may also be used to request that the judge modify a damage award if a comparative fault calculation by the jury is at variance with the jury's factual findings. n5

Another situation calling for a Rule 59(e) motion is one where the judgment itself incorporates findings which are unnecessary to the result and which may have some prejudicial effect in other proceedings. Under Rule 58, the judgment need not encompass findings, and they can be stricken by way of Rule 59(e) motion. The judgment should be amended pursuant to a Rule 59(e) motion if costs or interest awards are misstated or omitted.

[3] Seeking Fees Under Rule 59(e)

When there is a basis for an award of attorney's fees, but fees have been omitted from the judgment, it is proper to seek

fees by Rule 59(e) motion in certain circumstances. n6 In fact, there is some authority that substantive (as opposed to equitable) claims to attorney's fees may be time-barred if they are not made within 28 days pursuant to Rule 59(e). n7

The Supreme Court has ruled that postjudgment requests for attorney's fees in civil rights cases, under *42 U.S.C. § 1988*, however, are *not* subject to Rule 59(e), and may be brought after the Rule's filing deadline has expired. n8 The Supreme Court expressly addressed only § 1988 fee requests; consequently, it is unclear whether fees sought pursuant to other statutory provisions are likewise not subject to the time limit of Rule 59(e). For the time being, however, it is advisable to make any other attorney fee request within 28 days under Rule 59(e) to avoid denial of the request for untimeliness.

[4] Using Rule 59(e) to Amend Specific Terms in Otherwise Acceptable Judgment

Rule 59(e) is particularly useful for the party who has prevailed or is otherwise satisfied with the judgment and does not want to appeal, but finds that the judgment itself is erroneous as to some of its terms or damage calculations. Thus, if the judgment on the merits is acceptable but the terms of the judgment are flawed, it would be good practice to bring a Rule 59(e) motion, and perhaps no other post-trial motion.

Rule 59(e), at least in the post-trial setting, is best employed to fine-tune the judgment: to eliminate any variance with the court's findings or the verdict; to set the damage award precisely; n9 and to eliminate extraneous or unnecessary findings incorporated in the judgment which might complicate or prejudice future proceedings. Other post-trial motions can be used to attack the substance of the judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

FOOTNOTES:
(n1)Footnote 1. *Continental Cas. Co. v. American Fid. & Cas. Co., 186 F. Supp. 173, 179-180 (S.D. Ill. 1959)* , *aff'd, 275 F.2d 381 (7th Cir. 1960)* (prior judgment vacated under Rule 59(e) after it was determined to be inconsistent with evidence).

(n2)Footnote 2. *Erickson Tool Co. v. Balas Collet Co., 277 F. Supp. 226, 234 (N.D. Ohio 1967)* , *aff'd, 404 F.2d 35, 37 (6th Cir. 1968)* (plaintiff was not entitled to amendment of judgment where he sought, in effect, complete reversal of court's judgment).

(n3)Footnote 3. *Davis v. West, 71 F. Supp. 377, 378 (W.D. Mo. 1947)* , *aff'd, 74 F. Supp. 495, 496 (W.D. Mo. 1947)* (judgment against partnership modified to delete partner who had joined partnership after transaction at issue).

(n4)Footnote 4. *Field v. Witt Tire Co., 200 F.2d 74, 78 (2d Cir. 1952)* (court instructed as to damage standard not in effect at time of accident; award recalculated without need for new trial).

(n5)Footnote 5. *Mumma v. Reading Co., 247 F. Supp. 252, 259-260 (E.D. Pa. 1965)* .

(n6)Footnote 6. *Fase v. Seafarers Welfare & Pension Plan, 79 F.R.D. 363, 366 (E.D.N.Y. 1978)* ; *Hairline Creations, Inc. v. Kefalas, 664 F.2d 652, 660 (7th Cir. 1981)* (fees tied to substance of judgment must be obtained under Rule 59(e), but collateral "bad faith" fees may be sought as costs under Rule 54(d)).

(n7)Footnote 7. *Lichtenstein v. Lichtenstein, 55 F.R.D. 535, 537 (E.D. Pa. 1972)* , *rev'd on other grounds, 481 F.2d 682 (3d Cir. 1973)* , *cert. denied, 414 U.S. 1144 (1974)* (fees ordinarily must be sought within Rule 59(e) deadline, but party could thereafter amend bill of costs to seek fees on the basis of bad faith). *Cf. Maristuen v. National States Ins. Co., 57 F.3d 673, 676-679 (8th Cir. 1995)* (trial court entered judgment with unquantified award of attorney

fees, later amended with a quantified amount; appeals court held that judgment first entered was not final, was not appealable until amended, and motion to alter judgment was thus timely).

(n8)Footnote 8. *White v. New Hampshire Dep't of Empl. Sec., 455 U.S. 445, 450, 102 S. Ct. 1162, 71 L. Ed. 2d 325 (1982)* .

See also *Buchanan v. Stanships, Inc., 485 U.S. 265, 268-269, 108 S. Ct. 1130, 99 L. Ed. 2d 289 (1988)* (although postjudgment application for costs was styled as a motion to amend under Rule 59, the motion was predicated on Rule 54(d) and therefore did not involve a reconsideration within the meaning of Rule 59 and did not render a prior notice of appeal ineffective).

(n9)Footnote 9. *See, e.g., Maristuen v. National States Ins. Co., 57 F.3d 673, 676-679 (8th Cir. 1995)* (trial court entered judgment with unquantified award of attorney fees, later amended with a quantified amount; appeals court held that judgment first entered was not final, was not appealable until amended, and motion to alter judgment was thus timely).

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CHAPTER 44 Findings and Judgments *
D. Moving to Alter or Amend a Judgment Under Rule 59(e)

4-44 Federal Litigation Guide § 44.46

§ 44.46 Moving to Alter or Amend Judgments Entered Prior to Trial

[1] Understanding Pretrial Application of Rule 59(e)

Rule 59(e) is not limited to judgments rendered after trial. A Rule 59(e) motion may be made with respect to any judicial determination which results in judgment, and indeed the pretrial application of Rule 59(e) may be more important than its application after trial, since the post-trial litigant may make a variety of motions to challenge a trial judgment, while a party who has been dismissed on a pretrial motion, for example, has limited procedural options short of appeal.

Substantive errors in judgments rendered on pretrial motions may be raised by a Rule 59(e) motion. n1 Rule 59(e) thus represents an alternative to an immediate appeal where judgments have been rendered without trial.

[2] Using Rule 59(e) to Challenge Entry of Judgment of Dismissal on Summary Judgment

Perhaps the most common application of Rule 59(e) where judgment has been entered without trial is to challenge the entry of judgment of dismissal, as on a summary judgment motion. A Rule 59(e) motion may be made to alter, amend, or vacate judgment entered after hearing on a motion for summary judgment. n2 Such a motion is an important procedural device with respect to summary judgment because the losing party has a very limited number of options short of appeal, unlike the losing party at trial.

Under Rule 52(a) a court is not required to issue findings of fact and conclusions of law in connection with a summary judgment motion. n3 This means that a Rule 52(b) motion to alter or amend findings and conclusions may be inappropriate to attack the summary judgment. Second, in the interest of finality of judgments, many courts have required that a challenge to entry of summary judgment be made within 28 days even if the challenge is labeled a request for "reconsideration" or "rehearing."

Thus, Rule 59(e) may afford the *only* opportunity to have the district court reconsider its ruling on a summary judgment motion or other pretrial motion to dismiss. Because such "reconsideration" must comply with Rule 59(e), a party wishing to have the pretrial judgment altered or set aside should be prepared to bring the motion within 28 days or run the risk that it will be denied as untimely. n4

The absence of alternative procedures explains why Rule 59(e) is often used to vacate a judgment of dismissal before

trial although the text of Rule 59(e) does not expressly speak of a motion to vacate. n5 Despite the literal terms of the Rule, it is clear that a motion to vacate judgment can be made under Rule 59(e), n6 and counsel should not hesitate to do so whenever the chances for success outweigh the costs, and prompt review by the district court is preferable to appeal. The motion would be appropriate, for example, if the district court has made a clear error of law, or has misconstrued affidavits or other evidence presented by the party against whom judgment has been entered.

[3] Using Rule 59(e) to Challenge Other Pretrial Judgments

In addition to summary judgment, a Rule 59(e) motion may be made with respect to virtually all judgments or final orders entered prior to trial, or without trial. n7 For example, relief under Rule 59(e) may be sought in all the following situations:

- Upon judgment of dismissal for want of jurisdiction; n8
- Upon judgment of dismissal for failure to comply with discovery; n9
- Upon entry of order granting a preliminary injunction; n10
- Upon judgment of dismissal for failure to join indispensable parties; n11
- Upon judgment of dismissal of a complaint for failure to state a claim on which relief can be granted; n12 and
- Upon judgment of dismissal for failure to prosecute. n13

In the above situations, the Rule 59(e) motion challenges the substance of the district court's decision and requests the district court to reconsider the merits before an appeal is taken. The purpose of the motion is simple--to obtain a second hearing on the merits without the cost and delay of appeal. Obviously, this strategy will be most effective when the district judge has made a clear error which he or she is likely to correct, but in any case this procedure affords a quick and inexpensive alternative to appeal. Although many practitioners would simply move for rehearing, perhaps after 28 days have elapsed, this practice is fraught with risk in light of the authorities that have construed "reconsideration" motions as Rule 59(e) motions, and have regularly found them time-barred.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

FOOTNOTES:
(n1)Footnote 1. *St. Paul Fire & Marine Ins. Co. v. Continental Cas. Co., 684 F.2d 691, 693 (10th Cir. 1982)* (Rule 59(e) is substantive motion, in summary judgment context).

(n2)Footnote 2. *Sonnenblick-Goldman Corp. v. Nowalk, 420 F.2d 858, 859 (3d Cir. 1970)* . District courts also treat motions seeking reconsideration of dismissal or summary judgment as Rule 59(e) motions. *See, e.g., Tripati v. Henman, 845 F.2d 205, 206 n.1 (9th Cir. 1988)* ; *Northern Cheyenne Tribe v. Hodel, 842 F.2d 224, 227 (9th Cir. 1988)* .

(n3)Footnote 3. Under *Fed. R. Civ. P. 52(a)*, findings are required only as to cases tried to a court, with or without an advisory jury, and to cases where interlocutory injunctions are issued.

(n4)Footnote 4. *Peake v. First Nat'l Bank & Trust Co., 717 F.2d 1016, 1019 (6th Cir. 1983)* (motion to "reconsider" granting of summary judgment denied when brought 25 days after judgment).

(n5)Footnote 5. *Spatz v. Nascone, 368 F. Supp. 352, 353 (W.D. Pa. 1973)* .

(n6)Footnote 6. *Sonnenblick-Goldman Corp. v. Nowalk, 420 F.2d 858, 859 (3d Cir. 1970)* .

(n7)Footnote 7. The motion may be made as to all "judgments" as defined by Rule 54(a): all final orders and all appealable interlocutory orders.

(n8)Footnote 8. *Markert v. Swift & Co., 173 F.2d 517, 519 (2d Cir. 1949)* .

(n9)Footnote 9. *Vac--Air, Inc. v. John Mohr & Sons, Inc., 471 F.2d 231, 234 (7th Cir. 1973)* .

(n10)Footnote 10. *Commonwealth of Virginia v. Tenneco, Inc., 538 F.2d 1026, 1030 (4th Cir. 1976)* (temporary restraining order in nature of preliminary injunction was final order subject to Rule 59(e)).

(n11)Footnote 11. *Silk v. Sandoval, 435 F.2d 1266, 1267 (1st Cir. 1971)* , *cert. denied, 402 U.S. 1012 (1971)* .

(n12)Footnote 12. *Foman v. Davis, 371 U.S. 178, 181, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)* .

(n13)Footnote 13. *Theodoropoulos v. Thompson-Starrett Co., 418 F.2d 350, 353 (2d Cir. 1969)* , *cert. denied, 398 U.S. 905 (1970)* .

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CHAPTER 44 Findings and Judgments *
D. Moving to Alter or Amend a Judgment Under Rule 59(e)

4-44 Federal Litigation Guide §§ 44.47 through 44.49

[Reserved]

§§ 44.47[Reserved]

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CHAPTER 44 Findings and Judgments *
E. Understanding Default Judgments Under Rule 55

4-44 Federal Litigation Guide § 44.50

§ 44.50 Obtaining a Default Judgment Against Defendant for Failure to Appear or Defend

[1] Moving For Default Judgment Under Rule 55

Rule 55 sets forth the procedure for obtaining a default or a default judgment "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend ...". Other rules provide for the entry of default judgment in other circumstances, such as disobedience of a court order to respond to discovery. n1

The default for which Rule 55 may be used generally occurs when the defendant has not appeared or has appeared and then disappeared. Generally, it is unlikely that a default or default judgment will be obtained, or maintained, against a party who appears to have a substantive defense against a claim but who, through some understandable error, has missed a filing deadline or otherwise run afoul of a procedural technicality.

[2] Determining Whether to Seek Entry of Default

Before seeking entry of default, counsel should first be satisfied that there is some real purpose to obtaining the default or default judgment. If the defending party is not before the court because it is insolvent or otherwise insulated against any judgment, there may be no practical reason for pursuing the claim. If the defending party is absent because there is some question regarding jurisdiction, counsel should think carefully about whether a default judgment will be of any real use in collecting a judgment or enforcing the terms of a nonmonetary judgment.

[3] Analyzing Two-Step Process to Obtain Default Judgment

Rule 55 contemplates two steps in the process of obtaining a default judgment. First is the entry of default, which is a function for the clerk. Second is the entry of a judgment by default which is done either by the clerk or by the court depending on the type of situation involved. All the procedures contemplated by Rule 55--the entry of default, the entry of a default judgment, or setting aside either or both--are matters that are discretionary with the trial court. n2 Counsel should check with the district court clerk to determine whether there are any local rules or practices that govern the entry of defaults or of default judgments.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePretrial JudgmentsDefaultGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See Fed. R. Civ. P. 37(b)(2)(A)(vi).*

(n2)Footnote 2. *Ackra Direct Mktg. Corp. v. Fingerhut Corp., 86 F.3d 852, 856 (8th Cir. 1996)* (court of appeals reviewed entry of default judgment by district court under Rule 55(b)(2) for abuse of discretion); *Duling v. Markun, 231 F.2d 833, 836 (7th Cir. 1956)* , *cert. denied, 352 U.S. 870 (1956)* ; *Midland Eng'g Co. v. John A. Hall Constr. Co., 398 F. Supp. 981, 987 (N.D. Ind. 1975)* .

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CHAPTER 44 Findings and Judgments *
E. Understanding Default Judgments Under Rule 55

4-44 Federal Litigation Guide § 44.51

§ 44.51 Considering Threshold Issues Before Requesting Entry of Default

[1] Determining Whether Affirmative Relief Is Sought Against the Party Whose Default Is To Be Entered

In most cases there is little difficulty in determining whether affirmative relief is sought against the party whose default is to be entered. The affirmative relief may be a money judgment or it may be a declaration or other nonmonetary form of relief. n1

In one case, a default judgment in a contract action was denied because the individual against whom the judgment was sought had signed the contract as an agent and his agency status was indicated on the face of the contract. Because the contract was attached to the complaint, the court decided that the allegations of the complaint, including the contract, could not support a judgment against the individual. n2

Default judgments in cases involving multiple defendants may present unique problems. The Supreme Court has held that in certain circumstances it is inappropriate to enter a default judgment against one defendant when other defendants in the same case have prevailed on the merits. n3 Although the Court's opinion did not identify those specific circumstances, several courts of appeals have held that if at trial facts are established that exonerate certain defendants, and that as a matter of logic preclude the liability of another defendant, the plaintiff should be collaterally estopped from obtaining a default judgment against the other defendant, even though it failed to participate in the proceeding in which the exculpatory facts were established. n4

[2] Determining Whether the Party Has Failed to Plead or Otherwise Defend

The most typical failure that will invoke Rule 55 is the failure to file an answer or other responsive pleading to a complaint. n5 The failure to participate in discovery proceedings n6 or to participate in judicial pretrial proceedings n7 may also justify the entry of default.

But courts tend to deny requests for default based on the failure to conduct discovery or to participate in the case if the party seeking default has also been dilatory. n8 The party seeking default must be prepared to persuade the court that the conduct of the party against whom a default is sought has been sufficiently egregious to justify the extreme consequences of a default judgment. n9

[3] Determining Whether the Court Has Jurisdiction

The court, in deciding whether to grant a request for a default judgment, should determine whether it has jurisdiction. If it determines that it lacks jurisdiction, default judgment should not be entered and the action may be dismissed at least as to the party over whom there is no jurisdiction. n10

[4] Determining Whether the Party Whose Default Is To Be Entered is an Infant or an Incompetent Person

Rule 55(b)(2) prohibits the clerk from entering a default *judgment* against an infant or incompetent person. When a minor or incompetent person is involved, the court is required to determine whether the individual is represented by a guardian or other representative and, if the individual has no such representative, the court is empowered under Rule 17(c) to appoint one. If a default judgment is entered against a minor or incompetent person who does not have a proper representative, such judgment may be set aside. n11

[5] Determining Whether the Party Whose Default Is To Be Entered Is in the Military

The Servicemembers' Civil Relief Act (SCRA) applies to any civil action or proceeding in which the defendant does not make an appearance. n12 Under the Act, before a default judgment may be entered for failure to appear, the plaintiff must file an affidavit stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service. n13 The requirement for an affidavit can be satisfied by a statement, declaration, verification, or certificate, in writing, subscribed and certified or declared to be true under penalty of perjury. n14

If it appears that the defendant is in military service, the court may not enter a judgment until after the court appoints an attorney to represent the defendant. n15 If an attorney appointed to represent a servicemember cannot locate the servicemember, actions by the attorney in the case shall not waive any defense of the servicemember or otherwise bind the servicemember. n16

If based upon the affidavits filed, the court is unable to determine whether the defendant is in military service, the court may require the plaintiff to file a bond in an amount approved by the court before entering judgment. n17 If the defendant is later found to be in military service, the bond shall be available to indemnify the defendant against any loss or damage the defendant may suffer by reason of any judgment for the plaintiff against the defendant, should the judgment be set aside in whole or in part. n18

[6] Determining Whether There Are Other Factors Which Would Tend to Make Default Unjust

The entry of defaults or default judgments is discretionary and the court will look to all the relevant circumstances. Most judges will refuse to enter a default judgment if they believe that such action will simply provoke a motion to set aside the default judgment that would have to be granted if it were made.

Before seeking a default judgment, consider the arguments which the defaulting party might make to persuade the court that the entry of default judgment would be unjust or should be set aside. Then minimize the impact such arguments would have either by highlighting factors which favor default judgment (such as prejudice to the moving party) or by eliminating the basis of the defendant's argument.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See Massa v. Jiffy Prods. Co., 240 F.2d 702, 705 (9th Cir. 1957)* , *cert. denied, 353 U.S. 947 (1957)* ; *Hartford Accident & Indem. Co. v. Smeck, 78 F.R.D. 537, 539 (E.D. Pa. 1978)* .

(n2)Footnote 2. *Nishimatsu Constr. Co. v. Houston Nat'l Bank, 515 F.2d 1200, 1206 (5th Cir. 1975)* .

(n3)Footnote 3. *Frow v. De La Vega, 82 U.S. 552, 554, 21 L. Ed. 60 (1872)* . In *Frow,* the plaintiff De La Vega sued 14 defendants, alleging that eight of them participated in a "joint conspiracy to defraud him" out of a parcel of real estate. One of the eight defendants was Frow. Frow failed to file a timely answer and the district court entered a pretrial default judgment against him. The case went to trial and the complaint alleging the joint conspiracy was dismissed on the merits. The Court wrote that "if the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike--the defaulter as well as the others." *Id. See also Haines v. Fisher, 82 F.3d 1503, 1511 (10th Cir. 1996)* (court (citing *Frow v. De La Vega, 82 U.S. 552 (1872) , supra*) held that when multiple defendants are alleged to be jointly liable and fewer than all defendants default, district court may not render liability determination as to defaulting parties unless and until remaining defendants are found liable on the merits).

(n4)Footnote 4. *See, e.g., Farzetta v. Turner & Newall, Ltd., 797 F.2d 151, 154 (3d Cir. 1986)* ; *Gulf Coast Fans, Inc. v. Midwest Elecs. Importers, Inc., 740 F.2d 1499, 1511-1512 (11th Cir. 1984)* ; *In re Uranium Antitrust Litig., 617 F.2d 1248, 1256-1258 (7th Cir. 1980)* ; *International Controls Corp. v. Vesco, 535 F.2d 742, 746 (2d Cir. 1976)* , *cert. denied, 434 U.S. 1014 (1978)* .

(n5)Footnote 5. *E.g., Norsyn, Inc. v. Desai, 351 F.3d 825, 828-829 (8th Cir. 2003)* (district court properly denied a motion for default judgment when the plaintiff had never been properly served and therefore had no obligation to answer); *Meadows v. Dominican Republic, 817 F.2d 517, 521-522 (9th Cir. 1987)* ; *Douglas v. Metro Rental Servs., Inc., 827 F.2d 252, 255 (7th Cir. 1987)* .

(n6)Footnote 6. *See Ackra Direct Mktg. Corp. v. Fingerhut Corp., 86 F.3d 852, 856 (8th Cir. 1996)* (complete failure to respond to discovery order and other orders, failure to comply with pretrial requirements, and failure to attend final pretrial/settlement conference supported entry of default judgment against defendant); *Coleman v. Smith, 814 F.2d 1142, 1145-1146 (7th Cir. 1987)* (willful failure to comply with pretrial orders over a two-year period); *Au Bon Pain Corp. v. Artect, Inc., 653 F.2d 61, 65 (2d Cir. 1981)* ; *Trans World Airlines, Inc. v. Hughes, 449 F.2d 51, 57 (2d Cir. 1971)* , *rev'd on other grounds, 409 U.S. 363* .

(n7)Footnote 7. *See Ringgold Corp. v. Worrall, 880 F.2d 1138, 1141 (9th Cir. 1989)* ; *American Electronics Laboratories, Inc. v. Dopp, 369 F. Supp. 1245, 1249-1250 (D. Del. 1974)* .

(n8)Footnote 8. *See SEC v. North Am. Research & Dev. Corp., 59 F.R.D. 111, 116 (S.D.N.Y. 1972)* .

(n9)Footnote 9. *Brock v. Unique Racquetball & Health Clubs, Inc., 786 F.2d 61, 64-65 (2d Cir. 1986)* (an entry of default was proper where defense counsel failed to appear during the course of trial; however, defense counsel should have been granted an opportunity to be heard concerning the judgment to be entered). *See also* HMG Property Invs., Inc. v. Parque Indus. Rio Canas, In c., *847 F.2d 908, 919 (1st Cir. 1988)* .

(n10)Footnote 10. *Bross Utils. Serv. Corp. v. Aboubshait, 489 F. Supp. 1366, 1367-1368 (D. Conn. 1980)* , *aff'd, 646 F.2d 559 (2d Cir. 1982)* .

(n11)Footnote 11. *See Zaro v. Strauss, 167 F.2d 218, 220 (5th Cir. 1948)* .

(n12)Footnote 12. *50 U.S.C. App. § 521* Sec. 201(a).

(n13)Footnote 13. *50 U.S.C. App. § 521* Sec. 201(b)(1).

(n14)Footnote 14. *50 U.S.C. App. § 521* Sec. 201(b)(4).

(n15)Footnote 15. *50 U.S.C. App. § 521* Sec. 201(b)(2).

(n16)Footnote 16. *50 U.S.C. App. § 521* Sec. 201(b)(2).

(n17)Footnote 17. *50 U.S.C. App. § 521* Sec. 201(b)(3).

(n18)Footnote 18. *50 U.S.C. App. § 521* Sec. 201(b)(3).

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CHAPTER 44 Findings and Judgments *
E. Understanding Default Judgments Under Rule 55

4-44 Federal Litigation Guide § 44.52

§ 44.52 Obtaining Entry of Default

Rule 55(a) establishes simple requirements for the entry of default. The appropriate local rules should be consulted for any particular requirements they may contain. The application for the entry of default must include an affidavit or other means of proving that the party whose default is to be entered is one against whom a judgment for affirmative relief is sought and that such party has failed to plead or otherwise defend the action.

In simple cases the application for entry of default may be joined with an application for entry of default judgment by the clerk pursuant to Rule 55(b)(1), or the application may be made for the entry of default only.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

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CHAPTER 44 Findings and Judgments *
E. Understanding Default Judgments Under Rule 55

4-44 Federal Litigation Guide § 44.53

§ 44.53 Obtaining a Judgment on the Default

[1] Preparing an Application to the Clerk for a Default Judgment

Rule 55(b)(1) sets forth the only instances in which the clerk may enter the default judgment. The application should be in the form of an affidavit or unsworn declaration under penalty of perjury and should show:

- The party against whom judgment is sought has been defaulted for *failure to appear*;
- The party is not a minor or an incompetent person or in the military service;
- The claim made against such party is for a sum certain or for a sum which can by computation be made certain; and
- The amount which is due under such computation.

If the foregoing facts are not set forth, the clerk should not enter a default judgment and an application to the court will have to be made.

The most difficult condition to meet is that the claim is for a sum certain. If the amount of the defendant's liability is capable of precise calculation, such as the amount of a promissory note n1 or the amount of delinquent assessment, n2 then it is a sum certain and the clerk may enter a default judgment. If, however, the amount of the defendant's liability cannot be determined and is a matter of estimation, such as the value of personal property n3 or the extent of personal injuries, n4 it is not a sum certain, and the clerk cannot enter a default judgment.

[2] Preparing an Application to the Court for a Default Judgment

The best approach in preparing an application to the court for a judgment by default is to begin with the requirements for a judgment which might be entered by the clerk. Normally, the application will be made to the court because one or more of the requirements for entry of judgment by the clerk is missing.

The elements that can be stated should be stated by affidavit or statement under penalty of perjury, just as they would be if the application were being made to the clerk. The required elements that cannot be so stated will then dictate the

remainder of the application. If the clerk should have entered default judgment but did not do so for any reason, then the motion to the court should indicate that fact and be accompanied by an affidavit or statement under penalty of perjury setting forth the elements required by Rule 55(b)(1). n5

[3] Appointing a Representative for a Minor, Incompetent Person, or Person in the Military Service

One reason that an application to the court may be required is that the individual against whom judgment is sought is a minor or incompetent person or person in the military service. If the individual is an infant or incompetent, then the application for judgment should include (1) an indication that the individual is represented in the action by a proper representative who has appeared in the action or (2) an application under Rule 17(c) for the appointment of a guardian *ad litem*.

If the individual is in the military service, the application should include a request that the court appoint an attorney to represent the defendant.

[4] Giving Seven-Days Notice to Person Who Has Appeared

Another reason that an application to the court may be required is that the party against whom judgment by default is sought has appeared in the action. In that case the rule requires that the defaulting party be given at least seven-days notice prior to a hearing on the application. n6 If the party has appeared by a representative, the notice must go to the representative. Local rules may require longer notice.

If the party has already appeared, then the application to the court should recite clearly the reason that default judgment should be entered. Generally, the moving papers should include a complete statement of all the evidence that shows that the defaulting party has "failed to plead or otherwise defend" and all of the reasons that such failure might have caused prejudice to the moving party. If the moving party has any evidence concerning why the defaulting party may have stopped active participation after the initial appearance, it should present that evidence to the court because the court will want to know why the defaulting party has failed to continue to defend the action.

[5] Establishing the Amount of Damages or the Merits of a Claim

When the amount of damages is not liquidated, a hearing may be necessary to determine the amount of damages.

When a hearing is required, there is no right to a jury to determine the amount of damages. n7 In many situations, the best practice will be to submit the evidence as to the damage calculation by affidavit or unsworn statement under penalty of perjury, but prudence dictates inquiring as to the particular practice of the individual judge before whom the matter is to be heard. The moving party has the burden of establishing the amount of damages to the court's satisfaction even though the court has entered a default. n8

Similarly, where there is any other question to be determined by the court, best practice is to include the evidence in favor of the moving party's case in affidavits or unsworn statements under penalty of perjury accompanying the moving papers. For example, where the claim is against the United States, Rule 55(d) requires that the claimant establish the claim or right to relief by satisfactory evidence. What will constitute satisfactory evidence will depend on the circumstances of a particular case as well as the preferences of the particular judge.

When liability is joint and several, a default judgment against fewer than all defendants in an action is proper, but damages may not be decided until the liability of each defendant has been resolved. The reason for this rule is to avoid inconsistent damages awards on a single claim involving joint and several liability. n8.1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Thorpe v. Thorpe, 364 F.2d 692, 693-694 (D.C. Cir. 1966)* .

(n2)Footnote 2. *United States v. Raleigh Restaurant, 398 F. Supp. 496, 498 (E.D.N.Y. 1975)* .

(n3)Footnote 3. *United States v. Melichar, 56 F.R.D. 49, 50 (E.D. Wis. 1972)* (personal property).

(n4)Footnote 4. *Finch v. Big Chief Drilling Co., 56 F.R.D. 456, 457-458 (E.D. Tex. 1972)* (personal injury). *See also Combs v. Coal & Mineral Mgmt. Servs., Inc., 105 F.R.D. 472, 474-475 (D.D.C. 1984)* (withdrawal liability under the Employee Retirement Income Security Act of 1974, interest thereon, and liquidated damages represented sums certain, but reasonable attorney's fees did not).

(n5)Footnote 5. *See Brown v. Weschler, 135 F. Supp. 622, 624 (D.D.C. 1955)* .

(n6)Footnote 6. *Ackra Direct Mktg. Corp. v. Fingerhut Corp., 86 F.3d 852, 856 (8th Cir. 1996)* (notice of motion for default judgment was properly served on defendant more than three days prior to hearing on motion).

(n7)Footnote 7. *Olcott v. Delaware Flood Co., 327 F.3d 1115, 1124 (10th Cir. 2003)* .

(n8)Footnote 8. *KPS Assocs., Inc. v. Designs by FMC, Inc., 318 F.3d 1, 17-21 (1st Cir. 2003)* .

(n9)Footnote 8.1. *See Kidd v. Andrews, 340 F. Supp. 2d 333, 338 (W.D.N.Y. 2004)* .

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CHAPTER 44 Findings and Judgments *
E. Understanding Default Judgments Under Rule 55

4-44 Federal Litigation Guide § 44.54

§ 44.54 Setting Aside a Default or Default Judgment

[1] Resolving Doubts in Favor of Party Seeking Relief From Default Judgment

Default judgments are not favored by the federal courts, and the courts generally resolve all doubts in favor of the party seeking relief from thedefault judgment to facilitate resolution of disputes on the merits. n1

[2] Showing of Good Cause Required

The factors which constitute good cause depend on the circumstances of the case. n1.1 The party attempting to set aside a default or default judgment should demonstrate that the "failure to plead or otherwise defend" which caused the entry of default in the first place was the result of some excusable neglect or mistake and that there is some credible basis for believing that the party has a meritorious defense to the claim being asserted. n2

Even where a meritorious defense does exist, relief from default may be denied where defendant does not sufficiently show an excuse for failing to respond. n3 In one case, the court found that the defendant's explanation that its failure to respond was due to an error in handling documents was too vague to constitute good cause. n3.1 A willful refusal to litigate the case properly may justify the court's refusal to vacate a default entry. n4

[3] Moving to Set Aside Default Judgment in Reasonable Time

The moving party must demonstrate that it has been reasonably quick to move to set aside the default and that the opposing party is unlikely to suffer any prejudice as a result of setting aside the default. n5 A party's good faith or lack thereof also may be considered as a factor. n6 If the default has led to a default judgment, such judgment may be set aside in accordance with the provisions of Rule 60(b). n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See, e.g., Coon v. Grenier, 867 F.2d 73, 76 (1st Cir. 1989)* ; *United States v. One Parcel of Real Property with Bldgs., Appurtenances, & Improv., etc., 682 F. Supp. 694, 697 (D.R.I. 1988)* .

(n2)Footnote 1.1. *See Edes v. Fredson, 344 F. Supp. 2d 209, 212-213 (D. Me. 2004)* (the district court set aside an entry of default, applying a seven-factor test).

(n3)Footnote 2. A general denial, although it raises a meritorious defense in a timely answer, is insufficient to support the reopening of a default. *Sony Corp. v. Elm State Electronics, Inc., 800 F.2d 317, 319-320 (2d Cir. 1986)* . *See also FDIC v. Francisco Inv. Corp., 873 F.2d 474, 478 (1st Cir. 1989)* ; *Flute, Inc. v. Rubel, 682 F. Supp. 184, 187 (S.D.N.Y. 1988)* .

(n4)Footnote 3. *Park Corp. v. Lexington Ins. Corp., 812 F.2d 894, 897 (4th Cir. 1987)* (defendant simply stated that summons and complaint had somehow disappeared from its mailroom). *Cf. New York Life Ins. Co. v. Brown, 84 F.3d 137, 141 (5th Cir. 1996)* (defendant was never given notice that default judgment was being entered against him although he had participated in telephone conference with magistrate judge and later with opposing party's counsel, in which he made it known that he planned to contest the action).

(n5)Footnote 3.1. *See Brand Scaffold Builders, Inc. v. Puerto Rico Elec. Power Auth., 364 F. Supp. 2d 50, 53-56 (D.P.R. 2005)* .

(n6)Footnote 4. *Davis v. Hutchins, 321 F.3d 641, 646-648 (7th Cir. 2003)* .

(n7)Footnote 5. *Shepard Claims Serv., Inc. v. William Darrah & Assocs., 796 F.2d 190, 195 (6th Cir. 1986)* (refusal to set aside an entry of default is an abuse of discretion where plaintiff is not prejudiced by defendant's conduct, defendant has a meritorious defense, and defendant's conduct was not willful). *See Schartner v. Copeland, 59 F.R.D. 653, 656-657 (M.D. Pa. 1973)* , *aff'd. without opinion*, *487 F.2d 1395 (3rd Cir. 1973)* . *Cf. INVST Fin. Group, Inc. v. Chem-Nuclear Sys., Inc., 815 F.2d 391, 398-400 (6th Cir. 1987) cert. denied sub nom. Garratt v. INVST Fin. Group, Inc., 484 U.S. 927 (1987)* (default judgment for defendant's failure to file an answer is too severe where the parties have agreed to an extension of time, plaintiff would not be prejudiced by relief, and defendant presents a meritorious defense); *Brock v. Unique Racquetball & Health Clubs, Inc., 786 F.2d 61, 64-65 (2d Cir. 1986)* (where defense counsel's motion to vacate a default judgment was received by the court, final judgment should not have been entered before defense counsel was given an opportunity to be heard regarding the judgment; the court of appeals therefore remanded the case for such proceedings).

(n8)Footnote 6. *See, e.g., McKinnon v. Kwong Wah Restaurant, 83 F.3d 498, 503-504 (1st Cir. 1996)* (defendant's failure to cooperate with counsel in filing answer to complaint justified refusal to set aside default judgment because "[l]itigants must act punctually and not casually or indifferently if a judicial system is to function effectively"); *Boron v. West Texas Exports, Inc., 680 F. Supp. 1532, 1535-1536 (S.D. Fla. 1988) aff'd, 869 F.2d 1500 (11th Cir. 1989)* ; (default judgment entered against defendant which made "patently false representations" upheld); *Kryzak v. Dresser Indus., 118 F.R.D. 12, 13-14 (D. Me. 1987)* (denying default judgment where defendant failed to respond to complaint which was improperly routed through in-house counsel's office and such delay evidenced no bad faith). *See also Alan Neuman Prods., Inc. v. Albright, 862 F.2d 1388, 1392 (9th Cir. 1988)* , *cert. denied*, *493 U.S. 858 (1989)* .

(n9)Footnote 7. *See Fed. R. Civ. P. 60(b). See also Calumet Lumber, Inc. v. Mid-America Indus., Inc., 103 F.3d 612, 615 (7th Cir. 1997)* (scope of review of district court's Rule 60(b) determination is especially narrow; reviewing court only considers whether denial of motion was abuse of discretion); *American Alliance Ins. Co. v. Eagle Ins. Co., 92 F.3d 57, 61 (2d Cir. 1996)* (district court abused discretion in not setting aside default judgment for "excusable neglect" when default resulted from gross negligence, rather than willfulness, party had meritorious defense, and opponent would not be prejudiced by setting aside of verdict); *Gregorian v. Izvestia, 871 F.2d 1515 (9th Cir. 1989)* , *cert. denied*, *493 U.S. 891 (1989)* .

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CHAPTER 44 Findings and Judgments *
E. Understanding Default Judgments Under Rule 55

4-44 Federal Litigation Guide §§ 44.55 through 44.59

[Reserved]

§§ 44.55[Reserved]

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CHAPTER 44 Findings and Judgments *
F. Understanding the Use of Rule 60(a) to Correct Clerical Mistakes in Judgments

4-44 Federal Litigation Guide § 44.60

§ 44.60 Correcting Clerical Mistakes Under Rule 60(a)

Rule 60(a) of the Federal Rules of Civil Procedure authorizes the federal courts to correct "clerical mistakes" in the judgment or in any part of the record. It provides:

> 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. n1

This rule can be invoked to correct mistakes in the judgment, in a jury verdict, in orders of the court or in any other part of the record. It cannot be invoked to seek reconsideration of substantive legal errors. n2 That must be done under Rule 59 or Rule 60(b). Rule 60(a), however, has been used successfully to correct a wide variety of "clerical mistakes," which are discussed more fully below.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistake

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 60(a).*

(n2)Footnote 2. *Crowe v. Bolduc, 365 F.3d 86, 91-95 (1st Cir. 2004) .*

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CHAPTER 44 Findings and Judgments *
F. Understanding the Use of Rule 60(a) to Correct Clerical Mistakes in Judgments

4-44 Federal Litigation Guide § 44.61

§ 44.61 Comparing Rule 60(a) and Rule 60(b)

If there is an error in a judgment or order, a litigant will frequently be able to obtain relief under Rule 60(a), Rule 60(b), or both. n1 Insome circumstances, Rule 60(a) may be a more advantageous choice than Rule 60(b) because there are no time restrictions for seeking the relief authorized by Rule 60(a).

Rule 60(a) specifically provides that a "clerical mistake" may be corrected "whenever one is found," either on the motion of any party or on the court's own initiative. In this respect, Rule 60(a) differs from the related provisions of Rule 60(b). Rule 60(b) authorizes relief from a judgment or order on broader grounds than Rule 60(a), but it also requires, as to some grounds for relief, that a motion for relief from the judgment or order be made within one year from entry of the judgment or order. Rule 60(a) imposes no such time limitation. n2

As a practical matter, however, the potential for using Rule 60(a) to avoid the time restriction of Rule 60(b) is limited. The reason is that relief under Rule 60(a) is available only for "clerical mistakes" and errors "arising from oversight or omission." The courts have maintained a relatively strict interpretation of this language in Rule 60(a), and most of the reported cases turn on the interpretation of this language.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistake

FOOTNOTES:
(n1)Footnote 1. *See also Fed. R. Civ. P. 59(e)* (motion to alter or amend judgment must be made not later than 10 days after entry of judgment).

(n2)Footnote 2. *E.g., Jones & Guerrero Co. v. Sealift Pac., 650 F.2d 1072, 1074 (9th Cir. 1981)* ; *International Controls Corp. v. Vesco, 556 F.2d 665, 670 (2d Cir. 1977)* , *cert. denied, 434 U.S. 1014 (1978)* . If Rule 60(a) relief is sought during pendency of an appeal, however, leave of the appellate court is required.

* Chapter 44 was rewritten in 2000 by Andrew E. Westley, Esq., of San Francisco, California.

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CHAPTER 44 Findings and Judgments *
F. Understanding the Use of Rule 60(a) to Correct Clerical Mistakes in Judgments

4-44 Federal Litigation Guide § 44.62

§ 44.62 Determining Whether Error Is a "Clerical Mistake"

[1] Evaluating Nature of Error

It is clear that the phrase "clerical mistakes" is not restricted literally to mistakes made by the court clerk. Instead, Rule 60(a) can be applied to mistakes which are clerical in nature, even if they were made by the court, the jury, an attorney, or a party. n1 One court has defined the term "clerical mistake" as follows:

The term "clerical mistake" does not mean that it must be made by a clerk. The phrase merely describes the type of error identified with mistakes in transcription, alteration or omission of any papers and documents which are traditionally or customarily handled or controlled by clerks but which papers or documents may be handled by others. It is a type of mistake or omission mechanical in nature which is apparent on the record and which does not involve a legal decision or judgment by an attorney. n2

Other courts have explained that Rule 60(a) concerns "what is erroneous because the thing spoken, written, or recorded is *not what the person intended* to speak, write or record." n3

[2] Seeking Amendment of Judgment to Include Prejudgment Interest

Several courts have held that a judgment may be amended under Rule 60(a) to include prejudgment interest if the prevailing party has an unconditional statutory right to prejudgment interest. n4 On the other hand, if an award of prejudgment interest is discretionary, or if such an award must be predicated on some legal ruling by the court, Rule 60(a) is not applicable. n5

[3] Correcting Other Clerical Mistakes Under Rule 60(a)

Rule 60(a) has also been applied to correct a wide variety of other clerical mistakes. For example, it has been used to:

- Revoke the unintended dismissal of an action; n6
- Increase an award of attorney's fees to the stipulated amount; n7
- Correct damage calculations by the court n8 or by the jury; n9

- Add class certification findings which were inadvertently omitted from a judgment; n10
- Correct an error in naming a party; n11
- Correct typographical errors; n12
- Delete prejudgment interest when the court never intended to award such interest; n13
- Correct an improper rate of interest applicable to a judgment on a promissory note; n14
- Add statutorily mandated damages for delay; n15 and
- Correct a judgment which did not specify the relief to which the prevailing parties were entitled, to recite the relief obtained. n16

Relief under Rule 60(a) has been denied, however, in numerous cases in which the moving party actually sought reconsideration of some legal ruling or other intentional decision by the court. n17

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistake

FOOTNOTES:
(n1)Footnote 1. *Pattiz v. Schwartz, 386 F.2d 300, 303 (8th Cir. 1968)* ; *In re Merry Queen Transfer Corp., 266 F. Supp. 605, 607 (E.D.N.Y.) , modified on other grounds, 370 F.2d 781 (2d Cir. 1967) .*
The court's amendment of a judgment, shifting an award of prejudgment interest to the proper recipient, is a clerical change, properly made more than 10 days after entry of judgment. *Frederick v. Mobil Oil Corp., 765 F.2d 442, 450 (5th Cir. 1985) .*

(n2)Footnote 2. *In re Merry Queen Transfer Corp., 266 F. Supp. 605, 607 (E.D.N.Y.) , modified on other grounds, 370 F.2d 781 (2d Cir. 1967) .*

(n3)Footnote 3. *Chavez v. Balesh, 704 F.2d 774, 776 (5th Cir. 1983)* , quoting *Allied Materials Corp. v. Superior Prods. Co., 620 F.2d 224 (10th Cir. 1980)* (*emphasis in original*). *See also Panama Processes v. Cities Serv. Co., 789 F.2d 991, 993-994 (2d Cir. 1986) .*

(n4)Footnote 4. *E.g., Lee v. Joseph E. Seagram & Sons, Inc., 592 F.2d 39, 41-42 (2d Cir. 1979)* ; *Glick v. White Motor Co., 458 F.2d 1287, 1293-1294 (3d Cir. 1972)* ; *United States v. Faulkner, 119 F.R.D. 390, 390-391 (N.D. Ill. 1988) .*

(n5)Footnote 5. *E.g., Stern v. Shouldice, 706 F.2d 742, 746-747 (6th Cir. 1983)* ; *Scola v. Boat Frances, R., Inc., 618 F.2d 147, 155-156 (1st Cir. 1980) . See also Chicago & N.W. Ry. Co. v. Union Packing Co., 527 F.2d 592, 592 (8th Cir. 1976) .*

(n6)Footnote 6. *Jones & Guerrero Co. v. Sealift Pac., 650 F.2d 1072, 1074 (9th Cir. 1981)* .

(n7)Footnote 7. *Dura-Wood Treating Co. v. Century Forest Indus., Inc., 694 F.2d 112, 114 (5th Cir. 1982)* .

(n8)Footnote 8. *E.g., Chavez v. Balesh, 704 F.2d 774, 776-777 (5th Cir. 1983)* ; *Allied Materials Corp. v. Superior Prods. Co., 620 F.2d 224, 226 (10th Cir. 1980)* .

(n9)Footnote 9. United States *ex rel. Mississippi Road Supply Co. v. H.R. Morgan, Inc., 542 F.2d 262, 269 (5th Cir. 1976)* , *cert. denied, 434 U.S. 828 (1977)* .

(n10)Footnote 10. *Gurule v. Wilson, 635 F.2d 782, 788-790 (10th Cir. 1980)* .

(n11)Footnote 11. *E.g., Fluoro Elec. Corp. v. Branford Assoc., 489 F.2d 320, 323-326 (2d Cir. 1973)* .

(n12)Footnote 12. *Esquire Radio & Elecs., Inc. v. Montgomery Ward & Co., 804 F.2d 787, 795-796 (2d Cir. 1986)* .

(n13)Footnote 13. *Blanton v. Anzalone, 813 F.2d 1574, 1577 (9th Cir. 1987)* .

(n14)Footnote 14. *United States v. Griffin, 782 F.2d 1393, 1397 (7th Cir. 1986)* .

(n15)Footnote 15. *Aloe Coal Co. v. Clark Equip. Co., 816 F.2d 110, 112-113 (3d Cir. 1987)* , *cert. denied, 484 U.S. 853 (1987)* .

(n16)Footnote 16. *Soo Line R.R. v. Escanaba & Lake Superior R.R., 840 F.2d 546, 549 (7th Cir. 1988)* . *See also McNickle v. Bankers Life & Cas. Co., 888 F.2d 678, 681-682 (10th Cir. 1989)* .

(n17)Footnote 17. *E.g., Security Mut. Cas. Co. v. Century Cas. Co., 621 F.2d 1062, 1065 (10th Cir. 1980)* ; *Scola v. Boat Frances, R., Inc., 618 F.2d 147, 155-156 (1st Cir. 1980)* ; *Warner v. City of Bay St. Louis, 526 F.2d 1211, 1212 (5th Cir. 1976)* .

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CHAPTER 44 Findings and Judgments *
F. Understanding the Use of Rule 60(a) to Correct Clerical Mistakes in Judgments

4-44 Federal Litigation Guide § 44.63

§ 44.63 Preparing a Motion Under Rule 60(a)

[1] Providing Notice of Motion

Correction of clerical mistakes pursuant to Rule 60(a) may be made on the motion of any party, after such notice as the court orders. It can also be made on the court's own initiative, although most courts would give notice to the parties before doing so.

Generally, a Rule 60(a) motion will be made according to the regular motion procedures of the district court, as set forth in its local rules. There is no time limitation for a motion under Rule 60(a). n1

The motion should be based on facts that convince the court that the error is "clerical" in nature, or that correction is necessary to conform the judgment, order, or other part of the record to what its author intended. In some cases, this may require the submission of affidavits as well as legal argument, and in an unusual case the lawyer might even ask the court for leave to present oral testimony. The key point is to avoid asking the court to reconsider any substantive legal ruling or finding of fact because that is impermissible under Rule 60(a).

[2] Making Motion in a Case on Appeal

If a motion under Rule 60(a) is to be made in a case that is on appeal, and an appeal has been docketed in the appellate court, the moving party must obtain leave from the appellate court. n2 Normally this will be done by a written motion in accordance with the appellate court's local rules.

After the appeal has been decided, a Rule 60(a) motion may be made on remand, even if the subject of the motion was not previously raised in the district court or on appeal. n3 If the judgment has been affirmed on appeal, however, relief under Rule 60(a) may not be available, at least not without leave from the appellate court. n4

If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and pending, the court may: n5

- Defer considering the motion
- Deny the motion

- 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

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. n6 The district court may decide the motion if the court of appeals remands for that purpose. n7 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. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistake

FOOTNOTES:
(n1)Footnote 1. *See Frederick v. Mobil Oil Corp., 765 F.2d 442, 450 (5th Cir. 1985)* .

(n2)Footnote 2. *Fed. R. Civ. P. 60(a).*

(n3)Footnote 3. *Dura-Wood Treating Co. v. Century Forest Indus., Inc., 694 F.2d 112, 114 (5th Cir. 1982)* .

(n4)Footnote 4. *Id., at 114 n.2* . Note, however, that a judgment may be amended after an appeal and affirmance where the court of appeals did not consider the issue amended and the amendment reflects the court's original intention. *Panama Processes v. Cities Serv. Co., 789 F.2d 991, 994 (2d Cir. 1986)* ; *Cannon v. Loyola Univ. of Chicago, 116 F.R.D. 243, 243-244 (N.D. Ill. 1987)* .

(n5)Footnote 5. *Fed. R. Civ. P. 62.1(a).*

(n6)Footnote 6. *Fed. R. Civ. P. 62.1(b)*; *Fed. Rule. App. P. 12.1(a).*

(n7)Footnote 7. *Fed. R. Civ. P. 62.1(c).*

(n8)Footnote 8. *Fed. Rule. App. P. 12.1(b).*

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *

4-45 Federal Litigation Guide 45.syn

§ 45.syn Synopsis to Chapter 45: Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *

§ 45.01 Asserting Pre-Verdict Motion for Judgment as a Matter of Law Under Rule 50(a) to Preserve Right to Make Renewed Motion Under Rule 50(b)

§ 45.02 Judgment as a Matter of Law Replaces Directed Verdict and Judgment Notwithstanding Verdict

§ 45.03 Most Courts Take Liberal Approach to Sufficiency of Pre-Verdict Motion

§ 45.04 Liberal Approach Does Not Extend to Complete Failure to Assert Motion for Judgment at Trial

§ 45.05 Failing to Object to Pre-Verdict JMOL Waives Defect

§ 45.06 Renewing Pre-Verdict Motion to Obtain Judgment and to Preserve Issue of Sufficiency of Evidence for Appellate Review

§ 45.07 Filing Timely Motion Under Rule 50(b)
[1] Filing Renewed Motion Within 28 Days of Entry of Judgment
[2] Court May Not Extend Time to File Renewed Motion

§ 45.08 Making Rule 50(b) Motion Orally in Open Court

§ 45.09 Evaluating the Form and Content of Rule 50(b) Motions
[1] Specifying Grounds for Renewed Motion Under Rule 50(b)
[2] Rule 50(b) Motion Must Assert Same Grounds as Pre-Verdict Motion Under Rule 50(a)
[3] Technical Precision Not Required
[4] Defect Subject to Waiver

§ 45.10 Joining Alternative Motion for New Trial Under Rule 59(a) With Renewed Motion Under Rule 50(b)

§ 45.11 Determination of Renewed Motion Under Rule 50(b)

§ 45.12 Granting New Trial Instead of Judgment as Matter of Law

§ 45.13 If Court Grants Renewed Motion, Nonmovant May Move for New Trial Within 28 Days of Entry of

Judgment as Matter of Law

§ 45.14 Evaluating the Standard for Granting a Renewed Judgment Under Rule 50(b)

§ 45.15 Same Standard Governs Pre-Verdict and Post-Verdict Consideration of Motion and Appellate Review of Trial Court Ruling on Motion

§ 45.16 Grant or Denial of Renewed Motion Is Final Appealable Judgment

§§ 45.17 through 45.19 [Reserved]

§ 45.20 Considering Scope of Rule 59
[1] Three Types of Procedures Relating to New Trial
[2] Grant of Motion Is Within Trial Court's Discretion
[3] Court May Order New Trial on Its Own Motion
[4] New Trial Must Be Jury Trial If Original Trial Was Jury Trial

§ 45.21 Limiting New Trial to Certain Parties
[1] Only Injured Party May Get New Trial
[2] Court May Limit New Trial to Some But Not All Injured Parties
[3] All Parties Must Receive New Trial When Liability Is Interrelated

§ 45.22 Obtaining Partial New Trial
[1] Jury Trials
[2] Nonjury Trials
[3] Grounds for Partial New Trial

§ 45.23 Staying Enforcement of Judgment

§ 45.24 Considering Impact of Harmless Error Rule
[1] No New Trial Unless Error Affects Substantial Right
[2] Harmless Error Will Not Be Reversed
[3] Case by Case Review for Harmless Error
[4] Burden of Persuasion Is on Movant

§ 45.25 Distinguishing Rule 59 Motion for New Trial From Rule 50 Motion for Judgment as Matter of Law
[1] Rule 50 Motion for Judgment as Matter of Law Made Before Case Goes to Jury
[2] New Trial May Be Granted When Rule 50 Motion Is Renewed
[3] Rule 50(b) Standard More Strict Than Rule 59

§ 45.26 Objecting to Preserve Error
[1] Counsel Must Object During Trial
[2] Making Objections Specific and Distinct

§ 45.27 Filing Timely Motion for New Trial
[1] Filing Within 28 Days of Entry of Judgment
[2] Computing 28-Day Period
[3] Notation of Judgment in the Civil Docket Constitutes Entry of Final Judgment

§ 45.28 Amending After 28-Day Period

§ 45.29 Motion May Be Made Before Entry of Judgment

§ 45.30 Motion Must Be Made From Final Judgment

§ 45.31 Converting Motion for New Trial to Motion for Rule 60(b) Relief

§ 45.32 Moving for New Trial Based on Due Process

§ 45.33 Moving for New Trial When Verdict Against Weight of Evidence
[1] Jury's Verdict Must Be Seriously Erroneous
[2] Compared With Standard for Judgment as Matter of Law
[3] Judge May Not Assess Credibility of Witnesses

§ 45.34 Moving for New Trial Based on Inadequate or Excessive Damages
[1] Possible Remedies for Jury Error in Awarding Damages
[2] Determining Whether Award Is Excessive
[3] Partial New Trial May Be Appropriate

§ 45.35 Moving for New Trial Based on Inconsistent Verdicts and Special Interrogatories
[1] Distinguishing Special Verdict From General Verdict With Special Interrogatories
[2] Dealing With Inconsistencies in Verdicts
[3] Court Must Attempt to Reconcile Inconsistent Answers Before Ordering New Trial
[4] Only Partial New Trial May Be Required to Remedy Inconsistencies

§ 45.36 Improper Jury Instructions
[1] Improper Instructions May Be Grounds for New Trial
[2] No New Trial When Erroneous Jury Instructions Constitute Harmless Error

§ 45.37 Improper Submission to or Withdrawal of Issues From Jury

§ 45.38 Erroneous Evidentiary Rulings
[1] May Be Grounds for New Trial
[2] New Trial Not Warranted If Erroneous Evidentiary Ruling Is Harmless Error
[3] Erroneous Admission of Evidence in Nonjury Trials Is Usually Harmless

§ 45.39 Newly Discovered Evidence
[1] Motion May Be Made Under Rule 59(b) or Rule 60(b)
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§ 45.40 Denial of Jury Trial

§ 45.41 Judge's Failure to Make Findings and Conclusions in Bench Trial
[1] New Trial Not Warranted in Most Instances
[2] Remand for Additional Evidence or New Trial

§ 45.42 Inability of Judge to Proceed
[1] Successor Judge May Proceed With Trial
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§ 45.43 Errors in Jury Selection, or Bias of Jurors
[1] Jury Selection
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§ 45.44 Improper Juror Motivation
[1] Jury Prejudice, Compromise, or Coercion May Be Grounds for New Trial
[2] Juror Access to Inappropriate Information May Be Grounds for New Trial
[3] Outside Influence or Independent Juror Investigation May Be Grounds for New Trial
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§ 45.45 Misconduct of Trial Judge
[1] Misconduct of Judge May Be Grounds for New Trial
[2] Determining Whether Misconduct of Judge Is Harmless Error

§ 45.46 Misconduct of Attorneys, Witnesses, and Parties
[1] Misconduct of Attorneys
[2] New Trial Based on Counsel's Conduct Solely Within Discretion of Court
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[4] Conduct of Party During Trial Is Rarely Grounds for New Trial

§ 45.47 Content and Form of Motion for New Trial
[1] State With Particularity Grounds for Motion
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§ 45.48 Preparing Supporting Affidavits
[1] Supporting Affidavits Must Be Filed With Motion
[2] Court May Permit Reply Affidavits

§ 45.49 Joining Motion for New Trial With Motion for Judgment as Matter of Law
[1] Time for Filing Joined Motions
[2] Trial Court's Possible Rulings on Joined Motions
[3] When Court Grants Motion for Judgment as Matter of Law, Court Must Rule Conditionally on Joined Motion for New Trial

§ 45.50 CHECKLIST: Moving for New Trial

§ 45.51 Opposing Motion for New Trial

§ 45.52 Filing Opposing Affidavits
[1] Must Be Filed Up to 14 Days After Service of Motion
[2] Extension to Respond Governed by Rule 6(b)

§ 45.53 Court May Employ Remittitur as Alternative to New Trial When Damages Are Excessive
[1] Choosing Between Reduction of Excessive Verdict and New Trial
[2] Cases in Which Remittitur Is Appropriate
[3] Distinction Between Verdict and Amount Remitted
[4] New Trial Required If Plaintiff Rejects Remittitur
[5] Determination of Amount of Remittitur
[6] Plaintiff's Acceptance of Remittitur Limits Appeal

§ 45.54 Employing Additur Is Unlikely as Alternative to New Trial When Damages Are Inadequate
[1] Additur Generally Not Permitted
[2] Additur May Be Permissible When There Is No Right to Jury Trial
[3] Additur May Be Permissible When Statute Requires Nominal Damages

§ 45.55 Weighing Evidence in Considering Motion

§ 45.56 Motions to Reconsider Rule 59 Orders
[1] Court May Reconsider Order Granting New Trial
[2] Motion to Reconsider Order Denying New Trial Must Be Filed Within 28 Days After Entry of Judgment

§ 45.57 Timely Rule 59 Motion Suspends Time for Appeal

§ 45.58 Motion for New Trial Is Not Required to Appeal From Judgment

§ 45.59 Appealing Grant of Motion for New Trial
[1] Order Granting New Trial Is Generally Not Appealable
[2] Order Granting New Trial May Be Appealable If Court Lacked Jurisdiction
[3] Conditional Motion for New Trial Granted With Judgment as Matter of Law

§ 45.60 Appealing Order Denying New Trial
[1] Order Denying New Trial Is Not Immediately Appealable
[2] Exceptions to Nonappealability of Order Denying New Trial
[3] Appeal From Denial of Untimely Motion
[4] Order Denying New Trial Is Appealable If Order Involves New Matters Arising After Entry of Judgment

§§ 45.61 through 45.99 [Reserved]

§ 45.100 Combined Notice for Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial
[1] FORM
Combined Notice for Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial
[2] Use of Form
[3] Motion Must Be Filed Within 28 Days of Entry of Judgment
[4] Filing of Opposing Affidavits
[5] Critical Considerations

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *

4-45 Federal Litigation Guide Scope

Scope

SCOPE

This chapter covers the following post-trial motions:

- Renewed motions for judgment as a matter of law under Rule 50(b)
- Motions for a new trial under Rule 59.

First, the chapter covers renewed motions for judgment as a matter of law. The chapter includes discussion regarding the function, scope, and procedure for filing a renewed motion. Because the post-verdict renewed motion is dependent upon the filing of a pre-verdict motion for judgment as a matter of law, and because the same standards apply to both motions, Chapter 38, *Dispositive Motions,* should also be consulted when filing a renewed motion. Second, the chapter covers motions for a new trial. The chapter discusses the grounds and procedures applicable to a motion for a new trial and discusses the use of combined motions for both judgment and new trial. The chapter also covers opposing the motion for a new trial, as well as appealing orders on post-trial motions. The chapter includes a form of combined notice of renewed motion for judgment as a matter of law and motion for a new trial. Comments for use of the form are also included.

For expanded coverage of post-trial motions, *see* Moore's Federal Practice, Ch. 50, *Judgment as a Matter of Law in Actions Tried by Jury; Alternative Motion for New Trial; Conditional Rulings* , and Ch. 59, *New Trials; Amendment of Judgments* (Matthew Bender 3d ed.).

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *
A. Renewed Motion for Judgment as a Matter of Law

4-45 Federal Litigation Guide § 45.01

§ 45.01 Asserting Pre-Verdict Motion for Judgment as a Matter of Law Under Rule 50(a) to Preserve Right to Make Renewed Motion Under Rule 50(b)

In general, a party must have made a timely and proper motion for judgment as a matter of law under Rule 50(a) after being fully heard on the issue at trial to preserve the ability to renew the motion after the verdict under Rule 50(b). n1 Specifically, a pre-verdict motion for judgment as a matter of law is a prerequisite to a post-verdict motion on the same grounds. n2

Thus, the failure to make a proper pre-verdict motion for judgment at the close of all evidence limits the moving party to seeking a new trial and waives the right to mount a post-trial attack on the sufficiency of the evidence.

If a party has been fully heard on an issue during a 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: n3

- Resolve the issue against the party, and n4
- Grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, may be maintained or defeated only with a favorable finding on that issue n5

A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. n6

If a 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.

Rule 50(a) provides that a court may grant a motion for judgment as a matter of law during a jury trial. Courts have interpreted this language to mean that motions for judgment as a matter of law are available only in civil cases tried by a jury with the power to return a binding verdict. n7 Accordingly, Rule 50 does not apply to cases or matters in which the trial court acts as finder of fact, n8 or to cases tried to the court with an advisory jury. n9

A motion for judgment as a matter of law made during a bench trial is treated as a motion for judgment on partial findings under Rule 52(c), and the appellate court considers arguments in support of such a motion as challenges to the factual and legal sufficiency of the district court's determinations based on all the evidence. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawPostverdict JudgmentsCivil ProcedureTrialsJudgment as Matter of LawPreverdict JudgmentsCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote 1. *See* Ch. 38, *Dispositive Motions*, for a complete discussion of the pre-verdict motion for judgment as a matter of law (JMOL) under Rule 50(a); *Fed. R. Civ. P. 50(b)*; *Price v. City of Charlotte, N.C., 93 F.3d 1241, 1248-1249 (4th Cir. 1996)* , *cert. denied*, *520 U.S. 1116 (1997)* (pre-verdict motion is prerequisite to post-verdict motion because movant must apprise district court of alleged insufficiency of opponent's suit before case is submitted to jury).

(n2)Footnote 2. *Mayo v. Schooner Capital Corp., 825 F.2d 566, 571-572 (1st Cir. 1987)* ("a party may not be awarded judgment notwithstanding the verdict on a ground that was not previously included in a motion for directed verdict at the close of all the evidence").

(n3)Footnote 3. *Fed. R. Civ. P. 50(a)(1).*

(n4)Footnote 4. *Fed. R. Civ. P. 50(a)(1)(A).*

(n5)Footnote 5. *Fed. R. Civ. P. 50(a)(1)(B).*

(n6)Footnote 6. *Fed. R. Civ. P. 50(a)(2).*

(n7)Footnote 7. *Fed. R. Civ. P. 50(a).*

(n8)Footnote 8. *Ortloff v. United States, 335 F.3d 652, 660 (7th Cir. 2003)* .

(n9)Footnote 9. *Schlitt v. Florida, 749 F.2d 1482, 1483 (11th Cir. 1985)* .

(n10)Footnote 10. *Federal Ins. Co. v. HPSC, Inc., 480 F.3d 26, 32 (1st Cir. 2007)* .

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *
A. Renewed Motion for Judgment as a Matter of Law

4-45 Federal Litigation Guide § 45.02

§ 45.02 Judgment as a Matter of Law Replaces Directed Verdict and Judgment Notwithstanding Verdict

Rule 50 uses the term "judgment as a matter of law" to encompass both of the former terms "directed verdict" and "judgment notwithstanding the verdict" n1 (also known as judgment non obstante verdicto, often abbreviated as "j.n.o.v."). n2 This chapter uses current terminology unless discussing or quoting cases employing the former terminology.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawDirected VerdictsCivil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 50* advisory committee's note (1991).

(n2)Footnote 2. *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 199 n.14 (1st Cir.), cert. denied, 519 U.S. 927 (1996)* (the term "judgment as a matter of law" refers to directed verdict and JNOV).

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *
A. Renewed Motion for Judgment as a Matter of Law

4-45 Federal Litigation Guide § 45.03

§ 45.03 Most Courts Take Liberal Approach to Sufficiency of Pre-Verdict Motion

A majority of courts take a broad view of what constitutes a sufficient predicate for a Rule 50(b) motion. n1 In deciding whether to excuse a movant's failure to assert a Rule 50(a) motion, courts often look to the purpose of Rule 50(b) in providing notice of evidentiary deficiencies before the close of the evidence. n2 When the trial court and opposing parties are alerted to grounds on which evidence is allegedly insufficient before the case is submitted to a jury, technical noncompliance with Rule 50(b) may be excused, n3 particularly when the nonmoving party has not been prejudiced by noncompliance. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawPostverdict JudgmentsCivil ProcedureTrialsJudgment as Matter of LawPreverdict JudgmentsCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote 1. *Tamez v. City of San Marcos, 118 F.3d 1085, 1089-1091 (5th Cir. 1997) , cert. denied, 522 U.S. 1125 (1998)* . (because bar can be harsh, courts should view pre-verdict motion broadly to secure just resolution of case).

(n2)Footnote 2. *Scottish Heritable Trust v. Peat Marwick Main & Co., 81 F.3d 606, 610 (5th Cir.) , cert. denied, 519 U.S. 869 (1996)* ("[t]echnical noncompliance with Rule 50(b) may be excused in situations in which the purposes of the rule are satisfied").

(n3)Footnote 3. *Greenwood v. Societe Francaise De, 111 F.3d 1239, 1244-1245 (5th Cir.) , cert. denied, 522 U.S. 995 (1997)* (court does not require strict compliance with *Fed. R. Civ. P. 50(b)* when its purposes are satisfied, i.e., when court and opponent are alerted to grounds on which evidence is allegedly insufficient before case is submitted to jury).

(n4)Footnote 4. *Benson v. Allphin, 786 F.2d 268, 274 (7th Cir.) , cert. denied, 479 U.S. 848 (1986)* ("Unless *Seventh Amendment* questions are presented, the requirements of Rule 50(b) are not strictly enforced provided the prevailing party's failure to renew the motion for directed verdict did not unduly prejudice his opponent").

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *
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4-45 Federal Litigation Guide § 45.04

§ 45.04 Liberal Approach Does Not Extend to Complete Failure to Assert Motion for Judgment at Trial

The "liberal approach" to pre-verdict motion requirements does not extend to a movant's complete failure to make a motion for judgment at any point during trial. n1 Nor does it extend to a movant's failure to assert a pre-verdict motion on a basis advanced in a post-verdict motion for judgment. Furthermore, "liberal" application of Rule 50(b) may be curtailed by the requirement in Rule 50(a)(2) that pre-verdict motions specify the judgment sought and the law and facts on which the moving party is entitled to judgment. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawPostverdict JudgmentsCivil ProcedureTrialsJudgment as Matter of LawPreverdict JudgmentsCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote 1. *Johnson v. University of Wis.-Milwaukee, 783 F.2d 59, 61 (7th Cir. 1986)* ("[P]laintiff's failure to make a motion for directed verdict at any point in the trial cannot be excused").

(n2)Footnote 2. *Whelan v. Abell, 48 F.3d 1247, 1251 (D.C. Cir. 1995)* ("new language explicitly requiring specificity in Rule 50 motions works to 'alter the result' in cases where a court, by allowing less specificity, effectively circumvented the requirement that the later motion be based on grounds raised in the earlier motion").

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4-45 Federal Litigation Guide § 45.05

§ 45.05 Failing to Object to Pre-Verdict JMOL Waives Defect

Most courts hold that the failure to object to the lack of a motion for judgment as a matter of law at the close of the evidence waives the objection, provided that the opponent has substantially complied with renewed motion requirements. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawPostverdict JudgmentsCivil ProcedureTrialsJudgment as Matter of LawPreverdict JudgmentsCivil ProcedureAppealsReviewabilityPreservation for Review

FOOTNOTES:
(n1)Footnote 1. *Thompson & Wallace of Memphis, Inc. v. Falconwood Corp., 100 F.3d 429, 435 (5th Cir. 1996)* (nonmovants who failed to raise waiver bar at trial in opposing Rule 50(b) motion may not raise bar on appeal).

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *
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4-45 Federal Litigation Guide § 45.06

§ 45.06 Renewing Pre-Verdict Motion to Obtain Judgment and to Preserve Issue of Sufficiency of Evidence for Appellate Review

Rule 50(b) provides that a movant may renew a request for judgment as a matter of law by filing a post-verdict motion for judgment. n1 Moreover, a trial court's express reservation of decision on a pre-verdict motion for judgment does not relieve a moving party from the obligation to renew the motion for judgment as a matter of law, post-verdict. n2 Additionally, moving parties must renew the motion for judgment post-verdict to preserve the right to full appellate review of the trial court's denial of a pre-verdict motion for judgment. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawPostverdict JudgmentsCivil ProcedureTrialsJudgment as Matter of LawPreverdict JudgmentsCivil ProcedureAppealsReviewabilityPreservation for Review

FOOTNOTES:
(n1)Footnote 1. *Pahuta v. Massey-Ferguson, Inc., 170 F.3d 125, 129 (2d Cir. 1999)* ("when a Rule 50(a) motion made during trial is not granted, the moving party must renew the motion both at the close of the evidence and within ten days after entry of judgment").

(n2)Footnote 2. *Warkentien v. Vondracek, 633 F.2d 1, 2 n.1 (6th Cir. 1980)* ("[E]xpress reservation of a directed verdict motion does not authorize a district court to direct a verdict contrary to the jury's decision in the absence of a motion for a judgment n.o.v.").

(n3)Footnote 3. *Pahuta v. Massey-Ferguson, Inc., 170 F.3d 125, 129 (2d Cir. 1999)* .

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4-45 Federal Litigation Guide § 45.07

§ 45.07 Filing Timely Motion Under Rule 50(b)

[1] Filing Renewed Motion Within 28 Days of Entry of Judgment

A party renewing a motion for judgment as a matter of law must file the renewed 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. n1

If Rule 58(a) does not require a separate document for the judgment, the judgment is entered when the notation of judgment is made in the civil docket in the manner prescribed by Rule 79(a). If Rule 58(a) does require a separate document, judgment is entered when it is entered into the civil docket pursuant to Rule 79(a) and when the earlier of these events occurs: (1) when it is set forth on a separate document; or (2) when 150 days have run from entry in the civil docket under Rule 79(a). n2 In the absence of a timely renewed motion for judgment, the trial judge may not enter post-verdict judgment. n3 Nor may an appellate court enter judgment as a matter of law in the absence of a timely renewed motion for judgment. n4

If a movant joins a motion for new trial under Rule 59 with a renewed motion for judgment as permitted by Rule 50(b), the motion for new trial also must be filed no later than 28 days after entry of judgment. n5 However, the timely filing of one motion does not automatically satisfy the time requirements for the other. n6

[2] Court May Not Extend Time to File Renewed Motion

Courts may not extend the deadline following entry of judgment within which movants must file renewed motions under Rule 50(b). n7 Rule 6(b) provides that courts may not extend the time to file a renewed motion for judgment under Rule 50(b) or to file a motion for new trial under Rule 59(b). Neither Rule 50 nor Rule 59 provide a mechanism for extending the prescribed 28-day filing deadline. n8 Accordingly, requests for an extension of time to file a renewed motion under Rule 50(b) or a new trial under Rule 59 are ineffective, even if received without objection and granted by a trial court. n9

As a result, courts interpret the 28-day time limitation as a jurisdictional limit on the power of the court to consider renewed motions. The failure to make a timely renewed motion divests district courts of the power to modify trial verdicts. n10 Accordingly, parties may not confer jurisdiction on the court by stipulating an extension of the filing deadline. n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawPostverdict JudgmentsCivil ProcedureTrialsJudgment as Matter of LawPreverdict Judgments

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 50(b).*

(n2)Footnote 2. *Fed. R. Civ. P. 58(c).*

(n3)Footnote 3. *Jennings v. Patterson, 488 F.2d 436, 440 (5th Cir. 1974)* .

(n4)Footnote 4. *Whitehead v. Food Max of Miss., Inc., 163 F.3d 265, 271 (5th Cir. 1998)* (movant who fails to renew its pre-verdict motion for judgment in district court is not entitled to rendition of judgment in its favor on appeal).

(n5)Footnote 5. *Fed. R. Civ. P. 50(b).*

(n6)Footnote 6. *Bass v. Spitz, 522 F. Supp. 1343, 1346 (E.D. Mich. 1981)* .

(n7)Footnote 7. *Goodman v. Bowdoin Coll., 380 F.3d 33, 46 (1st Cir. 2004)* ; *Phillips v. Corbin, 132 F.3d 867, 868 (2d Cir. 1998)* .

(n8)Footnote 8. *Pinion v. Dow Chem., 928 F.2d 1522, 1525 (11th Cir. 1991)* , *cert. denied, 502 U.S. 968 (1991)* (neither *Fed. R. Civ. P. 50(b)* nor *Fed. R. Civ. P. 59(b)* provides mechanism for extending prescribed filing deadline).

(n9)Footnote 9. *Rodick v. City of Schenectady, 1 F.3d 1341, 1346 (2d Cir. 1993)* .

(n10)Footnote 10. *Metropolitan Life Ins. Co. v. Golden Triangle, 121 F.3d 351, 353-354 n.5 (8th Cir. 1997)* .

(n11)Footnote 11. *United States Leather, Inc. v. H & W Partnership, 60 F.3d 222, 224 (5th Cir. 1995)* .

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§ 45.08 Making Rule 50(b) Motion Orally in Open Court

Renewed motions may be made orally if asserted in open court during trial. n1 Although Rule 50(b) refers to renewal of a motion for judgment by filing a motion no later than 28 days after entry of judgment, Rule 7(b) provides that motions need not be in writing if made during a hearing or trial. n2 A motion made immediately after pronouncement of the verdict is made "during" trial for purposes of Rule 7(b)(1). n3

If the proceeding is not recorded, the renewed motion must be made in writing. In any event, the better practice is file and serve a written renewed motion for judgment as a matter of law. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawPostverdict JudgmentsCivil ProcedureTrialsJudgment as Matter of LawPreverdict Judgments

FOOTNOTES:
(n1)Footnote 1. *In re City of Philadelphia Litig., 158 F.3d 711, 717 (3d Cir. 1998)* (immediately following jury verdict, movant "orally renewed its motion for judgment as a matter of law in open court under *Fed. R. Civ. P. 50(b)*").

(n2)Footnote 2. *Fed. R. Civ. P. 7(b)(1).*

(n3)Footnote 3. *Rodick v. City of Schenectady, 1 F.3d 1341, 1347 (2d Cir. 1993)* (counsel's oral, post-trial request for additional time to make JMOL motion does not constitute timely oral motion).

(n4)Footnote 4. *Warkentien v. Vondracek, 633 F.2d 1, 2 n.1 (6th Cir. 1980)* .

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4-45 Federal Litigation Guide § 45.09

§ 45.09 Evaluating the Form and Content of Rule 50(b) Motions

[1] Specifying Grounds for Renewed Motion Under Rule 50(b)

A renewed motion for judgment as a matter of law, like a pre-verdict motion for judgment as a matter of law, generally must state the grounds on which it is based. n1 Technical precision is unnecessary in stating grounds for a renewed motion, however, providing the trial court is aware of the movant's position. n2

Furthermore, renewed motions for judgment are subject to the requirements of Rule 7(b)(1), which provides that motions state with particularity the grounds on which they are based. n3

[2] Rule 50(b) Motion Must Assert Same Grounds as Pre-Verdict Motion Under Rule 50(a)

In making a renewed motion for judgment, a movant generally may assert only those grounds previously raised in the pre-verdict motion for judgment; n4 Rule 50(b) ordinarily bars a renewed motion on any ground not specifically raised in an earlier motion at the close of the evidence. n5 A pre-verdict motion serves as a predicate to a post-verdict motion only if the pre-verdict motion includes the specific grounds asserted in the second motion. n6 Accordingly, trial courts may not ordinarily consider a ground raised for the first time in a post-trial motion as a basis for granting judgment as a matter of law. n7 Further, the failure to raise an issue until a post-verdict motion for judgment may result in its waiver for purposes of appellate review, although review may be available to prevent manifest injustice. n8

[3] Technical Precision Not Required

Technical precision is unnecessary in stating the grounds supporting a renewed motion. It follows that as long as the grounds for the renewed motion are "closely related" to those asserted in the pre-verdict motion, trial courts may consider those grounds in ruling on the renewed motion. n9

[4] Defect Subject to Waiver

If the party opposing a renewed motion for judgment as a matter of law does not object to the insertion of a basis for granting the motion that was not raised in the motion at the close of the evidence, that defect is subject to waiver. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawPostverdict JudgmentsCivil ProcedureTrialsJudgment as Matter of LawPreverdict Judgments

FOOTNOTES:

(n1)Footnote 1. *Dimmitt Agri Indus., Inc. v. CPC Int'l Inc., 679 F.2d 516, 521 (5th Cir. 1982)* , *cert. denied*, *460 U.S. 1082 (1983)* .

(n2)Footnote 2. *Jarvis v. Sauer Sundstrand Co., 116 F.3d 321, 323 n.4 (8th Cir. 1997)* .

(n3)Footnote 3. *Cambridge Plating Co. v. Napco, Inc., 85 F.3d 752, 760 (1st Cir. 1996)* .

(n4)Footnote 4. *Freund v. Nycomed Amersham, 347 F.3d 752, 761 (9th Cir. 2003)* ; *EMI Music Mktg. v. Avatar Records, Inc., 364 F. Supp. 2d 337, 341 (S.D.N.Y. 2005)* .

(n5)Footnote 5. *Doe v. Celebrity Cruises, Inc., 394 F.3d 891, 903-904 (11th Cir. 2004)* ; *Doctor's Assocs., Inc. v. Weible, 92 F.3d 108, 112 (2d Cir. 1996)* , *cert. denied*, *519 U.S. 1091 (1997)* .

(n6)Footnote 6. *Lifshitz v. Walter Drake & Sons, Inc., 806 F.2d 1426, 1429 (9th Cir. 1986)* .

(n7)Footnote 7. *Correa v. Hospital San Francisco, 69 F.3d 1184, 1196 (1st Cir. 1995)* .

(n8)Footnote 8. *Purcell v. Seguin State Bank & Trust Co., 999 F.2d 950, 956 (5th Cir. 1993)* .

(n9)Footnote 9. *Ross v. Rhodes Furniture, Inc., 146 F.3d 1286, 1289 (11th Cir. 1998)* .

(n10)Footnote 10. *EMI Music Mktg. v. Avatar Records, Inc., 364 F. Supp. 2d 337, 341-342 (S.D.N.Y. 2005)* ; *Whelan v. Abell, 48 F.3d 1247, 1251 (D.C. Cir. 1995)* (movants' failure to raise defensive theory in pre-verdict motion waived defense as basis for judgment, but opponent's failure to object to post-trial motion on this basis waived objection).

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§ 45.10 Joining Alternative Motion for New Trial Under Rule 59(a) With Renewed Motion Under Rule 50(b)

Parties moving for judgment as a matter of law often seek alternative relief in the form of a new trial motion. n1 Rule 50 explicitly contemplates this practice, n2 and courts have discretion to grant motions for new trial even when a movant is not entitled to judgment as a matter of law. n3 As a general rule, the standard for motions for new trial is broader and more lenient than the standard for motions for judgment; for example, evidence may be legally sufficient to take a case to a jury so that judgment as a matter of law is not justified, but new trial may still may be warranted when the verdict is against the great weight of the evidence. n4

A movant under Rule 50(b) wishing to bring an alternative motion for new trial under Rule 59(a) may proceed in either of two ways: n5

- Separate motion for new trial. The movant may file both a renewed motion for judgment as a matter of law and a separate motion for new trial.

- Single motion seeking relief in the alternative. The movant may file a single motion requesting judgment as a matter of law, or in the alternative, a new trial.

Legal Topics:

For related research and practice materials, see the following legal topics:
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FOOTNOTES:
(n1)Footnote 1. *Dunn v. Consolidated Rail Corp., 890 F. Supp. 1262, 1274 (M.D. La. 1995)* .

(n2)Footnote 2. *Fed. R. Civ. P. 50(c)*.

(n3)Footnote 3. *Long v. Shultz Cattle Co., 881 F.2d 129, 132 (5th Cir. 1989)* .

(n4)Footnote 4. *Dunn v. Consolidated Rail Corp., 890 F. Supp. 1262, 1274 (M.D. La. 1995)* .

(n5)Footnote 5. *Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 250-251, 61 S. Ct. 189, 85 L. Ed. 147 (1940)* .

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4-45 Federal Litigation Guide § 45.11

§ 45.11 Determination of Renewed Motion Under Rule 50(b)

In ruling on a renewed motion, the court may, if a verdict was returned, do any of the following: n1

- Allow the judgment to stand
- Order a new trial
- Direct entry of judgment as a matter of law

If no verdict was returned, the court may order a new trial, or direct entry of judgment as a matter of law. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
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FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 50(b)(1), (2), (3).*

(n2)Footnote 2. *Fed. R. Civ. P. 50(b)(2), (3).*

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4-45 Federal Litigation Guide § 45.12

§ 45.12 Granting New Trial Instead of Judgment as Matter of Law

In ruling on a renewed motion for judgment as a matter of law, the trial court may direct entry of judgment or may order a new trial. n1 In presenting these two options as alternatives, Rule 50(b) does not compel a trial court to enter judgment instead of ordering a new trial. Rather, it permits trial courts to exercise discretion in choosing one of the two alternatives. n2 For example, a new trial may be proper when the deficiencies in the nonmovant's proof may be remedied on retrial, or when the trial court erred in excluding the necessary evidence. n3

Note that the court's discretionary power to grant a new trial as an alternative to judgment as a matter of law comes into play only when the court believes that the moving party is entitled to post-verdict judgment. If the court does not believe the moving party is entitled to post-verdict judgment, the court may not grant the movant a new trial unless the movant has moved in the alternative for a new trial, or the court grants the new trial sua sponte in compliance with Rule 59(d). n4

Legal Topics:

For related research and practice materials, see the following legal topics:
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FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 50(b).*

(n2)Footnote 2. *Cone v. West Va. Pulp & Paper Co., 330 U.S. 212, 215, 67 S. Ct. 752, 91 L. Ed. 849 (1947) .*

(n3)Footnote 3. *Network Publications, Inc. v. Ellis Graphics Corp., 959 F.2d 212, 214 (11th Cir. 1992) .*

(n4)Footnote 4. *Goldsmith v. Diamond Shamrock Corp., 767 F.2d 411, 414 (8th Cir. 1985) .*

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4-45 Federal Litigation Guide § 45.13

§ 45.13 If Court Grants Renewed Motion, Nonmovant May Move for New Trial Within 28 Days of Entry of Judgment as Matter of Law

The fact that the trial court has granted the renewed motion for judgment as a matter of law does not automatically mean the end of the nonmovant's chances. Like any litigant who has lost at the trial level, the nonmovant may seek a new trial on any grounds that motions for new trial were granted at common law. n1 Thus, if the trial court grants a renewed motion and directs entry of judgment as a matter of law for the movant, the party against whom the court grants judgment may file a motion for new trial in the trial court no later than 28 days after entry of judgment. n2 Rule 50(d) thus gives the nonmoving party a brief period after entry of judgment as a matter of law in which to invoke the trial court's discretion to order a new trial. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
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FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 59.*

(n2)Footnote 2. *Fed. R. Civ. P. 50(d).*

(n3)Footnote 3. *Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 321, 87 S. Ct. 1072, 18 L. Ed. 2d 75 (1967) .*

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4-45 Federal Litigation Guide § 45.14

§ 45.14 Evaluating the Standard for Granting a Renewed Judgment Under Rule 50(b)

A renewed judgment as a matter of law is proper if there was no legally sufficient evidentiary basis for a reasonable jury to find for the nonmovant under controlling law. n1 Stated differently, judgment as a matter of law must be granted when, under governing law, there can be but one reasonable conclusion as to the verdict. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
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FOOTNOTES:
(n1)Footnote 1. *Merrill Lynch Interfunding, Inc. v. Argenti, 155 F.3d 113, 120 (2d Cir. 1998)* .

(n2)Footnote 2. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-251, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* .

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4-45 Federal Litigation Guide § 45.15

§ 45.15 Same Standard Governs Pre-Verdict and Post-Verdict Consideration of Motion and Appellate Review of Trial Court Ruling on Motion

The standard for reviewing the grant or denial of pre-verdict and post-verdict motions for judgment as a matter of law is identical. n1

The same standard also governs trial and appellate court consideration of the propriety of the grant of judgment as a matter of law. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawPostverdict JudgmentsCivil ProcedureTrialsJudgment as Matter of LawPreverdict JudgmentsCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote 1. *Gibson v. City of Cranston, 37 F.3d 731, 735 (1st Cir. 1994)* (applying same standard to motion for judgment "whether at the end of a plaintiff's case or at the close of all the evidence").

(n2)Footnote 2. *McGreevy v. Daktronics, Inc., 156 F.3d 837, 840 (8th Cir. 1998)* (appellate court reviews a district court's decision to grant JMOL de novo, applying the same standards as those used by the district court).

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *
A. Renewed Motion for Judgment as a Matter of Law

4-45 Federal Litigation Guide § 45.16

§ 45.16 Grant or Denial of Renewed Motion Is Final Appealable Judgment

Entry of judgment on a trial court's grant or denial of a motion for judgment as a matter of law results in a final judgment for purposes of appeal. Specifically, if the trial court grants the motion for judgment, the nonmoving party may appeal from entry of judgment on the order granting the motion. n1

If the trial court denies the motion for judgment as a matter of law, the jury verdict stands and the movant may appeal from the judgment entered on the verdict. n2 However, a district court order determining the issue of liability but leaving damages to be determined is not a final appealable order. n3

Failure to raise an issue in a motion for judgment as a matter of law bars appellate review of that issue. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawPostverdict JudgmentsCivil ProcedureTrialsJudgment as Matter of LawPreverdict JudgmentsCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureAppealsAppellate JurisdictionFinal Judgment Rule

FOOTNOTES:
(n1)Footnote 1. *Morante v. American Gen. Fin. Ctr., 157 F.3d 1006, 1008 (5th Cir. 1998)* .

(n2)Footnote 2. *Fiore v. Washington County Community Mental Health Ctr., 960 F.2d 229, 232-233 n.8 (1st Cir. 1992)* .

(n3)Footnote 3. *Cook v. Carolina Freight Carriers Corp., 867 F.2d 1266, 1267 (11th Cir. 1989)* .

(n4)Footnote 4. *See Miller v. Eby Realty Group LLC, 396 F.3d 1105, 1114 (10th Cir. 2005)* .

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *
A. Renewed Motion for Judgment as a Matter of Law

4-45 Federal Litigation Guide §§ 45.17 through 45.19

[Reserved]

§§ 45.17[Reserved]

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *
B. Motion for New Trial

4-45 Federal Litigation Guide § 45.20

§ 45.20 Considering Scope of Rule 59

[1] Three Types of Procedures Relating to New Trial

Rule 59 permits three types of procedures relating to a new trial: n1

- A motion for a new trial by any party in either a jury or a nonjury action
- A new trial order made on the district court's own initiative
- A hybrid of the two procedures: a district court may grant a motion for a new trial on any grounds that are appropriate, even if those grounds are not alleged by the movant in the papers

The final type of motion permitted under Rule 59 is not one for a new trial, but rather for an alteration or amendment of a judgment. For discussion of that topic, *see* Ch. 44, *Findings and Judgments*.

[2] Grant of Motion Is Within Trial Court's Discretion

Granting a motion for a new trial is within the trial court's discretion. n2

[3] Court May Order New Trial on Its Own Motion

The court may grant a new trial on its own initiative for any reason that would justify granting a new trial on a party's motion. In that event, the court must enter the order granting a new trial no later than 28 days after entry of the judgment. n3

However, if a timely motion for a new trial is pending, the trial court has the power to grant a new trial for reasons not stated in the motion if it gives the parties notice and an opportunity to be heard. n4 The time to grant a new trial is enlarged in this situation because when a party makes a timely motion for a new trial, the finality of the judgment is already suspended. n5

When granting a new trial sua sponte or for a reason not stated in a motion, the court must specify the grounds in its order. n6

[4] New Trial Must Be Jury Trial If Original Trial Was Jury Trial

If the court grants a new trial in an action for which the *Seventh Amendment* required a jury in the first instance, the new trial must also be before a jury, unless a jury is not required due to lack of triable issues of fact or waiver by the parties. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 59.*

(n2)Footnote 2. *Metromedia Co. v. Fugazy, 983 F.2d 350, 363 (2d Cir. 1992) , cert. denied, 508 U.S. 952 (1993) .*

(n3)Footnote 3. *Fed. R. Civ. P. 59(d).*

(n4)Footnote 4. *Fed. R. Civ. P. 59(d).*

(n5)Footnote 5. *Stone v. INS, 514 U.S. 386, 401-402, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995) .*

(n6)Footnote 6. *Fed. R. Civ. P. 59(d).*

(n7)Footnote 7. *See Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 656, 55 S. Ct. 890, 79 L. Ed. 1636 (1935)* ; *Slocum v. New York Life Ins. Co., 228 U.S. 364, 376, 33 S. Ct. 523, 57 L. Ed. 879 (1913) .*

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *
B. Motion for New Trial

4-45 Federal Litigation Guide § 45.21

§ 45.21 Limiting New Trial to Certain Parties

[1] Only Injured Party May Get New Trial

Only a party injured by the verdict may be granted a new trial. n1

[2] Court May Limit New Trial to Some But Not All Injured Parties

In an action with multiple parties, the trial court has the discretion to limit the new trial to only some of the injured parties as justice dictates. In such a case, the verdict stands against the remaining parties. In other words, the court may grant a new trial to defendants found liable while allowing the verdict to stand as to another defendant found not liable. n2

[3] All Parties Must Receive New Trial When Liability Is Interrelated

The court must grant all defendants against whom a judgment has been entered a new trial when their liability is so interrelated that it is impossible to separate the issues. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

FOOTNOTES:
(n1)Footnote 1. *Somerville v. Capital Transit Co., 192 F.2d 413, 415 (D.C. Cir. 1951) , cert. denied, 342 U.S. 941 (1952) .*

(n2)Footnote 2. *See Compagnie Nationale Air France v. Port of New York Auth., 427 F.2d 951, 956 (2d Cir. 1970) .*

(n3)Footnote 3. *See Continental Cas. Co., v. United States, 167 F.2d 107, 109 (9th Cir. 1948) , cert. denied, 337*

U.S. 940 (1949) .

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *
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4-45 Federal Litigation Guide § 45.22

§ 45.22 Obtaining Partial New Trial

[1] Jury Trials

Rule 59 permits a new trial of any separable issue in a case. The trial court has the power to grant a partial new trial on any of the grounds for which a complete new trial may be granted. n1

Only an issue that is distinct and independent from all of the remaining issues of the trial is proper for a partial new trial. The court should deny a motion for a partial new trial when the issue that the jury has improperly determined is so interwoven with the other issues involved in the case as to be inseparable from those remaining issues. n2

The most common instance for the proper grant of a partial new trial involves cases in which liability of the defendant has been properly determined by the jury, but damages have not. In such a case, a partial new trial may be granted solely on the issues of proper damages to be awarded to the plaintiff. A new trial on the sole issue of damages is only appropriate if the court is satisfied that liability has been properly determined. n3

If the jury has apparently made an improper damage award because of a difficulty with the liability issue, a new trial must be granted on the liability issue as well as the damage issue. n4

[2] Nonjury Trials

In a nonjury case, even after a judgment has been entered, the trial judge may simply reopen the case to take additional testimony and amend the findings of fact or conclusions of law, or both. This may be done in a rehearing, or a new trial may be granted on all or some of the issues before the court. n5

[3] Grounds for Partial New Trial

The court may order a partial new trial on any ground that would support a complete new trial. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil

ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:

(n1)Footnote 1. *See Fed. R. Civ. P. 59(a).*

(n2)Footnote 2. *See Bohack Corp. v. Iowa Beef Processors, Inc., 715 F.2d 703, 709 (2d Cir. 1983)* .

(n3)Footnote 3. *Wharf v. Burlington N. R.R. Co., 60 F.3d 631, 638 (9th Cir. 1995)* (court may reopen issue of liability when new trial on damages alone would result in injustice).

(n4)Footnote 4. *In re Joint E. Dist. & S. Dist. Asbestos Litig., 995 F.2d 343, 346 (2d Cir. 1993)* .

(n5)Footnote 5. *Fed. R. Civ. P. 59(a).*

(n6)Footnote 6. *Fed. R. Civ. P. 59(a).*

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *
B. Motion for New Trial

4-45 Federal Litigation Guide § 45.23

§ 45.23 Staying Enforcement of Judgment

Enforcement of a judgment may be stayed pending a ruling on a motion for a new trial. A stay of enforcement or any other proceedings to enforce a judgment is appropriate if the losing party is at risk of insolvency if the judgment were enforced. The district court has discretion to grant or deny the motion. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 62(b).*

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *
B. Motion for New Trial

4-45 Federal Litigation Guide § 45.24

§ 45.24 Considering Impact of Harmless Error Rule

[1] No New Trial Unless Error Affects Substantial Right

None of the following errors are grounds for a new trial, unless failure to grant a new trial would be inconsistent with substantial justice: n1

- An error in the admission or the exclusion of evidence
- An error or defect in any ruling or order or in anything done or omitted by the court
- Anything done or omitted by any of the parties

At every stage of the proceeding, the court must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. n2

[2] Harmless Error Will Not Be Reversed

Even if the trial court is mistaken, it will not be reversed unless its ruling results in substantial prejudice, or had a substantial effect on the outcome of the case. n3

[3] Case by Case Review for Harmless Error

Review for harmless error is fact specific, and must therefore proceed on a case by case basis. The court will consider the unique context of the particular case, including whether the error pertains to an issue that is one-sided or closely balanced, and how it relates to the ultimate decision in the case. n4

[4] Burden of Persuasion Is on Movant

The party asserting error has the burden of persuading the court that the error substantially affected the party's rights. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureAppealsStandards of ReviewHarmless & Invited ErrorsHarmless Error Rule

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 61.*

(n2)Footnote 2. *Fed. R. Civ. P. 61*; *Kotteakos v. United States, 328 U.S. 750, 764-765, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)* .

(n3)Footnote 3. *Fed. R. Evid. 103(a).*

(n4)Footnote 4. *Markovich v. Bell Helicopter Textron, Inc., 805 F. Supp. 1231, 1240 (E.D. Pa. 1992)* , *aff'd without opinion*, *977 F.2d 568 (3d Cir.1992)* .

(n5)Footnote 5. *Hygh v. Jacobs, 961 F.2d 359, 365 (2d Cir. 1992)* .

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4-45 Federal Litigation Guide § 45.25

§ 45.25 Distinguishing Rule 59 Motion for New Trial From Rule 50 Motion for Judgment as Matter of Law

[1] Rule 50 Motion for Judgment as Matter of Law Made Before Case Goes to Jury

If a party has been fully heard on an issue during a 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: n1

- Resolve the issue against the party, and n2
- Grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, may be maintained or defeated only with a favorable finding on that issue n3

Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion must specify the judgment sought, as well as the law and the facts on which the moving party is entitled to the judgment. n4

[2] New Trial May Be Granted When Rule 50 Motion Is Renewed

The movant may renew its request for judgment as a matter of law by filing a 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 alternatively request a new trial or join a motion for a new trial under Rule 59. n5

Rule 50(b) unambiguously requires that a renewed motion for a judgment as a matter of law be *filed* no later than 28 days after entry of judgment. n6

In ruling on a renewed motion, the court may, if a verdict was returned, do any of the following: n7

- Allow the judgment to stand
- Order a new trial
- Direct entry of judgment as a matter of law

If no verdict was returned, the court may order a new trial, or direct entry of judgment as a matter of law. n8

[3] Rule 50(b) Standard More Strict Than Rule 59

The standard for deciding a motion for judgment as a matter of law under Rule 50(b) is strict and the court will grant the motion only on the following grounds: n9

- There is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture

- There is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded people could not arrive at a verdict against the movant

The standard for granting a new trial is less strict: a motion for new trial may be granted even if there is substantial evidence to support the verdict. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 50(a)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 50(a)(1)(A).*

(n3)Footnote 3. *Fed. R. Civ. P. 50(a)(1)(B).*

(n4)Footnote 4. *Fed. R. Civ. P. 50(a)(2).*

(n5)Footnote 5. *Fed. R. Civ. P. 50(b).*

(n6)Footnote 6. *Fed. R. Civ. P. 50(b).*

(n7)Footnote 7. *Fed. R. Civ. P. 50(b)(1), (2), (3).*

(n8)Footnote 8. *Fed. R. Civ. P. 50(b)(2), (3).*

(n9)Footnote 9. *Dunn v. Consolidated Rail Corp., 890 F. Supp. 1262, 1274 (M.D. La. 1995) .*

(n10)Footnote 10. *Bevevino v. Saydjari, 574 F.2d 676, 683 (2d Cir. 1978) .*

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4-45 Federal Litigation Guide § 45.26

§ 45.26 Objecting to Preserve Error

[1] Counsel Must Object During Trial

Counsel must object during trial; a new trial will not be granted unless the grounds are brought to the court's attention during the trial. n1

For example:

- **Attorney, party, or witness conduct**. Misconduct by counsel, a party, a witness, or an unrelated third party is waived if a timely objection is not made by the party injured by the remark or conduct n2

- **Juror conduct**. Failure to timely object to contact between a juror and an outside party may waive the objection n3

- **Jury instructions**. To preserve the ground, the party moving for a new trial generally must object to the instructions before the jury retires to deliberate n4

- **Jury submission**. A party seeking to prevent submission of an issue to the jury generally must object to the submission before the jury retires; n5 similarly, litigants may waive the submission of an issue to the jury if they do not demand submission before the jury retires for deliberation n6

A motion for a new trial may be based only on the grounds for the objection made by a party at the time the evidence is offered for admission. n7

[2] Making Objections Specific and Distinct

The party must distinctly state the matter objected to and the grounds of the objection. n8 A general objection or an objection unaccompanied by a statement of the grounds is inadequate to preserve the right to a motion for a new trial. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureAppealsReviewabilityPreservation for Review

FOOTNOTES:

(n1)Footnote 1. *Bateman v. Mnemonics, Inc., 79 F.3d 1532, 1543-1544 (11th Cir. 1996)* .

(n2)Footnote 2. *Wharf v. Burlington N. R.R. Co., 60 F.3d 631, 637-638 (9th Cir. 1995)* .

(n3)Footnote 3. *Hafner v. Brown, 983 F.2d 570, 578 (4th Cir. 1992)* .

(n4)Footnote 4. *Fed. R. Civ. P. 51*; *Juneau Square Corp. v. First Wis. Nat'l Bank, 624 F.2d 798, 810 (7th Cir. 1980)* , *cert. denied*, *449 U.S. 1013 (1980)* .

(n5)Footnote 5. *See Fed. R. Civ. P. 49(a), 51.*

(n6)Footnote 6. *Fed. R. Civ. P. 49(a), 51.*

(n7)Footnote 7. *Minetos v. City Univ. of N.Y., 925 F. Supp. 177, 185 (S.D.N.Y. 1996)* .

(n8)Footnote 8. *Fed. R. Civ. P. 51.*

(n9)Footnote 9. *Palmer v. Hoffman, 318 U.S. 109, 119, 63 S. Ct. 477, 87 L. Ed. 645 (1943)* .

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *
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4-45 Federal Litigation Guide § 45.27

§ 45.27 Filing Timely Motion for New Trial

[1] Filing Within 28 Days of Entry of Judgment

Any motion for a new trial must be filed no later than 28 days after the judgment has been entered. n1 The 28-day time period is mandatory and may not be extended by the court or by stipulation of the parties. The court must deny an untimely motion for a new trial. n2

The district court has no jurisdiction to entertain a motion for a new trial made more than 28 days after the entry of judgment. n3

[2] Computing 28-Day Period

The motion is timely if made within 28 business days after the judgment is entered.

The 28 days are computed as follows: n4

- Exclude the day judgment is entered
- Count every other day, including intermediate Saturdays, Sundays, and legal holidays
- 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

[3] Notation of Judgment in the Civil Docket Constitutes Entry of Final Judgment

If Rule 58(a)(1) does not require a separate document for the judgment, the judgment is entered when the notation of judgment is made in the civil docket in the manner prescribed by Rule 79(a). If Rule 58(a)(1) does require a separate document, judgment is entered when it is entered into the civil docket pursuant to Rule 79(a) and when the earlier of these events occurs: (1) when it is set forth on a separate document; or (2) when 150 days have run from entry in the civil docket under Rule 79(a). n5

The 28-day period begins to run when the judgment is entered, regardless of when or whether the parties have received

notice of the entry of the judgment. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 59(b).*

(n2)Footnote 2. *Garcia-Velazquez v. Frito Lay Snacks Caribbean, 358 F.3d 6, 10 (1st Cir. 2004)* ; *United States Leather, Inc. v. H & W Partnership, 60 F.3d 222, 225 (5th Cir. 1995)* (post trial motions must be filed within deadline after entry of judgment).

(n3)Footnote 3. *Fed. R. Civ. P. 6(b)*; *Samuels v. American Motors Sales Corp., 969 F.2d 573, 578 (7th Cir. 1992)* .

(n4)Footnote 4. *Fed. R. Civ. P. 6(a)(1).*

(n5)Footnote 5. *Fed. R. Civ. P. 58(b)(1).*

(n6)Footnote 6. *See Shults v. Henderson, 110 F.R.D. 102, 105 (W.D.N.Y. 1986)* (citing **Moore's**).

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *
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4-45 Federal Litigation Guide § 45.28

§ 45.28 Amending After 28-Day Period

The courts of appeals are split on whether a timely motion for a new trial may be amended to assert additional grounds for a new trial after the filing deadline has expired. Some circuits have held that the district court may not grant a new trial for reasons brought to its attention after the filing deadline. n1

Other circuits have held that because a timely motion suspends the finality of the judgment, the district court has the discretion to determine whether justice requires the consideration of an amendment to an otherwise timely motion. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote 1. *See, e.g., Arkwright Mut. Ins. Co. v. Philadelphia Elec. Co., 427 F.2d 1273, 1275 (3d Cir. 1970)* .

(n2)Footnote 2. *See, e.g., Pate v. Seaboard R.R., Inc., 819 F.2d 1074, 1085 (11th Cir. 1987)* .

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4-45 Federal Litigation Guide § 45.29

§ 45.29 Motion May Be Made Before Entry of Judgment

A motion for a new trial may be made before judgment actually has entered. n1

Even though the motion may be made before judgment, the time for appeal does not begin to run until judgment has entered, and the district court has resolved all timely motions under Rule 59. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote 1. *FirsTier Mortgage Co. v. Investors Mortgage Ins. Co., 498 U.S. 269, 274, 111 S. Ct. 648, 112 L. Ed. 2d 743 (1991)* .

(n2)Footnote 2. *See Charles v. Daley, 799 F.2d 343, 348 (7th Cir. 1986)* .

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *
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4-45 Federal Litigation Guide § 45.30

§ 45.30 Motion Must Be Made From Final Judgment

Although a motion under Rule 59 may be made before a final judgment has entered, Rule 59 applies only to the final judgment. No motion under Rule 59 is proper with regard to an interlocutory judgment that is not appealable and that the district court has the power to alter or amend at any time. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote 1. *Warner v. Rossignol, 513 F.2d 678, 684 n.3 (1st Cir. 1975)* .

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *
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4-45 Federal Litigation Guide § 45.31

§ 45.31 Converting Motion for New Trial to Motion for Rule 60(b) Relief

A motion for a new trial under Rule 59 that is filed more than 28 days after entry of judgment may be treated as a Rule 60(b) motion. n1

Rule 60(b) provides relief from a judgment, provided the motion is filed not more than one year after the judgment was entered, on any of the following grounds: n2

- Mistake, inadvertence, surprise, or excusable neglect
- Newly discovered evidence
- Fraud, misrepresentation, or misconduct of an adverse party

Rule 60(b) also provides for relief from judgment on the grounds that the judgment is void or has been satisfied, or for any other reason, provided the motion is filed within a reasonable time. n3

Even if the motion is filed within the time limit for a Rule 59(e) motion, the court may treat a motion that seeks to modify a judgment as a motion for relief under Rule 60(b) if the asserted ground for modifying the judgment is the movant's excusable neglect. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote 1. *Hope v. United States, 43 F.3d 1140, 1143 (7th Cir. 1994)* .

(n2)Footnote 2. *Fed. R. Civ. P. 60(b).*

(n3)Footnote 3. *Fed. R. Civ. P. 60(b).*

(n4)Footnote 4. *Harrington v. City of Chicago, 433 F.3d 542, 546 (7th Cir. 2006)* ; *United States v. $23,000 in U.S. Currency, 356 F.3d 157, 165 n.9 (1st Cir. 2004)* .

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *
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4-45 Federal Litigation Guide § 45.32

§ 45.32 Moving for New Trial Based on Due Process

Due process requires a fair trial, not a perfect trial. A motion for a new trial must be granted if the trial was not fair to the moving party. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Rivas v. Brattesani, 94 F.3d 802, 807 (2d Cir. 1996)* .

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4-45 Federal Litigation Guide § 45.33

§ 45.33 Moving for New Trial When Verdict Against Weight of Evidence

[1] Jury's Verdict Must Be Seriously Erroneous

The trial court may grant a new trial when the verdict is against the weight of the evidence. The court must view the jury's verdict as "seriously erroneous" or a "miscarriage of justice." In making this assessment, a court may weigh the evidence itself, and need not view it in the light most favorable to the verdict winner. n1

[2] Compared With Standard for Judgment as Matter of Law

The standard for granting a new trial when the verdict is against the weight of the evidence is less stringent than the standard for granting judgment as a matter of law. Unlike judgment as a matter of law, the court may grant a new trial even if there is substantial evidence to support the jury's verdict. n2

[3] Judge May Not Assess Credibility of Witnesses

In reviewing a jury's verdict, the trial judge's role is to ensure that justice is carried out. The judge will weigh all of the evidence presented and consider all of the events of the trial to determine whether the verdict is seriously erroneous. However, with respect to the credibility of witnesses, the judge must avoid substituting his or her judgment for the jury's. The court will not grant a new trial when the witnesses' credibility would have been integral to the jury's resolution of the disputed issues. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureAppealsStandards of ReviewGeneral OverviewCivil ProcedureAppealsStandards of ReviewSubstantial EvidenceSufficiency of Evidence

FOOTNOTES:
(n1)Footnote 1. *See Bevevino v. Saydjari, 574 F.2d 676, 684 (2d Cir. 1978)* (citing **Moore's**).

(n2)Footnote 2. *See Fed. R. Civ. P. 50(b).*

(n3)Footnote 3. *Taber Partners I v. Insurance Co. of N. Am., Inc., 917 F. Supp. 112, 116 (D.P.R. 1996)* .

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4-45 Federal Litigation Guide § 45.34

§ 45.34 Moving for New Trial Based on Inadequate or Excessive Damages

[1] Possible Remedies for Jury Error in Awarding Damages

A damage award that is insufficient or excessive as a matter of law may be grounds for a new trial. The trial may be limited to the issue of damages only. n1

Instead of ordering a new trial when damages are excessive as a matter of law, the court may offer the plaintiff the alternative of a new trial or accepting a remittitur. n2

[2] Determining Whether Award Is Excessive

In federal question cases, the issue whether a damage award is excessive is determined in accordance with federal law. n3

A motion for a new trial based on excessive damages is properly granted if the damages are so excessive as to "shock the conscience" of the court, so that it appears that some misconduct on the part of the jury must have occurred. n4

In diversity actions, federal district courts must apply state law standards for determining whether damages are excessive. n5

[3] Partial New Trial May Be Appropriate

The court may grant a partial new trial on the issue of damages provided the jury has properly determined the issue of liability. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentAdditurs & RemittitursRemittitursCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureRemediesDamagesGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See, e.g., Eiland v. Westinghouse Elec. Corp., 58 F.3d 176, 183 (5th Cir. 1995)* .

(n2)Footnote 2. *Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 432-435, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996)* (court may order new trial without qualification or offer verdict winner a remittitur in exchange for denying motion for new trial).

(n3)Footnote 3. *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 279, 109 S. Ct. 2909, 106 L. Ed.2d 219 (1989)* .

(n4)Footnote 4. *BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996)* ; *Eich v. Board of Regents for Cent. Mo. State Univ., 350 F.3d 752, 763-764 (8th Cir. 2003)* .

(n5)Footnote 5. *Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 426-431, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996)* .

(n6)Footnote 6. *See Fed. R. Civ. P. 59(a)*; *Crockett v. Long Island R.R., 65 F.3d 274, 278-279 (2d Cir. 1995)* .

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *
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4-45 Federal Litigation Guide § 45.35

§ 45.35 Moving for New Trial Based on Inconsistent Verdicts and Special Interrogatories

[1] Distinguishing Special Verdict From General Verdict With Special Interrogatories

Rule 49 provides two alternatives to a general verdict:

- The special verdict n1
- The general verdict accompanied by answers to special interrogatories n2

A special verdict is returned in lieu of a general verdict and contains factual findings on all of the material issues in the case. The jury returns its special verdict in the form of written answers to separate questions concerning specific factual issues. The trial court then applies the law to those answers and enters judgment accordingly. n3

By removing from the jury the consideration or application of the law (which a general verdict requires through application of the court's instruction), the special verdict avoids those two sources of possible error in the general verdict.

A trial court may submit written interrogatories to the jury for consideration, along with a general verdict form. In such a case, the jury will return both a general verdict of nonliability or of liability and damages, and answers to each of the individual interrogatories. n4

Rule 49(b) combines the two types of verdicts, the general verdict and the special verdict. Special interrogatories are directed to selected issues of fact and the answers should support, rather than take the place of, the general verdict.

[2] Dealing With Inconsistencies in Verdicts

A general verdict that is facially inconsistent and reflects confusion on the part of the jury is substantial grounds for a new trial. n5 If an internally consistent verdict is inconsistent with answers to special interrogatories, the trial court has discretion to grant a new trial. n6

When the answers to interrogatories are inconsistent with each other and one or more is inconsistent with the jury's verdict, a new trial may be warranted. First, the judge should attempt to read the answers to the interrogatories

consistently, if possible. If the answers to interrogatories can be read in a way that shows a verdict by the jury that makes sense and does not show an abuse of power or other misconduct by the jury, a new trial should not be required. n7 If the answers cannot be reconciled, the judge may not enter judgment based on selecting from among inconsistent answers: if the jury has not been discharged, the court should return the matter to the jury for further consideration; n8 if the jury has been discharged, the court must order a new trial. n9

[3] Court Must Attempt to Reconcile Inconsistent Answers Before Ordering New Trial

A trial court must render a judgment that makes the jury's answers consistent if such a construction is possible. A new trial is not necessary if the answers can be interpreted in a way that results in a consistent verdict. The verdict need not be the same for all defendants in the action, and the jury's verdict need not be the same on all issues. n10

[4] Only Partial New Trial May Be Required to Remedy Inconsistencies

When a jury arrives at its decision by special interrogatories, a new trial may only be required on the issues on which the jury reached the erroneous verdict. When the jury arrives at its decision by special interrogatories, a court generally may be reasonably certain that an erroneous verdict was reached independent of the other verdicts. n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureTrialsJury TrialsVerdictsInconsistent VerdictsCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 49(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 49(b).*

(n3)Footnote 3. *See Fed. R. Civ. P. 49(a).*

(n4)Footnote 4. *See Fed. R. Civ. P. 49(b).*

(n5)Footnote 5. *Hopkins v. Coen, 431 F.2d 1055, 1059-1060 (6th Cir. 1970) .*

(n6)Footnote 6. *Harvey v. General Motors Corp., 873 F.2d 1343, 1346-1348 (10th Cir. 1989) .*

(n7)Footnote 7. *Gallick v. Baltimore & Ohio R.R. Co., 372 U.S. 108, 119, 83 S. Ct. 659, 9 L. Ed. 2d 618 (1963) .*

(n8)Footnote 8. *Turyna v. Martam Constr. Co., 83 F.3d 178, 181 (7th Cir. 1996) .*

(n9)Footnote 9. *Turyna v. Martam Constr. Co., 83 F.3d 178, 181 (7th Cir. 1996)* (when jury returns factually inconsistent verdicts and is discharged, only option is new trial).

(n10)Footnote 10. *See Gallick v. B & O R.R., 372 U.S. 108, 119, 83 S. Ct. 659, 9 L. Ed. 2d 618 (1963).*

(n11)Footnote 11. *Crockett v. Long Island R.R., 65 F.3d 274, 278-279 (2d Cir. 1995) .*

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4-45 Federal Litigation Guide § 45.36

§ 45.36 Improper Jury Instructions

[1] Improper Instructions May Be Grounds for New Trial

Improper jury instructions, or the trial judge's failure to give a properly requested jury instruction, may be grounds for a new trial. A jury charge is erroneous if the instruction misleads the jury as to the proper legal standard, or does not adequately inform the jury of the law. n1

In reviewing jury instructions, the court will consider them as a whole, considering the court's entire charge, the allegations in the complaint, the opening statements, the closing arguments, and the evidence contained in the record. n2

[2] No New Trial When Erroneous Jury Instructions Constitute Harmless Error

Erroneous instructions are harmless error and do not warrant a new trial if, in light of the jury's verdict, they were irrelevant. For example, an error in the definition of damages is harmless if the jury finds no liability. n3

Failure to give the jury a proposed instruction constitutes harmless error if the instructions that were given both:

- Sufficiently informed the jury n4
- Did not mislead the jury or give the jury an inadequate impression of the law n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureAppealsStandards of ReviewHarmless & Invited ErrorsHarmless Error Rule

FOOTNOTES:
(n1)Footnote 1. *See, e.g., Bateman v. Mnemonics, Inc. 79 F.3d 1532, 1543-1544 (11th Cir. 1996)* (incorrect infringement instructions distinguishing between copyrightable and noncopyrightable work manifestly infected deliberative process of jury and requires new trial; timely objection required before jury retires).

(n2)Footnote 2. *See National R.R. Passenger Corp., v. One 25,900 Sq. Ft. Parcel of Land, 766 F.2d 685, 688 (2d Cir. 1985)* .

(n3)Footnote 3. *See Fed. R. Civ. P. 61.*

(n4)Footnote 4. *See BAII Banking Corp. v. UPG, Inc., 985 F.2d 685, 696 (2d Cir. 1993)* .

(n5)Footnote 5. *See Riverwoods Chappaqua Corp. v. Marine Midland Bank, 30 F.3d 339, 346 (2d Cir. 1994)* .

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§ 45.37 Improper Submission to or Withdrawal of Issues From Jury

Issues that are improperly submitted to or withdrawn from the jury for consideration may be grounds for a new trial, unless the error is harmless. The issue improperly submitted or withdrawn must be material. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureAppealsStandards of ReviewHarmless & Invited ErrorsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See King v. United Benefit Fire Ins. Co., 377 F.2d 728, 731-732 (10th Cir. 1967)* .

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4-45 Federal Litigation Guide § 45.38

§ 45.38 Erroneous Evidentiary Rulings

[1] May Be Grounds for New Trial

A new trial may be warranted when the trial court:

- Improperly admits prejudicial evidence at trial n1
- Fails to admit highly probative evidence that is likely to have a profound impact on the outcome of the trial n2
- Refuses to allow use of otherwise inadmissible evidence for impeachment purposes, if the result prejudices the moving party n3

[2] New Trial Not Warranted If Erroneous Evidentiary Ruling Is Harmless Error

The exclusion of competent evidence will be harmless error n4 unless both of the following occur:

- A substantial right of a party is affected n5
- The evidence excluded would have affected the outcome of the case n6

The introduction of inadmissible evidence is harmless error unless the introduction was a clear abuse of discretion and was so clearly prejudicial to the outcome of the trial that the court is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice. n7

The party seeking to prove that the admission of incompetent evidence was reversible error has the burden of showing that there is a significant chance that it affected the result of the trial. n8

[3] Erroneous Admission of Evidence in Nonjury Trials Is Usually Harmless

A trial judge sitting without a jury is entitled to greater latitude in the admission or exclusion of evidence. n9

In most circumstances, error in the admission of evidence during a bench trial will be deemed harmless error. Reversal is only required if either: n10

- All of the competent evidence is insufficient to support the judgment
- It appears that the trial court used the improperly admitted evidence to make an essential finding that it otherwise would not have made

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureAppealsStandards of ReviewHarmless & Invited ErrorsHarmless Error RuleEvidenceProcedural ConsiderationsRulings on Evidence

FOOTNOTES:
(n1)Footnote 1. *See Logan v. Dayton Hudson Corp., 865 F.2d 789, 790 (6th Cir. 1989)* .

(n2)Footnote 2. *See, e.g., Dabney v. Montgomery Ward & Co., 692 F.2d 49, 51-52 (8th Cir. 1982)* , *cert. denied, 461 U.S. 957 (1983)* .

(n3)Footnote 3. *Wood v. Morbark Indus., Inc., 70 F.3d 1201, 1209 (11th Cir. 1995)* .

(n4)Footnote 4. *See Fed. R. Civ. P. 61.*

(n5)Footnote 5. *See Phoenix Assocs. III v. Stone, 60 F.3d 95, 104-105 (2d Cir. 1995)* .

(n6)Footnote 6. *Malek v. Federal Ins. Co., 994 F.2d 49, 55 (2d Cir. 1993)* .

(n7)Footnote 7. *Hygh v. Jacobs, 961 F.2d 359, 365 (2d Cir. 1992)* .

(n8)Footnote 8. *Walton v. United Consumers Club, Inc., 786 F.2d 303, 313 (7th Cir. 1986)* .

(n9)Footnote 9. *See Southern Pac. Transp. Co. v. Chabert, 973 F.2d 441, 448 (5th Cir. 1992)* , *cert. denied, 507 U.S. 987 (1993)* .

(n10)Footnote 10. *Southern Pac. Transp. Co. v. Chabert, 973 F.2d 441, 448 (5th Cir. 1992)* , *cert. denied, 507 U.S. 987 (1993)* .

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *
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4-45 Federal Litigation Guide § 45.39

§ 45.39 Newly Discovered Evidence

[1] Motion May Be Made Under Rule 59(b) or Rule 60(b)

A motion for a new trial based on newly discovered evidence may be made under either Rule 59(b) or Rule 60(b). Rule 60(b) permits any party to seek a modification of a judgment on grounds, including newly discovered evidence, that could not have been discovered by due diligence within the time period required for a Rule 59(b) motion. n1

A Rule 59(b) motion must be made within 28 days after the entry of judgment. n2 A Rule 60(b) motion must be made within a reasonable time, but not more than one year after the judgment is entered. n3

The court may consider an untimely Rule 59 motion for a new trial as a Rule 60(b) motion if the movant could not have discovered the new evidence by due diligence within the 28-day period. n4 A motion based on newly discovered evidence brought under Rule 59 destroys the finality of the judgment and suspends the period for appeal. In contrast, a motion under Rule 60(b) to set aside the judgment is unrelated to the process of appealing from that judgment.

[2] Evidence Must Relate to Facts Existing at Time of Trial

To constitute proper grounds for a Rule 59 motion for a new trial, the newly discovered evidence must relate to facts in existence at the time of the trial and may not pertain to events that occurred after the conclusion of the trial. n5

The party seeking a new trial based on newly discovered evidence must: n6

- Have been excusably unaware of the existence of the evidence during the trial
- Be able to show that he or she exercised due diligence in investigating the facts of the case

The evidence on which the motion for a new trial is based must be of the type that would not have been uncovered by a diligent search. n7 Evidence that supports a new legal theory of the case that was not introduced at the original trial is not an adequate basis for a motion for a new trial. n8 In such a case, the movant should move to amend the pleadings to add the new theory to the case, and then move to reopen to introduce additional relevant proof.

For newly discovered evidence to constitute adequate grounds for a Rule 59 motion for a new trial, the evidence must

be both admissible and probative. The evidence must be of such substantial probative value that if it had been introduced at the previous trial, a different result would have been attained. n9 Evidence that is merely cumulative or that is only being introduced to impeach is not proper grounds for a new trial. n10 Evidence of false testimony by a witness may constitute a sufficient basis for a new trial on the grounds of newly discovered evidence. n11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From JudgmentNewly Discovered Evidence

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 60(b).*

(n2)Footnote 2. *Fed. R. Civ. P. 59(b).*

(n3)Footnote 3. *Fed. R. Civ. P. 60(b).*

(n4)Footnote 4. *See, e.g., Godwin v. FSLIC, 806 F.2d 1290, 1293 (5th Cir. 1987) .*

(n5)Footnote 5. *White v. Bowen, 835 F.2d 974, 979 (2d Cir. 1987) .*

(n6)Footnote 6. *Morgan v. Labiak, 368 F.2d 338, 341 (10th Cir. 1966) .*

(n7)Footnote 7. *See, e.g., Jay Edwards, Inc. v. New England Toyota Distrib., Inc., 708 F.2d 814, 825 (1st Cir.) , cert. denied, 464 U.S. 894 (1983) .*

(n8)Footnote 8. *Toops v. United States Fidelity & Guar. Co., 871 F. Supp. 284, 294-295 (S.D. Tex. 1994) , rev'd on other grounds, sub nom. Toops v. Gulf Coast Marine, Inc., 72 F.3d 483 (5th Cir. 1996) .*

(n9)Footnote 9. *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A., 833 F.2d 208, 211-212 (9th Cir. 1987) .*

(n10)Footnote 10. *Mesarosh v. United States, 352 U.S. 1, 9, 77 S. Ct. 1, 1 L. Ed. 2d 1 (1956) .*

(n11)Footnote 11. *Phillips v. Crown Cent. Petroleum Corp., 556 F.2d 702, 705 (4th Cir. 1977) , cert. denied, 444 U.S. 1074 (1980) .*

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4-45 Federal Litigation Guide § 45.40

§ 45.40 Denial of Jury Trial

Denial of a jury trial when one is requested is proper grounds for a new trial, if the denial is not harmless error. n1

Denial of a jury trial will be deemed harmless error if a directed verdict would have been warranted. In other words, denial of a jury trial is not grounds for a new trial if:

- There was no material issue of fact for submission to a jury n2
- A jury verdict on the factual issues would have to have been set aside because of lack of evidence n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureAppealsStandards of ReviewHarmless & Invited ErrorsHarmless Error Rule

FOOTNOTES:
(n1)Footnote 1. *See, e.g., Freeman Contractors, Inc. v. Central Sur. & Ins. Corp., 205 F.2d 607, 612 (8th Cir. 1953)* .

(n2)Footnote 2. *In re* N-500L *Cases, 691 F.2d 15, 32 (1st Cir. 1982)* .

(n3)Footnote 3. *King v. United Benefit Fire Ins. Co., 377 F.2d 728, 731 (10th Cir.)* , *cert. denied, 389 U.S. 857 (1967)* .

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4-45 Federal Litigation Guide § 45.41

§ 45.41 Judge's Failure to Make Findings and Conclusions in Bench Trial

[1] New Trial Not Warranted in Most Instances

The trial court's failure to make adequate findings of fact and conclusions of law in a bench trial usually does not warrant a new trial. The court may simply make its findings of fact and conclusions of law after the fact. n1

When the trial court's findings are inadequate, the appellate court usually will vacate the judgment and remand the action to the district court so that appropriate findings can be made. n2

[2] Remand for Additional Evidence or New Trial

In some cases, additional evidence may be required because the trial court failed to hear testimony on a material issue. In these cases the appellate court may instruct the district court to hear additional evidence, instead of merely remanding for further findings. n3

The appellate court may order a retrial when a significant period of time has elapsed since the trial, and the appeals court is concerned that the record might be stale in the trial judge's mind. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 52.*

(n2)Footnote 2. *Pullman-Standard v. Swint, 456 U.S. 273, 291, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982)* (citing **Moore's**).

(n3)Footnote 3. *Girard Trust Co. v. Windt, 178 F.2d 359, 360 (2d Cir. 1949) .*

(n4)Footnote 4. *See, e.g., Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179, 1184 (7th Cir. 1982)* .

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4-45 Federal Litigation Guide § 45.42

§ 45.42 Inability of Judge to Proceed

[1] Successor Judge May Proceed With Trial

When the trial judge is unable to proceed (due for example to death, failing health, retirement, resignation, or disqualification), a new trial is generally not necessary because a successor judge will be appointed. The successor judge may proceed with the trial "upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties." In a nonjury trial, the successor judge may recall witnesses. n1

[2] Successor Judge Has Discretion to Order New Trial

The successor judge has discretion to order a new trial if the judge is satisfied that he or she cannot preside over the remainder of the case for any reason. n2

[3] Grounds for Granting New Trial

Proper grounds for a successor judge to grant a new trial include an insufficient record or the successor judge's inability to assess credibility issues, although a successor in a bench trial may be able to resolve credibility problems by recalling key witnesses. n3

An intervening decision that affects the law governing the case is also a proper ground for a successor judge to grant a new trial. n4

[4] Waiver of New Trial

Litigants may waive their right to a new trial by their conduct, such as failing to appear at status conferences, failing to respond to notice that the court intends to proceed under the existing record, otherwise neglecting to respond or communicate with the court, or by acquiescing in the process established by the successor judge. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications &

RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesSuccessorsCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:

(n1)Footnote 1. *See Fed. R. Civ. P. 63.*

(n2)Footnote 2. *See generally Fed. R. Civ. P. 63*; *Mergentime Corp. v. Washington Metro. Area Transit Auth., 166 F.3d 1257, 1262-1263 (1999)* .

(n3)Footnote 3. *Rose Hall, Ltd. v. Chase Manhattan Overseas Banking Corp., 576 F. Supp. 107, 125 (D. Del. 1983)* ; *see Fed. R. Civ. P. 63.*

(n4)Footnote 4. *Berry v. School Dist. of Benton Harbor, 494 F. Supp. 118, 120 (W.D. Mich. 1980)* .

(n5)Footnote 5. *See In re Higginbotham, 917 F.2d 1130, 1133 (8th Cir. 1990)* ; *Townsend v. Gray Line Bus Co., 767 F.2d 11, 18 (1st Cir. 1985)* .

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B. Motion for New Trial

4-45 Federal Litigation Guide § 45.43

§ 45.43 Errors in Jury Selection, or Bias of Jurors

[1] Jury Selection

A new trial may properly be granted based either on:

- Denial of peremptory challenges n1
- The systematic exclusion of a particular group from service on a jury n2

The movant must show that he or she has been prejudiced by the error n3 and has made a timely objection. n4

The following errors in jury selection have been held to be harmless error:

- Allowing the wrong number of peremptory challenges in violation of Rule 47(b) if the alternate juror is not chosen to deliberate on the case n5
- Selecting an alternate juror by lottery in violation of Rule 47(b) n6

[2] Juror Bias or Disqualification May Be Grounds for New Trial

A new trial may be granted when a juror is biased or has failed to disclose information that would have justified his or her disqualification for cause. The movant must show that the juror failed to truthfully answer a material question during voir dire, and that if the juror had answered the question truthfully, the answer would have constituted cause to challenge the juror. n7

A motion for a new trial will not be granted merely because the untruthful answer deprived the movant of the information necessary to intelligently exercise peremptory challenges; the movant must show that the information withheld would have supported a challenge for cause n8

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureAppealsStandards of ReviewHarmless & Invited ErrorsHarmless Error Rule

FOOTNOTES:

(n1)Footnote 1. *See Medrano v. City of Los Angeles, 973 F.2d 1499, 1503 (9th Cir. 1992) , cert. denied, 508 U.S. 940 (1993) .*

(n2)Footnote 2. *See Mitchell v. Morgan, 844 F. Supp. 398, 404 (M.D. Tenn.) , aff'd, 41 F.3d 1508 (6th Cir. 1994) .*

(n3)Footnote 3. *Fed. R. Civ. P. 61.*

(n4)Footnote 4. *See generally Anglo-American Gen. Agents v. Jackson Nat'l Life Ins. Co., 83 F.R.D. 41, 43 (N.D. Cal. 1979) .*

(n5)Footnote 5. *Beard v. Mitchell, 604 F.2d 485, 500 (7th Cir. 1979) .*

(n6)Footnote 6. *See Heath v. Cast, 813 F.2d 254, 257 (9th Cir.) , cert. denied, 484 U.S. 849 (1987) .*

(n7)Footnote 7. *McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984) .*

(n8)Footnote 8. *Zerka v. Green, 49 F.3d 1181, 1185-1186 (6th Cir. 1995) .*

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *
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4-45 Federal Litigation Guide § 45.44

§ 45.44 Improper Juror Motivation

[1] Jury Prejudice, Compromise, or Coercion May Be Grounds for New Trial

A verdict that is the result of mistake, passion, prejudice, compromise or other improper motive may be grounds for a new trial. n1 A verdict resulting from coercion from the court may also constitute adequate grounds for a new trial. n2

[2] Juror Access to Inappropriate Information May Be Grounds for New Trial

Either of the following may be grounds for a new trial:

- A jury's consideration of evidence not introduced at the trial n3
- A juror's discussion of the case with a nonjuror n4

A juror's access to such inappropriate information is not grounds for a new trial if the error is harmless; that is, if the information did not influence the juror's decision. n5

[3] Outside Influence or Independent Juror Investigation May Be Grounds for New Trial

Proof that a juror conducted an independent investigation or was otherwise influenced by an outside source may constitute grounds for a new trial, if not harmless error. n6 The court may also grant a new trial if a juror relates to the other jurors facts or experiences from his or her past that relate to the facts presented at trial. n7

No finding of misconduct will be made if a juror only calls on his or her general experience or knowledge. n8

[4] Proof Is Difficult Because Jurors May Not Impeach Verdict

Juror misconduct may be proven by testimony of third parties or testimony of the jurors themselves. However, jurors may only testify to issues that do not relate to the verdict itself or to the jury's deliberations. Jurors are prohibited from impeaching their verdict. n9

Specifically a juror's testimony about any of the following is prohibited: n10

- Any matter or statement occurring during the course of the jury's deliberations
- The juror's mental processes in connection with reaching a verdict
- The influence of any other juror's mind or emotions on the juror's vote

The rule prohibiting impeachment of the verdict by a juror applies as soon as the jurors are discharged from service. The rule does not prohibit a juror from:

- Testifying to misconduct before he or she is discharged n11
- Coming forward after discharge to correct an error in the verdict to ensure that the verdict published represents the result the jurors' agreed upon n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsMisconductCivil ProcedureTrialsJury TrialsJurorsQualificationsCivil ProcedureTrialsJury TrialsJurorsRemovalsCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsEvidenceCompetencyJurorsExternal Influences

FOOTNOTES:
(n1)Footnote 1. *Mekdeci v. Merrell Nat'l Labs., Div. of Richardson-Merrell, Inc., 711 F.2d 1510, 1513-1515 (11th Cir. 1983)* .

(n2)Footnote 2. *See, e.g., Lucas v. American Mfg. Co., 630 F.2d 291, 293 (5th Cir. 1980)* .

(n3)Footnote 3. *Stephens v. South Atl. Canners, Inc., 848 F.2d 484, 489 (4th Cir.)* , *cert. denied, 488 U.S. 996 (1988)* .

(n4)Footnote 4. *Thomas v. Peerless Mattress Co., 284 F.2d 721, 722 (4th Cir. 1960)* .

(n5)Footnote 5. *See, e.g., Pough v. Capital Transit Co., 194 F.2d 355, 356 (D.C. Cir. 1952)* .

(n6)Footnote 6. *Kilgore v. Greyhound Corp., 30 F.R.D. 385, 387-389 (E.D. Tenn. 1962)* .

(n7)Footnote 7. *See Young v. Illinois Cent. Gulf R.R. Co., 618 F.2d 332, 336-337 (5th Cir. 1980)* .

(n8)Footnote 8. *Casey v. United States, 20 F.2d 752, 754 (9th Cir. 1927)* , *aff'd on other grounds, 276 U.S. 413 (1928)* .

(n9)Footnote 9. *Fed. R. Evid. 606(b)*; *see Webb v. United States Lines Co., 266 F.2d 611, 612 (2d Cir. 1959)* .

(n10)Footnote 10. *Fed. R. Evid. 606(b)*.

(n11)Footnote 11. *See California Fruit Exch. v. Henry, 89 F. Supp. 580, 587-588 (W.D. Pa. 1950)* , *aff'd on other grounds, 184 F.2d 517 (3d Cir. 1950)* .

(n12)Footnote 12. *See Freid v. McGrath, 135 F.2d 833, 834 (D.C. Cir. 1943)* .

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *
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4-45 Federal Litigation Guide § 45.45

§ 45.45 Misconduct of Trial Judge

[1] Misconduct of Judge May Be Grounds for New Trial

A motion for a new trial based on the judge's alleged misconduct should be granted only if the conduct of the judge or other officer of the court is prejudicial, but not if it may be deemed harmless error. The attitude of the trial judge toward a party or counsel may warrant a new trial if either: n1

- The judge's conduct is so inappropriate as to call the fairness of the trial into question
- The conduct may have had an adverse impact on the jury

An attempt by the trial judge to hasten or coerce a verdict may be grounds for a new trial. n2

[2] Determining Whether Misconduct of Judge Is Harmless Error

Comments by the trial judge during the trial will be considered harmless error unless the complaining party can make a clear and precise showing of the prejudice that resulted from the judge's comments. n3 A judge's improper conduct will also be deemed harmless error unless the appellant can demonstrate substantial prejudice caused by the conduct. n4

The appellate court considers the following three factors when determining whether denial of a motion to recuse is harmless error: n5

- The risk of injustice to the parties in the particular case
- The risk that the denial of relief will produce injustice in other cases
- The risk of undermining the public's confidence in the judicial process

An order denying a motion to recuse is interlocutory and therefore is not immediately appealable. However, litigants may attempt to remove a judge who has denied their recusal motion by seeking a writ of mandamus from the circuit court of appeals. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureAppealsStandards of ReviewHarmless & Invited ErrorsHarmless Error RuleEvidenceProcedural ConsiderationsJudicial Intervention in TrialsComments by JudgesGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See, e.g., Santa Maria v. Metro-N. Commuter R.R., 81 F.3d 265, 273 (2d Cir. 1996)* .

(n2)Footnote 2. *See, e.g., Lucas v. American Mfg. Co., 630 F.2d 291, 293-294 (5th Cir. 1980)* .

(n3)Footnote 3. *Hansen v. Commissioner of I.R.S., 820 F.2d 1464, 1467 (9th Cir. 1987)* .

(n4)Footnote 4. *See Leddy v. Standard Drywall, Inc., 875 F.2d 383, 386 (2d Cir. 1989)* .

(n5)Footnote 5. *Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 864, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988)* .

(n6)Footnote 6. *In re Drexel Burnham Lambert Inc., 861 F.2d 1307, 1312-1313 (2d Cir. 1988)* .

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4-45 Federal Litigation Guide § 45.46

§ 45.46 Misconduct of Attorneys, Witnesses, and Parties

[1] Misconduct of Attorneys

Improper comments by counsel, whether during the opening, the presentation of evidence, or the closing argument, are grounds for a new trial only if they are so prejudicial as to cast doubt upon the verdict. n1 Remarks or actions by counsel that raise questions in the minds of the jurors as to the character of opposing counsel or an opposing party without any evidence to support the inferences may be grounds for a new trial if a party has been prejudiced. Allegations that a plaintiff abused illegal drugs and committed adultery have been found sufficiently prejudicial to warrant granting a motion for a new trial. n2

References by counsel to insurance policies or to the wealth of the defendant will generally be held to be prejudicial and will be sufficient grounds to warrant granting a motion for a new trial. n3 The court may grant a motion for a new trial based on remarks by plaintiff's counsel designed to elicit sympathy for the plaintiff by suggesting that the members of the jury place themselves in the plaintiff's position. n4 This argument (known as the "Golden Rule" argument) encourages the jury to depart from its proper function and is therefore objectionable when used with respect to the issue of damages in a civil trial, but is not necessarily inappropriate when applied to the issue of liability. n5

A new trial may be warranted if misconduct of counsel leads to surprise of the opposing party rising to a prejudicial level. For example, a new trial is warranted if a claim or defense is raised that was not disclosed in the pleadings or in any prior proceeding, and that was not or could not have been anticipated. n6 However, the objection will be deemed waived if the surprised party fails to seek a continuance. n7

[2] New Trial Based on Counsel's Conduct Solely Within Discretion of Court

Evaluation of the actions of counsel in the context of a motion for a new trial is solely within the discretion of the trial court. On appeal, the trial court's determination will not be disturbed unless the appellant is able to show that the lower court's decision constitutes an abuse of discretion, refusal to exercise discretion, or that the trial court was operating under a misapprehension of the law. n8

[3] Perjury or Prejudicial Remarks by Witness May Be Grounds for New Trial

A motion for a new trial is properly granted in a case in which a witness's remarks while on the witness stand are

improper and prejudicial and no curative measures by the court will be adequate to eliminate the effect of these remarks on the jury. n9

Similarly, false testimony or perjury by a witness may be grounds for a new trial if the falsity of the testimony is established. n10

[4] Conduct of Party During Trial Is Rarely Grounds for New Trial

The conduct of a party during the trial is rarely adequate grounds for a new trial. The following conduct by a party did not warrant a new trial:

- Openly weeping n11
- Emotional outbursts n12
- Loudly accusing a witness of lying in the presence of the jury n13

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote 1. *See F.H. Krear & Co. v. Nineteen Named Trustees, 810 F.2d 1250, 1261 (2d Cir. 1987)* .

(n2)Footnote 2. *Hall v. Freese, 735 F.2d 956, 961 (5th Cir. 1984)* .

(n3)Footnote 3. *See, e.g., Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749, 758 (6th Cir. 1980)* .

(n4)Footnote 4. *Loose v. Offshore Navigation, Inc., 670 F.2d 493, 496 (5th Cir. 1982)* .

(n5)Footnote 5. *Stokes v. Delcambre, 710 F.2d 1120, 1128 (5th Cir. 1983)* .

(n6)Footnote 6. *See, e.g., Perez-Perez v. Popular Leasing Rental, Inc., 993 F.2d 281, 287-288 (1st Cir. 1993)* .

(n7)Footnote 7. *See, e.g., Forrestal v. Magendantz, 848 F.2d 303, 309 (1st Cir. 1988)* .

(n8)Footnote 8. *See generally, Juneau Square Corp. v. First Wis. Nat. Bank, 624 F.2d 798, 806 (7th Cir.)* , *cert. denied, 449 U.S. 1013 (1980)* .

(n9)Footnote 9. *Beck v. Wings Field, Inc., 122 F.2d 114, 117 (3d Cir. 1941)* .

(n10)Footnote 10. *Phillips v. Crown Cent. Petroleum Corp., 556 F.2d 702, 705 (4th Cir. 1977)* , *cert. denied, 444 U.S. 1074 (1980)* .

(n11)Footnote 11. *Franklin v. Shelton, 250 F.2d 92, 99 (10th Cir. 1957)* , *cert. denied, 355 U.S. 959 (1958)* .

(n12)Footnote 12. *Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 703 F.2d 1152, 1157 (10th Cir. 1981)* , *cert. denied, 464 U.S. 824 (1983)* .

(n13)Footnote 13. *Garland Coal & Mining Co., v. Few, 267 F.2d 785, 791-792 (10th Cir. 1959)* .

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4-45 Federal Litigation Guide § 45.47

§ 45.47 Content and Form of Motion for New Trial

[1] State With Particularity Grounds for Motion

All motions must state with particularity the grounds for making the motion. n1

[2] Make Motion in Writing Unless Made During Trial

Motions generally must be made in writing. n2 However, it is quite common for a motion for a new trial to be made orally if it is made during the trial or hearing, or immediately after the rendering of the jury verdict or the court decision. An oral motion must contain the grounds for the motion and the relief requested, and it must be made a part of the record. n3

As a general proposition, the better practice is to await the entry of judgment and serve a written motion. This will avoid any problem as to the validity of an oral motion, whether counsel has assigned grounds for the motion and what they are, and whether the subsequent entry of the judgment was an implied denial of the motion made before the entry of the judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 7(b)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 7(b)(1).*

(n3)Footnote 3. *See Rodick v. City of Schenectady, 1 F.3d 1341, 1346-1347 (2d Cir. 1993) .*

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *
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4-45 Federal Litigation Guide § 45.48

§ 45.48 Preparing Supporting Affidavits

[1] Supporting Affidavits Must Be Filed With Motion

If a motion for new trial is based on supporting affidavits, they must be filed with the motion. n1 Counsel should consult local rules as well as the individual judge's rules regarding extensions of time to serve a supporting affidavit.

[2] Court May Permit Reply Affidavits

The court may permit reply affidavits in connection with a motion for a new trial. n2 This would necessarily embrace the power to fix the time within which they may be served.

Counsel should consult the individual judge's rules regarding reply affidavits.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 59(c).*

(n2)Footnote 2. *Fed. R. Civ. P. 59(c).*

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4-45 Federal Litigation Guide § 45.49

§ 45.49 Joining Motion for New Trial With Motion for Judgment as Matter of Law

[1] Time for Filing Joined Motions

Motions for a new trial are often made in conjunction with Rule 50 motions for judgment as a matter of law. The movant may renew a request for judgment as a matter of law made during the trial by filing a motion no later than 28 days after entry of judgment. Alternatively, the movant may request a new trial, or join the motion for judgment as a matter of law with a Rule 59 motion for a new trial. n1

[2] Trial Court's Possible Rulings on Joined Motions

In ruling on the joined motion when the jury has returned a verdict, the court may do any of the following: n2

- Allow the judgment to stand
- Order a new trial
- Direct entry of judgment as a matter of law

In ruling on the joined motion when the jury has not returned a verdict, the court may do either of the following: n3

- Order a new trial
- Direct entry of judgment as a matter of law

[3] When Court Grants Motion for Judgment as Matter of Law, Court Must Rule Conditionally on Joined Motion for New Trial

If the trial court grants the renewed motion for judgment as a matter of law, the court must also determine whether the joined motion for a new trial should be granted if the judgment is subsequently vacated or reversed on appeal. n4 The trial court must specify the grounds for granting or denying the motion for the new trial. n5

The trial court's order conditionally granting the motion for a new trial does not affect the finality of the judgment. If the

trial court conditionally grants the motion for a new trial, and the judgment is reversed on appeal, the trial court must hold a new trial unless the appellate court orders otherwise. n6

If the trial court conditionally denies the motion for a new trial, the movant may assert on appeal that the trial court erred in that denial. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 50(b).*

(n2)Footnote 2. *Fed. R. Civ. P. 50(b).*

(n3)Footnote 3. *Fed. R. Civ. P. 50(b).*

(n4)Footnote 4. *Fed. R. Civ. P. 50(c)*; *see Taylor v. National R.R. Passenger Corp., 868 F. Supp. 479, 482 (E.D.N.Y. 1994)* .

(n5)Footnote 5. *Fed. R. Civ. P. 50(c).*

(n6)Footnote 6. *Fed. R. Civ. P. 50(c).*

(n7)Footnote 7. *Fed. R. Civ. P. 50(e).*

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *
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4-45 Federal Litigation Guide § 45.50

§ 45.50 CHECKLIST: Moving for New Trial

The following checklist will assist counsel in preparing a successful motion for new trial. Counsel should also check local district court rules and the individual judge's rules for motion procedures. Note that individual judges may require scheduling a pre-motion conference.

Initial Considerations:

- ☐ Consider the possibility of harmless error.
- ☐ Evaluate the strength of the evidence at trial.
- ☐ Decide whether motion will be limited to particular parties or issues.
- ☐ Determine whether the necessary objection appears in the record.

Determine grounds for motion. The following list includes the most common grounds for a motion for new trial:

- ☐ **Fairness:** Movant is entitled to fair trial.
- ☐ **Verdict:**
  - ☐ Against the weight of the evidence.
  - ☐ Excessive damages.
  - ☐ Inadequate damages.

- ☐ Inconsistencies.

☐ **Jury:**

- ☐ Misconduct.
- ☐ Improper instructions.
- ☐ Improper submission.
- ☐ Improper withdrawal.

☐ Denial of jury trial.

☐ Bias or selection errors.

☐ **Evidence:**

- ☐ Erroneous rulings.
- ☐ Newly discovered.

☐ **Judge:**

- ☐ Misconduct.
- ☐ Inability to proceed.
- ☐ Failure to make findings and conclusions in bench trial.

☐ **Other misconduct:**

- ☐ Opposing counsel.
- ☐ Witness.
- ☐ Party.

- ☐ **Procedure:**
  - ☐ File motion no later than 28 days after final judgment.
  - ☐ Prepare motion.
  - ☐ State grounds with particularity.
  - ☐ Include supporting affidavits.
- ☐ **Final considerations:**
  - ☐ Join motion with motion for judgment as matter of law.
  - ☐ If motion is based on excessive damages, will client accept remittitur?
- ☐ Is Rule 60(b) motion a viable alternative, if motion for new trial not timely filed?

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsMisconductCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentAdditurs & RemittitursRemittitursCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureAppealsStandards of ReviewHarmless & Invited ErrorsGeneral Overview

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4-45 Federal Litigation Guide § 45.51

§ 45.51 Opposing Motion for New Trial

In addition to whatever substantive grounds exist for opposing a motion for new trial, counsel should consider using the following arguments:

- It is harmless error.
- Movant failed to properly object during trial.
- Movant failed to timely file the motion for new trial.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureAppealsStandards of ReviewHarmless & Invited ErrorsHarmless Error Rule

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4-45 Federal Litigation Guide § 45.52

§ 45.52 Filing Opposing Affidavits

[1] Must Be Filed Up to 14 Days After Service of Motion

The opposing party has 14 days after service of the motion to file opposing affidavits. n1

[2] Extension to Respond Governed by Rule 6(b)

Although a court may not extend the time to act under Rules 59(b), (d), and (e), there is no such limitations regarding extensions to respond to a motion for a new trial. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 59(c).*

(n2)Footnote 2. *Fed. R. Civ. P. 6(b).*

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4-45 Federal Litigation Guide § 45.53

§ 45.53 Court May Employ Remittitur as Alternative to New Trial When Damages Are Excessive

[1] Choosing Between Reduction of Excessive Verdict and New Trial

Remittitur is the process by which a court compels a plaintiff to choose between reduction of an excessive verdict and a new trial. n1 The court will condition the denial of the motion for new trial on the plaintiff's accepting a remittitur of the excessive portion of the award. n2

The court may offer remittitur when a losing defendant moves for a new trial on the ground that the verdict is excessive. If the court concludes that the verdict is in fact excessive as a matter of law, it may either grant the defendant's motion, or deny the motion on condition that the plaintiff accept a specified lower amount of damages. n3

[2] Cases in Which Remittitur Is Appropriate

Remittitur may be appropriate in two distinct kinds of cases: n4

- When the court can identify an error that caused the jury to include in the verdict a quantifiable amount that should be stricken

- When the award is intrinsically excessive in the sense of being greater than the amount a reasonable jury could have awarded, although the surplus cannot be ascribed to a particular, quantifiable error

[3] Distinction Between Verdict and Amount Remitted

In discussing remittitur, a distinction between the final verdict amount and the amount remitted must be made. Cases are not always clear whether remittitur refers to the amount by which the verdict is reduced or the final judgment amount. The better view, however, is that the remittitur amount is the amount by which the verdict is reduced. n5

To ensure accuracy on this point, the better practice is to state the remitted amount separately from the final amount of the award following remittitur.

[4] New Trial Required If Plaintiff Rejects Remittitur

If the plaintiff rejects the remittitur amount, the court must grant a new trial. It cannot enter judgment for the reduced amount, and thereby force the plaintiff to accept the remittitur. n6

[5] Determination of Amount of Remittitur

Once a court has determined that a verdict is excessive, it must decide the amount to be remitted. Three approaches have been applied to the difficult issue of determining the proper amount of remittitur:

- Awarding the lowest amount of damages supported by the record (the "minimum recovery" rule); n7
- Awarding the highest legal amount of damages (the "maximum recovery" rule); n8
- Awarding damages that the court deems reasonable. n9

Setting the final judgment amount at anything less than the maximum legal award would seem to violate the *Seventh Amendment*. n10

[6] Plaintiff's Acceptance of Remittitur Limits Appeal

A plaintiff who accepts remittitur cannot appeal from the order of remittitur or otherwise dispute the final judgment amount. The plaintiff may not seek to reinstate the original amount of the verdict on appeal. n11

The plaintiff has only one opportunity to argue against the appropriateness of a remittitur that he or she has accepted--if the defendant argues that items were inappropriately included in the damages award. The plaintiff may raise on appeal the inappropriateness of the remittitur for the purpose of maintaining the final damages awarded following remittitur. n12

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentAdditurs & RemittitursRemittitursCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureAppealsRemands

FOOTNOTES:
(n1)Footnote 1. *Lanier v. Sallas, 777 F.2d 321, 323 (5th Cir. 1985)* .

(n2)Footnote 2. *Cline v. Wal-Mart Stores, Inc., 144 F.3d 294, 305-306 (4th Cir. 1998)* .

(n3)Footnote 3. *See, e.g., Petramale v. Local No 17, 847 F.2d 1009, 1012-1013 (2d Cir. 1988)* .

(n4)Footnote 4. *Shu-Tao Lin v. McDonnell Douglas Corp., 742 F.2d 45, 49 (2d Cir. 1984)* .

(n5)Footnote 5. *See, e.g., Earl v. Bouchard Transp. Co., 917 F.2d 1320, 1328 (2d Cir. 1990)* .

(n6)Footnote 6. *Carter v. District of Columbia, 795 F.2d 116, 134-135 (D.C. Cir. 1986)* .

(n7)Footnote 7. *Meissner v. Papas, 35 F. Supp. 676, 677 (E.D. Wis. 1940)* , *modified on other grounds*, *124 F.2d 720 (7th Cir. 1941)* .

(n8)Footnote 8. *Warren v. Ford Motor Credit Co., 693 F.2d 1373, 1379-1380 (11th Cir. 1982)* .

(n9)Footnote 9. *Lanfranconi v. Tidewater Oil Co., 376 F.2d 91, 97 (2d Cir.)* , *cert. denied*, *389 U.S. 951 (1967)* .

(n10)Footnote 10. *See Earl v. Bouchard Transp. Co., 917 F.2d 1320, 1328-1330 (2d Cir. 1990)* .

(n11)Footnote 11. *Donovan v. Penn Shipping Co., 429 U.S. 648, 648-650, 97 S. Ct. 835, 51 L. Ed. 2d 112 (1977)* .

(n12)Footnote 12. *See Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821, 839 (7th Cir. 1978)* , *cert. denied, 440 U.S. 930 (1979)* .

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *
B. Motion for New Trial

4-45 Federal Litigation Guide § 45.54

§ 45.54 Employing Additur Is Unlikely as Alternative to New Trial When Damages Are Inadequate

[1] Additur Generally Not Permitted

Additur is the practice of denying a plaintiff's motion for a new trial based on a claim of an insufficient amount of damages awarded by a jury on condition that the defendant pay damages in an amount greater than those returned by the jury.

The Supreme Court has held that additur violates the *Seventh Amendment's* proscription against "reexamining" facts tried by a jury. n1

[2] Additur May Be Permissible When There Is No Right to Jury Trial

Additur may still be appropriate in cases in which there is no right to a jury trial under the U.S. Constitution, but a jury trial is provided under some statutory authority. n2

[3] Additur May Be Permissible When Statute Requires Nominal Damages

Additur may be appropriate if nominal damages are required by statute and have not been awarded. n3

However, if nominal damages are not absolutely required, their award may well be considered impermissible additur. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentAdditurs & RemittitursAdditursCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote 1. *Dimick v. Schiedt, 293 U.S. 474, 484, 55 S. Ct. 296, 79 L. Ed. 603 (1935)* .

(n2)Footnote 2. *See United States v. Kennesaw Mountain Battlefield Ass'n, 99 F.2d 830, 833-834 (5th Cir. 1938)*, *cert. denied, 306 U.S. 646 (1939)*.

(n3)Footnote 3. *See Taylor v. Green, 868 F.2d 162, 165 (5th Cir.)*, *cert. denied, 493 U.S. 841 (1989)*.

(n4)Footnote 4. *See Walker v. Anderson Elec. Connectors, 944 F.2d 841, 845 (11th Cir. 1991)*, *cert. denied, 506 U.S. 1078 (1993)*.

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *
B. Motion for New Trial

4-45 Federal Litigation Guide § 45.55

§ 45.55 Weighing Evidence in Considering Motion

In considering a motion for new trial, the trial judge may weigh conflicting evidence and need not view the record in the light most favorable to the nonmoving party. n1 Accordingly, the party moving for a new trial must evaluate the strength of the case presented at trial. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote 1. *Song v. Ives Labs., Inc., 957 F.2d 1041, 1047 (2d Cir. 1992)* .

(n2)Footnote 2. *See, e.g., Minetos v. City Univ. of N.Y., 925 F. Supp. 177, 186 (S.D.N.Y. 1996)* .

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *
B. Motion for New Trial

4-45 Federal Litigation Guide § 45.56

§ 45.56 Motions to Reconsider Rule 59 Orders

[1] Court May Reconsider Order Granting New Trial

An order granting a new trial is interlocutory and destroys the finality of the judgment. n1

Since the district court has plenary power to reconsider, revise, alter, or amend an interlocutory order, the court has the power to take any action with respect to an order granting a new trial. The limitations of Rule 59 that are intended to protect the finality of judgments do not apply. n2

[2] Motion to Reconsider Order Denying New Trial Must Be Filed Within 28 Days After Entry of Judgment

When the court denies a motion for a new trial, the finality of the judgment is restored and the appeal time begins to run from the date the order is entered. n3

The court may hear a motion for reconsideration that is filed within the 28-day period following the order denying the motion for new trial. Once the 28-day period has expired, a motion to reconsider the denial is inappropriate. n4 An exception may be made if the order denying a new trial was inadvertent and can be corrected under Rule 60(a). n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

FOOTNOTES:
(n1)Footnote 1. *Stone v. INS, 514 U.S. 386, 402, 115 S. Ct 1537, 131 L. Ed. 2d 465 (1995)* .

(n2)Footnote 2. *Hardin v. Hayes, 52 F.3d 934, 938 (11th Cir. 1995)* .

(n3)Footnote 3. *See, e.g., Thomassen v. United States, 835 F.2d 727, 730 (9th Cir. 1987)* .

(n4)Footnote 4. *See Bank Leumi Trust Co. v. Istim, Inc., 902 F. Supp 46, 48 (S.D.N.Y. 1995)* .

(n5)Footnote 5. *See Burnam v. Amoco Container Co., 738 F.2d 1230, 1231-1232 (11th Cir. 1984)* .

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *
B. Motion for New Trial

4-45 Federal Litigation Guide § 45.57

§ 45.57 Timely Rule 59 Motion Suspends Time for Appeal

A notice of appeal must ordinarily be filed within 30 days of a final judgment. n1 However, the filing of certain post-decisional motions (including a timely filed Rule 59 motion for new trial) will defer the start of the appeal period until disposition of the last of those motions outstanding. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureAppealsReviewabilityGeneral OverviewCivil ProcedureAppealsReviewabilityTime Limitations

FOOTNOTES:
(n1)Footnote 1. *Fed. R. App. P. 4(a)(1).*

(n2)Footnote 2. *Fed. R. App. P. 4(a)(4)(A)(iv). Fed. R. App. P. 4(a)(4)(A)* provides, in relevant part:

> 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);
>
> (ii) to amend or make additional findings of fact 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.

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *
B. Motion for New Trial

4-45 Federal Litigation Guide § 45.58

§ 45.58 Motion for New Trial Is Not Required to Appeal From Judgment

A motion for a new trial is not essential to preserve properly made objections for appellate review, and therefore is not a prerequisite to an appeal from the judgment. n1

However, any ground for new trial that is reviewable for abuse of discretion must be presented to the trial court for the exercise of that discretion. Grounds for new trial that arise solely in the context of post-trial proceedings must be presented to the trial court for consideration by way of a motion for new trial, and the failure to do so deprives the appellate court from any record that is reviewable for error. Such grounds include:

- Newly discovered evidence
- Verdict against the weight of the evidence
- Inadequate or excessive damages

Although not a prerequisite to an appeal, it is often advisable to bring the alleged errors to the trial court's attention by a motion for a new trial, so that the time and expense of an appeal before a new trial ordered by the appellate court may be avoided.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsReviewabilityGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Elmore v. United States, 843 F.2d 1128, 1131 n.7 (8th Cir. 1988)* (citing **Moore's**).

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *
B. Motion for New Trial

4-45 Federal Litigation Guide § 45.59

§ 45.59 Appealing Grant of Motion for New Trial

[1] Order Granting New Trial Is Generally Not Appealable

An order granting a new trial is interlocutory and not appealable. n1

The order granting a new trial may be reviewed when the final judgment is entered following the new trial. n2

[2] Order Granting New Trial May Be Appealable If Court Lacked Jurisdiction

Under an old line of authority, an order granting a new trial is appealable if the district court lacked the jurisdiction to grant it. n3

Because this line of authority undermines the concept of finality, the better view is that review should only be available through an extraordinary writ, if the losing party does not wish to wait for the subsequent entry of a final judgment. An extraordinary writ enables the appellate court to review orders granting a new trial that are not otherwise appealable. The writ is proper only in exceptional circumstances. n4

Extraordinary writs have also been held appropriate if the district court exceeded its authority in granting a new trial. n5

[3] Conditional Motion for New Trial Granted With Judgment as Matter of Law

If a motion for a new trial is granted together with a motion for judgment as a matter of law, the order granting a new trial is conditional on the appellate court's reversal of the judgment. The judgment is final, and an appeal may be taken from it. n6

On appeal from that judgment, the court may review the propriety of the conditional grant of a new trial. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil

ProcedureAppealsReviewabilityGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 34, 101 S. Ct 188, 66 L. Ed. 2d 193 (1980)* .

(n2)Footnote 2. *Richardson v. Communications Workers of Am., 469 F.2d 333, 334 (8th Cir. 1972)* , *cert. denied, 414 U.S. 818 (1973)* (citing **Moore's**).

(n3)Footnote 3. *See Phillips v. Negley, 117 U.S. 665, 678, 6 S. Ct. 901, 29 L. Ed. 1013 (1886)* .

(n4)Footnote 4. *Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 34, 101 S. Ct 188, 190, 66 L. Ed. 2d 193 (1980)* .

(n5)Footnote 5. *Bailey v. Sharp, 782 F.2d 1366, 1367 (7th Cir. 1986)* , *appeal after remand, 811 F.2d 366 (1987)* .

(n6)Footnote 6. *See Fed. R. Civ. P. 50(c).*

(n7)Footnote 7. *Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 36, 101 S. Ct 188, 66 L. Ed. 2d 193 (1980)* .

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *
B. Motion for New Trial

4-45 Federal Litigation Guide § 45.60

§ 45.60 Appealing Order Denying New Trial

[1] Order Denying New Trial Is Not Immediately Appealable

An order denying a new trial may not be immediately appealed. Instead, the appeal must be taken from the underlying final judgment. n1

[2] Exceptions to Nonappealability of Order Denying New Trial

The appellate court will ordinarily treat as harmless and accept the appeal when both of the following can be demonstrated: n2

- An appeal is mistakenly taken from an order denying a new trial
- The underlying judgment is appealable because it is a final judgment or because it is an appealable interlocutory judgment

Once the court accepts an appeal on the underlying judgment, it may review an alleged abuse of discretion in the order denying a new trial. n3

However, the appellate court may not review the denial of a motion for a new trial on the ground that the verdict was against the weight of the evidence. n4

[3] Appeal From Denial of Untimely Motion

If a party appeals from the denial of an untimely motion for a new trial, the appellate court may construe the motion as being made under Rule 60, and may review the district's court discretion in denying the motion, but may not review the underlying judgment. n5

[4] Order Denying New Trial Is Appealable If Order Involves New Matters Arising After Entry of Judgment

The denial of a timely motion for a new trial that presents new evidence or other matters that were not before the court

at the time the judgment was entered is appealable. A party cannot raise this issue with an appeal from the final judgment, so the notice of appeal must be filed from the order denying the motion for a new trial. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureAppealsAppellate JurisdictionInterlocutory OrdersCivil ProcedureAppealsReviewabilityGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *McGowne v. Challenge-Cook Bros., Inc., 672 F.2d 652, 659 (8th Cir. 1982)* (citing **Moore's**).

(n2)Footnote 2. *See Wheatley v. Beetar, 637 F.2d 863, 864 n.1 (2d Cir. 1980)* , *rev'd on other grounds sub nom. Wheatley v. Ford, 679 F.2d 1037 (2d Cir. 1982)* .

(n3)Footnote 3. *Foman v. Davis, 371 U.S. 178, 181-182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)* (citing **Moore's**).

(n4)Footnote 4. *Stonewall Ins. Co. v. Asbestos Claims Management Corp., 73 F.3d 1178, 1199 (2d Cir. 1995)* .

(n5)Footnote 5. *Van Skiver v. United States, 952 F.2d 1241, 1243 (10th Cir. 1991)* , *cert. denied, 506 U.S. 828 (1992)* .

(n6)Footnote 6. *Peterman v. Indian Motorcycle Co., 216 F.2d 289, 291 (1st Cir. 1954)* .

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial *
B. Motion for New Trial

4-45 Federal Litigation Guide §§ 45.61 through 45.99

[Reserved]

§§ 45.61[Reserved]

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CHAPTER 45 Post-Trial Motions: Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial * C. Forms

4-45 Federal Litigation Guide § 45.100

§ 45.100 Combined Notice for Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial

[1] FORM

Combined Notice for Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

NOTICE IS HEREBY GIVEN that on [*date*] at [*time of day (specify a.m. or p.m.)*], or as soon thereafter as counsel may be heard, [*party designation and name of moving party*] will move this Court, at the United States Courthouse, located at [*address of court*], Courtroom [*courtroom number*], for an order pursuant to *Federal Rules of Civil Procedure, Rule 50(b)*:

(a) setting aside the verdict on the ground that [*describe grounds for setting aside the verdict, stating with particularity the lack of evidence raised in the pre-verdict motion for judgment as a matter of law*]; and

(b) granting [*moving party*] such other relief as may be appropriate.

In addition, [*party designation and name of moving party*] moves for an order pursuant to *Federal Rules of Civil Procedure, Rule 59(b)*:

(a) granting a new trial on the ground that [*describe grounds for seeking new trial, e.g., verdict is contrary to law*]; and

(b) granting [*moving party*] such other relief as may be appropriate.

This motion is based on this Notice of Motion, the accompanying Declaration (*or affidavit or other affidavit substitute; generally required*) of [*name of signatory*] dated (*or sworn to*) [*date*], the accompanying Memorandum of Law (*if required*) dated [*date*], and on all of the pleadings and papers on file in this action.

[*Date*]

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for [*name and designation of party*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

TO: [*Name of opposing counsel*], Attorney for [*name of party*]

[2] Use of Form

This is a form of notice of motion pursuant to *Fed. R. Civ. P. 50(b)* for renewed motion as a matter of law and *Fed. R. Civ. P. 59(b)* seeking a new trial. If, for any reason, the court does not grant a motion for judgment as a matter of law at the close of all the evidence, 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. The movant may renew the request for judgment as a matter of law and may alternatively request a new trial or join a motion for a new trial under *Fed. R. Civ. P. 59(b)*.

Grounds on which a new trial may be granted include the following:

- **Verdict is contrary to law**
- **Verdict is contrary to the weight of the evidence**
- **Damages are inadequate or excessive**
- **Inconsistency of special verdicts or general verdict and special interrogatories**
- **Newly discovered evidence**
- **Improper jury instructions**
- **Improper submission of issues to jury**
- **Erroneous evidentiary rulings**
- **Denial of jury trial**
- **Errors in selection or bias of jurors**
- **Misconduct of judge, attorneys, or jurors**

[3] Motion Must Be Filed Within 28 Days of Entry of Judgment

The movant may renew its request for judgment as a matter of law by filing a 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. n1 A party has 28 days after the entry of judgment to file a motion for a new trial. n1.1

[4] Filing of Opposing Affidavits

A party opposing the motion for new trial has 14 days after service of the motion to file opposing affidavits. n2

[5] Critical Considerations

Local district court rules and individual judge's rules should be consulted regarding the following topics:

- **Formatting requirements**
- **Bluebacks and other covers**
- **Page limits**
- **Specifying rule or statute on which motion is based**
- **Date and time of hearing**
- **Oral argument**
- **Extending time**
- **Expedited hearing/Orders to show cause**
- **Supporting papers**
- **Serving motion papers**
- **Filing motion papers**
- **Courtesy copies**
- **Opposing papers**
- **Reply papers**

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 50(b).*

(n2)Footnote 1.1. *Fed. R. Civ. P. 59(b).*

(n3)Footnote 2. *Fed. R. Civ. P. 59(c).*

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CHAPTER 46 Relief From Judgment *

4-46 Federal Litigation Guide 46.syn

§ 46.syn Synopsis to Chapter 46: Relief From Judgment *

§ 46.01 Moving for Relief From Judgment or Order Under Rule 60(b)

§ 46.02 Understanding Scope of Rule 60(b)
[1] Rule Applies Only to Final Judgment, Order, or Proceeding
[2] Motion Does Not Affect Finality of Judgment
[3] Balancing Justice and Public Interest
[4] Court Still Has Power to Entertain Independent Action to Grant Relief

§ 46.03 Filing Timely Motion Under Rule 60(b)
[1] Generally Motion Must Be Made Within Reasonable Time
[2] One-Year Filing Limitation for Motions Based on Certain Grounds
[3] Determining "Reasonable Time"
[4] Motion for Relief From Void Judgment May Be Made at Any Time

§ 46.04 Filing Rule 60(b) Motion in Correct Court

§ 46.05 Seeking Relief Under Rule 60(b)(1) for Mistake, Inadvertence, Surprise, or Excusable Neglect

§ 46.06 Generally Attorney's Mistakes or Omissions Are Not Basis for Relief Under Rule 60(b)(1)

§ 46.07 Legal Error by Court May Be Mistake Under Rule 60(b)(1)

§ 46.08 Vacating Default Judgment Under Rule 60(b)(1)

§ 46.09 Timing of Motion Under Rule 60(b)(1)

§ 46.10 Seeking Relief Under Rule 60(b)(2) on the Basis of Newly Discovered Evidence

§ 46.11 Evaluating Standard for Relief Under Rule 60(b)(2)

§ 46.12 Timing of Motion Under Rule 60(b)(2)

§ 46.13 Opposing a Motion Under Rule 60(b)(2)

§ 46.14 Seeking Relief Under Rule 60(b)(3) for Fraud, Misrepresentation, or Misconduct of Adverse Party

§ 46.15 Proving Fraud Under Rule 60(b)(3)
[1] Clear and Convincing Evidence
[2] Fraud Must Impact Fairness of Trial
[3] Demonstrating That Misconduct Could Not Have Been Exposed Sooner

§ 46.16 Timing Of Motion Under Rule 60(b)(3)

§ 46.17 Vacating Judgment Based on Fraud Upon the Court

§ 46.18 Seeking Relief Under Rule 60(b)(4) When the Judgment is Void

§ 46.19 Timing of Motion Under Rule 60(b)(4)

§ 46.20 Seeking Relief Under Rule 60(b)(5) for Satisfaction, Release, or Discharge of Judgment

§ 46.21 Proving Satisfaction, Release, or Discharge

§ 46.22 Seeking Relief Under Rule 60(b)(5) for Reversal or Vacatur of Prior Judgment

§ 46.23 Seeking Relief Under Rule 60(b)(5) When Co-Party Has Been Granted Reversal on Appeal

§ 46.24 Seeking Relief Under Rule 60(b)(5) for Unfairness of Prospective Application of Judgment

§ 46.25 Demonstrating That the Purpose of the Injunction or Decree Has Been Achieved

§ 46.26 Demonstrating That Continued Application of Decree is Causing Hardship to Moving Party

§ 46.27 Demonstrating Change in Law As Basis for Relief from Decree or Injunction

§ 46.28 Filing Timely Motion Under Rule 60(b)(5)

§ 46.29 Seeking Relief Under Rule 60(b)(6) for "Any Other Reason Justifying Relief"

§ 46.30 Party Seeking Relief Under Rule 60(b)(6) Must Show Extraordinary Circumstances

§ 46.31 Higher Standard Applies Under Rule 60(b)(6)

§ 46.32 Combining Rule 60(b)(6) Motion With Other Motions Under Rule 60(b)

§ 46.33 Filing Timely Motion Under Rule 60(b)(6)

§ 46.34 Rule 60(b) Motion Procedure
[1] Contents and Form of Motion Papers
[2] Serving Motion Papers

§ 46.35 Effect of Rule 60(b) Motion on Appeal of Underlying Judgment

§ 46.36 Appealing Ruling on Rule 60(b) Motion

§ 46.37 Opposing Rule 60(b) Motion

§ 46.38 CHECKLISTS: Motion for Relief From Judgment
[1] CHECKLIST: Moving for Relief From Order, Judgment, or Proceeding

[2] CHECKLIST: Opposing Motion for Relief

§ 46.100 Notice of Motion for Relief From Judgment or Order
[1] FORM
Notice of Motion for Relief from Judgment or Order
[2] Use of Form
[3] Deadline for Filing Motion
[4] Critical Considerations

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CHAPTER 46 Relief From Judgment *

4-46 Federal Litigation Guide Scope

Scope

SCOPE

This chapter provides a comprehensive and practical discussion of relief from judgment under Rule 60(b), and covers the following topics:

- The scope of relief available under Rule 60(b)
- Timing of filing of motion under Rule 60(b)
- Filing motion in proper court
- Grounds for relief under Rule 60(b)
- Motion practice
- Serving motion papers

The chapter also includes a checklist for moving for relief under Rule 60(b) and a checklist to oppose such a motion. Finally, the chapter includes a form of notice of motion under Rule 60(b) with comments for use of the form.

For expanded coverage of relief from judgment, ***see*** MOORE'S Federal Practice, Ch. 60, ***Relief From Judgment or Order*** (Matthew Bender 3d ed.).

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CHAPTER 46 Relief From Judgment *
A Relief From Judgment

4-46 Federal Litigation Guide § 46.01

§ 46.01 Moving for Relief From Judgment or Order Under Rule 60(b)

Under Rule 60(b) the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:

- Mistake, inadvertence, surprise, or excusable neglect; n1
- Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); n2
- Fraud, misrepresentation, or other misconduct of an adverse party; n3
- The judgment is void; n4
- The judgment has been satisfied, released, discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; n5 or
- Any other reason justifying relief from the operation of the judgment. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentNewly Discovered Evidence

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 60(b)(1).*

(n2)Footnote 2. *Fed. R. Civ. P. 60(b)(2).*

(n3)Footnote 3. *Fed. R. Civ. P. 60(b)(3)*.

(n4)Footnote 4. *Fed. R. Civ. P. 60(b)(4)*.

(n5)Footnote 5. *Fed. R. Civ. P. 60(b)(5)*.

(n6)Footnote 6. *Fed. R. Civ. P. 60(b)(6)*.

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CHAPTER 46 Relief From Judgment *
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4-46 Federal Litigation Guide § 46.02

§ 46.02 Understanding Scope of Rule 60(b)

[1] Rule Applies Only to Final Judgment, Order, or Proceeding

Under Rule 60(b) relief may be granted from a final judgment, order, or proceeding. n1

[2] Motion Does Not Affect Finality of Judgment

A motion under Rule 60(b) does not affect the finality of a judgment or suspend its operation. n2

[3] Balancing Justice and Public Interest

A motion seeking relief pursuant to Rule 60(b) is addressed to the sound discretion of the district court; in resolving the application, the court must balance the ends of justice with the public interest in the finality of judgments. n3

[4] Court Still Has Power to Entertain Independent Action to Grant Relief

Rule 60(d) explicitly provides that Rule 60 does not displace the power of the court to entertain an independent action for relief from judgment. n4 This provision does not authorize an independent action for relief. Instead, it preserves the pre-existing equitable remedy of an independent action.

An independent action does not require an independent basis of federal jurisdiction because whatever jurisdictional basis applied to the earlier action extends to the independent action. However, relief in such an action is rarely granted and is available only when not inconsistent with the strictures of Rule 60(b) and when necessary "to prevent a grave miscarriage of justice." n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentNewly Discovered EvidenceCivil ProcedureAppealsAppellate JurisdictionFinal Judgment Rule

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Civ. P. 60(b).*

(n2)Footnote 2. *Fed. R. Civ. P. 60(b)*; *Browder v. Director, Illinois Dep't of Corrections, 434 U.S. 257, 263 n.7, 98 S. Ct. 556, 54 L. Ed. 2d 521 (1978)* .

(n3)Footnote 3. *Aetna Cas. & Sur. Co. v. Home Ins. Co., 882 F. Supp 1355, 1356 (S.D.N.Y. 1995)* .

(n4)Footnote 4. *Fed. R. Civ. P. 60(b).*

(n5)Footnote 5. *United States v. Beggerly, 524 U.S. 38, 45-48, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998)* .

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4-46 Federal Litigation Guide § 46.03

§ 46.03 Filing Timely Motion Under Rule 60(b)

[1] Generally Motion Must Be Made Within Reasonable Time

Rule 60(c) provides that every motion for relief from judgment must be made within a "reasonable time." n1 Failure to satisfy this requirement is a ground for denying relief. n2 Moreover, many of the enumerated grounds, either by their language or by construction or both, make relief dependent on promptness. n3 Rule 60(b)(2) explicitly requires a showing that the newly discovered evidence "with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)."

The party opposing the motion should always question the moving party's showing as to reasonable time or diligence.

[2] One-Year Filing Limitation for Motions Based on Certain Grounds

A motion for relief based on one of the following grounds must be filed no more than one year after the judgment, order, or proceeding was entered or taken: n4

- Mistake, inadvertence, surprise, or excusable neglect;
- Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); or
- Fraud (whether denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

Although there is a one-year limitation period, the motion must also be made within a reasonable time. n5 The fact that the motion is made within one year gives the court power to entertain it, but as the delay in bringing the motion approaches one year there should be a corresponding increase in the burden that must be carried to show that the delay was reasonable. n6

The one-year period for bringing motions under Rules 60(b)(1), (2), and (3) is an absolute bar, even though a longer delay might be reasonable under the circumstances. Furthermore Rule 6(b) of the Federal Rules, relating to the court's discretionary authority to enlarge time limits, by its terms is expressly inapplicable to Rule 60(b).

[3] Determining "Reasonable Time"

A determination of reasonable time requires scrutinizing the particular circumstances of the case, and balancing the interest in finality of judgments with the reasons for the delay; in addition, courts consider the possibility of prejudice to the opposing party. n7

[4] Motion for Relief From Void Judgment May Be Made at Any Time

Because a void judgment is a nullity, a motion under Rule 60(b)(4) challenging a judgment as void may "reasonably" be made at any time. n8 In rare circumstances a party's conduct may constitute waiver of the right to challenge on grounds of voidness. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentNewly Discovered EvidenceGovernmentsLegislationStatutes of LimitationsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *United States v. Boch Oldsmobile, Inc., 909 F.2d 657, 660-661 (1st Cir. 1990)* ("What constitutes reasonable time ... depends on the facts of each case. ... The relevant considerations include, whether the parties have been prejudiced by the delay and whether a good reason has been presented for failing to take action sooner").

(n2)Footnote 2. *See, e.g., Limerick v. Greenwald, 749 F.2d 97, 98-99 (1st Cir. 1984)* ; *Trinkner v. Heckler, 683 F. Supp. 513, 514 (E.D. Pa. 1988)* .

(n3)Footnote 3. *See, e.g., Trustees of Local Union No. 727 Pension Fund v. Perfect Parking, Inc., 126 F.R.D. 48, 53-54 (N.D. Ill. 1989)* .

(n4)Footnote 4. *Fed. R. Civ. P. 60(c)(1).*

(n5)Footnote 5. *Fed. R. Civ. P. 60(c)(1).*

(n6)Footnote 6. *See, e.g., Sasso v. M. Fine Lumber Co., 144 F.R.D. 185, 189 (E.D.N.Y. 1992)* .

(n7)Footnote 7. *United States v. Boch Oldsmobile, Inc., 909 F.2d 657, 660-661 (1st Cir. 1990)* .

(n8)Footnote 8. *See, e.g., United States v. Boch Oldsmobile, Inc., 909 F.2d 657, 661 (1st Cir. 1990)* (relief not granted based on facts of case but court noted that if the judgment were void relief must be granted regardless of timeliness); *see, e.g., Taft v. Donellan Jerome, Inc., 407 F.2d 807, 808-809 (7th Cir. 1969)* (attack on void judgment after 13 years upheld); *see, e.g., Crosby v. Bradstreet Co., 312 F.2d 483, 485 (2d Cir.)* , *cert. denied, 373 U.S. 911 (1963)* (vacating void judgment after nearly 30 years).

(n9)Footnote 9. *See, e.g., Trustees of Cent. Laborers' Welfare Fund v. Lowery, 924 F.2d 731, 734 (7th Cir. 1991)* (although defense of failure of service of process had not technically been waived under the provisions of Rule 12, conduct of defendants subsequent to entry of default judgment, including participation in post-judgment proceedings for almost six years, was sufficient to show that defense was waived and hence ground of Rule 60(b) motion based on voidness was also waived).

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§ 46.04 Filing Rule 60(b) Motion in Correct Court

Counsel should file the Rule 60(b) motion in the court that rendered the judgment being challenged. n1

If a judgment rendered in one district court has been registered in another district court, the court where the judgment was registered may hear a Rule 60(b)(4) challenge alleging voidness due to lack of personal jurisdiction. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentNewly Discovered Evidence

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 60(b)* advisory committee's note (1946).

(n2)Footnote 2. *See, e.g., Covington Indus., Inc. v. Resintex, A.G., 629 F.2d 730, 733-734 (2d Cir. 1980)* (citing **Moore's**).

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4-46 Federal Litigation Guide § 46.05

§ 46.05 Seeking Relief Under Rule 60(b)(1) for Mistake, Inadvertence, Surprise, or Excusable Neglect

Since Rule 60(b)(1) does not define mistake, inadvertence, surprise, or excusable neglect, a motion based on the rule is entirely dependent on the facts of the case. Rule 60(b)(1) is intended primarily to provide the moving party with relief from a judgment produced by an isolated mistake or oversight, for which the moving party offers some plausible and sympathetic excuse. Relief is usually denied where the moving party's overall conduct shows a pattern of indifference toward the case, signifying a refusal or unreasonable failure to take normal precautions to safeguard its interests. n1 When there is evidence of prejudice to the other party or bad faith, the court may properly find that excusable neglect does not exist under the facts. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurprise

FOOTNOTES:
(n1)Footnote 1. *See Vargas v. Gonzalez, 975 F.2d 916, 917-918 (1st Cir. 1992)* (although underlying motion for relief did not clearly invoke Rule 60(b)(1), court noted that moving counsel's pattern of conduct was not neglect "of the 'excusable' variety" as would satisfy the requirements of Rule 60(b)(1)).

(n2)Footnote 2. *See e.g., Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 393-394, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993)* ; *Williams v. KFC Nat'l Mgmt. Co., 391 F.3d 411, 415-418 (2d Cir. 2004)* .

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4-46 Federal Litigation Guide § 46.06

§ 46.06 Generally Attorney's Mistakes or Omissions Are Not Basis for Relief Under Rule 60(b)(1)

In some cases, litigants seek relief from judgment on the ground that the misconduct of an attorney should not be imputed to the client. Many Rule 60(b) motions are made by the second or third lawyer to handle the case, alleging mistakes by earlier counsel. n1 Courts consistently decline to relieve a client under Rule 60(b)(1) of the burdens of a final judgment entered against the client due to the mistake or omission of his or her attorney by reason of the attorney's ignorance of the law or other rules of the court, or the attorney's inability to efficiently manage his or her caseload. n2 Note however, that an attorney's mental illness may constitute an extraordinary circumstance justifying relief under Rule 60(b)(6). n3

There is limited case law supporting Rule 60(b)(1) relief where the mistake of counsel has permitted an adverse judgment against a party who has a facially meritorious claim or defense which, because of counsel's mistake, was never heard. n4

There is also authority granting relief under Rule 60(b)(6) from mistakes of counsel which the courts are not prepared to say are "excusable" but where the seriousness of letting the judgment stand appears disproportionate to the gravity of the mistake. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurpriseLegal EthicsProfessional ConductGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *E.g, Sawka v. Healtheast, Inc., 989 F.2d 138, 139-140 (3d Cir. 1993)* (plaintiff's third lawyer unsuccessful in asserting Rule 60(b)(1) argument based upon insufficiently detailed language in settlement agreement drafted by second lawyer); *Smith v. Alumax Extrusions, Inc., 868 F.2d 1469, 1471 (5th Cir. 1989)* (plaintiff's first lawyer withdrew and plaintiff retained a second lawyer, but did not know of pending motions for summary judgment; the lack of information concerning the status of the lawsuit was not excusable neglect for failing to timely respond to

the summary judgment motions).

(n2)Footnote 2. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 393, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993)* (addressing the meaning of the term excusable neglect under a different statute); *see also Allmerica Fin. Life Ins. & Annuity Co. v. Llewellyn, 139 F.3d 664, 665-666 (9th Cir. 1997)* (attorney's failure to plead defense did not justify relief under Rule 60(b)(1)); *United States v. 8136 S. Dobson St., 125 F.3d 1076, 1084 (7th Cir. 1997)* (attorney's negligence or other misconduct not ground for Rule 60(b) relief); *Briones v. Riviera Hotel & Casino, 116 F.3d 379, 380-382 (9th Cir. 1997)* (relies on Supreme Court analysis from *Pioneer* in context of Rule 60(b)(1)).

(n3)Footnote 3. *See United States v. Cirami, 563 F.2d 26, 32 (2d Cir. 1977)* .

(n4)Footnote 4. *See In re Salem Mortg. Co., 791 F.2d 456, 459-460 (6th Cir. 1986)* (relief under Rule 60 was appropriate where a stipulation as to a particular issue, which limited available defenses, had been inadvertently signed, and counsel had, in fact, argued all the defenses).

(n5)Footnote 5. *See, e.g., Gray v. Estelle, 574 F.2d 209, 214-215 (5th Cir. 1978) . But see In re Virginia Information Sys. Corp., 932 F.2d 338, 342 (4th Cir. 1991)* (while "attorney malfeasance which actively misleads a client or is comparably culpable might successfully ground a Rule 60(b) motion," neither ignorance, carelessness, nor "poor lawyering" are sufficient).

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§ 46.07 Legal Error by Court May Be Mistake Under Rule 60(b)(1)

The circuits are split concerning whether courts may reconsider legal errors in a judgment under Rule 60(b)(1). n1 In some circuits a legal mistake by the court in a judgment may be a ground for relief, n2 as may inadvertence by the court. n3

However, the safer route for seeking such relief is a timely appeal. Most of the authority which recognizes the possibility of Rule 60(b)(1) as a method for relief from judicial error of law limits the "reasonable time" for filing such a motion to the time within which an appeal could be taken. n4 In general, a Rule 60(b) motion should not be thought of as a substitute for appeal, n5 although it has been used to assist a party in curing an untimely appeal. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurprise

FOOTNOTES:
(n1)Footnote 1. *See, e.g., Faile v. Upjohn Co. 988 F.2d 985, 986-987 (9th Cir. 1993) .*

(n2)Footnote 2. *Hopper v. Euclid Manor Nursing Home, Inc., 867 F.2d 291, 294 (6th Cir. 1989)* ; *see Schildhaus v. Moe, 335 F.2d 529, 531 (2d Cir. 1964)* (citing **Moore's**); *see also National Petrochemical Co. v. The M/T Stolt Sheaf, 930 F.2d 240, 244 (2d Cir. 1991) . But see Hoult v. Hoult, 57 F.3d 1 (1st Cir. 1995)* (district court's admission of expert testimony regarding repressed memory was, at most, an erroneous decision on a point of law, not a "mistake" as defined in Rule 60(b)(1)).

(n3)Footnote 3. *Buggs v. Elgin, J. & E. Ry. Co., 852 F.2d 318, 322 (7th Cir. 1988) .*

(n4)Footnote 4. *See Buggs v. Elgin, J. & E. Ry. Co., 852 F.2d 318, 322 (7th Cir. 1988)* (denying a Rule 60(b)(1) motion to correct a judgment containing what was indisputably error by the magistrate).

(n5)Footnote 5. *Latham v. Wells Fargo Bank, 987 F.2d 1199, 1203 (5th Cir. 1993)* ; *Eaton v. Jamrog, 984 F.2d 760, 762 (6th Cir. 1993)* (vacation of judgment for such purpose cannot be entered sua sponte).

(n6)Footnote 6. *See, e.g., Lewis v. Alexander, 987 F.2d 392, 394-395 (6th Cir. 1993)* .

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4-46 Federal Litigation Guide § 46.08

§ 46.08 Vacating Default Judgment Under Rule 60(b)(1)

Rule 60(b)(1) is most frequently invoked to seek relief from default judgments enteredat the outset of an action because the defendant (or someone acting on defendant's behalf) mistakenly or inadvertently failed to file a timely response to the complaint. In such circumstances Rule 60(b)(1) is usually the only subdivision of Rule 60(b) that applies. In the context of a default judgment, court's generally apply the following criteria to Rule 60(b)(1) motions: n1

- Whether the default was willful;
- Whether the defendant has a meritorious defense; and
- What prejudice will result to the non-defaulting party if the relief is granted.

Where the moving party or counsel is led to believe that the opponent has agreed to an extension, and a default is taken during that ostensibly extended time, the moving party may also argue fraud or opponent misconduct under Rule 60(b)(3). n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurprise

FOOTNOTES:
(n1)Footnote 1. *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp., 843 F.2d 808, 810-812 (4th Cir. 1988)* ; *American Alliance Ins. Co. v. Eagle Ins. Co., 92 F.3d 57, 59 (2d Cir. 1996)* .

(n2)Footnote 2. *See First Nat'l Life Ins. Co. v. California Pac. Life, 876 F.2d 877, 882-883 (11th Cir. 1989)* .

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4-46 Federal Litigation Guide § 46.09

§ 46.09 Timing of Motion Under Rule 60(b)(1)

To be timely a motion for relief under Rule 60(b)(1) must be made within a reasonable time and within a maximum time limit of one year after the final judgment, order, or proceeding was entered or taken. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurprise

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 60(c)(1).*

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4-46 Federal Litigation Guide § 46.10

§ 46.10 Seeking Relief Under Rule 60(b)(2) on the Basis of Newly Discovered Evidence

A Rule 60(b)(2) motion is a demanding and arduous motion to win, and once lost the denial is reviewed only for abuse of discretion. n1 It is often advisable to combine the ground of newly discovered evidence with some other Rule 60(b) ground, *e.g.*, Rule 60(b)(1) mistake, Rule 60(b)(3) fraud, misrepresentation, or other misconduct, and/or Rule 60(b)(5) inequity in "prospective application."

The task in making a Rule 60(b)(2) motion is to convince the court that with the newly discovered evidence the outcome would have been materially altered. n2

Generally speaking, the longer the trial, the heavier the 60(b)(2) burden, because the number of interconnections of facts which might have been persuasive increases exponentially with the length of a trial and because the court will be reluctant to vacate a result requiring the investment of substantial judicial resources. If the evidence could have been obtained during discovery but wasn't, or if a reasonable investigation would have uncovered it, the 60(b)(2) motion will be denied. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentNewly Discovered Evidence

FOOTNOTES:
(n1)Footnote 1. *See Schwartz v. Capital Liquidators, Inc., 984 F.2d 53, 54 (2d Cir. 1993)* ; *McKnight v. United States Steel Corp., 726 F.2d 333, 335 (7th Cir. 1984)* .

(n2)Footnote 2. *MCI Telecomm. Corp. v. Matrix Communications Corp., 135 F.3d 27, 35-37 (1st Cir. 1998)* (relief from judgment properly denied when newly discovered evidence was not likely to have changed outcome of action); *Hoult v. Hoult, 57 F.3d 1 (1st Cir. 1995)* (scientific paper on repressed memory published one month before trial did not constitute "newly discovered evidence" under Rule 60(b)(2); moreover, defendant failed to demonstrate that opinions expressed in article would probably have changed trial's outcome); *Brown v. Petrolite Corp., 965 F.2d 38, 50 (5th Cir. 1992)* ("Newly discovered evidence justifies relief under Rule 60(b)(2) ... only if the evidence is material and

clearly would have produced a different result if presented before the original judgment").

(n3)Footnote 3. *See Brooks v. Ferguson-Florissant School Dist., 113 F.3d 903, 905 (8th Cir. 1997)* (plaintiff not entitled to relief from judgment of dismissal since information offered to avoid limitations defense could have been uncovered earlier by the exercise of diligence); *see also Johns-Manville Corp. v. Guardian Indus. Corp., 116 F.R.D. 97, 101-102 (E.D. Mich. 1987)* (patent infringers could not rely on the results of post-trial experiments when they failed to conduct such tests before trial). *Cf. Alpern v. Utilicorp United, Inc., 84 F.3d 1525, 1536-1537 (8th Cir. 1996)* ("newly discovered evidence," obtained from a document "buried among the thousands produced" in this stockholder action, entitled the one stockholder, whose purchase occurred subsequent to publication by the corporate defendant of misinformation, to relief from partial summary judgment granted the corporation by the district court).

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4-46 Federal Litigation Guide § 46.11

§ 46.11 Evaluating Standard for Relief Under Rule 60(b)(2)

To prevail in a motion seeking relief from a judgment based on newly discovered evidence, the movant must show the following: n1

- The evidence must be discovered subsequent to the trial;
- The movant must demonstrate due diligence;
- The evidence must not be cumulative or impeaching;
- The evidence must be material; and
- The evidence is likely to produce a different result.

In addition, the newly discovered evidence must be both admissible and credible. n2 In most of the reported cases the moving party fails to satisfy one or more of these stringent requirements. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentNewly Discovered Evidence

FOOTNOTES:
(n1)Footnote 1. *Atkinson v. Prudential Property Co., 43 F.3d 367, 371-372 (8th Cir. 1994)* ; *United States v. McGaughey 977 F.2d 1067, 1075 (7th Cir. 1992)* , *cert. denied, 507 U.S. 1019 (1993)* .

(n2)Footnote 2. *See United States v. McGaughey, 977 F.2d 1067, 1071 (7th Cir. 1992)* , *cert. denied, 507 U.S. 1019 (1993)* .

(n3)Footnote 3. *See, e.g., Mitchell v. Shalala, 48 F.3d 1039, 1041 (8th Cir. 1995)* (claimant failed to exercise due

diligence in discovering evidence and failed to show that new evidence would have changed outcome); *Atkinson v. Prudential Property Co., 43 F.3d 367, 372 (8th Cir. 1994)* (motion properly denied because there was no reason to believe that newly discovered evidence would produce different results).

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4-46 Federal Litigation Guide § 46.12

§ 46.12 Timing of Motion Under Rule 60(b)(2)

Relief may be accorded under Rule 60(b)(2) based on newly discovered evidence that could not have been discovered by due diligence in time for the party to move for a new trial under Rule 59(b). n1 The Rule 59 time period is 28 days. n2 The movingparty must establish that the evidence could not have been discovered earlier with due diligence. n3 Additionally, the movant must bring the motion within a reasonable time and not later than one year after the judgment enters, n4 even if reasonableness can be shown.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentNewly Discovered Evidence

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 60(b)(2).*

(n2)Footnote 2. *Fed. R. Civ. P. 59(b).*

(n3)Footnote 3. *Schwartz v. Capital Liquidators, Inc., 984 F.2d 53, 54 (2d Cir. 1993) .*

(n4)Footnote 4. *Fed. R. Civ. P. 60(c)(1); see also In re Dakota Cheese, Inc., 923 F.2d 576, 577 (8th Cir. 1991)* (Rule 60(b) motion denied where it failed to come within one-year time limit applicable when ground is newly-discovered evidence).

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4-46 Federal Litigation Guide § 46.13

§ 46.13 Opposing a Motion Under Rule 60(b)(2)

Counsel opposing a Rule 60(b)(2) motion should be prepared to attack the moving party's "due diligence." n1 Such an attack presents a wide range of approaches. If the moving party pursued extensive discovery and obtained what was requested, but simply failed to ask for the materials now identified as the newly discovered evidence, diligence is open to question. If the identity of a witness was known, but the witness was not called at trial because of the expense involved, this can be construed as a lack of due diligence. n2 Rule 60(b)(2) is not intended to remedy the moving party's failure to properly analyze and prepare the case or to provide relief from the errors of judgment made by moving counsel. If the moving party pursued little pretrial discovery, that fact alone might establish a lack of diligence.

Counsel opposing the motion should also try to minimize the significance of the newly discovered evidence, arguing that it is merely cumulative, or merely impeaching, or in any event not of such significance as to impact a new trial. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentNewly Discovered Evidence

FOOTNOTES:
(n1)Footnote 1. *E.g., Gomez v. Chody, 867 F.2d 395, 404-406 (7th Cir. 1989)* ; *Lepore v. Vidockler, 792 F.2d 272, 274-275 (1st Cir. 1986)* .

(n2)Footnote 2. *Parrilla-Lopez v. United States, 841 F.2d 16, 19-20 (1st Cir. 1988)* (newly- discovered evidence was not grounds for a new trial where the evidence was cumulative in nature, and therefore not "newly discovered" within the meaning of Rule 60(b)(2), and was not sought previously because of the expense involved).

(n3)Footnote 3. *E.g., Shiley, Inc. v. Bentley Labs., Inc., 115 F.R.D. 169, 170-171 (C.D. Cal. 1987) . See also Hoult v. Hoult, 57 F. 3d 1, 5 (1st Cir. 1995)* (article published one month before trial criticizing reliability of repressed memories was "hardly the sort of extraordinary new evidence contemplated by Rule 60(b)(2)").

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4-46 Federal Litigation Guide § 46.14

§ 46.14 Seeking Relief Under Rule 60(b)(3) for Fraud, Misrepresentation, or Misconduct of Adverse Party

Rule 60(b)(3) provides for relief based upon fraud, misrepresentation, or other misconduct of an adverse party. n1 A movant may rely on conduct outside or inside the courtroom to constitute fraud. n2 In addition to losing the benefit of the judgment, there may be other serious consequences for the party and counsel accused of fraud. Prosecution for perjury is possible. Professional disciplinary proceedings and a malpractice action against the attorney are probable if counsel's misconduct contributed to the fraud. The 60(b)(3) motion (or independent action seeking vacation of a judgment on grounds of the opposing party's fraud) will thus likely induce the court to inquire not only as to the possible involvement of non-moving counsel in the misconduct alleged, but also the extent to which moving counsel has investigated before acting.

Retribution for a wrongful charge of fraud should be expected, either in a request for Rule 11 sanctions or in a separate lawsuit for abuse of process. Therefore, counsel may consider moving for relief on the grounds of surprise, mistake, or newly discovered evidence even if the facts strongly indicate your opponent's misconduct. n3

Fraud is the knowing misrepresentation of a material fact, or concealment of a material fact when there is a duty to disclose, done to induce another to act to his or her detriment. n4 A party seeking relief under Rule 60(b)(3) need not demonstrate that the adverse party has committed all the elements of fraud specified in the law of the state where the federal court is sitting, but rather need only show that the adverse party's conduct was fraudulent under the general common-law understanding. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurpriseCivil ProcedureJudgmentsRelief From JudgmentFraud

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 60(b)(3).*

(n2)Footnote 2. *Fed. R. Civ. P. 60(b)(3).*

(n3)Footnote 3. *Cf. Good Luck Nursing Home, Inc. v. Harris, 636 F.2d 572, 577-578 n.4 (D.C. Cir. 1980)* ; *Fleming v. Gulf Oil Corp., 547 F.2d 908 (10th Cir. 1977)* .

(n4)Footnote 4. *See Info-Hold, Inc. v. Sound Merch., Inc., 538 F.3d 448, 456 (6th Cir. 2008)* (citing **Moore's**).

(n5)Footnote 5. *See Info-Hold, Inc. v. Sound Merch., Inc., 538 F.3d 448, 455-456 (6th Cir. 2008)* .

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4-46 Federal Litigation Guide § 46.15

§ 46.15 Proving Fraud Under Rule 60(b)(3)

[1] Clear and Convincing Evidence

It is a serious matter to assert that a party has obtained a judgment by fraud, misrepresentation, or other misconduct. The movant must establish the fraud by clear and convincing evidence. n1 However, the other party's conduct may raise a rebuttable presumption of fraud; for example, when a key report was intentionally withheld during discovery, the non-disclosing party was required to overcome a presumption that fraud had occurred. n2

[2] Fraud Must Impact Fairness of Trial

The fraud must have prevented the moving party from fully and fairly presenting its case. n3 It is not, however, necessary to prove that, absent the fraud, a different result would have been obtained at trial. n4

[3] Demonstrating That Misconduct Could Not Have Been Exposed Sooner

The district court may deny relief if the fraud or other misconduct should have been exposed earlier, through careful trial preparation and investigation or proper cross-examination. It is often wise to include an affidavit describing exactly how the fraud was discovered, to demonstrate that it could not have been uncovered by careful trial preparation. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentFraudEvidenceProcedural ConsiderationsBurdens of ProofClear & Convincing Proof

FOOTNOTES:
(n1)Footnote 1. *Abrahamsen v. Trans-State Express, Inc., 92 F.3d 425, 428 (6th Cir. 1996)* (plaintiffs introduced clear and convincing evidence that they were prevented from fully and fairly presenting their case when defendant failed to disclose or produce material requested in discovery and witness falsely testified that statement did not exist); *Longden v. Sunderman, 979 F.2d 1095, 1103 (5th Cir. 1992)* ; *Ervin v. Wilkinson, 701 F.2d 59, 61 (7th Cir. 1983)* ; *Harris v. Mapp, 719 F. Supp. 1317, 1324 (E.D. Va. 1989)* .

(n2)Footnote 2. *Anderson v. Cryovac, Inc., 862 F.2d 910, 925 (1st Cir. 1988) , aff'd sub nom. Anderson v. Beatrice Foods Co., 900 F.2d 388 (1st Cir.) , cert. denied, 498 U.S. 891 (1990) .*

(n3)Footnote 3. *Gonzalez v. Gannett Satellite Info. Network, 903 F. Supp 329, 332 (N.D.N.Y. 1995) , aff'd, 101 F.3d 109 (2d Cir. 1996) .*

(n4)Footnote 4. *See, e.g., Ty Inc. v. Softbelly's, Inc., 353 F.3d 528, 536-537 (7th Cir. 2003) ; Lonsdorf v. Seefeldt, 47 F.3d 893, 897 (7th Cir. 1995) ; Anderson v. Cryovac, Inc., 862 F.2d 910, 924 n.10 (1st Cir. 1988) , aff'd sub nom. Anderson v. Beatrice Foods Co., 900 F.2d 388 (1st Cir.) , cert. denied, 498 U.S. 891 (1990) .*

(n5)Footnote 5. *See, e.g., Black v. Niagara Mohawk Power Corp., 641 F. Supp. 799, 802 (N.D.N.Y. 1986) .*

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4-46 Federal Litigation Guide § 46.16

§ 46.16 Timing Of Motion Under Rule 60(b)(3)

A motion under Rule 60(b)(3) asserting that a judgment was the product of an adverse party's fraud, misrepresentation or other misconduct is subject to the requirement that it be brought within a reasonable time, and in any event, not later than one year from date of judgment. n1 If relief from a judgment on the ground of the adverse party's fraud, misconduct, or misrepresentation is sought more than one year after entry of judgment, the wrongful conduct must amount to fraud on the court, and the relief must be sought through an independent action. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentFraud

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 60(c)(1)*; *see also Gonzalez v. Walgreens Co., 918 F.2d 303, 305 (1st Cir. 1990)* ; *In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co., 878 F.2d 182, 184 (7th Cir. 1989)* .

(n2)Footnote 2. *See Wilson v. Johns-Manville Sales Corp., 873 F.2d 869, 871-872 (5th Cir. 1989)* (fraudulent concealment of hazards of asbestos was not egregious enough to be a fraud upon the court).

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4-46 Federal Litigation Guide § 46.17

§ 46.17 Vacating Judgment Based on Fraud Upon the Court

Rule 60(b)(3), by its own terms does not apply to a motion to set aside a judgment for fraud upon the court, such as bribery of a judge, jury tampering, or other serious interference with the integrity of the court. n1 These grounds are traditionally difficult to establish, and must involve egregious conduct. n2 The time limitation of one year generally applicable to motions under Rule 60(b)(3) does not apply to a motion for relief from judgment based on fraud upon the court.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentFraud

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 60(b)*; *see, e.g., Kupferman v. Consolidated Research & Mfg. Corp., 459 F.2d 1072, 1079 (2d Cir. 1972)* .

(n2)Footnote 2. *See, e.g., In re Intermagnetics Am., Inc., 926 F.2d 912, 916-917 (9th Cir. 1991)* (in reversing district court and remanding for further consideration of independent action seeking relief from sale of property approved by bankruptcy court, court discussed some of the difficulties of analysis with regard to a "fraud upon the court" ground under Rule 60(b), including the distinction drawn between extrinsic fraud which prevents a party by trick or artifice from properly presenting a case, and intrinsic fraud such as perjury, and the preference of a focus on harm to the integrity of the judicial system rather than, necessarily, prejudice to a party); *see also, United States v. International Tel. & Tel. Corp., 349 F. Supp. 22, 29 (D. Conn. 1972) , aff'd sub nom. Nader v. United States, 410 U.S. 919 (1973)* (citing **Moore's**).

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4-46 Federal Litigation Guide § 46.18

§ 46.18 Seeking Relief Under Rule 60(b)(4) When the Judgment is Void

Rule 60(b)(4) provides for seeking relief from a void judgment. n1 Examples of void judgments include:

- Court lacked personal jurisdiction; n2
- Court lacked subject matter jurisdiction; or n3
- Court's action violated due process. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentVoid Judgments

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 60(b)(4).*

(n2)Footnote 2. *See Kocher v. Dow Chem. Co., 132 F.3d 1225, 1229 (8th Cir. 1997)* ; *see also Covington Indus., Inc., v. Resintex, A.G., 629 F.2d 730, 732-737 & n.4 (2d Cir. 1980)* (citing **Moore's**).

(n3)Footnote 3. *United States v. Forma, 42 F.3d 759, 762 (2d Cir. 1994)* .

(n4)Footnote 4. *Carter v. Fenner, 136 F.3d 1000, 1005-1009 (5th Cir. 1998)* .

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§ 46.19 Timing of Motion Under Rule 60(b)(4)

There is no time limit with regard to attacking void judgments. n1 If a judgment is found to be void it must be set aside; discretion plays no role with respect to a void judgment. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentVoid Judgments

FOOTNOTES:
(n1)Footnote 1. *Briley v. Hidalgo, 981 F.2d 246, 249 (5th Cir. 1993)* .

(n2)Footnote 2. *Orner v. Shalala, 30 F.3d 1307, 1310 (10th Cir. 1994)* .

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4-46 Federal Litigation Guide § 46.20

§ 46.20 Seeking Relief Under Rule 60(b)(5) for Satisfaction, Release, or Discharge of Judgment

Relief from a judgment may be obtained on the grounds that "the judgment has been satisfied, released, or discharged." n1 The terms of Rule 60(b)(5) raise no particularly complex legal questions. If a judgment has been satisfied by the judgment debtor's payment or other compliance with its terms, *e.g.,* specific performance, the judgment debtor is entitled to discharge. Similarly, if there has been a release by the judgment creditor as to all or part of the judgment, or if the judgment has been discharged in bankruptcy, the judgment debtor is entitled to the benefit thereof.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 60(b)(5).*

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4-46 Federal Litigation Guide § 46.21

§ 46.21 Proving Satisfaction, Release, or Discharge

The question of satisfaction in the absence of a filed "satisfaction of judgment" is fertile ground for potential fact controversies, such as a controversy over the nature of payments made by the judgment debtor, whether payment was intended as satisfaction of the judgment or as satisfaction of some other obligation, whether a partial payment was intended as full satisfaction of the judgment or only as partial satisfaction, and so on. n1

The issue of release ordinarily presents questions of law concerning interpretation or validity of the alleged release. Disputed issues of fact may also arise, and should be addressed through discovery and possibly an oral evidentiary hearing.

Whether a judgment has been discharged in bankruptcy is ordinarily dependent on an interpretation of the bankruptcy court records in the proceeding involving the judgment debtor. Most of the controversy on a Rule 60(b)(4) motion asserting discharge will be resolved by those bankruptcy records.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. An unusual situation was presented in *Johnson Waste Materials v. Marshall*, an action by the Secretary of Labor claiming that the defendant had failed to pay overtime as required by the minimum wage laws. The defendant in fact had paid much of the overtime sought but failed to prove it at trial because it couldn't find the records. More than a year after the judgment, the defendant turned up its cancelled checks showing payment of the overtime and the endorsements of the employees. The court treated this as proof of satisfaction of the judgment. *Johnson Waste Materials v. Marshall, 611 F.2d 593, 599-600 (5th Cir. 1980)* .

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4-46 Federal Litigation Guide § 46.22

§ 46.22 Seeking Relief Under Rule 60(b)(5) for Reversal or Vacatur of Prior Judgment

Rule 60(b)(5) provides for relief from a judgment that was "based" on a prior judgment that has been "reversed or otherwise vacated." n1 This portion of Rule 60(b)(5) provides relief only in the situation where the judgment attacked by the motion rests entirely upon another judgment, as where an action is brought to enforce a judgment or as with res judicata or collateral estoppel. n2 Situations coming within this provision arise only rarely. Courts have refused to grant relief under this provision, for example, where there has merely been an intervening change in controlling decisional law which formed the basis for the judgment attacked. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentPrior Judgment Reversed

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 60(b)(5).*

(n2)Footnote 2. *Cruickshank & Co. v. Dutchess Shipping Co., 805 F.2d 465, 467 (2d Cir. 1986)* .

(n3)Footnote 3. *See, e.g., Bailey v. Ryan Stevedoring Co., 894 F.2d 157, 159-160 (5th Cir.)* , *cert. denied, 498 U.S. 829 (1990)* ; *Tomlin v. McDaniel, 865 F.2d 209, 211 (9th Cir. 1989)* .

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4-46 Federal Litigation Guide § 46.23

§ 46.23 Seeking Relief Under Rule 60(b)(5) When Co-Party Has Been Granted Reversal on Appeal

Rule 60(b)(5) may, in limited circumstances, be available to relieve one party to a judgment after a co-party has been granted a reversal on appeal. However, the party that neglected to appeal is not guaranteed relief, particularly if failing to appeal was a matter of litigation strategy. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Cruickshank & Co. v. Dutchess Shipping Co., 805 F.2d 465, 467-468 (2d Cir. 1986)* .

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4-46 Federal Litigation Guide § 46.24

§ 46.24 Seeking Relief Under Rule 60(b)(5) for Unfairness of Prospective Application of Judgment

Relief from a judgment may be obtained under Rule 60(b)(5) when "it is no longer equitable that the judgment should have prospective application." n1 This portion of Rule 60(b)(5) acknowledges the historic power of courts of equity to vacate or modify injunctions upon a showing of sufficient change in factual or legal circumstances. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 60(b)(5).*

(n2)Footnote 2. Note that relief from a judgment under Rule 60(b)(5) cannot be obtained where the judgment is final, not prospective in equity. *Kock v. Government of the Virgin Islands, 811 F.2d 240, 244-245 (3d Cir. 1987)* . The standard to be applied in determining whether an order has prospective application is whether it is "executory" or involves "supervision of changing conduct or conditions." *Twelve John Does v. District of Columbia, 841 F.2d 1133, 1139 (D.C. Cir. 1988)* .

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4-46 Federal Litigation Guide § 46.25

§ 46.25 Demonstrating That the Purpose of the Injunction or Decree Has Been Achieved

To obtain relief under Rule 60(b)(5), counsel must establish that circumstances have changed so significantly that relief is warranted. n1 Usually, this involves demonstrating that the purpose of the decree or injunction has been achieved, and there is no longer any need for the decree. n2

For example, in public interest cases, such as those involving integration plans or prison overcrowding, changes in the operative facts justify changes in the order or consent decree. n3 A party has a heavy burden, however, to justify modification of the equitable relief on the ground that the purpose of the judgment has been accomplished. n4 In addition to showing that the purpose of the judgment has ben accomplished, the moving party generally must show that ongoing equitable relief will result in hardship. n5

Although a hearing will generally be held before a court modifies a consent decree or a continuing injunction, n6 no hearing is required before a court denies a requested modification. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsConsent DecreesCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExtraordinary Circumstances

FOOTNOTES:
(n1)Footnote 1. *See Patterson v. Newspaper & Mail Deliverers' Union, 13 F.3d 33, 37-38 (2d Cir. 1993)* , *cert. denied, 513 U.S. 809 (1994)* .

(n2)Footnote 2. *Board of Educ. of Oklahoma City Pub. Schools v. Dowell, 498 U.S. 237, 246-248, 111 S. Ct. 630, 112 L. Ed. 2d 715 (1991)* (desegregation decree could be modified if its purposes had been fully achieved and remanded the action for determination of whether school district was being operated in compliance with *equal protection clause*, and whether it was unlikely that the school board would return to its former ways); *United States v. Eastman Kodak Co., 63 F.3d 95, 101 (2d Cir. 1995)* (no relief from consent decree was available when purposes of decree had not been achieved).

(n3)Footnote 3. *E.g., Plyler v. Evatt, 846 F. 2d 208, 211 (4th Cir. 1988)* .

(n4)Footnote 4. *Apex Fountain Sales, Inc. v. Kleinfeld, 818 F.2d 1089, 1098 (3rd Cir. 1987)* ; *Paradise v. Prescott, 767 F.2d 1514, 1526-1527 (11th Cir. 1985)* .

(n5)Footnote 5. *Lamphere v. Brown Univ., 706 F. Supp. 131, 137-138 (D. R.I. 1989)* .

(n6)Footnote 6. *Bradley v. Milliken, 772 F.2d 266, 271 (6th Cir. 1985)* .

(n7)Footnote 7. *Ibarra v. Texas Employment Comm'n, 645 F. Supp. 1060, 1069 (E.D. Tex.)* , *rev'd on other grounds, 823 F.2d 873 (5th Cir. 1986)* .

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4-46 Federal Litigation Guide § 46.26

§ 46.26 Demonstrating That Continued Application of Decree is Causing Hardship to Moving Party

A party relying on changed factual circumstances as a ground for Rule 60(b)(5) relief from the terms of an injunction or consent decree ordinarily must show hardship as a result of the injunction, which will continue unless relief is granted. The burden of proof of such hardship is on the party seeking relief. n1 The case law leaves some roomfor argument as to the standards of severity and unexpectedness which such a hardship must meet. n2 As a practical matter, the court's ultimate decision will depend on the overall showing by both parties and its inclination, on all the equities, to grant the moving party some relief. The unique nature and demands of institutional reform litigation (e.g, cases in which consent decrees mandate reforms in prisons or school systems) necessitate that a more flexible approach be taken towards modification of such decrees than might be appropriate with respect to consent decrees between private parties. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsConsent DecreesCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExtraordinary Circumstances

FOOTNOTES:
(n1)Footnote 1. *See United States v. Michigan, 680 F. Supp. 928, 969 (W.D. Mich. 1987) .*
Rule 60(b)(5) may also be applied if special circumstances would make prospective application of the injunction inequitable, and thus cause hardship, even before the injunction has taken effect. *See Williams v. Nix, 53 F.3d 212, 213-214 (8th Cir. 1995)* (appellate court identified special circumstances sufficientto give two defendants the benefit of the prior judgment).

(n2)Footnote 2. *United States v. Swift & Co.* and its progeny articulate a standard as to degree of hardship which it would be all but impossible for any Rule 60(b)(5) moving party to satisfy. *United States v. Swift & Co., 286 U.S. 106, 52 S. Ct. 460, 76 L. Ed. 999 (1932) . See, e.g., Humble Oil & Ref. Co. v. American Oil Co., 405 F.2d 803, 812-813 (8th Cir. 1969) .*

(n3)Footnote 3. *Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 383, 112 S. Ct. 748, 116 L. Ed. 2d 867 (1992) . See also Small v. Hunt, 98 F.3d 789, 795-796 (4th Cir. 1996)* (court was correct in determining that significant change in factual circumstances warranted modification of provision of original consent decree mandating state to

provide 50 square feet of living space per inmate; continued compliance would be substantially more onerous in light of unanticipated explosion in inmate population, and enforcement of provision would be detrimental to public interest in having institutions run in fiscally responsible manner).

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4-46 Federal Litigation Guide § 46.27

§ 46.27 Demonstrating Change in Law As Basis for Relief from Decree or Injunction

A significant change in law can also warrant relief from prospective application of an injunction. n1 If the legal premises for the injunction or decree have changed dramatically, relief from the injunction or decree may be available to the moving party. For example, if the injunction or consent decree was based on a federal statute which has been repealed or amended, so that what was then unlawful (and therefore enjoined) is now expressly lawful. n2

A change in the judicial construction of a statute that controlled the injunction or consent decree is also a possible ground relief. n3 "As to whether a change in the decisional law alone is sufficient ground for a Rule 60(b)(5) modification, there is a great deal of inconsistency among and even within the various circuits." n4 Nevertheless, such a change in the decisional law may serve as the basis for relief. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsConsent DecreesCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExtraordinary Circumstances

FOOTNOTES:
(n1)Footnote 1. *Agostini v. Felton, 521 U.S. 203, 237-240, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997)* (citing **Moore's**).

(n2)Footnote 2. *See, e.g., System Fed'n No. 91 v. Wright, 364 U.S. 642, 647-650, 81 S. Ct. 368, 5 L. Ed. 2d 349 (1961)* (modification of consent decree required where federal statutes in existence at time of entry of the decree had been amended specifically to permit what they had prohibited at time of entry of decree); *Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 430 (1855)* (federal court injunction against maintenance of bridge vacated after Congress enacted statute specifically authorizing the bridge).

(n3)Footnote 3. *Marshall v. Board of Educ., 575 F.2d 417 (3d Cir. 1978)* (injunction against school board violating federal minimum wage and hour laws vacated pursuant to Rule 60(b)(5) motion based on later decision of United States Supreme Court in another case holding those laws inapplicable to local government entities like Bergenfield School Board).

(n4)Footnote 4. *United States v. Georgia Power Co., 634 F.2d 929, 933 (5th Cir. 1981)* , and cases cited therein. The court in *Georgia Power* went on to state that "in this Circuit, given otherwise appropriate circumstances, a significant modification in decisional law will permit the district court in its sound discretion to prospectively modify a permanent injunction under Rule 60(b)(5)." *634 F.2d at 934* . The court further went on to hold that the circumstances there were not appropriate, vacating the district court's order modifying the injunction and directing the district court to reinstate it. *634 F.2d at 934* .

(n5)Footnote 5. *E.g., Harris v. Martin, 834 F.2d 361 (3d Cir. 1987)* .

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CHAPTER 46 Relief From Judgment *
A Relief From Judgment

4-46 Federal Litigation Guide § 46.28

§ 46.28 Filing Timely Motion Under Rule 60(b)(5)

A motion for relief from judgment under Rule 60(b)(5) must be made within a reasonable time. The maximum time limit of one year after the final judgment is entered is not applicable. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExtraordinary Circumstances

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 60(c)(1)*; *see also Lowe v. McGraw-Hill Cos., 361 F.3d 335, 342-343 (7th Cir. 2004)*

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CHAPTER 46 Relief From Judgment *
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4-46 Federal Litigation Guide § 46.29

§ 46.29 Seeking Relief Under Rule 60(b)(6) for "Any Other Reason Justifying Relief"

Rule 60(b)(6) is often called the catch-all provision of Rule 60(b), affording relief for "any other reason." Courts will not permit the use of the "catch-all" provision of Rule 60(b)(6) when another provision of the rule specifically governs the relief sought. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExtraordinary Circumstances

FOOTNOTES:
(n1)Footnote 1. For example, a mistake of law or fact will be considered only under Rule 60(b)(1), even when the one-year time limitation would bar relief and even though a Rule 60(b)(6) motion need be filed only within a reasonable time.
E.g., United States v. Alpine Land & Reservoir Co., 984 F.2d 1047, 1049 (9th Cir.) , cert. denied, 510 U.S. 813 (1993) ; *Hopper v. Euclid Manor Nursing Home, Inc., 867 F.2d 291, 294 (6th Cir. 1989) . See also Rice v. Ford Motor Co., 88 F.3d 914, 920 (11th Cir. 1996)* (Rule 60(b)(6) motion cannot be used in lieu of a "proper and timely appeal" of an alleged mistake of law by the district court).

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4-46 Federal Litigation Guide § 46.30

§ 46.30 Party Seeking Relief Under Rule 60(b)(6) Must Show Extraordinary Circumstances

To be granted relief under Rule 60(b)(6), the moving party must allege:

- Extraordinary circumstances n1
- Prompt action upon becoming aware of the extraordinary circumstances n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExtraordinary Circumstances

FOOTNOTES:
(n1)Footnote 1. *See Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 863-864, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988)* ; *Sawka v. Healtheast, Inc., 989 F.2d 138, 140 (3d Cir. 1993)* ("Relief under Rule 60(b)(6) may only be granted under extraordinary circumstances where, without such relief, an extreme and unexpected hardship would occur").

(n2)Footnote 2. *Transaero, Inc. v. La Fuerza Area Boliviana, 24 F.3d 457, 461-462 (2d Cir. 1994)* .

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4-46 Federal Litigation Guide § 46.31

§ 46.31 Higher Standard Applies Under Rule 60(b)(6)

The standard for this subdivision appears to be higher than the general "extraordinary circumstances" requirement of Rule 60(b): Rule 60(b)(6) requires that extreme andundue hardship would otherwise result. n1 Inexcusable neglect cannot be grounds for relief under Rule 60(b)(6). n2 However, when the neglect has been caused by extraordinary circumstances beyond the control of the movant, a court may grant relief under Rule 60(b)(6). n3

Ignorance of the law is not an "extraordinary circumstance." n4 Generally, a subsequent change in law will **not** justify relief under Rule 60(b)(6), n5 particularly when the judgment does not have prospective application. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExtraordinary Circumstances

FOOTNOTES:
(n1)Footnote 1. *In re Asbestos Litig., 173 F.R.D. 87, 90 (S.D.N.Y 1997)* .

(n2)Footnote 2. *See, e.g., Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat, 122 F.R.D. 517, 520 (N.D. Ill. 1988)* (attorney error no basis for relief under catch-all provision).

(n3)Footnote 3. *E.g., United States v. Cirami, 563 F.2d 26, 32-33 (2d Cir. 1977)* (neglect due to counsel's mental illness, which counsel concealed from client).

(n4)Footnote 4. *PRC Harris, Inc. v. Boeing Co., 700 F.2d 894, 897-898 (2d Cir.)* , *cert. denied*, *464 U.S. 936 (1983)* .

(n5)Footnote 5. *Tomlin v. McDaniel, 865 F.2d 209, 211 (9th Cir. 1989)* .

(n6)Footnote 6. *See Agostini v. Felton, 521 U.S. 203, 239-240, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997)* (citing **Moore's**).

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4-46 Federal Litigation Guide § 46.32

§ 46.32 Combining Rule 60(b)(6) Motion With Other Motions Under Rule 60(b)

Rule 60(b)(6) is often used as an additional ground in support of Rule 60(b) motions relying primarily on one or more of the Rule's other enumerated subdivisions, either because the facts do not fit precisely within any of them or because the combination of facts presents an extraordinary situation which warrants relief apart from the precise satisfaction of individual grounds. This application of Rule 60(b)(2) is probably most useful where the motion is made within one year of the date of judgment, so that you need not be concerned with drawing a line between the facts supporting Rule 60(b)(1), (2), or (3) relief and those supporting Rule 60(b)(6) relief.

One example of such use of Rule 60(b)(6) is where judgment was entered through some oversight or neglect of counsel undercircumstances which are perhaps only marginally excusable, and thus only marginally within Rule 60(b)(1), yet it seems harsh to the client or otherwise contrary to sound policy to let the judgment stand. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExtraordinary Circumstances

FOOTNOTES:
(n1)Footnote 1. *See, e.g., Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 863-864, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988)* ; *Hester Int'l Corp. v. Federal Republic of Nigeria, 879 F.2d 170, 173-174 (5th Cir. 1989)* . *Cf. Solaroll Shade & Shutter Corp. v. Bio-Energy Sys., Inc., 803 F.2d 1130, 1132-1133 (11th Cir. 1986)* (relief denied where unopposed motion merely reinstated action, and imposed no liability on defendant).

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4-46 Federal Litigation Guide § 46.33

§ 46.33 Filing Timely Motion Under Rule 60(b)(6)

A motion for relief from judgment under Rule 60(b)(6) must be made within a reasonable time. n1 The maximum time limit of one year after the final judgment is entered is not applicable. n2 Rule 60(b)(6) may not be used to overcome the requirement that specific motions under Rule 60(b) must be filed within one year after the judgment is entered. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExtraordinary Circumstances

FOOTNOTES:
(n1)Footnote 1. *See Callon Petroleum Co. v. Frontier Ins. Co., 351 F.3d 204, 210-211* (5th Cir. 2003 (the district court did not abuse its discretion in denying relief from a judgment under Rule 60(b)(6) when the party seeking relief offered no plausible excuse for a 14-month delay in seeking relief after receiving notice of the judgment).

(n2)Footnote 2. *Fed. R. Civ. P. 60(b).*

(n3)Footnote 3. *United States v. Alpine Land & Reservoir Co., 984 F.2d 1047, 1050 (9th Cir.) , cert. denied, 510 U.S. 813 (1993) .*

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4-46 Federal Litigation Guide § 46.34

§ 46.34 Rule 60(b) Motion Procedure

[1] Contents and Form of Motion Papers

Even though it comes after the entry of judgment, sometimes many months after, a Rule 60(b) motion is filed in the case in which the judgment was entered, and is subject to the Federal Rules of Civil Procedure and to the district court's local rules governing motions and motion papers generally.

Thus the motion must comply with Rule 7(b): it must be in writing, must state with particularity the grounds therefor, and must set forth the relief or order sought. n1

Local rules may go beyond the provisions of Rule 7(b) in specifying the content of a motion and the supporting materials that must accompany it. Such rules frequently require that the motion papers specify a hearing date. Often they require affidavits (or declarations under penalty of perjury) sufficient to support the motion's factual assertions. They may also require a memorandum of points and authorities or brief presenting argument and law in support of the relief requested. n2 Where you have identified the grounds on which you are moving and the evidence supporting those grounds, and believe that this evidence can effectively be presented by affidavit or declaration, compliance with such local rules presents essentially the same task as would be faced in any other motion asserting factual data (as, for example, a motion for summary judgment).Under limited circumstances, counsel may choose to file "skeleton" papers, indicating the intention to pursue discovery in support of the motion and to file supplemental evidentiary materials and argument upon completion of that discovery.

In any event, whether representing the movant or the opposing party, counsel should carefully consider the proclivities of the particular judge and the requirements of the local rules.

[2] Serving Motion Papers

A Rule 60(b) motion is sometimes made months or even years after the original action. It is thus possible that when the time comes to serve the motion papers, the party being served may no longer be represented by counsel, who would normally accept service.

Former counsel may choose to accept service on behalf of the client even if the attorney-client relationship has ended, but if the non-moving party's attorney refuses service, or has been formally permitted by the court to withdraw, counsel

for the moving party can seek an order for the former counsel to accept service.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExtraordinary Circumstances

FOOTNOTES:
(n1)Footnote 1. Rule 60(b) motions "must be shaped to the specific ground for modification or reversal listed in Rule 60(b)." *United States v. Deutsch, 981 F.2d 299, 301-302 (7th Cir. 1992)* .

(n2)Footnote 2. *E.g.,* C.D. Cal., L.R. 7.5.

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4-46 Federal Litigation Guide § 46.35

§ 46.35 Effect of Rule 60(b) Motion on Appeal of Underlying Judgment

A notice of appeal must ordinarily be filed within 30 days of a final judgment. n1 However, the filing of certain post-decisional motions (including a timely filed Rule 60 motion filed no later than 28 days after the entry of judgment) will defer the start of the appeal period until disposition of the last of those motions outstanding. n2

If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and pending, the court may: n3

- Defer considering the motion
- Deny the motion
- 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

The movant must promptly notify the circuit clerk under *Federal Rule Appellate Procedure 12.1* if the district court states that it would grant the motion or that the motion raises a substantial issue. n4 The district court may decide the motion if the court of appeals remands for that purpose. n5 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. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExtraordinary CircumstancesCivil ProcedureAppealsReviewabilityGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Fed. R. App. P. 4(a)(1).*

(n2)Footnote 2. *Fed. R. App. P. 4(a)(4)(A)(vi). Fed. R. App. P. 4(a)(4)(A)* provides, in relevant part:

> 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);
>
> (ii) to amend or make additional findings of fact 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.

(n3)Footnote 3. *Fed. R. Civ. P. 62.1(a).*

(n4)Footnote 4. *Fed. R. Civ. P. 62.1(b)*; *Fed. Rule. App. P. 12.1(a).*

(n5)Footnote 5. *Fed. R. Civ. P. 62.1(c).*

(n6)Footnote 6. *Fed. Rule. App. P. 12.1(b).*

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4-46 Federal Litigation Guide § 46.36

§ 46.36 Appealing Ruling on Rule 60(b) Motion

Denial of a Rule 60(b) motion is a final, appealable order. n1 An order granting a Rule 60(b) motion vacates the judgment. Since such an order leads to further proceedings, it is generally not a final, appealable order. However, if the relief granted is the entry of a new judgment that leaves nothing further to be decided, the new judgment is final and appealable. An appeal of a Rule 60(b) decision addresses only the granting or denial of the motion, not the merits of the underlying judgment. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Cinerama, Inc. v. Sweet Music, 482 F.2d 66, 71-72 (2d Cir. 1973)* (citing **Moore's**).

(n2)Footnote 2. *Ahmed v. Rosenblatt, 118 F.3d 886, 891 (1st Cir. 1997)* .

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4-46 Federal Litigation Guide § 46.37

§ 46.37 Opposing Rule 60(b) Motion

Rule 60(b) arguments most often turn on the facts of each case. Aside from arguing the facts, the following arguments should be considered when opposing a Rule 60(b) motion:

- The motion was not timely made; even if timely was not reasonable time n1
- Prejudice to opponent as a result of the passage of time, such as detrimental reliance on the judgment, or loss of evidence that would support the judgment, outweighs harm to movant of leaving judgment in place
- Movant is party responsible for event that is subject of motion
- Lack of due diligence by moving party
- Lack of extraordinary circumstances
- Facts alleged, even if true, do not satisfy statute; for example, if motion is brought under Rule 60(b)(3), argue that alleged conduct, even if true, does not constitute fraud

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *PRC Harris, Inc. v. Boeing Co., 700 F.2d 894, 897-898 (2d Cir.) , cert. denied, 464 U.S. 936 (1983) .*

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CHAPTER 46 Relief From Judgment *
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4-46 Federal Litigation Guide § 46.38

§ 46.38 CHECKLISTS: Motion for Relief From Judgment

[1] CHECKLIST: Moving for Relief From Order, Judgment, or Proceeding

The following checklist will assist counsel in evaluating the possibility of a successful Rule 60(b) motion. Counsel should also check local rules and the individual judge's rules for motion procedures. Note that individual judge's may require scheduling a pre-motion conference.

☐ **Is this the correct procedure**?

- ☐ Are you dealing with a judgment, order, or proceeding? n1
- ☐ Is the judgment, order, or proceeding final? n2

☐ **When to file**. File the motion as soon as possible after the basis for relief has been discovered.

- ☐ In all situations, the court will look at the reasonableness of the time.
- ☐ Motion based on Rule 60(b)(1)-(3) must be filed within one year of entry of the judgment, as well as within a reasonable time.
- ☐ Motion based on Rule 60(b)(4) can be filed at any time.

☐ **Basis for relief.**

- ☐ Mistake, inadvertence or surprise. n3

- ☐ Excusable neglect. n4
- ☐ Newly discovered evidence. n5
- ☐ Fraud or misrepresentation. n6
- ☐ Misconduct. n7
- ☐ Void judgment. n8
- ☐ Judgment satisfied, released, or discharged. n9
- ☐ Judgment reversed or vacated. n10
- ☐ No longer equitable that judgment have prospective application. n11
- ☐ "Any other reason." n12

☐ **Procedure**. Prepare motion; file and serve like any other motion; consult local and individual judge's rules.

[2] CHECKLIST: Opposing Motion for Relief

The following checklist will assist counsel in constructing arguments opposing a Rule 60(b) motion. Counsel should check local rules and the individual judge's rules for motion procedures.

- ☐ Does the motion relate to a judgment, order, or proceeding? n13
- ☐ Is the judgment, order, or proceeding final? n14
- ☐ Timeliness. How much time passed from the entry of judgment to the date of filing the motion?
- ☐ Was the delay reasonable?
- ☐ Was motion based on Rule 60(b)(1)-(3) filed within one year of entry of the judgment?
- ☐ Attacking the basis for relief.
- ☐ **Rule 60(b)(1).** Attorney errors do not constitute mistake, inadvertence, surprise, or excusable neglect.

- [ ] **Rule 60(b)(2).**
- [ ] Could evidence have been discovered sooner?
- [ ] Is the evidence admissible?
- [ ] Is the evidence merely cumulative?
- [ ] **Rule 60(b)(3).**
- [ ] Was the fraud or misrepresentation committed by an adverse party?
- [ ] Did the fraud impact the fairness of the trial?
- [ ] Could the fraud have been exposed earlier?
- [ ] **Rule 60(b)(4).**
- [ ] Is the judgment really void?
- [ ] Is there a timeliness argument?
- [ ] **Rule 60(b)(5).**
- [ ] Is there adequate documentary evidence that judgment has been discharged, vacated etc.?
- [ ] Has opposing counsel established that circumstances have changed so significantly that relief is warranted?
- [ ] **Rule 60(b)(6).**
- [ ] Is opposing counsel using this provision because the one year time limit has expired?
- [ ] Has opposing counsel shown that failure to grant relief would result in extreme and undue hardship?
- [ ] Do any other the other provisions of Rule 60(b) apply?
- [ ] Attacking the evidence.
- [ ] Is there a showing of exceptional circumstances?

☐ Can you show prejudice to your client?

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentNewly Discovered EvidenceCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsCivil ProcedureAppealsAppellate JurisdictionGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 60(b).*

(n2)Footnote 2. *See Fed. R. Civ. P. 60(b).*

(n3)Footnote 3. *See Fed. R. Civ. P. 60(b)(1).*

(n4)Footnote 4. *See Fed. R. Civ. P. 60(b)(1).*

(n5)Footnote 5. *See Fed. R. Civ. P. 60(b)(2).*

(n6)Footnote 6. *See Fed. R. Civ. P. 60(b)(3).*

(n7)Footnote 7. *See Fed. R. Civ. P. 60(b)(3).*

(n8)Footnote 8. *See Fed. R. Civ. P. 60(b)(4).*

(n9)Footnote 9. *See Fed. R. Civ. P. 60(b)(5).*

(n10)Footnote 10. *See Fed. R. Civ. P. 60(b)(5).*

(n11)Footnote 11. *See Fed. R. Civ. P. 60(b)(5).*

(n12)Footnote 12. *See Fed. R. Civ. P. 60(b)(6).*

(n13)Footnote 13. *See Fed. R. Civ. P. 60(b).*

(n14)Footnote 14. *See Fed. R. Civ. P. 60(b).*

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CHAPTER 46 Relief From Judgment *
B Forms

4-46 Federal Litigation Guide § 46.100

§ 46.100 Notice of Motion for Relief From Judgment or Order

[1] FORM

Notice of Motion for Relief from Judgment or Order

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

NOTICE IS HEREBY GIVEN that on [*date*] at [*time of day (specify a.m. or p.m.)*], or as soon thereafter as counsel may be heard, [*party designation and name of moving party*] will move this Court, at the United States Courthouse, located at [*address of Court*], Courtroom [*courtroom number*], for an order pursuant to *Federal Rules of Civil Procedure, Rule 60(b)* [*state with particularity any other legal basis for motion including any applicable local rules*] vacating and setting aside the final judgment entered against [*moving party*] in this action on [*date judgment entered*], on the ground that:

[*CHOOSE APPROPRIATE PARAGRAPH FROM BELOW*]

(a) [**Relief from judgment based upon a showing of mistake, inadvertence, or surprise:**] [*Identify grounds for relief, e.g.,* An error was made in the judgment through no fault of anyone and [*moving party*] was unfairly surprised; *identify mistake or explain why party was unfairly surprised*.] The party against whom relief is sought will not be prejudiced by relief from judgment because [*explain*].

[*OR*]

(a) [**Relief from judgment based on excusable neglect:**] [*Describe excusable neglect*]. The party against whom relief is sought will not be prejudiced by relief from judgment because [*explain*].

[*OR*]

(a) [**Relief from judgment based on newly discovered evidence that by due diligence could not have**

been discovered in time to move for a new trial:] [*Describe new evidence discovered, time of discovery, diligence in attempts to discover evidence at an earlier time*]. The newly discovered evidence is attached to this motion in admissible form as Exhibit A. The evidence is credible, material, and likely to be outcome determinative because [*explain*].

[*OR*]

(a) [**Relief from judgment based on fraud, misrepresentation, or other misconduct of adverse party:**] Clear and convincing evidence exists that [*party against whom relief is sought*] engaged in misconduct. [*Describe misconduct and how it prevented movant from fully and fairly presenting its case on the merits*.]

[*OR*]

(a) [**Relief from void judgment:**] The judgment is void because [*explain, e.g.*,the court did not have proper subject matter jurisdiction or personal jurisdiction].

[*OR*]

(a) [**Judgment has been satisfied, released, or discharged:**] [*Explain satisfaction, release, or discharge of action*].

[*OR*]

(a) [**Prior judgment has been reversed or otherwise vacated:**] [*Identify earlier judgment and explain*].

[*OR*]

(a) [**Inequity:**] [*Moving party*] is entitled to relief from judgment because it is inequitable for this judgment to have prospective application. [*Explain inequity*.]

[*OR*]

(a) [**Exceptional circumstances exist that demonstrate that the judgment is manifestly unjust:**] This judgment is manifestly unjust because [*explain*].

[*CONTINUE*]

(b) Granting [*moving party*] such other relief as may be appropriate.

This motion is based on this Notice of Motion, the accompanying Declaration (*or affidavit or other affidavit substitute; generally required*) of [*name of signatory*] dated (*or sworn to*) [*date*] , the accompanying Memorandum of Law (*if required*) dated [*date*] , and on all of the pleadings and papers on file in this action.

[*Date*]

[*Signature of attorney*

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for [*name and designation of party*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

TO: [*Name of opposing counsel*], Attorney for [*name of party*]

[2] Use of Form

This is a form of notice of motion pursuant to *Federal Rules of Civil Procedure, Rule 60(b)* for relief from a judgment or order.

[3] Deadline for Filing Motion

A motion for relief under *Fed. R. Civ. P. 60(b)* must be made within a reasonable time and, when based on the following grounds, not more than one year after the judgment, order, or proceeding was entered or taken:

- Mistake, inadvertence, surprise, or excusable neglect
- Newly discovered evidence, which by due diligence could not have been discovered in time to move for a new trial under *Federal Rules of Civil Procedure, Rule 59(b)*
- Fraud, misrepresentation, or other misconduct of an adverse party

[4] Critical Considerations

Local district court rules and individual judge's rules should be consulted regarding requirements for the following:

- **General formatting**
- **Bluebacks and other covers**
- **Page limits**
- **Caption**
- **Specifying rule or statute on which motion is based**
- **Date and time of hearing**
- **Availability of oral argument**
- **Extending time**

- **Expedited hearing/Orders to show cause**
- **Supporting papers**
- **Serving motion papers**
- **Filing motion papers**
- **Courtesy copies**
- **Opposing papers**
- **Reply papers**

* Chapter 46 was rewritten in 2000 by Andrew E. Westley, Esq., of San Francisco, California.

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CHAPTER 47 Costs

4-47 Federal Litigation Guide 47.syn

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CHAPTER 47 Costs

4-47 Federal Litigation Guide Scope

Scope

SCOPE

This chapter discusses post-judgment procedures to collect costs and attorney's fees, and covers the following topics:

- Determining recoverable costs
- Determining which party is entitled to costs
- Preparing a bill of costs
- Objecting to a bill of costs
- Seeking review of the clerk's taxation of costs
- Determining whether attorney's fees are recoverable
- Determining the proper amount of a fee award
- Employing the proper procedure for recovering attorney's fees
- Opposing a motion for attorney's fees

For expanded coverage of costs, *see* Moore's Federal Practice, Ch. 54, *Judgments; Costs* (Matthew Bender 3d ed.).

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CHAPTER 47 Costs
A. Determining Recoverable Costs

4-47 Federal Litigation Guide § 47.01

§ 47.01 Costs Recoverable Governed By Statute

Unless the court exercises its discretion to order otherwise, the prevailing party is entitled to an award of costs as a matter of course. n1

The term *costs* as used in Rule 54(d)(1) is a term of art. It does not refer to each and every expense incurred by the prevailing party in the action. Instead, it refers to those items that are properly taxed as costs in the action pursuant to statute. Indeed, Rule 54(d)(1) does not provide any authority for taxing items not specifically permitted by statute. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 54(d)(1).*

(n2)Footnote 2. *Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 441-445, 107 S. Ct. 2494, 96 L. Ed. 2d 385 (1987) .*

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CHAPTER 47 Costs
A. Determining Recoverable Costs

4-47 Federal Litigation Guide § 47.02

§ 47.02 Costs Enumerated in 28 U.S.C. § 1920

28 U.S.C. § 1920 authorizes the judge or clerk to tax as costs the following: n1

- Fees of the clerk and marshal [*see § 47.04*]
- Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case [*see § 47.05*]
- Fees and disbursements for printing and witnesses [*see §§ 47.08*, *47.09*]
- Fees for exemplification and copies of papers necessarily obtained for use in the case [*see § 47.09*]
- Docket fees pursuant to *28 U.S.C. § 1923* [*see § 47.07*]
- Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services pursuant to *28 U.S.C. § 1828* [*see § 47.10*]

Even if an item of costs is not *expressly* recoverable pursuant to *28 U.S.C. § 1920*, the item may be recovered if the statute can be fairly read to embrace it. For example, deposition expenses are not specifically mentioned in *28 U.S.C. § 1920*, but may be recoverable if reasonably necessary at the time taken, subject to statutory limitation. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsCourt & Marshal FeesCivil ProcedureRemediesCosts & Attorney FeesCostsDepositions & TranscriptsCivil ProcedureRemediesCosts & Attorney FeesCostsReproduction Costs

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1920.*

(n2)Footnote 2. *See West Wind Afr. Line, Ltd. v. Corpus Christi Marine Servs. Co., 834 F.2d 1232, 1237-1238 (5th Cir. 1988)* ; *SK Hand Tool Corp. v. Dresser Indus., Inc., 852 F2d 936, 944 (7th Cir. 1988)* ; *Cleveland v. North Am. Van Lines, Inc., 154 F.R.D. 37, 38 (N.D.N.Y. 1994)* ; *see also Health-Chem Corp. v. Hyman, 523 F. Supp. 27, 33 (S.D.N.Y. 1981)* .

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CHAPTER 47 Costs
A. Determining Recoverable Costs

4-47 Federal Litigation Guide § 47.03

§ 47.03 Costs Outside 28 U.S.C. § 1920

[1] Costs Not Recoverable Unless Expressly Allowed By Other Statutory Authority

If *28 U.S.C. § 1920* [*see § 47.02*] does not expressly or implicitly authorize taxation of a particular expense as a recoverable cost, taxation is not permitted unless some other statutory provision expressly authorizes recovery of those expenses. n1

Various circuits have held that a district court in a copyright-infringement action has discretion to award costs beyond those specified in *28 U.S.C. § 1920*. In a copyright-infringement action, *17 U.S.C. § 505* provides that "the court in its discretion may allow the recovery of full costs by or against any party." Courts have therefore held that the phrase "full costs" in Section 505 means that a district court in a copyright-infringement action may award otherwise nontaxable costs, including those outside the scope of Section 1920. n1.1

[2] Costs Governed By Federal Law Exclusively

Pursuant to the *Erie* doctrine, federal courts in diversity actions apply state substantive law but federal procedural law. n2

The types of costs that may be awarded incident to a judgment of a federal court is a procedural issue under *Erie*. Accordingly, federal law governs an award of costs in a diversity action, and state law regarding costs is irrelevant. n3

[3] Federal Rules of Civil Procedure Have Force of Statute

In view of the fact that the nationally promulgated Federal Rules of Civil Procedure have the force of statute, any costs expressly authorized by any of those rules may be awarded, even if not specifically authorized by *28 U.S.C. § 1920*.

For example, Appellate Rule 39(e) authorizes recovery of the premiums paidfor cost of supersedeas bonds or other bonds to preserve rights pending appeal. n4

[4] Costs Recoverable If Fee-Shifting Statute Applies and Expenses Are Billable to Client

If a federal statute permits recovery of attorney's fees from the losing party, items of expense that are outside the

coverage of *28 U.S.C. § 1920* [*see § 47.02*], but which are normally charged by the attorney to a paying client, may be recovered as a component of the attorney's fee award. Those expenses include photocopying, long-distance phone charges, postage and overnight delivery charges, and other routine expenses that are attributable to the client's action. n5

[5] Local District Court Rules May Dictate Recoverable Costs

It is not uncommon for local district court rules to enumerate the types of costs that are recoverable. Often, local district court rules also govern the procedure for recovering costs.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory AwardsCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureAppealsCosts & Attorney Fees

FOOTNOTES:
(n1)Footnote 1. *See West Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 87-88, 111 S. Ct. 1138, 113 L. Ed. 2d 68 (1991)* .

(n2)Footnote 1.1. *See Twentieth Century Fox Film Corp. v. Entertainment Distrib., 429 F.3d 869, 884-885 (9th Cir. 2005)* ; *Invessys, Inc. v. McGraw-Hill Cos., 369 F.3d 16, 22 (1st Cir. 2004)* ; *Coles v. Wonder, 283 F.3d 798, 803 (6th Cir. 2002)* ; *Susan Wakeen Doll Co. v. Ashton Drake Galleries, 272 F.3d 441, 458 (7th Cir. 2001)* .

(n3)Footnote 2. *Erie R.R. v. Tompkins, 304 U.S. 64, 78-79, 58 S. Ct. 817, 82 L. Ed. 1188, 11 Ohio Op. 246 (1938)* .

(n4)Footnote 3. *Aceves v. Allstate Ins. Co., 68 F.3d 1160, 1167-1168 (9th Cir. 1995)* ; *Carter v. General Motors Corp., 983 F.2d 40, 43-44 (5th Cir. 1993)* (citing **Moore's Federal Practice**); *Chapparal Resources, Inc. v. Monsanto Co., 849 F.2d 1286, 1291-1292 (10th Cir. 1988)* .

(n5)Footnote 4. *Fed. R. App. P. 39(e).*

(n6)Footnote 5. *Reichman v. Bonsignore, Brignati & Mazzotta P.C., 818 F.2d 278, 282 (2d Cir. 1987)* ; *Northcross v. Board of Education 611 F.2d 624, 639 (6th Cir. 1979)* .

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CHAPTER 47 Costs
A. Determining Recoverable Costs

4-47 Federal Litigation Guide § 47.04

§ 47.04 Recovering Clerk and Marshal Fees

[1] Clerk and Marshal Fees Taxable as Costs

Fees of the clerk [*see* [2], *below*] and marshal [*see* [3], *below*] may be taxed as costs, unless the court directs otherwise. n1

[2] Fees of Clerk Defined

Fees of the clerk include filing fees, as well as any other additional fees prescribed the Judicial Conference of the United States. n2

The Judicial Conference Schedule of Additional Fees specifies the fees to be charged for the following services to be performed by clerks of the district courts:

- Filing or indexing any paper not in a case or proceeding for which a case filing fee has been paid (this fee is applicable to the filing of a Rule 27(a) petition to perpetuate testimony, the filing of papers by trustees under *28 U.S.C. § 754*, the filing of letters rogatory or letters of request, and registering a judgment from another district pursuant to *28 U.S.C. § 1963*)

- Searching the records of the district court

- Certifying or exemplifying any document or paper

- Reproducing records or papers

- Reproducing magnetic tape recordings, either cassette or reel-to-reel

- Transcribing a record of any proceeding by a regularly employed member of the court staff who is not entitled by statute to retain the transcript fees for his or her own account

- Providing microfiche sheets of film or microfilm jacket copies of court records, where available

- Retrieving records from a Federal Records Center, National Archives, or other storage location removed from the place of business of the court

- Handling checks paid into the court which are returned for lack of funds

- Processing appeals to a district judge from a judgment of conviction by a magistrate judge in a misdemeanor case

- Processing applications by attorneys for admission to practice

- Providing copies of local rules of court

- Handling registry funds deposited with the court, to be assessed from interest earnings and in accordance with the detailed fee schedule issued by the Director of the Administrative Office of the United States Courts

- Providing electronic access to court data

[3] Fees of Marshal Defined

Fees of the marshal include fees for the following services: n3

- Serving a writ of possession, partition, execution, attachment in rem, or libel in admiralty, warrant, attachment, summons, complaints, or any other writ, order or process in any case or proceeding

- Serving a subpoena or summons for a witness or appraiser

- Forwarding any writ, order, or process to another judicial district for service

- Preparing any notice of sale, proclamation in admiralty, or other public notice or bill of sale

- Keeping attached property

- Copying writs or other papers furnished at the request of any party

- Necessary travel in serving or endeavoring to serve any process, writ, or order, except in the District of Columbia

- Overtime expenses incurred by deputy marshals in the course of serving or executing civil process

[4] Expenses of Private Process Server Not Taxable as Marshal Fee

At one time, the most common marshal's fee that was properly taxed as a cost was for service of the summons and complaint. Service of original process, however, is no longer restricted to United States marshals, but instead may be made by anyone over the age of 18 who is not a party to the action.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney

FeesCostsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsCourt & Marshal Fees

FOOTNOTES:

(n1)Footnote 1. *28 U.S.C. § 1920(1).*

(n2)Footnote 2. *28 U.S.C. § 1914.*

(n3)Footnote 3. *28 U.S.C. § 1921.*

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CHAPTER 47 Costs
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4-47 Federal Litigation Guide § 47.05

§ 47.05 Recovering Court Reporter Fees

[1] Complete Trial Transcripts

"Fees of a court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case" may be taxed as costs, unless the court directs otherwise. n1

[2] Transcripts of Pretrial Proceedings

The provision of *28 U.S.C. § 1920* which permits taxation of court reporter fees for stenographic transcription [*see* [1], *above*] is not restricted to complete trial transcripts, but extends to embrace pretrial proceedings as well. n2

[3] Transcripts of Post-Trial Proceedings

The provision of *28 U.S.C. § 1920* which permits taxation of court reporter fees for stenographic transcription [*see* [1], *above*] is not restricted to complete trial transcripts, but extends to embrace post-trial proceedings as well. n3

[4] Expedited Daily Transcripts

If a party can demonstrate its necessity, the cost of obtaining an expedited, daily transcript may be taxable. n4

If the daily transcript served no purpose other than counsel's convenience, taxation of that expense as a cost should be denied. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsCourt & Marshal FeesCivil ProcedureRemediesCosts & Attorney FeesCostsDepositions & TranscriptsGovernmentsCourtsCourt Personnel

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1920(2).*

(n2)Footnote 2. In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975, *687 F.2d 626, 631 (2d Cir. 1982)* ; *see § 28 U.S.C. § 1920(2).*

(n3)Footnote 3. *Chore-Time Equip., Inc. v. Cumberland Corp., 713 F.2d 774, 781-782 (Fed. Cir. 1983)* ; *see § 28 U.S.C. § 1920(2).*

(n4)Footnote 4. *Holmes v. Cessna Aircraft Co., 11 F.3d 63, 64 (5th Cir. 1994)* ; *see United States Indus. Inc., v. Touche Ross & Co., 854 F.2d 1223, 1248 (10th Cir. 1988)* ; *Mercy v. County of Suffolk, 748 F.2d 52, 54 (2d Cir. 1984)* .

(n5)Footnote 5. *McIlveen v. Stone Container 910 F.2d 1581, 1582-1584 (7th Cir. 1990)* ; *United States Indus., Inc. v. Touche Ross & Co., 854 F.2d 1223, 1247-1248 (10th Cir. 1988)* ; *McDowell v. Safeway Stores, Inc., 758 F.2d 1293, 1294 (8th Cir. 1985)* .

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CHAPTER 47 Costs
A. Determining Recoverable Costs

4-47 Federal Litigation Guide § 47.06

§ 47.06 Recovering Deposition Fees

[1] Deposition Fees Recoverable If Necessarily Obtained

"Fees of a court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case" may be taxed as costs, unless the court directs otherwise. n1

This provision has been interpreted to embrace not only the official court reporter of the district court, but also any officer taking a deposition; and to permit an award of the fees of the court reporter taking the deposition, as well as the fee for the original transcription of the deposition. n2 However, delivery costs for deposition transcripts are not taxable costs. n2.1

If the parties have agreed to a video or audio recording of a deposition as a substitute for a stenographic transcript, the expense of the recording is properly taxed as a cost. n3

[2] Concept of Necessity Applied Practically

The concept of necessity under *28 U.S.C. § 1920(2)* [*see* [1], *above*] is applied practically, so that the deposition need not have been necessary in an absolute sense. If the deposition was actually used, either in lieu of live testimony, for cross-examination or impeachment purposes, or in support of a successful dispositive motion, the necessity of the deposition is established. n4

Likewise, if the deposition appeared reasonably necessary at the time it was taken, costs may be taxed despite the lack of actual usage of the deposition. n5

[3] Local District Court Rules May Dictate Recoverability of Deposition Fees

Local district court rules often contain provisions regarding recovery of deposition fees.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersCourt ReportersGeneral OverviewCivil ProcedureRemediesCosts & Attorney

FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsDepositions & Transcripts

FOOTNOTES:

(n1)Footnote 1. *28 U.S.C. § 1920(2).*

(n2)Footnote 2. *See, e.g., SK Hand Tool Corp. v. Dresser Indus., Inc., 852 F.2d 936, 943 (7th Cir. 1988)* ; *Hudson v. Nabisco Brands, 758 F.2d 1237, 1242 (7th Cir. 1985)* .

(n3)Footnote 2.1. *See Smith v. Tenet Healthsystem SL, Inc., 436 F.3d 879, 889 (8th Cir. 2006)* .

(n4)Footnote 3. *Barber v. Ruth 7 F.3d 636, 645 (7th Cir. 1993)* ; *Marino v. Town of Kirkland, 146 F.R.D. 49, 52 (N.D.N.Y. 1993)* .

(n5)Footnote 4. *West Wind Afr. Line, Ltd. v. Corpus Christi Marine Servs. Co., 834 F.2d 1232, 1237-1238 (5th Cir. 1988)* ; *Templeman v. Chris Craft Corp., 770 F.2d 245, 249 (1st Cir. 1985)* .

(n6)Footnote 5. *Marino v. Town of Kirkland, 146 F.R.D. 49, 51 (N.D.N.Y. 1993)* .

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CHAPTER 47 Costs
A. Determining Recoverable Costs

4-47 Federal Litigation Guide § 47.07

§ 47.07 Recovering Docket Fees

Docket fees paid under § *28 U.S.C. § 1923* may be taxed as costs. n1 The amounts provided by *28 U.S.C. § 1923* for docket fees, however, are so small as to be virtually negligible.

If properly claimed, though, docket fees are taxable as costs. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsCourt & Marshal FeesCivil ProcedureRemediesCosts & Attorney FeesCostsDepositions & TranscriptsCivil ProcedureRemediesCosts & Attorney FeesCostsReproduction Costs

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1920(5).*

(n2)Footnote 2. *See, e.g., Templeman v. Chris Craft Corp., 770 F.2d 245, 249 (1st Cir. 1985) , cert. denied, 474 U.S. 1021 (1985) ; Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 486 (9th Cir. 1983) .*

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CHAPTER 47 Costs
A. Determining Recoverable Costs

4-47 Federal Litigation Guide § 47.08

§ 47.08 Recovering Witness Fees, Including Deposition Expenses

[1] Taxable Witness Fees

[1.--1] 28 U.S.C. § 1821 Fees

Any and all of the fees to which witnesses are entitled under *28 U.S.C. § 1821* are properly taxable as costs. n1

Those fees include a daily witness attendance fee [*see* [1.--2], *below*], travel expenses [*see* [1.--3], *below*], and in some circumstances, a subsistence allowance [*see* [1.--4], *below*].

[1.--2] Daily Witness Attendance Fees

Each witness is entitled to a daily attendance fee in the amount of $40 for each day spent going to or from the place of the trial, hearing, or deposition. n2

Taxation of daily witness attendance fees is limited to $40 per day, irrespective of whether the witness is a lay witness or an expert witness. n3 For discussion of taxation of expert witness fees in excess of the $40 statutory cap, *see* [2], *below*.

[1.--3] Witness Travel Expenses

Witness expenses for necessary travel to and from the place of the trial, hearing, or deposition are taxable. n4

The court's power to tax costs of witness travel is not limited to the geographic area of the court's subpoena power. n5

In general, the means of travel by the witness should be the most economical available. n6

[1.--4] Witness Subsistence Fees

A witness is entitled to a subsistence fee if overnight stays are required. n7

Subsistence fees paid to witnesses are taxable as costs. n8

The amount of the subsistence fee is capped at the maximum amount generally allowable to employees of the federal government under *5 U.S.C. § 5702*.

[2] Taxation of Expert Witness Fees in Excess of Statutory Cap

In general, taxation of witness fees is limited to $40 per day, irrespective of whether the witness is a lay witness or an expert witness. n9

Several fee-shifting statutes expressly authorize a fully compensatory award of expert witness fees. n10

If a federal statute authorizes the full recovery of expert witness fees, the proper method for seeking those expenses is a Rule 54(d)(2)(a) motion for "attorney's fees and related nontaxable expenses" [*see §§ 47.90 -47.98*].

A contract providing for fully compensatory expert witness fees is enforceable, and the full amount of those fees is taxable. n11

[3] Non-Testifying Witness

If a court order or some other extrinsic circumstance renders the testimony of a witness unnecessary, a paid witness fee may be taxed as a cost even though the witness never testified. n12

[4] Witness Includes Both Trial and Deposition Witness

Any and all of the fees to which to which witnesses are entitled under *28 U.S.C. § 1821* [*see* [1], *above*] are properly taxable as costs. n13

The statutory term witness as used in *28 U.S.C. §§ 1821* and *1920* is not defined, but has been judicially interpreted to mean not only witnesses at a trial or hearing in open court, but also deposition witnesses. n14

[5] Party Not Entitled to Witness Fees

A party is not a witness under *28 U.S.C. § 1821* or *28 U.S.C. § 1920*. Accordingly, a party is not entitled to witness fees. n15

[6] Subpoena Not Condition for Taxation of Witness Fees as Costs

Although some witnesses appear in response to a subpoena, others, notably paid expert witnesses, appear voluntarily. The issuance of a subpoena is not a condition of the witness's entitlement to fees, or to the taxation of those fees as costs. n16

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsDepositions & TranscriptsCivil ProcedureRemediesCosts & Attorney FeesCostsWitnesses

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1920(3).*

(n2)Footnote 2. *28 U.S.C. § 1821(b).*

(n3)Footnote 3. *Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 441-445, 107 S. Ct. 2494, 96 L. Ed. 2d 385 (1987)* .

(n4)Footnote 4. *See 28 U.S.C. § 1920(3).*

(n5)Footnote 5. *Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 231-232, 85 S. Ct. 411, 13 L. Ed. 2d 248 (1964)* .

(n6)Footnote 6. *E.g., Breazeale v. Smith 857 F.2d 258, 260-261 (5th Cir. 1988)* ; *Hemmerick v. Chrysler Corp., 769 F. Supp. 525, 530-531 (S.D.N.Y. 1991)* .

(n7)Footnote 7. *28 U.S.C. § 1821(d).*

(n8)Footnote 8. *See 28 U.S.C. § 1920(3)*; *Hemmerick v. Chrysler Corp., 769 F. Supp. 525, 530 (S.D.N.Y. 1991)* .

(n9)Footnote 9. *Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 441-445, 107 S. Ct. 2494, 96 L. Ed. 2d 385 (1987)* .

(n10)Footnote 10. *E.g., 15 U.S.C. §§ 2618(d), 2619(c)(2)*; *28 U.S.C. § 2412*; *42 U.S.C. § 1988(c).*

(n11)Footnote 11. *TCBY Sys., Inc. v. RSP Co., 33 F.3d 925, 931 (8th Cir. 1994)* .

(n12)Footnote 12. *See 28 U.S.C. § 1821(a)(1)*; *United States ex rel. Evergreen Pipeline Constr. Co. v. Merritt Meridian Constr. Corp., 95 F.3d 153, 173 (2d Cir. 1996)* .

(n13)Footnote 13. *See 28 U.S.C. § 1920(3)*; *28 U.S.C. § 1821.*

(n14)Footnote 14. *Demarest v. Manspeaker, 498 U.S. 184, 187-191, 111 S. Ct. 599, 112 L. Ed. 2d 608 (1991)* ; *McCombs v. Meijer, Inc., 395 F.3d 346, 361 (6th Cir. 2005)* .

(n15)Footnote 15. *Haroco, Inc. v. American Nat'l Bank & Trust Co., 38 F.3d 1429, 1442 (7th Cir. 1994)* ; *Hodge v. Seiler 558 F.2d 284, 287 (5th Cir. 1977)* .

(n16)Footnote 16. *See Demarest v. Manspeaker, 498 U.S. 184, 189, 111 S. Ct. 599, 112 L. Ed. 2d 608 (1991)* .

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CHAPTER 47 Costs
A. Determining Recoverable Costs

4-47 Federal Litigation Guide § 47.09

§ 47.09 Recovering Expenses for Production of Documentary and Other Non-Testimonial Evidence

[1] Exemplification and Copying Expenses

"Fees for exemplification and copies of papers necessarily obtained for use in the case" are taxable, unless the court otherwise directs. n1

This provision permits taxation of photocopying costs. n2

[2] Trial Exhibits, Photographs, Maps, and Chart Expenses

[2.--1] Generally Taxable

Expenses incurred in producing documentary, non-testimonial evidence, such as trial exhibits, photographs, maps, charts, graphs, motion pictures, and kindred materials are taxable as *28 U.S.C. § 1920(4)* costs. n3

Actual use of the evidence is not a prerequisite to a finding that the evidence was obtained necessarily. If the expense is required or approved by the court, its necessity is established. n4

Computer animations, videos, Powerpoint presentations, and graphic illustrations used to explain the case to the jury and the trial court generally do not qualify as "exemplification" costs recoverable under *28 U.S.C. § 1920(4)*. n4.1

[2.--2] Necessary Professional Expenses in Producing Evidence Recoverable

Taxation of costs for demonstrative evidence is not limited to the cost of physical production and copying of the evidence. Any required expenses of professionals in producing the evidence may also be taxed as costs. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsDepositions & TranscriptsCivil ProcedureRemediesCosts & Attorney FeesCostsReproduction CostsCivil ProcedureRemediesCosts & Attorney

FeesCostsWitnesses

FOOTNOTES:

(n1)Footnote 1. *28 U.S.C. § 1920(4).*

(n2)Footnote 2. *United States ex rel. Evergreen Pipeline Constr. Co. v. Merritt Meridian Constr. Corp., 95 F.3d 153, 173 (2d Cir. 1996)* ; *Commercial Credit Equip. Corp. v. Stamps 920 F.2d 1361, 1367 (7th Cir. 1990)* ; *Maxwell v. Hapag. Lloyd Aktiengesell Schaft, 862 F.2d 767, 770 (9th Cir. 1988)* .

(n3)Footnote 3. In *Re Kulicke & Soffa Indus., Inc. Litig. 747 F.Supp. 1136, 1147 (E.D. Pa. 1990)* , *aff'd without opinion*, *944 F.2d 897 (3d Cir. 1991)* ; *cf. Studiengesellschaft Kohle MbH v. Eastman Kodak Co., 713 F.2d 128, 132-133 (5th Cir. 1983)* ; In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975, *687 F.2d 626, 631 (2d Cir. 1982)* .

(n4)Footnote 4. *M.T. Bonk Co. v. Milton Bradley Co., 945 F.2d 1404 (7th Cir. 1990)* ; *McGuigan v. CAE Link Corp., 155 F.R.D. 31, 37 (N.D.N.Y. 1994)* .

(n5)Footnote 4.1. *See Summit Tech., Inc. v. Nidek Co., 435 F.3d 1371, 1375-1378 (Fed. Cir. 2006)* (citing **Moore's Federal Practice**).

(n6)Footnote 5. In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975, *687 F.2d 626, 631 (2d Cir. 1982)* .

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CHAPTER 47 Costs
A. Determining Recoverable Costs

4-47 Federal Litigation Guide § 47.10

§ 47.10 Recovering Expenses of Court Appointed Experts or Interpreters

The following expenses are taxable: n1

- Compensation of court appointed experts
- Compensation of interpreters
- Salaries, fees, expenses, and costs of special interpretation services under *28 U.S.C. § 1828*

Taxation of costs for a court appointed expert witness is not subject to the statutory limitation of $40 per day applicable when an expert appears for one of the parties [*see § 47.08[1.--2]*].

The fees of an interpreter who translates depositions or other documents may be taxed. n2 Likewise, the fees of a trial interpreter may be taxed against the losing party. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsDepositions & TranscriptsCivil ProcedureRemediesCosts & Attorney FeesCostsReproduction CostsCivil ProcedureRemediesCosts & Attorney FeesCostsWitnessesEvidenceTestimonyExpertsCourt-Appointed ExpertsCompensation

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1920(6).*

(n2)Footnote 2. *BDT Prods. v. Lexmark Int'l, Inc., 405 F.3d 415, 419 (6th Cir. 2005) .*

(n3)Footnote 3. *See Cruz v. Local Union No. 3, 150 F.R.D. 29, 37 (S.D.N.Y. 1993) .*

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CHAPTER 47 Costs
A. Determining Recoverable Costs

4-47 Federal Litigation Guide § 47.11

§ 47.11 Recovering Costs with Respect to Government Litigants

[1] Government May Collect Costs From Private Litigants

The federal government is entitled to an award of costs to the same extent as any private litigant, unless some statute, rule, or regulation provides otherwise. n1

Similarly, any state may be awarded costs under Rule 54(d)(1).

[2] Understanding the Equal Access to Justice Act

The Equal Access to Justice Act (EAJA) contains three fee-shifting provisions, found in two different sections of the United States Code, *5 U.S.C. § 504* and *28 U.S.C. § 2412*. The EAJA is markedly different from other fee-shifting provisions in federal law in that it is not keyed to the type of case involved, but rather is tied to the presence of a federal governmental entity as a party in the action. Section 504 permits an award of fees by an administrative agency against the government in an adversary adjudication. n2 The other two fee-shifting provisions of the EAJA, 2412(b) and (d), apply to fee awards by federal courts and are likewise not restricted to particular types of cases; instead, they provide for fees to the prevailing party in any civil action brought by or against the United States. n3 Under the provisions of *28 U.S.C. §§ 2412(b)* and *(d)*, the United States may be assessed fees by a court in any civil action.

The EAJA is a gap-filling statute. It generally does not apply when another, more specific statute either permits or precludes a fee award; the EAJA authorizes fees only if the issue of fees is not addressed by the substantive law governing the action. If the more specific fee-shifting provision is exclusive, no resort to the EAJA is permitted, and fees may be awarded only under the standards set forth in the more specific statute. n4 The fee-shifting provisions of *28 U.S.C. 2412(b)* and *(d)* both provide that if the substantive federal law at issue precludes fees, the more specific law governs and fees are not available. n5

If the substantive law contains a fee-shifting provision and the statute does not explicitly state that its provision is exclusive, the EAJA may supplement the provisions of the other fee-shifting statute. In such circumstances, the prevailing party should be given the benefit of whichever statute provides the more relaxed standard for awarding fees. n6

[3] Evaluating Government Fee Liability Under EAJA

Under *28 U.S.C. § 2412(b)*, unless prohibited by statute a court may award reasonable fees and attorney's fees to the prevailing party in any civil action brought by or against the United States. Section 2412(b) further states that the government shall be liable for fees to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award. n7 This provision places the government on an equal footing with private litigants and exposes the government to fee liability whenever a private litigant could be charged with such fees.

[4] Evaluating the Net Worth Limitation Under the EAJA

The mandatory fee-shifting provisions of the EAJA provide for an award of attorney's fees to the prevailing party other than the United States. n8 Thus, in order to be eligible for a fee award under the EAJA, the fee claimant must be a party in proceedings against the government. n9 The EAJA was designed to ensure that parties with limited resources would be able to litigate against the government on an equal footing; therefore, to qualify as a party, a litigant may not exceed certain net worth maximums, a requirement that has been upheld as constitutional. n10

A movant requesting fees under 2412(d) bears the burden of qualifying under the net worth requirements. n11 In general, individuals may not exceed a net worth of $2,000,000, and corporations or other organizations may not exceed a net worth of $7,000,000. n12 In determining the prevailing party's net worth, the court should apply generally accepted accounting principles (GAAP). n13

[5] Limiting Recovery of Fees to Those Incurred

Section 2412(d) provides that the United States may be assessed fees and costs that were incurred by the prevailing party in the civil action. n14 Fees and costs incurred by a party ordinarily are the prevailing market rates billed by the party's attorney for the relevant services and expenses, not the attorney's actual cost for those items. The circuits are split on the question whether a prevailing party "incurs" fees that have been paid by a third party. The Ninth and Federal Circuits have held that a party "incurs" fees paid on his or her behalf by a third party even if the party's obligation to repay that third party is contingent on obtaining an award of those fees. n15

The Eighth Circuit, in contrast, has held that a contingent obligation to repay fees does not constitute "incurring" fees under the EAJA. n16 Under either view of what constitutes "incurring" fees, an award of fees and costs cannot be greater than the amount incurred. n17

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsDepositions & TranscriptsCivil ProcedureRemediesCosts & Attorney FeesCostsReproduction CostsCivil ProcedureRemediesCosts & Attorney FeesCostsWitnesses

FOOTNOTES:
(n1)Footnote 1. *Pine River Logging & Improvement Co. v. United States, 186 U.S. 279, 296, 22 S. Ct. 920, 46 L. Ed. 1164 (1902)* ; *see also 28 U.S.C. § 2412(a)(1).*

(n2)Footnote 2. *5 U.S.C. 504(a)(1), (b)(1)(C).*

(n3)Footnote 3. *28 U.S.C. § 2412(b), (d).*

(n4)Footnote 4. *EEOC v. Consolidated Service Sys., 30 F.3d 58, 58-59 (7th Cir. 1994)* .

(n5)Footnote 5. *28 U.S.C. § 2412(b), (d).*

(n6)Footnote 6. *EEOC v. O & G Spring & Wire Forms Specialty, 38 F.3d 872, 880-884 (7th Cir. 1994)* .

(n7)Footnote 7. *28 U.S.C. § 2412(b).*

(n8)Footnote 8. *5 U.S.C. § 504*; *28 U.S.C. § 2412(d).*

(n9)Footnote 9. *Manning v. Astrue, 510 F.3d 1246, 1249-1255 (10th Cir. 2007)* .

(n10)Footnote 10. *Richard v. Hinson, 70 F.3d 415, 417 (5th Cir. 1995)* .

(n11)Footnote 11. *See Sosebee v. Astrue, 494 F.3d 583, 586-589 (7th Cir. 2007)* .

(n12)Footnote 12. *5 U.S.C. 504(b)(1)(B)*; *28 U.S.C. § 2412(d)(2)(B).*

(n13)Footnote 13. *See Broaddus v. United States Army Corps of Engrs, 380 F.3d 162, 166-173 (4th Cir. 2004)* .

(n14)Footnote 14. *5 U.S.C. 504(b)(1)(B)*; *28 U.S.C. 2412(d)(2).*

(n15)Footnote 15. *Morrison v. Commissioner, 565 F.3d 658, 662-663 (9th Cir. 2009)* ; *Ed A. Wilson, Inc. v. General Servs. Admin., 126 F.3d 1406, 1407 (Fed. Cir. 1997)* .

(n16)Footnote 16. *SEC v. Comserv Corp., 908 F.2d 1407, 1413-1414 (8th Cir. 1990)* .

(n17)Footnote 17. *United States v. Paisley, 957 F.2d 1161, 1164 (4th Cir. 1992)* .

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CHAPTER 47 Costs
A. Determining Recoverable Costs

4-47 Federal Litigation Guide § 47.12

§ 47.12 Posting Security for Costs

The district court has the inherent power to require any party to an action to furnish security, in the form of a bond or other type of undertaking, for any other party's costs. n1 The matter is completely discretionary with the court, but is seldom used.

Some districts have promulgated local district court rules governing requests for security for costs. n2 The circumstances under which those requests will be granted, and the type of showing required in support of the request, vary from one rule to another. Generally, the main consideration in deciding whether to impose a security requirement is whether prejudice will result to the party seeking security if that party is required to incur large costs, which the party against whom security is sought cannot pay if it loses the action.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewGovernmentsCourtsRule Application & Interpretation

FOOTNOTES:
(n1)Footnote 1. *See Anderson v. Steers, Sullivan, McNamar & Rogers, 998 F.2d 495 (7th Cir. 1991) .*

(n2)Footnote 2. *See, e.g.,* S.D.N.Y. & E.D.N.Y., Local Rule 54.2.

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CHAPTER 47 Costs
A. Determining Recoverable Costs

4-47 Federal Litigation Guide §§ 47.13 through 47.19

[Reserved]

§§ 47.13[Reserved]

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CHAPTER 47 Costs
B. Determining Which Party Is Entitled to Costs

4-47 Federal Litigation Guide § 47.20

§ 47.20 Prevailing Party Presumed Entitled to Costs

Unless the court exercises its discretion to order otherwise, or a contrary express provision is made either in a federal statute or rule, the prevailing party is entitled to an award of costs as a matter of course. n1 The phrase *as a matter of course* has been interpreted to mean that the prevailing party is presumed to be entitled to costs. n2

There is no right of contribution among co-parties against whom costs have been awarded. Generally, parties against whom costs have been awarded are jointly and severally liable for the cost award, unless the court rules that one or more of them is responsible for a disproportionate share of the costs. n2.1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsDepositions & TranscriptsCivil ProcedureRemediesCosts & Attorney FeesCostsReproduction CostsCivil ProcedureRemediesCosts & Attorney FeesCostsWitnesses

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 54(d)(1).*

(n2)Footnote 2. *National Info. Servs. v. TRW, Inc., 51 F.3d 1470, 1471-1472 (9th Cir. 1995)* ; *Sally v. E.I. CuPont de NeMours & Co., 966 F.2d 1011, 1017 (5th Cir. 1985)* (citing **Moore's Federal Practice**); *Mercy v. County of Suffolk, 748 F.2d 52, 54 (2d Cir. 1984)* ; *Delta Airlines, Inc. v. Colbert, 692 F.2d 489, 490 (7th Cir. 1982)* .

(n3)Footnote 2.1. *Anderson v. Griffin, 397 F.3d 515, 523-524 (7th Cir. 2005)* .

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CHAPTER 47 Costs
B. Determining Which Party Is Entitled to Costs

4-47 Federal Litigation Guide § 47.21

§ 47.21 *Prevailing Party* Defined

The term *prevailing party* generally means the party in whose favor judgment was entered. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsDepositions & TranscriptsCivil ProcedureRemediesCosts & Attorney FeesCostsReproduction CostsCivil ProcedureRemediesCosts & Attorney FeesCostsWitnesses

FOOTNOTES:
(n1)Footnote 1. *Head v. Medford, 62 F.3d 351, 354-355 (11th Cir. 1995)* ; *Roberts v. Madigan 921 F.2d 1047, 1058 (10th Cir. 1990)* ; *Schwarz v. Folloder 767 F.2d 125, 130-131 (5th Cir. 1985)* (citing **Moore's Federal Practice**).

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CHAPTER 47 Costs
B. Determining Which Party Is Entitled to Costs

4-47 Federal Litigation Guide § 47.22

§ 47.22 Departing From Presumption of Costs to Prevailing Party

[1] Court May Limit or Deny Award of Costs to Prevailing Party

Despite the presumption that the prevailing party is entitled to an award of costs [see *§ 47.20*], Rule 54(d)(1) nevertheless grants the court discretion to limit or deny taxable costs to the prevailing party. n1

[2] Discretion May Be Limited by Federal Statute or Rule

The discretion to tax costs granted by Rule 54(d)(1) [*see* [1], *above*] is subject to any express provision in a federal statute or a Federal Rule of Civil Procedure.

A number of statutes state that the court may award costs in its discretion. Such a provision is not contrary to Rule 54(d)(1), and does not displace the court's discretion under the Rule. n2

Other federal statutes explicitly mandate or prohibit an award of costs in particular circumstances, removing the court's discretion under the Rule 54(d)(1). n3

In order for the statute to be considered contrary to Rule 54(d)(1), it must specifically mention the term costs. n4

[3] Losing Party Bears Burden of Demonstrating That Costs Should Be Denied or Limited

The losing party bears the burden of demonstrating that costs should be denied or limited. The losing party's good faith is irrelevant, and cannot overcome the presumption in favor of an award of costs. n5

To overcome the presumption in favor of an award of costs to the prevailing party [*see § 47.20*], the losing party generally must show some misconduct on the part of the prevailing party. n6

[4] Denial Or Limitation of Costs Must Be Explained

Any decision to deny or limit otherwise taxable costs to the prevailing party must be explained by the district court. n7 Although the fact that a case is "close and difficult" may serve as a ground for denying costs to the prevailing party, a district court does not abuse its discretion merely because it awards costs in such a close and difficult case. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewEvidenceInferences & PresumptionsPresumptionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 441-445, 107 S. Ct. 2494, 96 L. Ed. 2d 385 (1987)* .

(n2)Footnote 2. *E.g.,* Fair Housing Act, *42 U.S.C. § 3613(c)(2).*

(n3)Footnote 3. *See, e.g., United States v. D.K.G. Appaloosas Inc., 829 F.2d 532, 539 (5th Cir. 1987)* ; *SEC v. Kaufman, 835 F. Supp. 157, 159 (S.D.N.Y. 1993)* .

(n4)Footnote 4. *United States ex rel. Lindenthal v. General Dynamics Corp., 61 F.3d 1402, 1412-1414 (9th Cir. 1995)* .

(n5)Footnote 5. *National Info. Servs. v. TRW, Inc., 51 F.3d 1470, 1471-1472 (9th Cir. 1995)* ; *McGill v. Faulkner 18 F.3d 456, 459 (7th Cir. 1994)* ; *White & White v. American Hosp. Supply Corp. 786 F.2d 728, 731 (6th Cir. 1986)* .

(n6)Footnote 6. *Smith v. Southeastern Penn. Transp. Auth., 47 F.3d 97, 99 (3d Cir. 1995)* ; *see, e.g., Sally v. E.I. CuPont de NeMours & Co., 966 F.2d 1011, 1017 (5th Cir. 1985)* (citing **Moore's Federal Practice**); *Litton Sys., Inc. v. AT&T, 700 F.2d 785, 827 (2d Cir. 1983)* .

(n7)Footnote 7. *Head v. Medford, 62 F.3d 351, 354 (11th Cir. 1995)* ; *National Info. Servs. v. TRW, Inc., 51 F.3d 1470, 1471-1472 (9th Cir. 1995)* ; *Hall v. State Farm & Fire Cas. Co., 937 F.2d 210, 216-217 (5th Cir. 1991)* .

(n8)Footnote 8. *See McDonald v. Petree, 409 F.3d 724, 732 (6th Cir. 2005)* .

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CHAPTER 47 Costs
B. Determining Which Party Is Entitled to Costs

4-47 Federal Litigation Guide §§ 47.23 through 47.29

[Reserved]

§§ 47.23[Reserved]

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CHAPTER 47 Costs
C. Preparing Bill of Costs

4-47 Federal Litigation Guide § 47.30

§ 47.30 Deadline for Filing Bill of Costs

[1] Deadline Established by Local District Court Rules

Rule 54(d)(1) does not provide any specific deadline within which a bill of costs must be filed. In the absence of a uniform time period in the national rules, the matter is left to the local rules of the individual district courts. n1

It is generally improper to file a bill costs before judgment has been entered. n2

[2] Deadline May Be Extended

The deadline provided in a local district court rule for filing a bill of costs [*see* [1], *above*] is not jurisdictional. Accordingly, the district court may extend the time, or may choose to permit an untimely motion or bill. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Congregation of the Passion v. Touche, Ross & Co., 854 F.2d 219, 221-223 (7th Cir. 1988)* ; *Wakefield v. Northern Telecom, Inc., 813 F.2d 535, 542 (2d Cir. 1987)* .

(n2)Footnote 2. *Knighton v. Watkins, 616 F.2d 795, 798 (5th Cir. 1980)* (citing **Moore's Federal Practice**); *Repp v. Webber, 892 F. Supp. 552, 560 (S.D.N.Y. 1995)* ; *Friends For All Children, Inc. v. Lockheed Aircraft Corp. 725 F.2d 1392, 1399 (D.C. Cir. 1984)* .

(n3)Footnote 3. *LoSacco v. City of Middletown, 71 F.3d 88, 92-93 (2d Cir. 1995)* ; *S.A. Healy Co. v. Milwaukee Metro. Sewage Dist., 60 F.3d 305, 308-309 (7th Cir. 1995)* ; *see Hernandez v. George 793 F.2d 264, 267-268 (10th Cir. 1986)* .

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CHAPTER 47 Costs
C. Preparing Bill of Costs

4-47 Federal Litigation Guide § 47.31

§ 47.31 Filing of Appeal May Stay Taxation of Costs

Local district court rules should be consulted to determine whether the filing of an appeal stays the taxation of costs.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureAppealsGeneral Overview

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CHAPTER 47 Costs
C. Preparing Bill of Costs

4-47 Federal Litigation Guide § 47.32

§ 47.32 Submitting Verified Bill of Costs

A party seeking costs must file a bill of costs, accompanied by an affidavit, made either by the party, the party's attorney, or the party's agent with knowledge of the facts, attesting to the fact that: n1

- The items are correct
- The costs incurred were necessarily incurred in the case
- The services for which fees have been charged were actually and necessarily performed

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsReproduction Costs

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1924.*

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CHAPTER 47 Costs
C. Preparing Bill of Costs

4-47 Federal Litigation Guide § 47.33

§ 47.33 Advance Notice Must Be Given to Losing Party

[1] Costs Generally Taxed by Clerk on 14 Days' Notice

The initial obligation for the taxing of costs falls upon the clerk of the court. n1 However, the Sixth Circuit has held that a district court has inherent and statutory authority to act on motions related to costs prior to any action by the clerk. n1.1

The losing party must be given 14 days' notice of the proposed bill of costs before the clerk may tax costs. n2

If the notice is served by mail, the clerk must wait an additional three days before taxing costs. n3

[2] Local District Court Rules May Require More Notice

Local district court rules may require more than one day's notice of the proposed bill of costs before the clerk may tax costs.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsReproduction Costs

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 54(d)(1).*

(n2)Footnote 1.1. *BDT Prods. v. Lexmark Int'l, Inc., 405 F.3d 415, 417-419 (6th Cir. 2005) .*

(n3)Footnote 2. *Fed. R. Civ. P. 54(d)(1).*

(n4)Footnote 3. *See Fed. R. Civ. P. 6(d); United States v. Carson, 52 F.3d 1173, 1190 (2d Cir. 1995) .*

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CHAPTER 47 Costs
C. Preparing Bill of Costs

4-47 Federal Litigation Guide §§ 47.34 through 47.39

[Reserved]

§§ 47.34[Reserved]

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CHAPTER 47 Costs
D. Objecting to Bill of Costs

4-47 Federal Litigation Guide § 47.40

§ 47.40 Losing Party Has Right to Object to Bill of Costs

The losing party may object to the taxation of costs, either in whole or in part, in favor of the prevailing party.

In general, the failure to object to the taxation of costs properly claimed in the bill of costs is a concession to each and every item contained in the bill, unless the clerk abused its discretion in taxing items without statutory authorization. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsReproduction Costs

FOOTNOTES:
(n1)Footnote 1. *United States v. Local No. 1804-1, No. 90-C0963, 1994 U.S. Dist. LEXIS 611, at *2 (S.D.N.Y. Jan. 25, 1994)* .

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CHAPTER 47 Costs
D. Objecting to Bill of Costs

4-47 Federal Litigation Guide § 47.41

§ 47.41 Deadline for Objecting to Bill of Costs

Objections to a bill of costs must be filed prior to the time at which the clerk may properly tax costs.

The losing party is entitled to 14 days' advance notice of the proposed bill of costs. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 54(d)(1)*; *see § 47.33*.

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CHAPTER 47 Costs
D. Objecting to Bill of Costs

4-47 Federal Litigation Guide § 47.42

§ 47.42 Particular Objections

[1] Challenging Court Reporter Fees Not Necessarily Obtained

Fees of the court reporter are taxable only if necessarily obtained for use in the case. n1

For discussion of the types of fees recoverable under *28 U.S.C. § 1920(2)*, *see § 47.05*.

The party opposing the application for taxation of court reporter fees should focus on whether those fees were necessarily obtained for use in the case. For example, if the fees incurred served no purpose other than counsel's convenience (for example, expedited daily transcript fees), taxation of that expense as a cost will be denied. n2

[2] Challenging Trial Witness Fees

In general, taxation of daily witness attendance fees is limited to $40 per day, irrespective of whether the witness is a lay witness of an expert witness. n3

[3] Challenging Production of Copies or Documentary Evidence Not Necessarily Obtained

"Fees for exemplification and copies of papers necessarily obtained for use in the case" are taxable, unless the court otherwise directs. n4

For discussion of the types of fees recoverable under this provision, *see § 47.09*.

The party opposing the application for taxation of *28 U.S.C. § 1920(4)* fees should focus on whether those fees were necessarily obtained for use in the case.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureJudicial OfficersCourt ReportersGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesCosts & Attorney

FeesCostsDepositions & TranscriptsCivil ProcedureRemediesCosts & Attorney FeesCostsReproduction Costs

FOOTNOTES:

(n1)Footnote 1. *28 U.S.C. § 1920(2).*

(n2)Footnote 2. *McIlveen v. Stone Container Corp., 910 F.2d 1581, 1582-1583 (7th Cir. 1990)* ; *U.S. Indus., Inc. v. Touche Ross & Co., 854 F.2d 1223, 1247-1248 (10th Cir. 1988)* ; *McDowell v. Safeway Stores, Inc., 758 F.2d 1293, 1294 (8th Cir. 1985)* .

(n3)Footnote 3. *Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 441-445, 107 S. Ct. 2494, 96 L. Ed. 2d 385 (1987)* ; *Stryker Corp. v. Intermedics Orthopedics, Inc., 898 F. Supp. 116, 121-122 (E.D.N.Y. 1995)* ; *see § 47.08[1.--2].*

(n4)Footnote 4. *28 U.S.C. § 1920(4)*; *see Fed. R. Civ. P. 54(d)(1).*

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CHAPTER 47 Costs
D. Objecting to Bill of Costs

4-47 Federal Litigation Guide §§ 47.43 through 47.49

[Reserved]

§§ 47.43[Reserved]

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CHAPTER 47 Costs
E. Seeking Review of Clerk's Taxation of Costs

4-47 Federal Litigation Guide § 47.50

§ 47.50 Clerk's Action Subject to De Novo Review

If a timely motion for review by the court is filed [*see § 47.51*], the district court should make a de novo determination of the costs issue. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsDepositions & TranscriptsCivil ProcedureRemediesCosts & Attorney FeesCostsReproduction CostsCivil ProcedureAppealsStandards of ReviewDe Novo Review

FOOTNOTES:
(n1)Footnote 1. *See Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 233, 85 S. Ct. 411, 13 L. Ed. 2d 248 (1964)* .

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CHAPTER 47 Costs
E. Seeking Review of Clerk's Taxation of Costs

4-47 Federal Litigation Guide § 47.51

§ 47.51 Motion Required Within Seven Days of Clerk's Action

A party seeking review of the clerk's taxation of costs must file a motion with the court within seven days of the clerk's action. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsDepositions & TranscriptsCivil ProcedureRemediesCosts & Attorney FeesCostsReproduction Costs

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 54(d)(1).*

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CHAPTER 47 Costs
E. Seeking Review of Clerk's Taxation of Costs

4-47 Federal Litigation Guide § 47.52

§ 47.52 Failure to File Motion Waives Any Objection to Clerk's Taxation of Costs

If the party against whom costs were taxed fails to file a timely motion to review the clerk's action, any objections are waived, and the district court is not obliged to review the taxation of costs. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsDepositions & TranscriptsCivil ProcedureRemediesCosts & Attorney FeesCostsReproduction Costs

FOOTNOTES:
(n1)Footnote 1. *Prince v. Poulos, 876 F.2d 30, 33-34 (5th Cir. 1989)* ; *Rowe v. Maremount Corp., 850 F.2d 1226, 1244 (7th Cir. 1988)* .

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CHAPTER 47 Costs
E. Seeking Review of Clerk's Taxation of Costs

4-47 Federal Litigation Guide § 47.53

§ 47.53 Time May Be Extended

The seven-day period within which a motion to review the clerk's taxation of costs must be filed [*see § 47.51*] may be extended, or alternatively, the court in its discretion may consider an untimely motion. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsDepositions & TranscriptsCivil ProcedureRemediesCosts & Attorney FeesCostsReproduction Costs

FOOTNOTES:
(n1)Footnote 1. *Lorenz v. Valley Forge Ins. Co., 23 F.3d 1259, 1260 (7th Cir. 1994)* ; *McLeod, Alexander, Powel & Apfell, P.C. v. Quarles 894 F.2d 1482, 1488 n.6 (5th Cir. 1990)* .

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CHAPTER 47 Costs
E. Seeking Review of Clerk's Taxation of Costs

4-47 Federal Litigation Guide §§ 47.54 through 47.59

[Reserved]

§§ 47.54 [Reserved]

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CHAPTER 47 Costs
F. Determining Whether Attorney's Fees Are Recoverable

4-47 Federal Litigation Guide § 47.60

§ 47.60 Grounds for Recovering Attorney's Fees Must Be Found in Fee-Shifting Statute

Although Rule 54(d)(2) provides the procedure for the recovery of attorney's fees in federal court, that rule does not and cannot provide a basis for the recovery of those fees. Instead, the legal ground for fee recovery must be found in the substantive law governing the action. In general, the so-called American Rule prohibits the recovery of fees in federal court, absent a specific congressional authorization of fee-shifting. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Perdue v. Kenny A., __ U.S. __, 130 S. Ct. 1662, 176 L. Ed. 2d 494, 504 (2010)*; *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257-261, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975)* .

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CHAPTER 47 Costs
F. Determining Whether Attorney's Fees Are Recoverable

4-47 Federal Litigation Guide § 47.61

§ 47.61 Determining Whether Statute Authorizes Fee-Shifting

[1] Statute Must Expressly Mention Attorney's Fees

Hundreds of federal statutes explicitly provide for an award of attorney's fees in a federal action. The vast majority of those are true fee-shifting statutes, in which the losing party is required to pay the entire litigation expense of the prevailing party. Thus, in every action in which a federal claim is presented, it is incumbent upon the attorneys to determine whether one or more fee-shifting statutes attach to the claims presented.

The statute at issue must expressly mention attorney's fees, because the statutory abrogation of the American Rule cannot be inferred. n1

[2] Invoking State Law in Diversity Actions

State fee-shifting statutes are to be applied in federal actions in which diversity of citizenship forms the basis for the court's subject matter jurisdiction. n2

However, the federal bad faith exception [*see § 47.63[3]*] is applicable even in diversity actions. n3

If state law claims are brought as claims within the federal court's supplementaljurisdiction under *28 U.S.C. § 1367*, a party prevailing on pendent state claims may rely on a state fee-shifting provision to recover attorney's fees, so long as the state law has not been preempted by contrary federal law. n4

In most cases, however, the federal claim to which the state claims are pendent will also authorize fee-shifting, so that there will be no need to rely on the state law. If, however, the federal claims are dismissed prior to trial, the federal fee-shifting statute will not support an award of attorney's fees for prevailing on only the pendent state claims; instead, fees are available only if the pendent state claims authorize fee-shifting. n5

[3] Discretionary Fee-Shifting Statutes

Some fee-shifting statutes provide for a mandatory award of attorney's fees by stating that a prevailing party is entitled to recover attorney's fees. Most fee-shifting statutes, however, are discretionary in nature.

Many discretionary fee-shifting statutes expressly contain the criteria to be applied by the court. Others, however, are entirely a matter of judicial construction. In every case it is incumbent on the attorneys to research the applicable criteria.

[4] Pro Se Party Not Entitled to Fee Award

Obtaining an award of attorney's fees is contingent upon the existence of an attorney-client relationship. Accordingly, a pro se party, whether a lay person or attorney representing himself or herself, may not collect attorney's fees under a fee-shifting statute. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Key Tronic Corp. v. United States, 511 U.S. 809, 815, 114 S. Ct. 1960, 128 L. Ed. 2d 797 (1994)* .

(n2)Footnote 2. *See Sioux County v. National Surety Co., 276 U.S. 238, 239-241, 48 S. Ct. 239, 72 L. Ed. 547 (1928)* .

(n3)Footnote 3. *Chambers v. NASCO, Inc., 501 U.S. 32, 51-55, 111 S. Ct. 2123, 2136-2138, 115 L. Ed. 2d 27 (1991)* .

(n4)Footnote 4. *E.g., Milwe v. Cavuoto, 653 F.2d 80, 84 (2d Cir. 1981)* .

(n5)Footnote 5. *Lightfoot v. Union Carbide Corp., 110 F.3d 898, 913-914 (2d Cir. 1997)* .

(n6)Footnote 6. *Kay v. Ehrler, 499 U.S. 432, 435-436, 111 S. Ct. 1435, 113 L. Ed. 2d 486 (1991)* ; *Krecioch v. United States, 316 F.3d 684, 687-688 (7th Cir. 2003)* .

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CHAPTER 47 Costs
F. Determining Whether Attorney's Fees Are Recoverable

4-47 Federal Litigation Guide § 47.62

§ 47.62 Determining Prevailing Party

[1] Plaintiff Is Prevailing Party If Success on Issues Achieves Some of Benefit Sought and Changes Relationship Between Plaintiff and Defendant

Although the various federal fee-shifting statutes employ a variety of wording, the most common formulation simply states that the prevailing party may be entitled to collect attorney's fees from the losing party.

The plaintiff is considered to be the prevailing party under a fee-shifting statute if the plaintiff succeeds on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit, and the suit is resolved in a way that changes the legal relationship between the plaintiff and the defendant. n1

Because the prevailing party test requires only that the suit obtain some of the benefit sought, the fact that the entire relief sought in the action was not obtained does not preclude prevailing party status. n2

A decision by a court that the defendant has violated the law, but that the plaintiff is not entitled to any relief, does not make the plaintiff a prevailing party for purposes of recovering attorney's fees. n3

A preliminary injunction that grants only temporary relief that merely maintains the status quo pendente lite is not, without more, a judicially sanctioned material alteration of the parties' legal relationship that confers "prevailing party" status for purposes of awarding attorney's fees. n4

A plaintiff who gains a preliminary injunction does not qualify for an award of attorney fees as the prevailing party if the merits of the case are ultimately decided against the plaintiff. The Supreme Court has held that prevailing party status does not result from a preliminary injunction that is reversed, dissolved, or otherwise undone by the court's final decision. n5

[2] Plaintiff May Be Prevailing Party Even If Relief Obtained Is Only Nominal Damages

An award of nominal damages is sufficient under the "achievement of benefit" test [(*see* [1], *above*), because it changes the legal relationship between the plaintiff and defendant by forcing the defendant to pay money to the plaintiff. However, because the relief obtained is so limited, a recovery of nominal damages generally results in denial of attorney's fees. n6

If the plaintiff can point to some benefit derived from the action other than the award of nominal damages, a fully compensatory award of attorney's fees may nevertheless be obtained. n7

[3] Plaintiff Is Prevailing Party If Case Is Dismissed Pursuant to Settlement

If the plaintiff secures some of the relief sought through settlement, the plaintiff generally is the prevailing party even though no formal judgment of the court on the merits finds the defendant liable. n8 However, some courts have held that a plaintiff who obtains an out-of-court settlement and then voluntarily dismisses his or her action is not a "prevailing party" for purposes of obtaining an award of attorney's fees. n9 A settlement that is executed before the commencement of any administrative or judicial proceeding does not allow one to bring an independent action for the attorney's fees which were incurred to obtain the settlement agreement. n10

[4] Determining Prevailing Party If Suit Was Catalyst for Unilateral Action of Defendant That Mooted Case

The Supreme Court has rejected the "catalyst theory" and held that a plaintiff who fails to secure a favorable judgment is not a "prevailing party" for purposes of federal fee-shifting statutes. The Court thus overruled the majority of circuits, which had held under the "catalyst theory" that a plaintiff who failed to secure a favorable judgment could nevertheless be treated as the prevailing party if the plaintiff's lawsuit achieved the desired result by bringing about a voluntary change in the defendant's conduct. n11

However, applying the fee provision of the Surface Mining Control and Reclamation Act, the Fourth Circuit held that the catalyst theory remains available to recover attorney's fees in a mooted action under environmental fee statutes that do not contain an express "prevailing party" requirement. n12 The Federal Circuit, on the other hand, held that because mootness is a jurisdictional doctrine, the court must dismiss a mooted action, and may not enter judgment for the plaintiff merely to preserve a plaintiff's eligibility for attorney's fees under a "prevailing party" fee-shifting statute such as the Equal Access to Justice Act (EAJA). n13

[5] Defeating Suit on Merits Makes Defendant Prevailing Party

Because a plaintiff establishes prevailing party status by achieving some of the benefit sought in bringing suit (*see* [1], *above*), a defendant can be a prevailing party only if the plaintiff obtains absolutely no relief whatsoever from the litigation, and the suit is resolved in a way that does not change the legal relationship between the plaintiff and defendant. Because a resolution of the case without a determination on the merits generally leaves the plaintiff free to refile the suit, no change in the legal relationship occurs, and the defendant is not the prevailing party. n14

On the other hand, if the case is resolved on the merits in favor of the defendant and the plaintiff obtains no relief, the defendant is the prevailing party. n15

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory AwardsCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Texas State Teachers Ass'n v. Garland Indep. School Dist., 489 U.S. 782, 792-793, 109 S. Ct. 1486, 103 L. Ed. 2d 866 (1989)* .

(n2)Footnote 2. *Armster v. United States Dist. Court, 817 F.2d 480, 482-483 (9th Cir. 1987)* .

(n3)Footnote 3. *Sierra Club v. City of Little Rock, 351 F.3d 840, 845-846 (8th Cir. 2003)* .

(n4)Footnote 4. *See Northern Cheyenne Tribe v. Jackson, 433 F.3d 1083, 1086 (8th Cir. 2006)* .

(n5)Footnote 5. *Sole v. Wyner, 551 U.S. 74, 86, 127 S. Ct. 2188, 167 L. Ed. 2d 1069 (2007)* ; *see also UFO Chuting of Hawaii Inc. v. Smith, 508 F.3d 1189, 1197-1198 (9th Cir. 2007)* .

(n6)Footnote 6. *Farrar v. Hobby, 506 U.S. 103, 108-111, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992)* ; *Benton v. Oregon Student Assistance Comm'n, 421 F.3d 901, 908 (9th Cir. 2005)* .

(n7)Footnote 7. *Cabrera v. Jakabovitz, 24 F.3d 372, 393 (2d Cir. 1994)* .

(n8)Footnote 8. *Maher v. Gagne, 448 U.S. 122, 129, 100 S. Ct. 2570, 65 L. Ed. 2d 653 (1980)* ; *Richard S. v. Department of Developmental Servs., 317 F.3d 1080, 1086-1088 (9th Cir. 2003)* .

(n9)Footnote 9. *See John T. v. Delaware County Intermediate Unit, 318 F.3d 545, 560-561 (3d Cir. 2003)* .

(n10)Footnote 10. *See P.N. v. Seattle School Dist., 474 F.3d 1165, 1173-1174 (9th Cir. 2007)* .

(n11)Footnote 11. *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources, 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855, 862-863 (2001)* .

(n12)Footnote 12. *See Ohio River Valley Environmental Coalition, Inc. v. Green Valley Coal Co., 511 F.3d 407, 414-416 (4th Cir. 2007)* .

(n13)Footnote 13. *See Chapman Law Firm Co. v. Greenleaf Constr. Co., 490 F.3d 934, 939-940 (Fed. Cir. 2007)* .

(n14)Footnote 14. *W.G. v. Senatore, 18 F.3d 60, 64-65 (2d Cir. 1994)* ; *Szabo Food Serv. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987)* ; *Evers v. County of Custer 745 F.2d 1196, 1204-1205 (9th Cir. 1984)* .

(n15)Footnote 15. *See Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 419, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978)* .

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CHAPTER 47 Costs
F. Determining Whether Attorney's Fees Are Recoverable

4-47 Federal Litigation Guide § 47.63

§ 47.63 Determining Applicability of Federal Equitable Principles

[1] Obtaining Award if Class Action, Interpleader, or Other Action Creates Common Fund

The common fund exception to the American Rule permits recovery of attorney's fees from a fund created by the litigation. The common fund exception applies when the fund created benefits both the fee movant and others who are not named parties to the action, and a fee assessment against the fund would serve to spread the cost of the litigation to all of those beneficiaries. Class actions and interpleader actions are the most frequent type of common fund actions. n1

Under the common fund exception, only the legal services that benefit the fund may be compensated. n2

However, if a fund is created, the fact that some or most of the beneficiaries have rejected the benefit derived does not prevent an award of fees. n3

[2] Obtaining Award if Action Confers Substantial Benefit and Award Spreads Cost of Suit Among Beneficiaries

The substantial benefit exception to the American Rule permits the recovery of attorney's fees from the losing party when a substantial benefit is conferred upon non-parties by the action, and the losing party is a collective representative of the class of beneficiaries. The most common types of suits are shareholder derivative suits, and suits against labor unions in which the award will serve to spread the cost of the litigation to all shareholders or union members. n4

A substantial benefit may be conferred merely by demonstrating that the defendant violated the law. n5

The fact that the plaintiff derived some greater benefit from the action than the absent beneficiaries does not defeat application of the substantial benefit exception. n6

[3] Obtaining Award When Subjective Bad Faith of Party Merits Sanctions

If a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons," a federal court may award attorney's fees as sanctions under the bad faith exception to the American Rule. The fact that the conduct might be punished under some federal rule or statute does not curtail the inherent equitable power of the federal court to award attorney's fees under this bad faith exception. n7

In general, in determining whether the requisite bad faith is present, the court may consider only the conduct relating to the litigation, and not the conduct leading to the cause of action. Additionally, subjective bad faith must be shown, but may be inferred when the actions lack any reasonable basis. n8

Bad faith attorney's fees may be awarded even against the prevailing party. n9

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsClass CounselFeesCivil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See generally Boeing Co. v. Van Gemert, 444 U.S. 472, 478, 100 S. Ct. 745, 749, 62 L. Ed. 2d 676 (1980)* ; *see also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 121-123 (2d Cir. 2005)* .

(n2)Footnote 2. United States v. 110- *118 Riverside Tenants Corp., 5 F.3d 645, 646-647 (2d Cir. 1993)* (per curiam); *Capital Bancshares v. United States, 957 F.2d 203, 208 (5th Cir. 1992)* ; *In re Hill, 775 F.2d 1037, 1041 (9th Cir. 1985)* ; *Holbrook v. Pitt, 748 F.2d 1168, 1176 (7th Cir. 1984)* .

(n3)Footnote 3. *Koppel v. Wien, 743 F.2d 129, 134 (2d Cir. 1984)* .

(n4)Footnote 4. *Hall v. Cole, 412 U.S. 1, 5, 93 S. Ct. 1943, 36 L. Ed. 2d 702 (1973)* .

(n5)Footnote 5. *Amalgamated Clothing and Textile Workers Union v. Wal-Mart Stores, Inc., 54 F.3d 69, 71-72 (2d Cir. 1995)* .

(n6)Footnote 6. *Rodonich v. Senyshyn, 52 F.3d 28, 34-35 (2d Cir. 1995)* ; *Aguinaga v. United Food & Commercial Workers Int'l Union, 993 F.2d 1480, 1483 (10th Cir. 1993)* ; *Guidry v. International Union of Operating Engr's, Local 406, 882 F.2d 929, 944 (5th Cir. 1989)* , *vacated on other grounds*, *494 U.S. 1022 (1990)* .

(n7)Footnote 7. *Chambers v. NASCO, Inc., 501 U.S. 32, 45-46, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)* , *quoting F.D. Rich Co. v. United States ex rel. Industrial Lumber Co., 417 U.S. 116, 129, 94 S. Ct. 2157, 40 L. Ed. 2d 703 (1974)* .

(n8)Footnote 8. *Association of Flight Attendants v. Horizon Air Indus. Inc., 976 F.2d 541 (9th Cir. 1992)* ; *Sanchez v. Rowe, 870 F.2d 291, 295 (5th Cir. 1989)* ; *Dow Chem. Pac. Ltd. v. Rascator Maritime, S.A., 782 F.2d 329, 342-345 (2d Cir. 1986)* ; *Shimman v. International Union Eng'rs, Local 18, 744 F.2d 1226, 1232-1233 (6th Cir. 1984)* .

(n9)Footnote 9. *See Chambers v. NASCO, Inc., 501 U.S. 32, 53, 111 S.Ct. 2123, 115 L. Ed. 2d 27 (1991)* .

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CHAPTER 47 Costs
F. Determining Whether Attorney's Fees Are Recoverable

4-47 Federal Litigation Guide § 47.64

§ 47.64 Determining Whether Contract Between Parties Authorizes Fees

Contracts often provide that in litigation arising from the contract, the prevailing litigant will be entitled to collect reasonable attorney's fees incurred. Such contractual clauses are valid. Therefore, in litigation over a contract, the winning litigant may collect attorney's fees from the loser if the contract expressly so provides. n1

A claim for contractual attorney's fees must be made as provided in the applicable substantive law of contracts. If the attorney's fees are defined by that substantive law as an element of damages in the action, as they often will be, the provisions of Rule 54(d)(2) providing for a post-judgment motion to collect the fees are inapplicable. Instead, the fee must be claimed in the pleadings. In general, the right to the fee is a legal issue properly triable by the jury, while the amount of the fee is reserved for decision by the court. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewLegal EthicsClient RelationsAttorney FeesGeneral OverviewLegal EthicsClient RelationsAttorney FeesFee Agreements

FOOTNOTES:
(n1)Footnote 1. *Franklin Fed. v. Resolution Trust Corp., 53 F.3d 268, 273 (9th Cir. 1995)* ; *In re Auto Specialities Mfg. Co., 18 F.3d 358, 361 (6th Cir. 1994)* ; *McGuire v. Russell Miller, Inc., 1 F.3d 1306, 1312-1313 (2d Cir. 1993)* ; *General Elec. Credit Corp. v. The Oil Screw Triton, VI, 712 F.2d 991, 994 (5th Cir. 1983)* .

(n2)Footnote 2. *McGuire v. Russell Miller, Inc., 1 F.3d 1306, 1315-1316 (2d Cir. 1993)* ; *Resolution Trust Corp. v. Marshall, 939 F.2d 274, 279 (5th Cir. 1991)* .

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CHAPTER 47 Costs
F. Determining Whether Attorney's Fees Are Recoverable

4-47 Federal Litigation Guide § 47.65

§ 47.65 Determining Whether Attorney's Fees May Be Recovered From Governmental Litigants

[1] Federal Government Liable for Attorney's Fees Whenever Private Litigant Would Be Liable Under Same Circumstances

Under the Equal Access to Justice Act (EAJA), the federal government is liable for attorney's fees "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." n1 A prevailing party that satisfies the EAJA's other requirements may recover its paralegal fees from the government at prevailing market rates. n2 The Tenth Circuit has held that the right to an EAJA fee award belongs to the client not to counsel, so neither the party nor the attorney may request that the fee be paid directly to counsel. n3

This provision rarely comes into play, however, because under most federal fee-shifting statutes, the government is already either specifically liable or specifically exempt from a fee assessment.

[2] Federal Government Liable for Fees Unless Position Was Substantially Justified or Special Circumstances Make Award Unjust

[2.--1] Imposition of Fees Is Mandatory

The government is actually more vulnerable than private parties to an assessment of fees; 28 U.S.C. § 2812(d) provides for a mandatory assessment of fees against the United States in favor of a prevailing party in any civil action (except an action sounding in tort), unless the position of the government was substantially justified, or special circumstances made an award unjust.

[2.--2] Qualification for Fee Award Based on Net Worth of Litigant

To qualify for attorney's fees under *28 U.S.C. § 2412(d)* [*see* [2.--1], *above*], a litigant cannot exceed certain net worth requirements that do not apply to fee awards under *28 U.S.C. § 2412(b)*.

In general, individuals must have a net worth not more than two million dollars, and corporations or other organizations must have a net worth not more than seven million dollars. n4

The fee movant must allege eligibility, which will often be conceded by the government. If challenged, however, the fee movant must show eligibility. The movant may comply by submitting a formal affidavit, or may do so through a more informal process of pointing to other evidence already in the record. n5

[2.--3] Government Bears Burden on Substantial Justification Issue

Under *28 U.S.C. § 2412(d)*, attorney's fees may be denied to a prevailing party if the position of the United States was substantially justified. The government bears the burden of establishing that its position was substantially justified. n6

Substantial justification is present whenever the government's position is justified to a degree that could satisfy a reasonable person. n7

The substantial justification issue is to be determined on the basis of the record. Additional evidentiary submissions by the movant or the government are unnecessary. n8

[3] Obtaining Fees from State and Local Governmental Units, Agencies, and Officers

[3.--1] Obtaining Fees from State When Eleventh Amendment Immunity Has Been Waived or Abrogated

If the *Eleventh Amendment* immunity of the states has been waived by the state or validly abrogated by Congress, the state may be held liable both on the merits, and for attorney's fees. n9

In the absence of such a waiver or abrogation, however, the states retain their immunity, and may not be sued for any kind of relief, either on the merits or for attorney's fees. n10

[3.--2] Obtaining Fees From State When Officer Sued in Official Capacity

The general *Eleventh Amendment* immunity of the states does not preclude any suit to force compliance with federal law. The plaintiff may effectively bring such an action by requesting prospective relief in a suit against an officer of the state in that officer's official capacity. When such an action is brought, a federal court may award attorney's fees payable by the state as relief incidental to the prospective relief obtained in the action. n11

[3.--3] Obtaining Fees From Local Governmental Unit

Local governmental units are not states within the purview of the *Eleventh Amendment*, so that any such unit properly held liable on the merits may also be charged with attorney's fees under an applicable fee-shifting statute. n12

In some cases, however, the local governmental unit is not expressly named as a defendant, because the action is brought against an officer of that government. If the suit names the officer in an official capacity, the local governmental unit is responsible for any award of damages or attorney's fees, even if not named as a defendant. n13

[3.--4] Obtaining Fees From Officer in Individual Capacity

A suit against a state officer in an official capacity is effectively a suit against the state, which is solely liable for any damages or attorney's fee award [*see* [3.--3], *above*]. A suit against an officer in an individual capacity, however, is a suit against that officer personally. Therefore, if relief on the merits is obtained, the officer is personally liable for any recovery of either damages or attorney's fees. The state cannot be compelled to satisfy the officer's liability when the suit is brought against the officer in an individual capacity. n14

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewGovernmentsLocal GovernmentsClaims By & Against

FOOTNOTES:

(n1)Footnote 1. *28 U.S.C. § 2412(b)*; *see Wells v. Bowen, 855 F.2d 37, 46 (2d Cir. 1988)* ; *see also Vacchio v. Ashcroft, 404 F.3d 663, 667-672 (2d Cir. 2005)* (petition for writ of habeas corpus challenging immigration detention qualifies as "civil action" for purposes of the Equal Access to Justice Act).

(n2)Footnote 2. *Richlin Security Service Co. v. Chertoff, 553 U.S. 571, 128 S. Ct. 2007, 170 L. Ed. 2d 960, 974 (2008)* .

(n3)Footnote 3. *See Manning v. Astrue, 510 F.3d 1246, 1249-1255 (10th Cir. 2007)* .

(n4)Footnote 4. *28 U.S.C. § 2412(d)(2)(B)*; *United States v. 27.09 Acres of Land in Town of Harrison, 43 F.3d 769, 774, n.3 (2d Cir. 1994)* .

(n5)Footnote 5. *See Sosebee v. Astrue, 494 F.3d 583, 587-590 (7th Cir. 2007)* .

(n6)Footnote 6. *Flores v. Shalala, 49 F.3d 562, 567 (9th Cir. 1995)* ; *United States v. One Parcel of Real Property, 960 F.2d 200, 208 (1st Cir. 1992)* ; *Eames v. Bowen, 864 F.2d 251, 252 (2d Cir. 1988)* .

(n7)Footnote 7. *Pierce v. Underwood, 487 U.S. 552, 566-568, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988)* ; *but cf. Lauer v. Barnhart, 321 F.3d 762, 765 (8th Cir. 2003)* (fees award justified even though governement persuaded one of three circuit judges that it was right).

(n8)Footnote 8. *28 U.S.C. § 2412(d)(1)(B)*.

(n9)Footnote 9. *Fitzpatrick v. Bitzer, 427 U.S. 445, 456, 96 S. Ct. 2666, 49 L. Ed. 2d 614 (1976)* .

(n10)Footnote 10. *Quern v. Jordan, 440 U.S. 332, 338-340, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979)* .

(n11)Footnote 11. *Hutto v. Finney, 437 U.S. 678, 689-698, 98 S. Ct. 2565, 57 L. Ed. 2d 522 (1978)* .

(n12)Footnote 12. *Monell v. Dep't of Soc. Servs., 436 U.S. 658, 667, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)* .

(n13)Footnote 13. *Brandon v. Holt, 469 U.S. 464, 469-471, 105 S. Ct. 873, 83 L. Ed. 2d 878 (1985)* .

(n14)Footnote 14. *Kentucky v. Graham, 473 U.S. 159, 165, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985)* .

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CHAPTER 47 Costs
F. Determining Whether Attorney's Fees Are Recoverable

4-47 Federal Litigation Guide §§ 47.66 through 47.69

[Reserved]

§§ 47.66[Reserved]

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CHAPTER 47 Costs
G. Determining Proper Amount of Fee Award

4-47 Federal Litigation Guide § 47.70

§ 47.70 Lodestar Method Generally Required

A fee award under any federal fee-shifting statute proving for fees to the prevailing party should be calculated under the lodestar methodology. n1

A lodestar attorney's fee award is calculated by: n2

- Determining the number of hours reasonably spent on the litigation (*see § 47.72*), and
- Multiplying that figure by a reasonable hourly rate (*see § 47.73*)

Some courts have endorsed the abandonment of the term "lodestar" in favor of the more modern and more accurate "presumptively reasonable fee." n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewLegal EthicsClient RelationsAttorney FeesExcessive Fees

FOOTNOTES:
(n1)Footnote 1. *Perdue v. Kenny A., __ U.S. __, 130 S. Ct. 1662, 176 L. Ed. 2d 494, 504 (2010)*; *Blum v. Stenson, 465 U.S. 886, 901, n.16, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984)* .

(n2)Footnote 2. *Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)* .

(n3)Footnote 3. *See Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 493 F.3d 110, 114-121 (2d Cir. 2007)* .

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CHAPTER 47 Costs
G. Determining Proper Amount of Fee Award

4-47 Federal Litigation Guide § 47.71

§ 47.71 Statutory Cap on Hourly Rate Recoverable

Generally, $125 per hour is the highest rate that may be recovered, with adjustments for the costs of living. n1

If, however, the prevailing party can demonstrate the limited availability of qualified attorneys to handle the proceeding or some other special factor [*see §§ 47.74*, *47.75*], the court may award market rates that exceed the cap of $125 per hour. The special factor of limited availability is restricted to "distinctive knowledge or specialized skill needful for the litigation in question". n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory AwardsCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 2412(d)*; *Harris v. Sullivan, 968 F.2d 263, 265-266 (2d Cir. 1992)* .

(n2)Footnote 2. *Pierce v. Underwood, 487 U.S. 552, 572, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988)* .

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CHAPTER 47 Costs
G. Determining Proper Amount of Fee Award

4-47 Federal Litigation Guide § 47.72

§ 47.72 Proving Hours Reasonably Spent

[1] Submitting Contemporaneously Prepared Time Sheets Provides Best Proof of Hours Claimed

When submitting evidentiary proof of the claimed hours, the fee movant should submit contemporaneously prepared time sheets; the failure to keep such records is sufficient ground for a substantial reduction in the claimed hours. n1

A summary of time records may be submitted in lieu of the records themselves. n2

[2] Any Time Appropriately Billed to Client May Be Recovered

The guiding principle in determining which hours may be compensable in a court awarded attorney's fee is that any hours appropriately billed to a client are recoverable; but that if the time could not have properly been billed to the client, it may not be charged against the losing party. n3

Thus, for example, attorney time spent in necessary travel is generally billed to the client, and is therefore appropriately compensated as part of the attorney's fee award. n4 However, some courts have determined that travel time should be reimbursed at half of the hourly prevailing rate. n5

[3] Time Spent in Fee Litigation Generally Recoverable

As a general rule, time expended solely on the fee issue itself is properly included in the fee award. Such time is often referred to as fees on fees, and because that time is billable to a client, it is properly charged to the losing party. n6

However, the applicable substantive law may preclude recovery of fees on fees. For example, if attorney's fees are sought pursuant to the provisions of a contract to which the law of the state of New York is applicable, only the attorney's fees for the litigation on the merits are recoverable, and not the fees for the fee litigation. n7

Similarly, if attorney's fees are sought under the equitable common fund exception [*see § 47.63[1]*], fees on fees are inappropriate because that work does not benefit the fund. n8

[4] Time Spent on Unsuccessful Claims

In many cases, a prevailing plaintiff will not have succeeded on all claims in the action, but will nevertheless be seeking an attorney's fee for all time expended in the action. Despite the limited success of the suit, all time reasonably spent may be compensated if the unsuccessful claims are related to the successful ones, and the results of the suit are nevertheless excellent. n9

If the claims on which the plaintiff prevailed are unrelated to the unsuccessful claims, time spent on the unsuccessful claims did not contribute to the success of the suit, and should be excluded from the fee award. n10

If the successful and unsuccessful claims are related, so that division of the hours on a claim-by-claim basis is impractical, the claimed hours should be reduced if the award of a fully compensatory lodestar figure would be excessive in view of the limited results of the suit. n11

When there are multiple unsuccessful claims, some of which are related while others are unrelated to the victorious fee claims, the court should eliminate all the hours dedicated to the unrelated claims, and then make a further reduction to account for the limited success as to the related claims. n12

[5] Time Spent in Other Forums

[5.--1] Express Statutory Language Controls

Occasionally a prevailing party will seek to recover attorney's fees expended not in the actual litigation in federal court, but in prior administrative or other proceedings that preceded the federal action. Whether time spent in connection with those proceedings is compensable depends first on the statutory language. n13

In most cases, however, the statutory language will not definitively resolve the issue. In that event, the statute is subject to interpretation. If the statute permits recovery for any proceeding, it generally will be interpreted to embrace prior administrative work. n14

[5.--2] Fees in Connection With Mandatory Administrative Proceedings

If a plaintiff is obligated to exhaust administrative remedies before filing a federal civil action, the fees incurred in connection with those administrative proceedings are generally compensable when the plaintiff prevails in the federal action, unless the language of the fee-shifting statute precludes such an award. n15 However, the Third Circuit has held that the fee provision of the Employee Retirement Income Security Act, *29 U.S.C. 1132(g)(1)*, which authorizes the court to award attorney's fees to either party in "any action" precludes an award for pre-litigation administrative proceedings, even if those proceedings were mandatory and therefore a prerequisite to an ERISA suit. n16

The Ninth Circuit applied the fee provision of the Longshore and Harbor Workers' Compensation Act, *33 U.S.C. § 928(c)*, which provides that the "court may approve an attorney's fee for the work done before it." The court held that this language separates administrative and judicial proceedings, and precludes a court from awarding attorney's fees for work not done "before" the court awarding fees, such as preparatory administrative work. n17

The Second Circuit held that when arbitration of a federal claim is required by contract, and that claim is subject to a federal fee-shifting statute, an arbitrator or arbitration panel must award attorney's fees to the prevailing party in the arbitration to the same extent and in the same manner that a court would award those fees in litigation over the claim. n18

[5.--3] Fees in Connection With Optional Administrative Proceedings

If administrative proceedings are optional, the analysis is more complex. Attorney's fees may be collected for the time expended in voluntary administrative proceedings only if the work was "useful and of a type ordinarily necessary" to

success of a later federal action. n19

[5.--4] Independent Action to Collect Attorney's Fees Prohibited Unless Permitted By Statute

In some cases, a party may obtain all desired relief in the administrative proceeding, so that no subsequent federal action is required. In general, an independent action in federal court to collect the attorney's fees incurred in such proceedings is not permissible. n20

If, however, the fee-shifting statute at issue expressly permits an independent action, that language, of course, controls. n21

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory AwardsCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Louisiana Power & Light Co. v. Kellstrom, 50 F.3d 319, 326-327 (5th Cir. 1995)* ; *New York State Ass'n for Retarded Children v. Carey, 711 F.2d 1136, 1148 (2d Cir. 1983)* ; *Powers v. Commissioner, 43 F.3d 172, 181 (5th Cir. 1995)* ; *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 886 F.2d 1545, 1557 (9th Cir. 1989)* ; *Pawlak v. Greenawalt, 713 F.2d 972, 979 (3d Cir. 1983)* .

(n2)Footnote 2. *Powers v. Commissioner, 43 F.3d 172, 181 (5th Cir. 1995)* ; *Cruz v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 34 F.3d 1148, 1160 (2d Cir. 1994)* ; *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 886 F.2d 1545, 1557 (9th Cir. 1989)* ; *Pawlak v. Greenawalt, 713 F.2d 972, 979 (3d Cir. 1983)* .

(n3)Footnote 3. *Hensley v. Eckerhart, 461 U.S. 424, 434, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)* , *quoting*, *Copeland v. Marshall, 641 F.2d 880, 891 (1980)* (en banc).

(n4)Footnote 4. *Telluride Mgt. Solutions, Inc. v. Telluride Inv. Corp., 55 F.3d 463, 467 (9th Cir. 1995)* ; *Cruz v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 34 F.3d 1148, 1161 (2d Cir. 1994)* .

(n5)Footnote 5. *See Patterson v. Julian, 250 F. Supp. 2d, 36, 45 (N.D.N.Y. 2003)* .

(n6)Footnote 6. *INS v. Jean, 496 U.S. 154, 162, 110 S. Ct. 2316, 110 L. Ed. 2d 134 (1990)* .

(n7)Footnote 7. *F.H. Krear & Co. v. Nineteen Named Trustees, 810 F.2d 1250, 1269 (2d Cir. 1987)* .

(n8)Footnote 8. *Mautner v. Hirsch, 32 F.3d 37, 39 (2d Cir. 1994)* ; *but cf. Donovan v. CSEA Local Union 1000, 784 F.2d 98, 106 (2d Cir. 1986)* .

(n9)Footnote 9. *Hensley v. Eckerhart, 461 U.S. 424, 434, 103 S. Ct. 1933, 1940, 76 L. Ed. 2d 40 (1983)* .

(n10)Footnote 10. *Hensley v. Eckerhart, 461 U.S. 424, 434, 103 S. Ct. 1933, 1940, 76 L. Ed. 2d 40 (1983)* .

(n11)Footnote 11. *Hensley v. Eckerhart, 461 U.S. 424, 436-437, 103 S. Ct. 1933, 1940, 76 L. Ed. 2d 40 (1983)* ; *cf. Terminate Control Corp. v. Horowitz, 28 F.3d 1335, 1342-1343 (2d Cir. 1994)* .

(n12)Footnote 12. *See Bogan v. City of Boston, 489 F.3d 417, 428-430 (1st Cir. 2007)* .

(n13)Footnote 13. *Summit Valley Indus. v. Carpenters Local 112, 456 U.S. 717, 725, 102 S. Ct. 2112, 72 L. Ed. 2d 511 (1982)* .

(n14)Footnote 14. *New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 61, 100 S. Ct. 2024, 64 L. Ed. 2d 723 (1980)* .

(n15)Footnote 15. *New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 61, 100 S. Ct. 2024, 64 L. Ed. 2d 723 (1980)* ; *see also Rego v. Westvaco Corp., 319 F.3d 140, 150 (4th Cir. 2003)* (under ERISA (*29 U.S.C. § 1132(g)*), attorney's fees are categorically unavailable for expenses incurred in exhausting administrative proceedings).

(n16)Footnote 16. *See Hahnemann University Hosp. v. All Shore, Inc., 514 F.3d 300, 312-314 (3d Cir. 2008)* .

(n17)Footnote 17. *See Tahara v. Matson Terminals, Inc., 511 F.3d 950, 955 (9th Cir. 2007)* .

(n18)Footnote 18. *See Porzig v. Dresdner, Kleinwort, Benson, North America LLC, 497 F.3d 133, 138-143 (2d Cir. 2007)* .

(n19)Footnote 19. *Webb v. Board of Educ., 471 U.S. 234, 243, 105 S. Ct. 1923, 85 L. Ed. 2d 233 (1985)* .

(n20)Footnote 20. *North Carolina Dept. of Transp. v. Crest Street Community Council, 479 U.S. 6, 12, 107 S. Ct. 336, 93 L. Ed. 2d 188 (1986)* .

(n21)Footnote 21. *Johnson v. Bismarck Pub. Sch. Dist., 949 F.2d 1000, 1004 (8th Cir. 1991)* .

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CHAPTER 47 Costs
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4-47 Federal Litigation Guide § 47.73

§ 47.73 Proving Reasonable Hourly Rate

[1] Affidavit of Counsel's Customary Rates

When considering a statutory attorney's fee request, a federal court is to award the "prevailing market rate," which must be demonstrated by the evidentiary submissions of the fee movant. n1

If counsel is in private practice and charges hourly rates, the best evidence of the prevailing market rate is, of course, the actual rate customarily charged by the attorney in that market. n2

A reasonable hourly rate for purposes of awarding attorney's fees is not ordinarily ascertained simply by reference to rates awarded in previous cases. n3

[2] Affidavit to Prove Rate When Counsel's Work Not Customary

The recovery of customary billing rates is premised upon the notion that counsel is performing customary work within the market. However, many lawyers routinely practice outside of an immediate market, and practice across state boundaries is quite common. The relevant market for the determination of an appropriate hourly rate is the district in which the court sits. n4

Thus, if counsel provides services outside of the usual market or some other factor makes the lawyer's customary rates unrepresentative of the market rate, that latter rate should be proven by affidavit or other appropriate evidentiary submissions. n5

The district judge may rely upon his or her own personal knowledge of the legal market in the forum in setting an appropriate hourly rate. n6

The district court may depart from the strict application of the forum community rule under appropriate circumstances, such as when a party has made a reasonable decision to retain out-of-district counsel rather than local counsel. n7 The Third Circuit has held that if a prevailing party with a right to recover attorney's fees can show that it required the particular expertise of counsel from another community, or that local attorneys were unwilling to take on the litigation, then it will be entitled to compensation based on prevailing rates in the community in which the party's attorneys practice. n8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory Awards

FOOTNOTES:

(n1)Footnote 1. *Blum v. Stenson, 465 U.S. 886, 895, n.11, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984)* .

(n2)Footnote 2. *Barrow v. Falck, 977 F.2d 1100, 1105 (7th Cir. 1992)* ; *Moore v. Jas. H. Matthews & Co., 682 F.2d 830, 840 (9th Cir. 1982)* .

(n3)Footnote 3. *See Farbotko v. Clinton County, 433 F.3d 204, 208-209 (2d Cir. 2005)* .

(n4)Footnote 4. *Polk v. New York State Dep't of Correctional Servs., 722 F.2d 23, 25 (2d Cir. 1983)* .

(n5)Footnote 5. *Brewer v. Protexall, Inc., 50 F.3d 453, 459 (7th Cir. 1995)* ; *Shlomchik v. Richmond 103 Equities Co., 763 F. Supp. 732, 743 (S.D.N.Y. 1991)* .

(n6)Footnote 6. *See Chambless v. Masters, Mates & Pilots Pension Plan, 815 F.2d 869, 873 (2d Cir. 1987)* , *cert. denied*, *496 U.S. 905 (1990)* .

(n7)Footnote 7. *See Arbor Hill Concerned Citizens Neighborhood Assn v. County of Albany, 484 F.3d 162, 169-173 (2d Cir. 2007)* (district court may use out-of-district hourly rate or some rate in between out-of-district rate sought and rates charged by local attorneys in calculating lodestar, if it is clear that a reasonable, paying client would have paid those higher rates).

(n8)Footnote 8. *See Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 426 F.3d 694, 704-705 (3d Cir. 2005)* .

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CHAPTER 47 Costs
G. Determining Proper Amount of Fee Award

4-47 Federal Litigation Guide § 47.74

§ 47.74 Post-Lodestar Adjustments

[1] Factors Not Reflected In Hours or Rate

The lodestar figure arrived at by multiplying the hours reasonably expended by a reasonable hourly rate is the amount that is presumed to be the reasonable fee to be awarded. Any adjustments made to the lodestar must be for factors not already subsumed within the factors of time or rate, and must be supported by specific and detailed findings as to why the lodestar figure did not include those factors. n1

[2] Prohibition Against Adjusting Lodestar for Contingency

Contingency enhancements to the lodestar calculation are not available under fee-shifting statutes. n2

[3] Adjusting Lodestar for Quality of Service Disfavored

The quality of the legal services of counsel is usually reflected in the lodestar component of the appropriate hourly rate to be awarded. Therefore, that factor normally cannot be a basis for a post-lodestar adjustment of the fee. n3

However, the Supreme Court has specifically declined to completely foreclose the possibility of an enhancement for quality of representation. Indeed, the Court has stated that such an enhancement is permissible in the "rare case" when the fee movant proves that the result of the suit was "exceptional," and that the quality of services rendered was superior to what one reasonably should expect in light of the hourly rates charged. n4

[4] Adjusting Lodestar for Limited Nature of Results Obtained

The fact that the suit was not entirely successful does not require a reduction in the fee request if the results of the suit are nevertheless excellent [*see § 47.72[4]*]. If, however, the relief obtained is limited in comparison to the scope of the litigation as a whole, the district court should reduce the fee request to account for this limited success. Although this often will be accomplished by the elimination of certain claimed hours, the court may also simply make a downward adjustment to the lodestar. n5

A recovery of only a fraction of the damages sought is not such "limited success" as to warrant a downward adjustment to the lodestar; the fee awarded under a fee-shifting statute need not be proportional to the damages obtained. n6

If, however, only nominal damages are recovered, a fee award is generally improper [*see § 47.62[2]*].

[5] Considering Factors Allowing for Lodestar Adjustment

The Supreme Court has held that the calculation of an attorney's fee based on the lodestar may be increased due to superior performance, but only in extraordinary circumstances. n7 Enhancements should not be awarded without specific evidence that the lodestar fee would not have been adequate to attract competent counsel. n8 The following factors may be considered for lodestar adjustments: n9

- Where the method used to determine the hourly rate does not adequately measure the attorney's true market value, as demonstrated in part during the litigatio--in such a case, the trial judge should adjust the hourly rate in accordance with specific proof comparing the attorney's ability to a prevailing market rate

- If the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted--in such cases, the enhancement amount must be calculated using a method that is reasonable, objective, and capable of being reviewed on appeal, such as by applying a standard interest rate to the qualifying expense outlays

- Where an attorney's performance involves exceptional delay in the payment of fees--in such a case, the enhancement should be calculated by a method similar to that used for an exceptional delay in expense reimbursement

Enhancements cannot be justified on the ground that departures from hourly billing are becoming more common. Nor can they be based on a flawed analogy to the increasingly popular practice of paying attorneys a reduced hourly rate with a bonus for obtaining specified results. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory Awards

FOOTNOTES:
(n1)Footnote 1. *Perdue v. Kenny A., __ U.S. __, 130 S. Ct. 1662, 176 L. Ed. 2d 494, 506 (2010)*; *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565-568, 106 S. Ct. 3088, 92 L. Ed. 2d 439 (1986)* .

(n2)Footnote 2. *City of Burlington v. Dague, 505 U.S. 557, 560-566, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992)* .

(n3)Footnote 3. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565-568, 106 S. Ct. 3088, 92 L. Ed. 2d 439 (1986)* .

(n4)Footnote 4. *Blum v. Stenson, 465 U.S. 886, 899, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984)* .

(n5)Footnote 5. *Hensley v. Eckerhart, 461 U.S. 424, 440, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)* .

(n6)Footnote 6. *City of Riverside v. Rivera, 477 U.S. 561, 574, 106 S. Ct. 2686, 91 L. Ed. 2d 466 (1986)* .

(n7)Footnote 7. *See Perdue v. Kenny A., __ U.S. __, 130 S. Ct. 1662, 176 L. Ed. 2d 494, 505 (2010).*

(n8)Footnote 8. *See Perdue v. Kenny A., __ U.S. __, 130 S. Ct. 1662, 176 L. Ed. 2d 494, 505 (2010).*

(n9)Footnote 9. *See Perdue v. Kenny A., __ U.S. __, 130 S. Ct. 1662, 176 L. Ed. 2d 494 (2010).*

(n10)Footnote 10. *See Perdue v. Kenny A., __ U.S. __, 130 S. Ct. 1662, 176 L. Ed. 2d 494, 508 (2010).*

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CHAPTER 47 Costs
G. Determining Proper Amount of Fee Award

4-47 Federal Litigation Guide § 47.75

§ 47.75 Obtaining Current Rates In Lengthy Cases

If a case is particularly lengthy, the fee movant may be harmed by the delay in the receipt of the fee award because of the time value of money. Recognizing this, the Supreme Court has approved of the practice of awarding counsel's current market rates, rather than the attorney's lower market rate at the time the services were rendered. n1

If, however, the fee payor is the federal government, an enhancement to account for delay is prohibited by the doctrine of sovereign immunity. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory Awards

FOOTNOTES:
(n1)Footnote 1. *Missouri v. Jenkins, 491 U.S. 274, 283-284, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989)* .

(n2)Footnote 2. *Library of Congress v. Shaw, 478 U.S. 310, 315, 106 S. Ct. 2957, 92 L. Ed. 2d 950 (1986)* .

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CHAPTER 47 Costs
G. Determining Proper Amount of Fee Award

4-47 Federal Litigation Guide § 47.76

§ 47.76 Recovering Other Expenses

[1] Recovering Out-of-Pocket Expenses Generally Billed to Client

Any time properly billed to the client may be included in a court-awarded attorney's fee [*see § 47.72[2]*]. This same principle applies to other items billed to the client that are neither taxable as costs, nor literally within the concept of an attorney's fee. Expenses that are paid out-of-pocket by the attorney, such as postage and delivery charges, long-distance telephone calls, computer-assisted legal research, copying, travel, meals, and similar charges that are properly billed to the client as attributable specifically to the client's case may be recovered as a component of the attorney's fees in the case. n1

Expert witness fees, however, even if routinely billed to the client, may only be recovered to the statutory maximum of $40 per day expressed in *28 U.S.C. § 1823*, unless the fee-shifting statute relied on expressly authorizes a fully compensatory award of expert fees [*see §§ 47.60*, *47.61*]. n2

[2] Expenses That Comprise Attorney Overhead Are Not Recoverable

To recover out-of-pocket expenses as part of a court-awarded attorney's fee, the expenses must be attributable solely to the client's case. If the expenses are part of attorney overhead in merely running an ongoing legal practice, those expenses cannot be attributed to the client's case, and so they are not recoverable. Thus, the salaries of employees of the law firm, rent, utility bills, and the like that would have been incurred in any event are part of overhead, and may not be recovered. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory Awards

FOOTNOTES:
(n1)Footnote 1. *Hensley v. Eckerhart, 461 U.S. 424, 434, 103 S. Ct. 1933, 1940, 76 L. Ed. 2d 40 (1983)* .

(n2)Footnote 2. *Stryker Corp. v. Intermedics Orthopedics, Inc., 898 F. Supp. 116, 121-122 (E.D.N.Y. 1995)* .

(n3)Footnote 3. *Tucker Leasing Capital Corp. v. Farber, 882 F. Supp. 1290, 1292 (E.D.N.Y. 1995)* .

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4-47 Federal Litigation Guide § 47.77

§ 47.77 Awarding Percentage of Recovery in Common Fund Actions

When fees are awarded under the equitable common fund exception to the American Rule [*see § 47.63[1]*], the court may, in its discretion, set the amount of the fee by awarding an appropriate percentage of the fund obtained. n1

In determining a reasonable fee under the "percentage of the fund" method, a court must consider the following factors: n2

- The time and labor expended by counsel
- The magnitude and complexities of the litigation
- The risk involved in the litigation
- The quality of representation
- The requested fee in relation to the settlement
- Public policy considerations

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory Awards

FOOTNOTES:
(n1)Footnote 1. *Blum v. Stenson, 465 U.S. 886, 900 n. 16, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984)* .

(n2)Footnote 2. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 121-123 (2d Cir. 2005)* , *cert. denied, 125 S. Ct. 2277, 161 L. Ed. 2d 1080 (2005)* .

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CHAPTER 47 Costs
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4-47 Federal Litigation Guide § 47.78

§ 47.78 Effect of Client's Contract With Counsel

The fact that the prevailing party agreed to pay a particular sum to counsel does not limit that party to recovering only that amount from the opponent under a fee-shifting statute. Instead, a reasonable fee should be calculated under the lodestar analysis. Should the statutory fee prove to be higher than the contractual fee, the losing party must nevertheless pay the higher statutory award. n1

However, some federal fee-shifting statutes provide for recovery of attorney's fees incurred in connection with the action. If an award of attorney's fees is sought under one of these statutes, the contract does provide an upper limit on the amount of the fee awarded, because the only fees incurred are those that the client is obligated to pay. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory AwardsLegal EthicsClient RelationsAttorney FeesFee Agreements

FOOTNOTES:
(n1)Footnote 1. *Blanchard v. Bergeron, 489 U.S. 87, 91-96, 109 S. Ct. 939, 103 L. Ed. 2d 67 (1989)* .

(n2)Footnote 2. *Marre v. United States, 38 F.3d 823, 829 (5th Cir. 1994)* ; *cf. F.H. Krear & Co. v. Nineteen Named Trustees, 810 F.2d 1250, 1269 (2d Cir. 1987)* .

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CHAPTER 47 Costs
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4-47 Federal Litigation Guide §§ 47.79 through 47.89

[Reserved]

§§ 47.79[Reserved]

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CHAPTER 47 Costs
H. Employing Proper Procedure for Recovering Attorney's Fees

4-47 Federal Litigation Guide § 47.90

§ 47.90 Motion Generally Required Within 14 Days of Judgment

A claim for attorney's fees must be made by motion served no later than 14 days after entry of judgment. n1

For exceptions to the 14-day requirement, *see § 47.92*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory Awards

FOOTNOTES:
(n1)Footnote 1. Rule 54(d)(2)(B); *Mints v. Educ. Testing Serv., 99 F.3d 1253, 1259 (2d Cir. 1996)* .

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CHAPTER 47 Costs
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4-47 Federal Litigation Guide § 47.91

§ 47.91 Court May Extend Deadline or Permit Untimely Motion

The 14-day deadline for filing a motion for attorney's fees [*see § 47.91*] is not jurisdictional, so the court may extend the time for filing the motion, or may permit an untimely motion. n1

The court is not required to grant such an extension, however, so that the failure to make the motion within 14 days is sufficient reason to deny any request for attorney's fees. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory Awards

FOOTNOTES:
(n1)Footnote 1. *E.g., Labrie v. Secretary of Health & Human Servs., 976 F.2d 779, 785-786 (1st Cir. 1992)* .

(n2)Footnote 2. *Sol Salins, Inc. v. W.M. Ercanbrack Co., 155 F.R.D. 4, 4-5 (D.D.C. 1994)* .

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CHAPTER 47 Costs
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4-47 Federal Litigation Guide § 47.92

§ 47.92 Exceptions to 14-Day Requirement

[1] Motion Seeking Attorney's Fees as Sanctions

Motions seeking an award of attorney's fees as sanctions for the violation of any of the Federal Rules of Civil Procedure, or under *28 U.S.C. § 1927* (counsel's liability for excessive costs), are not subject to the provisions of Rule 54(d)(2), including the 14-day filing period. n1

[2] Motion for Fees Against Federal Government Based on 28 U.S.C. § 2412(d)

A party seeking fees against the federal government under the Equal Access to Justice Act based on *28 U.S.C. § 2412(d)* [*see § 47.65*] must move for attorney's fees "within thirty days of final judgment in the action". n2

The statutory term *final judgment* is expressly defined as a judgment that is "final and not appealable" n3 so that the time to move for fees does not begin to rununtil an appellate mandate is issued, or the time to appeal the judgment has expired. n4

An application for attorney's fees and expenses must set out all of the statutory prerequisites for a fee award. However, a timely application for attorney's fees and expenses under the Equal Access to Justice Act may be amended, after the initial 30-day filing period has run, to cure an initial failure to allege that the position of the United States was "not substantially justified." n4.1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory AwardsLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 54(d)(2)(E).*

(n2)Footnote 2. *28 U.S.C. § 2412(d)(1)(B).*

(n3)Footnote 3. *28 U.S.C. § 2412(d)(2)(G).*

(n4)Footnote 4. *Shalala v. Schaefer, 509 U.S. 292, 295-297, 113 S. Ct. 2625, 125 L. Ed. 2d 239 (1993)* .

(n5)Footnote 4.1. *Scarborough v. Principi, 541 U.S. 401, 414-421 124 S. Ct. 1856, 158 L. Ed. 2d 674, (2004)* .

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CHAPTER 47 Costs
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4-47 Federal Litigation Guide § 47.93

§ 47.93 Complying With Requirements of Form of Motion and Submission of Evidentiary Materials

[1] Motion Need Only State Basis For Fee Award and Fee Estimate

A motion for attorney's fees must: n1

- Specify the judgment entitling the movant to fees
- Specify the statute, rule, or other grounds entitling the moving party to the award
- State or estimate the amount of the fee sought

[2] Submitting Evidentiary Materials to Justify Fee Award

The fee movant bears the burden of establishing both the right to the fee, as well as the amount of the fee, and must submit adequate evidentiary proof. n2

Rule 54(d)(2) does not require the submitted motion to be accompanied by evidentiary materials to justify the fee; instead, those materials must be submitted in due course as directed by the court. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory Awards

FOOTNOTES:
(n1)Footnote 1. Rule 54(d)(2)(B).

(n2)Footnote 2. *Hensley v. Eckerhart, 461 U.S. 424, 437, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)* .

(n3)Footnote 3. *See, e.g., In re Central Ice Cream Co., 836 F.2d 1068, 1074 (7th Cir. 1987)* .

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CHAPTER 47 Costs
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4-47 Federal Litigation Guide § 47.94

§ 47.94 Attorney's Fees as an Element of Damages

If the substantive law provides for attorney's fees as an element of damages, the fees must be sought as provided in that substantive law, and not by a post-judgment motion. n1

If the substantive law provides for the recovery of attorney's fees as an element of damages, the 14-day period provided by Rule 54(d)(2)(B) within which to file a motion for attorney's fees is inapplicable. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory Awards

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 54(d)(2)(A)*; *Stochastic Decisions, Inc. v. DiDomenico, 995 F.2d 1158, 1166-1167 (2d Cir. 1995) , cert. denied, 114 S. Ct. 385 (1995) .*

(n2)Footnote 2. *Fed. R. Civ. P. 54(d)(2)(A).*

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CHAPTER 47 Costs
H. Employing Proper Procedure for Recovering Attorney's Fees

4-47 Federal Litigation Guide § 47.95

§ 47.95 Motion Must Be Brought in Client's Name

The right to claim an award of attorney's fees under a fee-shifting statute belongs to the prevailing litigant, and not the attorney for that party. Therefore, a motion for attorney's fees must be brought in the name of the client, unless the client has assigned the right to the fee to the attorney as part of the fee contract between attorney and client. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory AwardsLegal EthicsClient RelationsAttorney FeesFee Agreements

FOOTNOTES:
(n1)Footnote 1. *Evans v. Jeff D., 475 U.S. 717, 727-728, 106 S. Ct. 1531, 89 L. Ed. 2d 747 (1986)* .

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CHAPTER 47 Costs
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4-47 Federal Litigation Guide § 47.96

§ 47.96 Claim for Expert Witness Fees Requires Motion Within 14 Days of Judgment

Rule 54(d)(2)(A) applies not only to claims for attorney's fees, but to claims for "related nontaxable expenses" as well.

This language refers to items that are neither attorney's fees nor taxable costs under Rule 54(d)(1), such as an award of fully compensatory expert witness fees when such fees are authorized by the substantive law [*see § 47.08[2]*].

For example, *42 U.S.C. § 1988(c)* authorizes an award of expert witness fees in addition to attorney's fees in civil rights litigation. Rule 54(d)(2) in turn provides that the method for seeking an award of those fees is a motion filed within 14 days of the entry of judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory AwardsCivil ProcedureRemediesCosts & Attorney FeesCostsWitnesses

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4-47 Federal Litigation Guide § 47.97

§ 47.97 Motion Does Not Suspend Time to Appeal Judgment on Merits

The filing of a post-judgment motion for attorney's fees does not affect the finality of the underlying judgment on the merits, or suspend the time to appeal that judgment. If the judgment on the merits is not timely appealed, any notice of appeal filed after the decision on the attorney's fee motion is effective, but only to appeal the dispensation of that motion. n1

The court has discretion under Rule 58 to suspend the finality of the judgment on the merits pending a decision on the motion for attorney's fees. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory AwardsCivil ProcedureAppealsReviewabilityGeneral OverviewCivil ProcedureAppealsReviewabilityTime Limitations

FOOTNOTES:
(n1)Footnote 1. *Budinich v. Becton Dickinson and Co., 486 U.S. 196, 199-203, 108 S. Ct. 1717, 100 L. Ed. 2d 178 (1988)* .

(n2)Footnote 2. *See Fed. R. Civ. P. 58*; *Heldman v. Sobol, 846 F. Supp. 285, 288 (S.D.N.Y. 1994)* .

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CHAPTER 47 Costs
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4-47 Federal Litigation Guide § 47.98

§ 47.98 Appeal Does Not Divest Court of Jurisdiction to Award Fees

If an appeal is taken from the underlying judgment, the district court retains jurisdiction to decide a Rule 54(d)(2) motion for attorney's fees. n1

If, however, a single judgment addresses both the merits and attorney's fees, an appeal taken from that judgment brings up both issues to the court of appeals, and ousts the district court of jurisdiction to reconsider its ruling on attorney's fees. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory AwardsCivil ProcedureAppealsAppellate JurisdictionLower Court JurisdictionCivil ProcedureAppealsAppellate JurisdictionState Court Review

FOOTNOTES:
(n1)Footnote 1. *Chalais v. Milton Bradley Co., No. 95-C0737, 1996 U.S. Dist. LEXIS 13438, at *3 (S.D.N.Y. Sept. 11, 1996)* .

(n2)Footnote 2. *Ramsey v. Colonial Life Ins. Co. of Am., 12 F.3d 472, 476 (5th Cir. 1994)* ; *Toliver v. County of Sullivan, 957 F.2d 47, 49 (2d Cir. 1992)* .

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CHAPTER 47 Costs
H. Employing Proper Procedure for Recovering Attorney's Fees

4-47 Federal Litigation Guide §§ 47.99 through 47.109

[Reserved]

§§ 47.99[Reserved]

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CHAPTER 47 Costs
I. Opposing Motion for Attorney's Fees

4-47 Federal Litigation Guide § 47.110

§ 47.110 Requesting Opportunity for Adversary Submissions

On request of a party, the court must afford an opportunity for adversary submissions with respect to the motion. n1

Rule 54(d)(2)(C) does not state how or when a request to oppose a fee request should be made; consult applicable local district court rules.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory Awards

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 54(d)(2)(C).*

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CHAPTER 47 Costs
I. Opposing Motion for Attorney's Fees

4-47 Federal Litigation Guide § 47.111

§ 47.111 Determining Time Within Which to Oppose Motion

If the request to oppose the fees motion is granted [*see § 47.110*], the court generally will either specify the date by which opposing papers must be submitted, or will set the matter down for an evidentiary hearing.

In the absence of any such court direction, opposing papers should be served as provided in the local district court rules or judge's individual orders governing general motion procedures.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory Awards

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CHAPTER 47 Costs
I. Opposing Motion for Attorney's Fees

4-47 Federal Litigation Guide § 47.112

§ 47.112 Obtaining Evidentiary Hearing

Although Rule 54(d)(2) provides an opportunity to submit opposing evidentiary materials on a motion for attorney's fees, the rule does not guarantee the right to an evidentiary hearing. n1

If an evidentiary hearing is sought, it generally should be requested in the motion or in the opposing papers, and must comply with any applicable local district court rules.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory AwardsGovernmentsCourtsRule Application & Interpretation

FOOTNOTES:
(n1)Footnote 1. *Bingham v. Zolt, 66 F.3d 553, 565 (2d Cir. 1995)* ; *Building Serv. Local 47 v. Grandview Raceway, 46 F.3d 1392, 1402 (6th Cir. 1995)* ; *In re Thirteen Appeals, 56 F.3d 295, 301 (1st Cir. 1995)* .

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CHAPTER 47 Costs
I. Opposing Motion for Attorney's Fees

4-47 Federal Litigation Guide § 47.113

§ 47.113 Raising Specific Objections

Specific objections should be stated and contradictory evidence should be offered. Unsubstantiated allegations that the fee request is overstated are insufficient. n1

Any argument not raised before the court by the opposing party is waived on appeal. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory Awards

FOOTNOTES:
(n1)Footnote 1. *Sheets v. Salt Lake City, 45 F.3d 1383, 1391 (10th Cir. 1995)* ; *Gates v. Rowland, 39 F.3d 1439, 1449 (9th Cir. 1994)* .

(n2)Footnote 2. *Amalgamated Clothing and Textile Workers Union v. Wal-Mart Stores, Inc., 54 F.3d 69, 73 (2d Cir. 1995)* ; *Scarfo v. Cabletron Sys., Inc., 54 F.3d 931, 941 (1st Cir. 1995)* ; *Formby v. Farmers & Merchant Bank, 904 F.2d 627, 631 (11th Cir. 1990)* .

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CHAPTER 47 Costs
I. Opposing Motion for Attorney's Fees

4-47 Federal Litigation Guide § 47.114

§ 47.114 Obtaining Discovery On Fee Issue Requires Exceptional Circumstances

If the evidentiary submissions of the fee movant and the opponent raise disputedissues of material fact, and discovery would be useful in resolving those issues, the district court may exercise its discretion to permit discovery on the question of attorney's fees. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory Awards

FOOTNOTES:
(n1)Footnote 1. *Gucci America, Inc. v. Rebecca Gold Enterprises, 802 F. Supp. 1048, 1051-1052 (S.D.N.Y. 1992)* ; *see, e.g., Henson v. Columbus Bank & Trust Co., 770 F.2d 1566, 1574 (11th Cir. 1985)* .

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CHAPTER 47 Costs
I. Opposing Motion for Attorney's Fees

4-47 Federal Litigation Guide § 47.115

§ 47.115 Right to Fee and Amount of Fee May Be Separately Resolved

When a motion for attorney's fees is made, the district court may first decide whether fees are available before receiving evidence on the amount of the fee. n1

If fees are quickly denied, the necessity for resolving the amount of the fee is obviated. Accordingly, this bifurcated procedure may be desirable if the fee computation issues are particularly complex. Whether to employ this procedure is within the discretion of the district court.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory Awards

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 54(d)(2)(C).*

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CHAPTER 47 Costs
I. Opposing Motion for Attorney's Fees

4-47 Federal Litigation Guide § 47.116

§ 47.116 Court May Refer to Master or Magistrate Judge

The court may refer issues relating to the value of legal services to a special master. Similarly, the court may refer a motion for attorney's fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter. n1

Pursuant to Rule 72(b), the magistrate judge may not actually decide the motion, but may only make recommendations as to whether fees should be awarded and in what amount, with the ultimate decision reserved to the district judge. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMagistratesPretrial OrdersCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory Awards

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 54(d)(2)(D).*

(n2)Footnote 2. *See Fed. R. Civ. P. 72(b).*

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CHAPTER 48 Appeals to Court of Appeals *

4-48 Federal Litigation Guide 48.syn

§ 48.syn Synopsis to Chapter 48: Appeals to Court of Appeals *

§ 48.01 Subject Matter Jurisdiction of Circuit Courts

§ 48.02 Jurisdiction to Review of Decisions of Administrative Agencies

§ 48.03 Importance of Federal Rules of Appellate Procedure, Local Appellate Rules, and Manuals of Internal Operating Procedures

§ 48.04 Liberal Construction of Appellate Rules

§§ 48.05 through 48.09 [Reserved]

§ 48.10 Litigants Must Preserve Record for Appeal

§ 48.11 Preserving Issues for Appeal by Pretrial Motion

§ 48.12 Preserving Issues for Appeal by Motion in Limine or Motion During Trial

§ 48.13 Preserving Issues for Appeal by Evidentiary Objections During Trial

§ 48.14 Preserving Issues for Appeal by Offers of Proof During Trial

§ 48.15 Preserving Issues for Appeal by Objecting to Jury Instructions

§ 48.16 Preserving Issues for Appeal by Objecting to Proposed Findings

§ 48.17 Preserving Issues for Appeal by Post-Trial Motion

§§ 48.18 through 48.29 [Reserved]

§ 48.30 All Final Decisions Are Appealable as of Right

§ 48.31 Types of Interlocutory Orders Appealable as of Right

§ 48.32 Considering Whether to Appeal from Appelable Interlocutory Order

§ 48.33 Partial Final Judgment May Be Appealable as of Right

§ 48.34 The Cohen Doctrine: Appealable Collateral Orders

§ 48.35 Appellate Review by Prerogative Writ

§ 48.36 Appellant Must Have Standing to Appeal as of Right
[1] Appellant Must Have Been a Party of Record at Time Order or Judgment Was Entered
[2] Appellant Must Be Aggrieved by Order or Judgment

§ 48.37 Joinder and Consolidation of Appeals

§ 48.38 Drafting, Filing, and Serving the Notice of Appeal
[1] Appeals in Which Notice of Appeal Must be Filed
[2] Deadline for Appealing as of Right
[2.--1] General Rule: Notice of Appeal Must Be Filed Within 30 Days After Entry of Judgment or Order
[2.--2] United States as Party; 60 Day Deadline
[2.--3] Certain Motions Filed in District Court May Extend Appeal Deadline
[2.--4] Extension of Time for Good Cause or Excusable Neglect
[2.--5] Extension of Time on Grounds of Lack of Notice
[2.--6] Deadline for Filing Cross-Appeal
[2.--7] Checklist: Timeline for Appeal from Final Judgment
[3] Notice of Appeal Must Specify Parties Taking the Appeal
[4] Notice of Appeal Must Designate Order From Which Appeal Is Taken
[5] Notice of Appeal Must Name Court to Which Appeal is Taken
[6] Sample Form Notice of Appeal Included in Appendix of Forms to Appellate Rules
[7] Filing the Notice of Appeal; Payment of Fees
[8] Appellant Is Not Required to Serve Notice of Appeal on Other Parties

§§ 48.39 through 48.49 [Reserved]

§ 48.50 Petition for Permission to Appeal Must Be Filed With Circuit Court

§ 48.51 Contents of Petition for Permission to File Appeal

§ 48.52 Response to Petition for Permission to File Appeal

§ 48.53 Circuit Court May Require Bond to Cover Costs of Appeal

§§ 48.54 through 48.59 [Reserved]

§ 48.60 Enforcement of Non-Exempt Judgments Automatically Stayed 14 Days Following Entry

§ 48.61 Obtaining Stay of Enforcement of Non-Exempt Judgment Pending Appeal by Posting Bond

§§ 48.62 through 48.69 [Reserved]

§ 48.70 Record on Appeal is Official Compilation of Proceedings as Presented to District Court

§ 48.71 Items That Must be Included in Record on Appeal
[1] Record on Appeal Must Include Original Papers and Exhibits
[2] Record on Appeal Must Include Transcript of Proceedings
[3] Statement of Evidence When Transcript Unavailable

[4] Record on Appeal Must Include Certified Copy of Docket Entries

§ 48.72 Agreed Statement in Lieu of Record on Appeal

§ 48.73 Correction or Modification of Record on Appeal

§§ 48.74 through 48.79 [Reserved]

§ 48.80 Rules Governing Procedure for Review or Enforcement of Administrative Order

§ 48.81 Nature of Proceedings for Review or Enforcement of Administrative Order

§ 48.82 Petition for Review of Administrative Order
[1] Review of Agency Order Is Initiated by Filing Petition for Review
[2] Contents of Petition for Review

§ 48.83 Application for Enforcement of Administrative Order
[1] Filing Application and Answer
[2] Contents of Application for Enforcement

§ 48.84 Serving Petition for Review or Application for Enforcement

§ 48.85 No Automatic Stay of Administrative Order Pending Review

§§ 48.86 through 48.89 [Reserved]

§ 48.90 Required Contents of Appellant's and Appellee's Briefs

§ 48.91 Contents of Reply Brief

§ 48.92 Cross-Appellate Briefs; Briefs in Cases Involving Multiple Appellants or Appellees

§ 48.93 References to Record on Appeal; Reproduction of Statutes, Rules, Regulations, and Other Laws

§ 48.94 Page Limitations and Formatting Requirements

§ 48.95 Local Rules Often Include Additional Requirements for Appellate Briefs

§ 48.96 Appendix to Brief
[1] Contents of Appendix
[2] Appendix Filing Requirements
[3] Format of Appendix

§ 48.97 Deadline for Serving and Filing Appellate Briefs

§ 48.98 Practical Guidelines for Writing Appellate Briefs

§ 48.99 Sanctions for Frivolous Appeal
[1] Circuit Court Has Discretion to Award Damages and Costs to Appellee
[2] Determination of Frivolousness

§§ 48.100 through 48.109 [Reserved]

§ 48.110 Right to Oral Argument

§ 48.111 Oral Argument Procedure

§§ 48.112 through 48.119 [Reserved]

§ 48.120 Including Statement of Standard of Review in Appeal

§ 48.121 Jury Verdicts Reviewed for Sufficiency of Evidence
[1] Understanding Substantial Evidence Rule
[2] Evaluating Sufficiency of Evidence in Civil Cases

§ 48.122 Trial Court's Findings of Fact Reviewed for Clear Error
[1] Understanding the Clear Error Standard
[2] Rationale for Deference to Trial Court
[3] Plausible Finding Cannot Be Error
[4] Considering Basis of Trial Court's Findings
[5] Absent or Inadequate Findings
[6] Determining Clear Error

§ 48.123 Conclusions of Law Reviewed Independently
[1] Evaluating De Novo Review
[2] Understanding Rationale for De Novo Review
[3] Review of Mixed Questions of Law and Fact

§ 48.124 Discretionary Determinations Reviewed for Abuse of Discretion
[1] Abuse of Discretion by Trial Court
[2] Abuse of Discretion by Administrative Agency

§ 48.125 Reviewing Harmless Error
[1] Understanding Harmless Error Rule and Its Rational
[2] Determining Whether Error is Harmless
[3] Fundamentally Harmful Errors

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CHAPTER 48 Appeals to Court of Appeals *

4-48 Federal Litigation Guide Scope

Scope

SCOPE

This chapter discusses appeals from the federal district courts to the circuit courts of appeals, as well as review and enforcement of administrative agency orders. The following topics are covered:

- Jurisdiction of the the circuit courts of appeal
- Importance of the Federal Rules of Appellate Procedure, local rules, and manuals of internal operating procedures
- Appellate strategy in the trial court, including how to preserve issues for appeal
- Orders appealable as of right, and orders with respect to which permission to appeal must be obtained
- Notice of appeal deadlines and content requirements
- Stays pending appeal
- Appellate brief deadlines and content requirements
- Record on appeal content requirements
- Oral argument
- Standards of review

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CHAPTER 48 Appeals to Court of Appeals *
A. Jurisdiction of Circuit Courts; Importance of Federal Rules of Appellate Procedure, Local Rules, and Manuals of Internal Operating Procedures

4-48 Federal Litigation Guide § 48.01

§ 48.01 Subject Matter Jurisdiction of Circuit Courts

There are 13 federal circuit courts of appeals. Each circuit has jurisdiction to review decisions of "district and territorial" courts within its geographic or subject matter area. n1

Only the Federal Circuit is limited in subject matter jurisdiction. Specifically, the Federal Circuit deals primarily with patents, copyright, trademark, and contract and property claims against the United States. n2

Appeals to the courts of appeals from final judgments and orders of the district courts or of bankruptcy appellate panels are governed by *Rule 6 of the Federal Rules of Appellate Procedure*.

Review of Tax Court decisions is with the circuit court; the proper circuit depends on the status of the petitioner and the nature of the action. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsReviewabilityGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1291*.

(n2)Footnote 2. Federal Courts Improvements Act of 1982, Pub. L. 97-164.

(n3)Footnote 3. *26 U.S.C. § 7482(b)*.

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CHAPTER 48 Appeals to Court of Appeals *
A. Jurisdiction of Circuit Courts; Importance of Federal Rules of Appellate Procedure, Local Rules, and Manuals of Internal Operating Procedures

4-48 Federal Litigation Guide § 48.02

§ 48.02 Jurisdiction to Review of Decisions of Administrative Agencies

The courts of appeals also have jurisdiction to review decisions of administrative agencies. n1 The appropriate circuit for review is determined by statute. Judicial review of federal administrative agency action is based on either a specific grant of jurisdiction in the statute creating the agency, or federal question jurisdiction pursuant to *28 U.S.C. § 1331*. The Administrative Procedure Act (APA) provides that a person who is "adversely affected ... by agency action ... is entitled to judicial review thereof," and that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." n2 Often, more than one circuit may have jurisdiction over the appeal--commonly the District of Columbia Circuit, and the circuit in which the adversely affected party resides. n3 If agency action affects more than one party, and there is no exclusive venue for judicial review, the parties may race to different circuits seeking what they perceive to be a more hospitable forum. Certain circuit courts, for example, have acquired the reputation of being pro-business or pro-consumer. The winner of the race to the courthouse may have an advantage because the agency must file the record in the court where the first petition for review is filed if the second petition is filed more than 10 days after the agency order is issued. Potential unfairness is alleviated by a statute that allows transfer to another court of appeals "for the convenience of the parties in the interest of justice." n4

For complete discussion of review or enforcement of administrative orders, see *§§ 48.80 -48.85*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewReviewabilityGeneral OverviewAdministrative LawJudicial ReviewReviewabilityJurisdiction & VenueCivil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsReviewabilityGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See 28 U.S.C. § 1291*.

(n2)Footnote 2. *5 U.S.C. §§ 702, 704*.

(n3)Footnote 3. *28 U.S.C. § 1294*.

(n4)Footnote 4. *28 U.S.C. § 2112(a)*.

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CHAPTER 48 Appeals to Court of Appeals *
A. Jurisdiction of Circuit Courts; Importance of Federal Rules of Appellate Procedure, Local Rules, and Manuals of Internal Operating Procedures

4-48 Federal Litigation Guide § 48.03

§ 48.03 Importance of Federal Rules of Appellate Procedure, Local Appellate Rules, and Manuals of Internal Operating Procedures

Proceedings in the courts of appeals are generally governed by the Federal Rules of Appellate Procedure. Those rules outline the entire appeal process, and should be studied with care.

Fed. R. App. P. 1 provides that to the extent the procedure is not specified, it is governed by the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. Although the Federal Rules of Civil Procedure apply strictly only in the district courts, when necessary, they apply equally to the courts of appeals. n1 Accordingly, when the appellate rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court. n2

In addition, *Fed. R. App. P. 47* authorizes each circuit to establish rules governing its own procedures that are not inconsistent with the general rules. Each of the circuits has implemented local appellate rules.

Appellate practitioners should also be aware of the manuals of internal operating procedures (IOP) or practitioner's guides which most circuits have prepared. While not rules of procedure, those manuals or guides provide valuable assistance. For example, the Third Circuit's internal operating procedures provide that briefs and appendices are distributed to judges four weeks prior to oral argument, and the judges read the briefs at least 10 days before argument. The Fourth Circuit's IOP sets out detailed guidelines for handling death penalty cases. The Fifth Circuit's IOP informs practitioners of the manner in which cases are screened for oral argument.

Various statistics as to each of the circuits are published annually in the Annual Report of the Director of the Administrative Office of the United States Courts. Those statistics include the number of filings, terminations and pending cases; the distribution of cases by type; and the average time it takes to complete an appeal in each circuit.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsReviewabilityGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Balgowan v. New Jersey, 115 F.3d 214, 216-217 (3d Cir. 1997)* (provision of *Fed. R. Civ. P. 21* that parties may be dropped or added by order of court on motion of any party or on its own initiative at any stage of action and on such terms as are just, has been relied on by appellate courts to both dismiss and add parties for jurisdictional purposes).

(n2)Footnote 2. *Fed. R. App. P. 1(a)(2).*

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CHAPTER 48 Appeals to Court of Appeals *
A. Jurisdiction of Circuit Courts; Importance of Federal Rules of Appellate Procedure, Local Rules, and Manuals of Internal Operating Procedures

4-48 Federal Litigation Guide § 48.04

§ 48.04 Liberal Construction of Appellate Rules

Courts must give the Federal Rules of Appellate Procedure a liberal construction in light of the Congressional intent to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay. n1

The appellate rules expressly state that they may not be construed to extend or limit the jurisdiction of the circuit courts. n2 Rather, the appellate rules govern only procedure. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsReviewabilityGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See 28 U.S.C. § 331*; *see also In re Orbitec Corp., 520 F.2d 358, 362 (2d Cir. 1975)* .

(n2)Footnote 2. *Fed. R. App. P. 1(b)*.

(n3)Footnote 3. For a more complete discussion, see 20 *Moore's Federal Practice, § 301.20 et seq*. (Matthew Bender 3d ed.).

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CHAPTER 48 Appeals to Court of Appeals *
A. Jurisdiction of Circuit Courts; Importance of Federal Rules of Appellate Procedure, Local Rules, and Manuals of Internal Operating Procedures

4-48 Federal Litigation Guide §§ 48.05 through 48.09

[Reserved]

§§ 48.05[Reserved]

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CHAPTER 48 Appeals to Court of Appeals *
B. Appellate Strategy in the District Court

4-48 Federal Litigation Guide § 48.10

§ 48.10 Litigants Must Preserve Record for Appeal

A litigant's appellate strategy should start when preparing for trial. An appellate court does not try cases anew, but as a general matter, sits to review the errors of the trial court. Generally, while review of legal error is *de novo,* the "clearly erroneous" standard controls an appellate court's review of findings of fact by the trial judge. The findings will not be set aside unless they are unsupported by substantial evidence. n1

Even when error is conceded or found, the harmless error rule will often bar relief. The party asserting error has the burden of proving that the error was harmful. That party must show that substantial rights were affected by the error. n2 Error is not harmful unless a party is unjustly prejudiced, n3 substantial rights are affected, n4 or affirmance is inconsistent with substantial justice. n5

Moreover, even as to issues of law, it is insufficient merely to argue that the law requires reversal. An appellant must also show that the question was raised in the trial court. The general rule is that a litigant may not present as a ground for reversal an issue that was not presented to the trial court and that it, therefore, had no opportunity to decide. n6 That rule establishes the basic principle of appellate strategy in the trial court: an appellant must preserve the record for appeal by raising and securing rulings on each of the issues to be argued on appeal. It is nightmarish to realize during the process of writing the appellate brief that a key issue or exchange is not in the record.

There is no single or best way to preserve an issue for appeal. There are a number of different methods of presenting an issue to the trial court, and which method should be used will depend on the case and the issue. The key is to ensure the following:

- The issue is presented to the trial court
- A ruling is made on it
- The presentation and resolution of the issue are a part of the record that will go to the court of appeals

If any one of these requirements is absent, the litigant runs a substantial risk that the appellate court will decline to consider the merits of the issue.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsReviewabilityPreservation for ReviewCivil ProcedureAppealsStandards of ReviewClearly Erroneous ReviewCivil ProcedureAppealsStandards of ReviewDe Novo Review

FOOTNOTES:

(n1)Footnote 1. *United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948)* ; *see Fed. R. Civ. P. 52(a).*

(n2)Footnote 2. *28 U.S.C. § 2111*; *Fed. R. Civ. P. 61.*

(n3)Footnote 3. *Asbill v. Housing Auth., 726 F.2d 1499 (10th Cir. 1984)* .

(n4)Footnote 4. *Bickerstaff v. South Cent. Bell, 676 F.2d 163 (5th Cir. 1982)* .

(n5)Footnote 5. *Miller v. Princess Anne Volunteer Fire Co., Inc., 853 F.2d 1130 (4th Cir. 1988)* .

(n6)Footnote 6. *Polys v. Trans-Colorado Airlines, Inc., 941 F.2d 1404 (10th Cir. 1991)* .

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CHAPTER 48 Appeals to Court of Appeals *
B. Appellate Strategy in the District Court

4-48 Federal Litigation Guide § 48.11

§ 48.11 Preserving Issues for Appeal by Pretrial Motion

One of the most effective means of preserving an issue for appeal is through an appropriate pretrial motion. A motion provides a clear written statement of the issue, and the ruling on it provides a concrete basis for urging judicial error. The following motions may provide a proper basis for claiming legal error:

- Motions to dismiss
- Motions for judgment on the pleadings
- Motions to strike
- Motions for summary judgment

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsReviewabilityPreservation for Review

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CHAPTER 48 Appeals to Court of Appeals *
B. Appellate Strategy in the District Court

4-48 Federal Litigation Guide § 48.12

§ 48.12 Preserving Issues for Appeal by Motion in Limine or Motion During Trial

Motions in limine and motions during trial, especially motions for mistrial or for judgment as a matter of law, provide a means of preserving issues for appeal. Such motions may be directed at virtually any important legal issue, including the admissibility of evidence. Like pretrial motions, they can generally be prepared in advance and presented in such a way as to minimize disruption of the trial, and to maximize clarity in the record. A motion in limine may suffice to preserve an issue for appellate review even if no contemporaneous objection is raised at trial. n1

Motions during trial are particularly effective when the issue concerns whether a plaintiff has proved all of the essential elements of a claim for relief. In the absence of a motion for a judgment as a matter of law (formerly, a motion for a directed verdict), for example, the court of appeals will be foreclosed from any challenge to the sufficiency of the evidence. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePretrial MattersMotions in LimineCivil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsReviewabilityPreservation for Review

FOOTNOTES:
(n1)Footnote 1. *American Home Assurance Co. v. Sunshine Supermarket, Inc., 753 F.2d 321 (3d Cir. 1985)* (noting split among the circuits regarding whether an objection at trial is also necessary to preserve the issue for appeal).

(n2)Footnote 2. *Alston v. Bowins, 733 F.2d 161 (D.C. Cir. 1984)* ; *Yohannon v. Keene Corp., 924 F.2d 1255 (3d Cir. 1991)* ; *Jones v. Lewis, 957 F.2d 260 (6th Cir. 1992)* , *cert. denied, 506 U.S. 841, 113 S. Ct. 125, 121 L. Ed. 2d 80 (1992)* .

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CHAPTER 48 Appeals to Court of Appeals *
B. Appellate Strategy in the District Court

4-48 Federal Litigation Guide § 48.13

§ 48.13 Preserving Issues for Appeal by Evidentiary Objections During Trial

Objections during the course of trial are the traditional way to preserve issues for appeal. n1 Objections are most useful in raising evidentiary issues but may be an inefficient way to raise legal issues.

When an issue is raised by objection at trial, the party must state "the specific ground of objection, if the specific ground was not apparent from the context." n2 Except in extraordinary cases, in which "plain errors affecting substantial rights" are committed n3 the failure to properly object risks waiver of the objection on appeal. n4

Even though it is important to preserve the record, minimizing the number of objections made in the jury's presence, and clearly stating the basis for the objections is an equally important concern. One way to keep the jury from learning that an objection is being made is to request permission to approach the bench for a "sidebar" conference. Counsel and the judge can then discuss the matter out of the jury's hearing. An attorney requesting a sidebar conference should be sure that the court reporter transcribes the sidebar.

Whenever possible, the issue should be addressed in writing to the trial court, even if the writing is in a supplementary memorandum of law after the court has overruled the objection. A written argument will be more persuasive to the court than an off-hand, vague reference to undocumented precedent. Additionally, preparing post-trial motions and an appellate brief will be easier because much of the research will already have been completed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsReviewabilityPreservation for ReviewEvidenceProcedural ConsiderationsObjections & Offers of ProofGeneral OverviewEvidenceProcedural ConsiderationsRulings on Evidence

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Evid. 103(a)(1).*

(n2)Footnote 2. *Fed. R. Evid. 103(a)(1).*

(n3)Footnote 3. *Fed. R. Evid. 103(d).*

(n4)Footnote 4. *Fed. R. Evid. 103(a).*

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CHAPTER 48 Appeals to Court of Appeals *
B. Appellate Strategy in the District Court

4-48 Federal Litigation Guide § 48.14

§ 48.14 Preserving Issues for Appeal by Offers of Proof During Trial

When evidence is excluded, absent plain error, appellate review ordinarily requires an "offer of proof" unless the substance of the evidence was "apparent from the context." n1 Although there are no specific requirements, and some circuits are more lenient than others, an offer of proof should be specific enough for the appellate court to determine the admissibility and importance of the excluded evidence. n2 The offer must be complete enough to show that it was error to reject the proof. n3

The best way to make an offer of proof is to specify what the evidence will be, and to state why and how it is critical to the case. Naturally, this must be done on the record so that the appellate court can consider it. n4 The offer is one of "proof," not conclusion, and therefore a mere statement as to the legal effect of a witness' testimony may be insufficient. The offer should state what the testimony itself would be. Indeed, the trial court may require the offer to be in question and answer form. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsReviewabilityPreservation for ReviewEvidenceProcedural ConsiderationsObjections & Offers of ProofGeneral OverviewEvidenceProcedural ConsiderationsObjections & Offers of ProofOffers of Proof

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Evid. 103(a)(2).*

(n2)Footnote 2. *See, e.g., Armour & Co. v. Nard, 463 F.2d 8, 12 (8th Cir. 1972)* (refusing to consider exclusion of evidence when offer not specific and appellate court could not determine whether appellant was deprived of opportunity to prove point).

(n3)Footnote 3. *Reese v. Mercury Marine Div. of Brunswick Corp., 793 F.2d 1416 , reh'g denied, 797 F.2d 977 (5th Cir. 1986) .*

(n4)Footnote 4. *United States v. Rayco, 616 F.2d 462 (10th Cir. 1982) .*

(n5)Footnote 5. *Fed. R. Evid. 103(b).*

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CHAPTER 48 Appeals to Court of Appeals *
B. Appellate Strategy in the District Court

4-48 Federal Litigation Guide § 48.15

§ 48.15 Preserving Issues for Appeal by Objecting to Jury Instructions

Instructions given to the jury, and proposed instructions rejected by the trial court, provide fertile ground for appeal, provided the issues are properly reserved. *Fed. R. Civ. P. 51* requires the trial court, before closing argument, to inform counsel of its proposed action on requested instructions. This enables the attorneys to conform their arguments to the charge the jury will hear, and to plan their closing arguments more effectively.

An erroneous charge to the jury, however, does not automatically constitute a viable appellate issue. As with other errors, it generally may not be raised on appeal unless the party specifically presented the issue to the trial court. Objections to proposed jury instructions must distinctly state the matter objected to, the grounds for the objection, and must be made "before the jury retires to consider its verdict." n1 Moreover, error may be assigned only if the proffered instruction is accurate in every respect. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsObjections to InstructionsCivil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsReviewabilityPreservation for Review

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 51.*

(n2)Footnote 2. *Ruggiero v. Krzeminski, 928 F.2d 558 (2d Cir. 1991) .*

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CHAPTER 48 Appeals to Court of Appeals *
B. Appellate Strategy in the District Court

4-48 Federal Litigation Guide § 48.16

§ 48.16 Preserving Issues for Appeal by Objecting to Proposed Findings

The trial court is required to make specific findings of fact "in an action tried on the facts without a jury or with an advisory jury." n1 A trial court's findings of fact will not be overturned unless they are "clearly erroneous"--*i.e.*, they are unsupported by substantial evidence, or if they have some evidentiary support, the appellate court is left with "the definite and firm conviction that a mistake has been committed." n2 Accordingly, in most non-jury cases, the facts on appeal will be those as found by the trial court; the content of those findings is therefore of critical importance to the appellate advocate.

Frequently, the trial court will ask the parties to prepare findings, and will hold a hearing before entering findings. If it does not, counsel may make their views known through a motion pursuant to *Fed. R. Civ. P. Rule 52(b)* to amend or to make additional findings. In a non-jury case, however, Rule 52(a) explicitly states that neither the failure to object to the findings nor the failure to seek amendment of them will waive the right to challenge "the sufficiency of the evidence supporting the findings." n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsReviewabilityPreservation for ReviewCivil ProcedureAppealsStandards of ReviewClearly Erroneous Review

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 52(a)(1).*

(n2)Footnote 2. *United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948) .*

(n3)Footnote 3. *Fed. R. Civ. P. 52(a)(5).*

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CHAPTER 48 Appeals to Court of Appeals *
B. Appellate Strategy in the District Court

4-48 Federal Litigation Guide § 48.17

§ 48.17 Preserving Issues for Appeal by Post-Trial Motion

Motions made after trial present another limited opportunity to raise issues in the trial court. Generally, the failure to raise an issue earlier will preclude it from being raised after trial. Nevertheless, post-trial motions are valuable, not only because they may persuade the trial court, but also because they help clarify the record for the appellate court. Moreover, some issues, such as a challenge to subject matter jurisdiction, may be raised at any time.

Finally, although a post-trial motion is generally unnecessary to preserve issues for appeal, there are some exceptions, such as a claim in a jury trial that the verdict is against the weight of the evidence. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsReviewabilityPreservation for ReviewCivil ProcedureAppealsStandards of ReviewSubstantial EvidenceSufficiency of Evidence

FOOTNOTES:
(n1)Footnote 1. *See La Amiga del Pueblo, Inc. v. Robles, 937 F.2d 689 (1st Cir. 1991)* .

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CHAPTER 48 Appeals to Court of Appeals *
B. Appellate Strategy in the District Court

4-48 Federal Litigation Guide §§ 48.18 through 48.29

[Reserved]

§§ 48.18[Reserved]

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CHAPTER 48 Appeals to Court of Appeals *
C. Orders Appealable as of Right; Notice of Appeal Requirements

4-48 Federal Litigation Guide § 48.30

§ 48.30 All Final Decisions Are Appealable as of Right

In civil cases, a party may take an appeal as of right to the circuit court of any final decision of the district court, except those that are appealable directly to the Supreme Court. n1

Accordingly, when considering a possible appeal, the first issue to be analyzed is whether the decision involved is "final" within the meaning of *28 U.S.C. § 1291*. The basic idea is that appellate review of a single controversy should be done at one time, and not in fragments. Thus, generally speaking, under Section 1291 a "final" decision is one which, by its own force, terminates the case on the merits as to all the parties and leaves nothing to be done except to enforce or implement it. n2 When an appeal is taken from such a final judgment, all the prior interlocutory rulings in the case may be considered by the appellate court at the same time.

A judgment is not "final" and appealable as of right under *28 U.S.C. § 1291* unless and until it is effective. Therefore, it must be determined whether the decision to be reviewed complies with the requirements of *Fed. R. Civ. P. 58* concerning separate document requirements for some types of judgments, and *Fed. R. Civ. P. 79(a)* that judgments be entered by the clerk.

Moreover, a final appealable judgment loses its finality (at least temporarily) upon timely filing of any of the following post-trial motions:

- Motion for judgment as a matter of law pursuant to *Fed. R. Civ. P. 50(b)*
- Motion to amend or add to the findings of fact pursuant to *Fed. R. Civ. P. 52(b)*
- Motion for a new trial pursuant to *Fed. R. Civ. P. 59(b)*
- Motion to alter or amend the judgment pursuant to *Fed. R. Civ. P. 59(e)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil

ProcedureAppealsAppellate JurisdictionFinal Judgment RuleCivil ProcedureAppealsReviewabilityNotice of AppealCivil ProcedureAppealsReviewabilityPreservation for Review

FOOTNOTES:

(n1)Footnote 1. *28 U.S.C. § 1291.*

(n2)Footnote 2. *Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 96 S. Ct. 1202, 47 L. Ed. 2d 435 (1976)* ; *Donovan v. Hayden, Stone, Inc., 434 F.2d 619 (6th Cir. 1970)* .

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CHAPTER 48 Appeals to Court of Appeals *
C. Orders Appealable as of Right; Notice of Appeal Requirements

4-48 Federal Litigation Guide § 48.31

§ 48.31 Types of Interlocutory Orders Appealable as of Right

Appeals as of right may be taken from some interlocutory orders, such as:

- An order granting, continuing, modifying, or refusing to grant an injunction n1
- Certain orders in receivership proceedings n2
- An interlocutory decree that determines a right and liability of the parties to an admiralty case n3
- Judgments in actions for patent infringement that are final except for an accounting n4

When an interlocutory order is not appealable as of right, it may nonetheless be immediately appealed if the party obtains permission of the circuit court. n5 To obtain permission, the party must have the district judge certify that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion, and that an immediate appeal may materially advance the ultimate termination of the litigation. n6 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. n7

For complete discussion of appeals by permission from interlocutory orders not appealable as of right, see *§§ 48.50 -48.53*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionFinal Judgment RuleCivil ProcedureAppealsAppellate JurisdictionInterlocutory OrdersCivil ProcedureAppealsReviewabilityNotice of AppealCivil ProcedureAppealsReviewabilityPreservation for Review

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1292(a)(1).*

(n2)Footnote 2. *28 U.S.C. § 1292(a)(2).*

(n3)Footnote 3. *28 U.S.C. § 1292(a)(3)*.

(n4)Footnote 4. *28 U.S.C. § 1292(c)(2)*.

(n5)Footnote 5. *See 28 U.S.C. § 1292*.

(n6)Footnote 6. *28 U.S.C. §§ 1292(b), (d)(1), (2)*.

(n7)Footnote 7. *Fed. R. App. P. 5(a)(2)*; *see Fed. R. App. P. 4(a)* (typically providing 30-day period for filing notice of appeal); *see also § 48.38[2]*.

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CHAPTER 48 Appeals to Court of Appeals *
C. Orders Appealable as of Right; Notice of Appeal Requirements

4-48 Federal Litigation Guide § 48.32

§ 48.32 Considering Whether to Appeal from Appelable Interlocutory Order

Although the orders specified in *28 U.S.C. § 1292(a)*, like final judgments, are subject to appeal as a matter of right, the consequences of failing to exercise that right are very different. A failure to prosecute a timely appeal from a final judgment results in a permanent loss of the right to question the judgment (other than for some extraordinary reason). Failure to file a timely appeal from an appealable interlocutory order, however, does not preclude the aggrieved party from attacking the order during the course of appeal from a subsequent final judgment. n1 Moreover, if no appeal is taken from an interlocutory order, the district court retains full power to dissolve or modify the order even after the time for appeal has run. n2

It does not follow from this that there is a right to appeal twice from one of the interlocutory orders specified in Section 1292(a). If an immediate appeal is taken and is unsuccessful, the law of the case rule precludes a second bite at the apple on a later appeal from the final judgment. n3

Thus, the entry of an appealable interlocutory order may present a difficult tactical question. Of course, if the order is sufficiently onerous, an immediate appeal may be required as a practical necessity. However, there will be many cases in which such an appeal will not enable the aggrieved party to present its position to the appellate court in the most persuasive form. This may be true, for example, when the record is not yet fully developed, or when the ability to present the merits of the entire case (not just the propriety of the interlocutory order) will enhance the party's overall position. In these circumstances it may be preferable not to appeal immediately, but to seek relief from the district court itself by some form of motion for reconsideration or modification.

The aggrieved party should also take into account the fact that an appeal from an interlocutory order divests the district court of jurisdiction only as to the matter on appeal; the district court remains free to proceed with other aspects of the case. n4 Moreover, *Fed. R. Civ. P. 62(c)* expressly provides the district court with authority to "suspend, modify, restore or grant an injunction" while an appeal is pending to protect the rights of the adverse party. Thus, deciding whether to take an immediate appeal from an interlocutory order should include consideration of both the desirability of proceeding separately with other aspects of the case, and the likelihood that the district court will stay such proceedings pending appellate disposition of the portion on appeal.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionFinal Judgment RuleCivil ProcedureAppealsAppellate JurisdictionInterlocutory OrdersCivil ProcedureAppealsReviewabilityPreservation for Review

FOOTNOTES:

(n1)Footnote 1. *Drayer v. Krasner, 572 F.2d 348, 353 (2d Cir. 1978)* , *cert. denied, 436 U.S. 948 (1978)* .

(n2)Footnote 2. *I.A.M. National Pension Fund Plan A v. Cooper Indus., Inc., 789 F.2d 21 (D.C. Cir. 1986)* , *cert. denied, 479 U.S. 971 (1986)* ; *Ideal Toy Corp. v. Sayco Doll Corp., 302 F.2d 623, 625 (2d Cir. 1962)* ; *Hendler v. United States, 952 F.2d 1364 (Fed. Cir. 1991)* .

(n3)Footnote 3. *Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16, 19 (5th Cir. 1974)* .

(n4)Footnote 4. *United States v. City of Chicago, 534 F.2d 708, 711 (7th Cir. 1976)* .

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CHAPTER 48 Appeals to Court of Appeals *
C. Orders Appealable as of Right; Notice of Appeal Requirements

4-48 Federal Litigation Guide § 48.33

§ 48.33 Partial Final Judgment May Be Appealable as of Right

In cases involving multiple claims or multiple parties, a decision that leaves one or more claims unresolved, or that does not apply to all the parties, is not a final judgment in the ordinary sense, and no appeal will lie from it. However, such a decision may become a final judgment that is appealable as of right if the *district court* makes an express determination that there is no just reason for delay, and expressly directs that a final judgment be entered. n1

Fed. R. Civ. P. 54(b) applies only in cases involving multiple claims or parties when a decision affects less than all the claims or parties. The Rule is not intended to allow any wholesale avoidance of the final judgment rule, and a Rule 54(b) determination should not be routinely requested or granted. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionFinal Judgment RuleCivil ProcedureAppealsAppellate JurisdictionInterlocutory OrdersCivil ProcedureAppealsReviewabilityPreservation for Review

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 54(b)*; *Gray v. Beverly Enterprises-Mississippi, Inc., 390 F.3d 400, 403-404 (5th Cir. 2004)* .

(n2)Footnote 2. *Advanced Magnetics, Inc. v. Bayfront Partners, Inc., 106 F.3d 11, 16 (2d Cir. 1997)* (in light of historic federal policy against piecemeal appeals, court's authority under Rule 54(b) to enter final judgment before entire case is concluded should be exercised "sparingly"); *Page v. Gulf Oil Corp., 775 F.2d 1311 (5th Cir. 1985)* .

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CHAPTER 48 Appeals to Court of Appeals *
C. Orders Appealable as of Right; Notice of Appeal Requirements

4-48 Federal Litigation Guide § 48.34

§ 48.34 The *Cohen* Doctrine: Appealable Collateral Orders

Although the right to appeal is expressly governed by rule and statute, there is one judicially created exception to the final judgment rule. This judicial exception is known as the "*Cohen* doctrine" because it arises out of the Supreme Court's decision in Cohen v. Beneficial Industrial Loan Corp. n1 The doctrine permits an appeal to be taken from an order that finally disposes of a significant claim of right that is not part of the merits of the claim alleged, but rather is separable or "collateral" to that claim. An order is not appealable under the *Cohen* doctrine unless it presents an important unsettled question, and unless deferring appellate review until a final judgment is entered may cause the right asserted to be irretrievably lost. n2

The following types of orders have been found to satisfy the criteria of the *Cohen* doctrine:

- Orders denying prejudgment security n3
- Orders vacating an attachment n4
- Orders denying immunity from suit to a state under the *Eleventh Amendment*, n5 or denying qualified immunity to a government official in an action based on an alleged violation of the plaintiff's constitutional rights n6
- Orders refusing to approve settlement of a class action n7

An order found properly appealable under the collateral order doctrine is considered to be a "final" decision under *28 U.S.C. § 1291*, and thus appealable as a matter of right. n8 A failure to file a timely notice of appeal from such an order should not, however, mean that it cannot be reviewed later in an appeal from a subsequent final judgment. n9 As a practical matter, this problem should never arise, because if the order satisfies *Cohen,* a later appeal is, by definition, too late to do any good.

Moreover, unlike appeals from other "final" decisions, an appeal based on the *Cohen* rule does not remove the entire case from the district court's jurisdiction. Rather, as with interlocutory or partial appeals, the district court may proceed with the remainder of the case while the appellate process goes on. Finally, although an appealable collateral order is considered "final," there is apparently no need to satisfy the technical requirements for entry of judgment before an

appeal may be taken. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionCollateral Order DoctrineCivil ProcedureAppealsAppellate JurisdictionFinal Judgment RuleCivil ProcedureAppealsAppellate JurisdictionInterlocutory OrdersCivil ProcedureAppealsReviewabilityPreservation for Review

FOOTNOTES:
(n1)Footnote 1. *Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949)* .

(n2)Footnote 2. *Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 712-714, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996)* (district court's order remanding on grounds of *Burford* abstention was appealable as it put the litigants in the case " 'effectively out of court,' " and it conclusively determined an issue separate from the merits); *Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 108 S. Ct. 1133, 99 L. Ed. 2d 296 (1988)* .

(n3)Footnote 3. *Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S. Ct. 1221 (1949)* .

(n4)Footnote 4. *Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S. 684, 70 S. Ct. 861, 94 L. Ed. 1206 (1950)* .

(n5)Footnote 5. *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 113 S. Ct. 684, 121 L. Ed. 2d 605 (1993)* .

(n6)Footnote 6. *Behrens v. Pelletier, 516 U.S. 299, 312, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996)* .

(n7)Footnote 7. *Norman v. McKee, 431 F.2d 769 (9th Cir. 1970)* .

(n8)Footnote 8. *See Coopers & Lybrand v. Livesay, 437 U.S. 463, 468, 471, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978)* .

(n9)Footnote 9. *See Drayer v. Krasner, 572 F.2d 348, 353 n.6 (2d Cir. 1978)* , *cert. denied, 436 U.S. 948 (1978)* .

(n10)Footnote 10. *See Stevens v. Security Pac. Nat'l Bank, 538 F.2d 1387 (9th Cir. 1976)* .

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CHAPTER 48 Appeals to Court of Appeals *
C. Orders Appealable as of Right; Notice of Appeal Requirements

4-48 Federal Litigation Guide § 48.35

§ 48.35 Appellate Review by Prerogative Writ

If the decision does not fit within one of the categories of appealable orders, it may still be appealable under the *All Writs Act*, which provides that, "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." n1

Although the statute says the courts (including the courts of appeals) "may issue all writs," it does not mean they will. To the contrary, if anything is clear it is that the power to issue extraordinary writs conferred by Section 1651 should be exercised only in truly exceptional situations when there is no other adequate remedy by appeal. n2 In other words, an extraordinary writ will not be granted if there is a right to appeal, or if the decision is either within the district court's discretion or is routine.

However, there are areas in which review by mandamus seems to be relatively well established. In these areas, while a court of appeals may not grant the writ, it will at least consider it. These areas include interlocutory, non-appealable district court orders transferring or refusing to transfer a case to another district, n3 and orders relating to disqualification of the district judge. n4

The procedure for filing a petition for an extraordinary writ is not complicated. In any case in which an appeal would be direct to the Supreme Court, the petition is filed in the Supreme Court under the procedures specified in Supreme Court Rule 20. In all other cases, the petition is filed in the court of appeals that has responsibility for the district court making the order, and the procedure is governed by *Fed. R. App. P. 21.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsReviewabilityPreservation for Review

FOOTNOTES:
(n1)Footnote 1. *28 U.S.C. § 1651.*

(n2)Footnote 2. *In re Remington Arms, Inc., 952 F.2d 1029 (8th Cir. 1991) .*

(n3)Footnote 3. *Van Dusen v. Barrack, 376 U.S. 612, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964)* .

(n4)Footnote 4. *In re Cement Antitrust Litig., 688 F.2d 1297 (9th Cir. 1982)* .

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CHAPTER 48 Appeals to Court of Appeals *
C. Orders Appealable as of Right; Notice of Appeal Requirements

4-48 Federal Litigation Guide § 48.36

§ 48.36 Appellant Must Have Standing to Appeal as of Right

[1] Appellant Must Have Been a Party of Record at Time Order or Judgment Was Entered

To have standing to appeal as of right, the appellant must generally have been a party of record at the time the order or judgment appealed from was entered. n1

The appellant need not have necessarily been a party to the suit at the time the complaint was filed. An appeal as of right may also be taken by a party who entered the original suit by intervention, n2 or by substitution. n3 Additionally, a party who enters a case as a result of a third-party claim has standing to appeal an adverse judgment on either the third-party claim or the main claim. n4

On the other hand, a person who is a party to an action in an official capacity only, ceases to be a party on leaving office, and does not have standing to appeal an adverse judgment. Rather, the right to appeal passes to the successor in office. n5

A court may permit postjudgment intervention for the purposes of appeal if the court deems intervention necessary to protect the interests of a person whose rights were represented by others before the district court. n6

In certain other limited circumstances, persons who were never a party of record at the time of judgment may be deemed to have standing to appeal. For example, standing has been recognized for a nonparty against whom an injunction was issued, for purposes of appealing the jurisdiction of the court to enter the injunction. n7 Another example of a nonparty with standing to appeal is an attorney who is sanctioned pursuant to *Fed. R. Civ. P. 11*. n8

[2] Appellant Must Be Aggrieved by Order or Judgment

The second requirement for standing to appeal as of right is that the appellant must be aggrieved by the order or judgment. n9 A party is not *aggrieved* by a decision if the party does not have a direct interest that is affected by the decision. n10

Although a party who has fully prevailed may not usually appeal a judgment on the ground that the court has made an adverse finding, standing to appeal may be recognized if the finding could form the basis for collateral estoppel in later litigation. n11 However, this rarely occurs because a finding may form the basis for collateral estoppel only if it is

necessary to the judgment, and a finding adverse to an otherwise fully prevailing party will rarely be necessary to the judgment. n12

Conversely, a party may lose its status as an aggrieved party, and therefore the right to appeal, by estoppel or waiver. For example, a party may not ordinarily appeal if the party has agreed to a settlement or consented to the entry of a judgment. n13

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewCivil ProcedurePartiesGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsReviewabilityPreservation for Review

FOOTNOTES:
(n1)Footnote 1. *SEC v. Wozniak, 33 F.3d 13, 14 (7th Cir. 1994)* .

(n2)Footnote 2. *United States v. Alcan Aluminum, Inc., 25 F.3d 1174, 1185 (3d Cir. 1994)* .

(n3)Footnote 3. *See United States v. LTV Corp., 746 F.2d 51, 53 (D.C. Cir. 1984)* .

(n4)Footnote 4. *Kicklighter v. Nails by Jannee, Inc., 616 F.2d 734, 739 n.1 (5th Cir. 1980)* .

(n5)Footnote 5. *Karcher v. May, 484 U.S. 72, 79-81, 108 S. Ct. 388, 98 L. Ed. 2d 327 (1987)* .

(n6)Footnote 6. *United Airlines, Inc. v. McDonald, 432 U.S. 385, 394-395, 97 S. Ct. 2464, 53 L. Ed. 2d 423 (1977)* (permitting intervention by member of putative class, in action brought as class action but later decertified after final judgment, for purpose of appealing decertification order); *Heckethorn v. Sunan Corp., 992 F.2d 240, 241 (9th Cir. 1993)* (plaintiff's former attorney could appeal district court order conditioning plaintiff's voluntary dismissal on former counsel's payment of attorney's fees to defendant).

(n7)Footnote 7. *Commercial Sec. Bank v. Walker Bank & Trust Co., 456 F.2d 1352, 1354 (10th Cir. 1972)* .

(n8)Footnote 8. *Aetna Life Ins. Co. v. Alla Med. Serv., Inc., 855 F.2d 1470, 1472 (9th Cir. 1988)* (sanction orders issued solely against nonparty attorneys are immediately appealable).

(n9)Footnote 9. *United States v. Good Samaritan Church, 29 F.3d 487, 488 (9th Cir. 1994)* ; *Armotek Indus. v. Employers Ins., 952 F.2d 756, 759 n.3 (3d Cir. 1991)* .

(n10)Footnote 10. *Grinnell Mut. Reinsurance Co. v. Reinke, 43 F.3d 1152, 1154 (7th Cir. 1995)* (victims of automobile accident did not have standing to appeal declaratory judgment holding that insurer does not have duty to defend alleged tortfeasor, because victims' contingent expectancy in cash value of duty to defend was not legal interest adversely affected by judgment).

(n11)Footnote 11. *In re DES Litig., 7 F.3d 20, 23 (2d Cir. 1993)* .

(n12)Footnote 12. *In re DES Litig., 7 F.3d 20, 24 (2d Cir. 1993)* .

(n13)Footnote 13. *Justice v. CSX Transp., Inc., 908 F.2d 119, 125 (7th Cir. 1990)* .

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CHAPTER 48 Appeals to Court of Appeals *
C. Orders Appealable as of Right; Notice of Appeal Requirements

4-48 Federal Litigation Guide § 48.37

§ 48.37 Joinder and Consolidation of Appeals

When two or more parties are entitled to appeal from a district court judgment or order, and their interests make joinder practicable, they may proceed on appeal as a single appellant. n1 The parties may either file a joint notice of appeal, n2 or they may join after timely filing separate notices of appeal. n3 However, a party who has not timely filed a notice of appeal may not become an appellant by joining the appeal of a party who has timely filed a notice. n4

Fed. R. App. P. 3 does not provide any formal procedure for effecting joinder. However, if more than one party files a joint notice of appeal, they must ensure that they name the multiple appellants with specificity. The rule directs that the attorneys name each party in the caption or body of the notice, of if an attorney is representing more than one party, the attorney may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X." n5 An attorney who files a notice of appeal representing more than one party must also name each party in the statement that must be filed with the circuit court clerk within 14 days after filing the notice of appeal. n6

After two or more parties effectively join in an appeal, either by filing a joint notice of appeal or by joining in appeal after timely filing separate notices of appeal, they may then proceed on appeal as a single appellant. n7 Thus, they may jointly perform any acts that the rules require of a single appellant. As examples, they may serve a single designation of parts of the transcript to be included in the record on appeal, and if necessary, a single statement of the issues to be presented on the appeal; n8 they may jointly seek an extension of time for transmitting the record and docketing the appeal; n9 and they may join in a single application for intermediate relief pending the appeal. n10 Once in the circuit court, they may file a joint brief and appendix, and they may offer a single argument. In fact, the court may require the parties who join in an appeal to seek leave of the circuit court if they wish to argue separately. n11

Consolidated appeals are different from joint appeals because in consolidated appeals the separate appeals do not merge into one, and the parties do not proceed as a single appellant. Furthermore, a court order is required for consolidation even if the parties stipulate to consolidation. n12

The court of appeals has discretion to consolidate appeals if it concludes that consolidation will serve the interests of justice. The court must, however, have jurisdiction over each matter to be consolidated. In most cases, the goal of promoting judicial efficiency and economy is served by placing all related issues before the circuit court at one time. n13

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesJoinderGeneral OverviewCivil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsReviewabilityPreservation for Review

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. App. P. 3(b)(1).*

(n2)Footnote 2. *Fed. R. App. P. 3(b)(1)*; *see United States v. Suarez, 880 F.2d 626, 629 (2d Cir. 1989)* .

(n3)Footnote 3. *Fed. R. App. P. 3(b)(2).*

(n4)Footnote 4. *Cook & Sons Equip., Inc. v. Killen, 277 F.2d 607, 609 (9th Cir. 1960)* ; *see Browning v. Navarro, 894 F.2d 99, 100 (5th Cir. 1990)* .

(n5)Footnote 5. *Fed. R. App. P. 3(c)(1).*

(n6)Footnote 6. *See Fed. R. App. P. 12(b)(1).*

(n7)Footnote 7. *See Fed. R. App. P. 3(b)(1).*

(n8)Footnote 8. *Fed. R. App. P. 10(b).*

(n9)Footnote 9. *Fed. R. App. P. 11(a), 12(a).*

(n10)Footnote 10. *Fed. R. App. P. 11(g).*

(n11)Footnote 11. *Cf. Fed. R. App. P. 34(b)* allots a fixed time for argument to each side, and parties who join in an appeal constitute a single side.

(n12)Footnote 12. *See Fed. R. App. P. 3(b)(2)* advisory committee note (1998).

(n13)Footnote 13. *Weaver v. University of Cincinnati, 970 F.2d 1523, 1528-1529 (6th Cir. 1992)* , *cert. denied, 507 U.S. 917 (1993)* .

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CHAPTER 48 Appeals to Court of Appeals *
C. Orders Appealable as of Right; Notice of Appeal Requirements

4-48 Federal Litigation Guide § 48.38

§ 48.38 Drafting, Filing, and Serving the Notice of Appeal

[1] Appeals in Which Notice of Appeal Must be Filed

The following appeals are taken by filing a notice of appeal in the district court: n1

- Appeals from final judgments
- Appeals from collateral orders appealable under the *Cohen* doctrine
- Appeals from the types of interlocutory orders appealable as of right pursuant to *28 U.S.C. § 1292(a)*
- Appeals from partial judgments certified as final pursuant to *Fed. R. Civ. P. 54(b)*

[2] Deadline for Appealing as of Right

[2.--1] General Rule: Notice of Appeal Must Be Filed Within 30 Days After *Entry* of Judgment or Order

In a civil case, a notice of appeal generally must be filed with the district court clerk within 30 days after entry of the judgment or order from which the appeal is taken. n2 Although *Fed. R. Civ. P. 77(d)* requires district court clerks to give all parties immediate notice of entry of judgments and orders, parties should not rely on receiving such notice. Under *Fed. R. Civ. P. 77(d)*, the time to appeal runs from the date of entry, even if notice from the clerk is not received. The Rule specifically states that: 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). n3

[2.--2] United States as Party; 60 Day Deadline

If the United States or its officer or agency is a party, a notice of appeal must be filed with the district court clerk within 60 days after entry of the order or judgment from which the appeal is taken. n4 The 60-day appeal period applies even if the United States or one of its officers or agencies is not a party to the appeal. n5 Thus, any party to an action in which the United States is a party may avail itself of the 60-day appeal period. n6

[2.--3] Certain Motions Filed in District Court May Extend Appeal Deadline

If any party timely files one of the following six motions with the district court, the 30-day deadline to file a notice of appeal begins to run for all parties from the date of entry of the order disposing of the last such remaining motion: n7

1. Motion for judgment pursuant to *Fed. R. Civ. P. 50(b)*

2. Motion to amend or make additional factual findings pursuant to *Fed. R. Civ. P. 52(b)*, irrespective of whether granting the motion would alter the judgment

3. Motion for attorney's fees pursuant to *Fed. R. Civ. P. 54*, provided the district court extends the time to appeal pursuant to *Fed. R. Civ. P. 58*

4. Motion to alter or amend the judgment pursuant to *Fed. R. Civ. P. 59*

5. Motion for a new trial pursuant to *Fed. R. Civ. P. 59*

6. Motion for relief pursuant to *Fed. R. Civ. P. 60*, if the motion is filed no later than 28 days after the judgment is entered

If a party files a notice of appeal after the court announces or enters judgment, but before it disposes of any of the six motions listed above, the notice becomes effective to appeal the judgment or order when the order disposing of the last such remaining motion is entered. n8

[2.--4] Extension of Time for Good Cause or Excusable Neglect

The district court may extend the time to file a notice of appeal if a party files a motion for an extension no later than 30 days after the time prescribed by *Fed. R. App. P. 4(a)* expires, and demonstrates excusable neglect or good cause. n9 If the motion is filed before the expiration of the time for taking an appeal prescribed in *Fed. R. App. P. 4(a)(1)* or *(3)*, the motion may be made ex parte unless the court requires otherwise. n10

A determination of "excusable" neglect is an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include the danger of prejudice to the nonmovant, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. The proper focus is whether the neglect of both the party and their counsel was excusable. n11

The "good cause" standard is more lenient than the "excusable neglect" standard, and is left to the discretion of the district court. n12

An extension of time within which to appeal may not exceed 30 days from the original deadline, or 14 days from the date when the order granting the motion is entered, whichever is later. n13

[2.--5] Extension of Time on Grounds of Lack of Notice

The appellate rules provide a method for a party to reopen the time for appeal if the party did not receive timely notice of the entry of the court's decision. Specifically, the district court may reopen the time to file an appeal for a period of 14 days from the date of entry of the order to reopen, provided all of the following conditions are satisfied:

- The party files the motion within 180 days after the judgment or order is entered, or within 14 days after the moving party receives notice of the entry, whichever is earlier n14

- The court finds that the moving party was entitled to notice of the entry of the judgment or order from which the appeal is taken, but did not receive the notice from the district court or any party within 21 days after entry n15

- The court finds that no party would be prejudiced n16

[2.--6] Deadline for Filing Cross-Appeal

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 *Fed. R. App. P. 4(a)*, whichever period ends later. n17

The purpose of this provision, which allows additional time for an appeal that is taken after an initial appeal, is simply to permit each party to a judgment to decide on the advisability of an appeal with full knowledge of the intentions of all other parties with respect to an appeal. n18

[2.--7] Checklist: Timeline for Appeal from Final Judgment

Preparing an appeals timetable at the outset will save time in the long run, and may avoid a costly oversight. A sample checklist for an appeal from a final judgment in a civil case might be:

Deadline	To Do	Where	Authority
30 days from entry of judgment	File Notice of Appeal	District Court	Fed. R. App. P. 4(a)(1)
	Pay fees for appeal	District Court	Fed. R. App. P. 3(e); 28 U.S.C. §§ 1913, 1917
	Obtain stay of enforcement of judgment (supersedeas bond)	District Court	Fed. R. Civ. P. 62(d); Fed. R. App. P. 8
	File bond for costs on appeal, if required	District Court	Fed. R. App. P. 7
No later than 14 days after filing notice of appeal	Order Reporter's Transcript	From reporter in writing	Fed. R. App. P. 10(b)
	File copy of order for Reporter's Transcript	District Court	Fed. R. App. P. 10(b)

[3] Notice of Appeal Must Specify Parties Taking the Appeal

A notice of appeal must specify the party or parties taking the appeal. n19 However, the court may not dismiss an appeal for failure to name a party whose intent to appeal is otherwise clear from the notice. n20 In a class action, irrespective of whether 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. n21

To prevent the loss of a right to appeal through inadvertent omission of a party's name, and based on the liberal construction of the appellate rules, an attorney representing more than one party has the flexibility to indicate which parties are appealing without naming them individually. The test established by the rule for determining whether such designations are sufficient is whether it is objectively clear that a party intended to appeal. n22

Although the requirements of *Fed. R. App. 3* are construed liberally, a complete failure to identify the party taking the appeal deprives the appellate court of jurisdiction. n23

The party taking an appeal is not required in the notice of appeal to set forth the names of the appellees. n24

[4] Notice of Appeal Must Designate Order From Which Appeal Is Taken

The notice of appeal must contain a designation of the judgment, order, or part of the judgment or order, that is being appealed. n25 This requirement is particularly important in a case in which the appellant wishes to appeal only one part of the judgment or order, because it informs the appellate court of the issues that will be presented in the appeal. n26 The appeal will not be dismissed for mere technicalities if the intent to appeal from a specific ruling can be fairly inferred, and the opposing party is not prejudiced. n27

[5] Notice of Appeal Must Name Court to Which Appeal is Taken

The notice of appeal must name the court to which the appeal is taken. n28 Failure to comply strictly with this requirement will not preclude consideration of the appeal provided the intention to appeal to a particular court may be inferred from the notice, and the defect has not prejudiced the appellee. n29

If an appeal is improperly noticed to a court that lacks jurisdiction, that court may nevertheless transfer the appeal to the proper court, provided the notice would have been timely if filed in the proper court. n30

[6] Sample Form Notice of Appeal Included in Appendix of Forms to Appellate Rules

The simplest way to ensure that all the requirements of *Fed. R. App. P. 3* are met is to utilize the form Notice of Appeal provided in the Appendix of Forms to the appellate rules. n31

[7] Filing the Notice of Appeal; Payment of Fees

The appellant must initiate all appeals taken as of right by timely filing a notice of appeal with the district court clerk. n32 If the appellant mistakenly files a timely notice in the circuit court rather than the district court, the notice will be treated as if it had been properly filed in the district court. n33

There are several steps required to complete the process of initiating an appeal by filing. However, 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 grounds only for the court of appeals to act as it considers appropriate, including dismissing the appeal. n34 Furthermore, the court may impose sanctions short of dismissal. For example, the court may impose costs on the party n35 or directly on counsel. n36

At the time of filing a notice of appeal, the appellant must furnish the clerk with sufficient copies of the notice of appeal to enable the clerk to comply promptly with the service requirements of *Fed. R. App. P. 3(d)*. n37 Specifically, appellant's counsel must furnish enough copies for the district court clerk to serve counsel of record for all parties other than the appellant, to send a copy to the circuit court clerk, and in an appeal by a defendant in a criminal case, to serve the defendant. While a failure to furnish the clerk with a sufficient number of copies at the time of filing does not affect

the validity of the appeal, it could subject the appellant to dismissal if the copies are not eventually supplied. Therefore, the prudent course is to supply the clerk with all necessary copies at the time of filing. n38

When an appellant files a notice of appeal, the appellant must pay the district court clerk all required fees. n39

[8] Appellant Is Not Required to Serve Notice of Appeal on Other Parties

The appellant is not required to serve the notice of appeal on the other parties to the action. n40 Rather, the appellant is required to furnish the district court clerk with sufficient copies of the notice of appeal to enable the clerk to serve it in the manner specified in *Fed. R. App. P. 3(d)*. n41 The precise number of copies required will vary, depending on the number of parties, and whether they are represented by separate counsel. n42

The district court 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. The clerk must also promptly send a copy of the notice of appeal and of all current and future docket entries to the clerk of the court of appeals named in the notice. The district court clerk must note on each copy the date when the notice of appeal was filed. n43 The clerk must note on the docket the names of the parties to whom the clerk mails copies, with the date of mailing. n44

The clerk's failure to serve a notice of appeal does not affect the validity of the appeal. n45 However, if an appellee has not received notice of the appeal, but would be affected by the appeal, the circuit court should not determine the appeal before the appellee is given actual notice. n46 On the other hand, an appeal may proceed if the court of appeals determines that the appellee received actual notice from a source other than the clerk. n47

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionInterlocutory OrdersCivil ProcedureAppealsRecords on AppealCivil ProcedureAppealsReviewabilityNotice of AppealCivil ProcedureAppealsReviewabilityPreservation for Review

FOOTNOTES:
(n1)Footnote 1. *Fed. R. App. P. 3(a)*.

(n2)Footnote 2. *See Fed. R. App. P. 4(a)(1)(A)*.

(n3)Footnote 3. *Fed. R. Civ. P. 77(d)(2)*.

(n4)Footnote 4. *Fed. R. App. P. 4(a)(1)(B)*.

(n5)Footnote 5. *Montelongo v. Meese, 777 F.2d 1097, 1098 (5th Cir. 1985)* .

(n6)Footnote 6. *Fed. R. App. P. 4(a)(1)(B)* (notice of appeal may be filed by any party within 60 days).

(n7)Footnote 7. *Fed. R. App. P. 4(a)(4)(A)*.

(n8)Footnote 8. *Fed. R. App. P. 4(a)(4)(B)(i)*.

(n9)Footnote 9. *Fed. R. App. P. 4(a)(5)(A)*.

(n10)Footnote 10. *Fed. R. App. P. 4(a)(5)(B)*.

(n11)Footnote 11. *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 395-397, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993)* ; *Reynolds v. Wagner, 55 F.3d 1426, 1428-1429 (9th Cir. 1995)* , *cert. denied*, *516 U.S. 932 (1995)* .

(n12)Footnote 12. *Parke-Chapley Constr. Co. v. Cherrington, 865 F.2d 907, 909-910 n.5 (7th Cir. 1989)* .

(n13)Footnote 13. *Fed. R. App. P. 4(a)(5)(C)*.

(n14)Footnote 14. *Fed. R. App. P. 4(a)(6)(B)*; *see Zimmer St. Louis v. Zimmer Co., 32 F.3d 357, 360-361 (8th Cir. 1994)* if appellant did not receive notice of the entry of judgment, the motion to extend the time for appeal must be made within 180 days after the entry of judgment).

(n15)Footnote 15. *Fed. R. App. P. 4(a)(6)(A)*.

(n16)Footnote 16. *Fed. R. App. P. 4(a)(6)(C)*.

(n17)Footnote 17. *Fed. R. App. P. 4(a)(3)*; *In re Julien Co., 146 F.3d 420, 423 (6th Cir. 1998)* .

(n18)Footnote 18. *Kurdziel v. Pittsburgh Tube Co., 416 F.2d 882, 885 (6th Cir. 1969)* .

(n19)Footnote 19. *Fed. R. App. P. 3(c)(1)(A)*.

(n20)Footnote 20. *Fed. R. App. P. 3(c)(4)*.

(n21)Footnote 21. *Fed. R. App. P. 3(c)(3)*.

(n22)Footnote 22. *See Fed. R. App. P. 3(c)(1), (4)* advisory committee note (1993); *see also In re Continental Airlines, 125 F.3d 120, 128-129 (3d Cir. 1997)* .

(n23)Footnote 23. *Billino v. Citibank, N.A., 123 F.3d 723, 725-726 (2d Cir. 1997)* .

(n24)Footnote 24. *Thomas v. Gunter, 32 F.3d 1258, 1262 (8th Cir. 1994)* .

(n25)Footnote 25. *Fed. R. App. P. 3(c)(1)(B)*.

(n26)Footnote 26. *Bach v. Coughlin, 508 F.2d 303, 307 (7th Cir. 1974)* .

(n27)Footnote 27. *Torres v. Oakland Scavenger Co., 487 U.S. 312, 316, 108 S. Ct. 2405, 101 L. Ed. 2d 285 (1988)* .

(n28)Footnote 28. *Fed. R. App. P. 3(c)(1)(C)*.

(n29)Footnote 29. *Donovan v. Richland County Ass'n for Retarded Citizens, 454 U.S. 389, 389-390, 102 S. Ct. 713, 70 L. Ed. 2d 570 (1982)* (circuit court lacked jurisdiction because appellee was prejudiced by failure to properly designate court).

(n30)Footnote 30. *See 28 U.S.C. § 1631*.

(n31)Footnote 31. *Fed. R. App. P. 3(c)(5)*.

(n32)Footnote 32. *Fed. R. App. P. 3(a)(1)*.

(n33)Footnote 33. *Fed. R. App. P. 4(d)*.

(n34)Footnote 34. *Fed. R. App. P. 4(a)(2).*

(n35)Footnote 35. *Oliver v. Michigan State Bd. of Educ., 519 F.2d 619, 622 (6th Cir. 1975)* (costs assessed for unnecessary printing of 3311 pages in appendix).

(n36)Footnote 36. *Blount v. State Bank & Trust Co., 425 F.2d 266, 266 (4th Cir. 1970)* (costs taxed against appellant's attorney for unnecessary expenses incurred because appellant failed to comply with rules).

(n37)Footnote 37. *Fed. R. App. P. 3(a)(1).*

(n38)Footnote 38. *See Fed. R. App. P. 3(a)(2).*

(n39)Footnote 39. *Fed. R. App. P. 3(e).*

(n40)Footnote 40. *See Fed. R. App. P. 3(d)(1)* (clerk required to serve notice).

(n41)Footnote 41. *See Fed. R. App. P. 3(a)(1).*

(n42)Footnote 42. *See Fed. R. App. P. 3(d)(1).*

(n43)Footnote 43. *Fed. R. App. P. 3(d)(1).*

(n44)Footnote 44. *Fed. R. App. P. 3(d)(3).*

(n45)Footnote 45. *Fed. R. App. P. 3(d)(3).*

(n46)Footnote 46. *Pike v. Ruby Foo's Den, Inc., 232 F.2d 683, 684 (D.C. Cir. 1956)* ; *Beecher v. Leavenworth State Bank, 184 F.2d 498, 501 (9th Cir. 1950)* .

(n47)Footnote 47. *Caspar v. Devine, 257 F.2d 197, 198 (D.C. Cir. 1958)* (although notice of appeal was not served on appellee, appellant's brief and motion to expand time to docket record were mailed to appellee).

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CHAPTER 48 Appeals to Court of Appeals *
C. Orders Appealable as of Right; Notice of Appeal Requirements

4-48 Federal Litigation Guide §§ 48.39 through 48.49

[Reserved]

§§ 48.39[Reserved]

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CHAPTER 48 Appeals to Court of Appeals *
D. Appeal by Permission from Interlocutory Orders Not Appealable as of Right

4-48 Federal Litigation Guide § 48.50

§ 48.50 Petition for Permission to Appeal Must Be Filed With Circuit Court

Certain orders may be appealed as a matter of right even though they are plainly interlocutory. The principal source of this jurisdiction is *28 U.S.C. § 1292(a)*. That statute gives the courts of appeals jurisdiction over appeals from interlocutory orders relating to injunctions, receiverships, or the determination of rights and liabilities of parties to admiralty cases. n1

If an appeal is within the discretion of the court of appeals, a party seeking to appeal must file a petition for permission to appeal. The petition must be filed with the circuit court clerk, together with proof of service on all other parties to the district court action. n2 The appellant must file an original petition together with three copies, unless the court requires a different number by local rule or by order in the particular case. n3

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. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionInterlocutory OrdersCivil ProcedureAppealsRecords on AppealCivil ProcedureAppealsReviewabilityPreservation for ReviewCivil ProcedureAppealsReviewabilityTime Limitations

FOOTNOTES:
(n1)Footnote 1. *See 28 U.S.C. § 1292(a).*

(n2)Footnote 2. *Fed. R. App. P. 5(a)(1).*

(n3)Footnote 3. *Fed. R. App. P. 5(c).*

(n4)Footnote 4. *Fed. R. App. P. 5(a)(2)*; *see Fed. R. App. P. 4(a)* (typically providing 30-day period for filing notice of appeal); *see also § 48.38[2].*

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CHAPTER 48 Appeals to Court of Appeals *
D. Appeal by Permission from Interlocutory Orders Not Appealable as of Right

4-48 Federal Litigation Guide § 48.51

§ 48.51 Contents of Petition for Permission to File Appeal

The petition for permission to file an appeal must include all of the following elements:

- The facts necessary to understand the question presented n1
- The question itself n2
- The relief sought n3
- The reasons why the appeal should be allowed and is authorized by a statute or rule n4
- A copy of the order, decree, or judgment complained of and any related opinion or memorandum, and any order stating the district court's permission to appeal or finding that the necessary conditions are met n5

In addition to the five required items specified above, counsel should consider including in the petition a statement of any exceptional circumstances because some circuits have held that appeals of interlocutory orders should be granted only in exceptional circumstances in which an immediate appeal would avoid protracted and expensive litigation. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionInterlocutory OrdersCivil ProcedureAppealsBriefsCivil ProcedureAppealsRecords on Appeal

FOOTNOTES:
(n1)Footnote 1. *Fed. R. App. P. 5(b)(1)(A).*

(n2)Footnote 2. *Fed. R. App. P. 5(b)(1)(B).*

(n3)Footnote 3. *Fed. R. App. P. 5(b)(1)(C).*

(n4)Footnote 4. *Fed. R. App. P. 5(b)(1)(D).*

(n5)Footnote 5. *Fed. R. App. P. 5(b)(1)(E).*

(n6)Footnote 6. *See United States Rubber Co. v. Wright, 359 F.2d 784, 785 (9th Cir. 1966)* .

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CHAPTER 48 Appeals to Court of Appeals *
D. Appeal by Permission from Interlocutory Orders Not Appealable as of Right

4-48 Federal Litigation Guide § 48.52

§ 48.52 Response to Petition for Permission to File Appeal

A party may file a response or cross-petition to a petition for permission to file an appeal. The response or cross-petition must be filed within 10 days after the petition is served, n1 together with proof of service on all other parties to the district court action. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsBriefsCivil ProcedureAppealsRecords on Appeal

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. App. P. 5(b)(2).*

(n2)Footnote 2. *Fed. R. App. P. 25(d).*

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CHAPTER 48 Appeals to Court of Appeals *
D. Appeal by Permission from Interlocutory Orders Not Appealable as of Right

4-48 Federal Litigation Guide § 48.53

§ 48.53 Circuit Court May Require Bond to Cover Costs of Appeal

If the circuit court grants the petition for permission to appeal, the moving party must do the following within 14 days of entry of the order granting the petition:

- Pay the required fees to the district court clerk n1
- File a bond for any costs required pursuant to *Fed. R. App. P. 7.* n2

The district court has considerable discretion in determining the amount and nature of the bond for costs on appeal. n3 The amount of the bond imposed may be in any amount necessary to cover the costs of defending the appeal. n4

The court should generally not consider attorney's fees in determining the amount of a bond. n5 However, a district court may make a bond larger in cases in which the applicable substantive law makes an attorney's fee recoverable as part of the costs of suit. For example, the Copyright Act allows attorney's fees to be levied "as part of the costs." n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsBriefsCivil ProcedureAppealsCosts & Attorney FeesCivil ProcedureAppealsReviewabilityTime Limitations

FOOTNOTES:
(n1)Footnote 1. *Fed R. App. P. 5(d)(1)(A).*

(n2)Footnote 2. *Fed R. App. P. 5(d)(1)(B); see Fed R. App. P. 7.*

(n3)Footnote 3. *Sckolnick v. Harlow, 820 F.2d 13, 15 (1st Cir. 1987)* ; *Terry Inv. Co. v. United Funding & Investors Inc., 800 F. Supp. 879, 882 (E.D. Cal. 1992)* .

(n4)Footnote 4. *In re American President Lines, Inc., 779 F.2d 714, 716 (D.C. Cir. 1985)* .

(n5)Footnote 5. *Terry Inv. Co. v. United Funding & Investors Inc., 800 F. Supp. 879, 882 (E.D. Cal. 1992)* .

(n6)Footnote 6. *17 U.S.C. § 505.*

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CHAPTER 48 Appeals to Court of Appeals *
D. Appeal by Permission from Interlocutory Orders Not Appealable as of Right

4-48 Federal Litigation Guide §§ 48.54 through 48.59

[Reserved]

§§ 48.54[Reserved]

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CHAPTER 48 Appeals to Court of Appeals *
E. Seeking a Stay or Injunction Pending Appeal

4-48 Federal Litigation Guide § 48.60

§ 48.60 Enforcement of Non-Exempt Judgments Automatically Stayed 14 Days Following Entry

Generally, a judgment is automatically stayed for 14 days following entry. n1 The automatic 14-day stay gives the losing party time to determine what steps, if any, are available to attack the judgment.

The following types of judgments are exempt from the 14-day automatic stay provision, and are subject to immediate enforcement: n2

- An interlocutory or final judgment in an action seeking injunctive relief
- An interlocutory or final judgment in a receivership action
- A judgment or order directing an accounting in an action for patent infringement

A stay of enforcement pending appeal from these types of judgments is discretionary with the district court. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 62(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 62(a).*

(n3)Footnote 3. *See Beaver Cloth Cutting Machs., Inc. v. H. Maimin Co., 37 F.R.D. 47 (S.D.N.Y. 1964) , rev'd on other grounds, 343 F.2d 442 (2d Cir. 1965) .*

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CHAPTER 48 Appeals to Court of Appeals *
E. Seeking a Stay or Injunction Pending Appeal

4-48 Federal Litigation Guide § 48.61

§ 48.61 Obtaining Stay of Enforcement of Non-Exempt Judgment Pending Appeal by Posting Bond

Ordinarily, a stay pending appeal may be obtained as of right by posting a supersedeas bond in an amount adequate to protect the interests of the appellee. n1

The following types of judgments are not automatically stayed by posting a supersedeas bond: n2

- An interlocutory or final judgment in an action seeking injunctive relief
- An interlocutory or final judgment in a receivership action
- A judgment or order directing an accounting in an action for patent infringement

Instead, if any appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction pending appeal on such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. n3 If the motion in the district court is unsuccessful, a motion may be made to the court of appeals or to one of its judges. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionInterlocutory Orders

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 62(d).*

(n2)Footnote 2. *Fed. R. Civ. P. 62(a).*

(n3)Footnote 3. *Fed. R. Civ. P. 62(c).*

(n4)Footnote 4. *Fed. R. App. 8(a)(2).*

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CHAPTER 48 Appeals to Court of Appeals *
E. Seeking a Stay or Injunction Pending Appeal

4-48 Federal Litigation Guide §§ 48.62 through 48.69

[Reserved]

§§ 48.62[Reserved]

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CHAPTER 48 Appeals to Court of Appeals *
F. The Record on Appeal

4-48 Federal Litigation Guide § 48.70

§ 48.70 Record on Appeal is Official Compilation of Proceedings as Presented to District Court

The record on appeal is the official compilation of the documents, evidence, and transcript of proceedings as they were presented to the district court. n1 The record on appeal does not include *all* district court material. Rather, it includes only the material which is needed for review of the issues to be presented on appeal. n2 The record on appeal consists of the original papers and exhibits filed in the district court, the transcript of proceedings, and a certified copy of the district court's docket entries. n3

The record on appeal as it is presented to the circuit court determines and limits the issues that may be addressed on appeal. Because the function of the circuit court is to review district court decisions, the record is limited to the material that was presented to the district court, with limited exceptions. n4 Failure to include portions of the record that are necessary to review any particular issue raised on appeal may result in the circuit court's refusing to address that issue, n5 or even dismissing the appeal. n6

A record is required for interlocutory appeals, as well as appeals in wherein a final judgment has been entered. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsBriefsCivil ProcedureAppealsRecords on AppealCivil ProcedureAppealsReviewabilityGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. App. P. 10(a).*

(n2)Footnote 2. *Controlled Demolition v. F. A. Wilhelm Constr. Co., 84 F.3d 263, 269 (7th Cir. 1996)* .

(n3)Footnote 3. *Fed. R. App. P. 10(a).*

(n4)Footnote 4. *McClendon v. Indiana Sugars, Inc., 108 F.3d 789, 795 (7th Cir. 1997)* (evidence not admitted in district court is not part of record and may not be included in appellate brief); *Dakota Indus., Inc. v. Dakota Sportswear Inc., 988 F.2d 61, 63-64 (8th Cir. 1993)* (generally, appellate court may consider only record made before district

court).

(n5)Footnote 5. *Carter v. Jacobsen, 748 F.2d 487, 488-89 (8th Cir. 1984)* (when trial transcript was not included in record, claim that district court erred in admitting certain evidence could not be reviewed).

(n6)Footnote 6. *LaFollette v. Savage, 63 F.3d 540, 546 (7th Cir. 1995)* .

(n7)Footnote 7. *In re All Maine Asbestos Litig. (PNS Cases), 772 F.2d 1023, 1026 n.5 (1st Cir. 1985)* .

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CHAPTER 48 Appeals to Court of Appeals *
F. The Record on Appeal

4-48 Federal Litigation Guide § 48.71

§ 48.71 Items That Must be Included in Record on Appeal

[1] Record on Appeal Must Include Original Papers and Exhibits

The record on appeal must include the *original papers and exhibits* filed in the district court. n1

The following nonexhaustive list includes examples of documents that are classified as *original papers*:

- Material pleadings n2
- Process and proof of service n3
- Pretrial orders n4
- Court memoranda n5
- Affidavits n6

While the definition of *original papers* includes documentary evidence, a document does not become part of the record merely because it was filed with the district court. Rather, the document must have been offered into evidence. n7

The record on appeal also must include exhibits filed in the district court. n8 This includes all documentary and physical exhibits filed and offered into evidence, irrespective of whether they were ultimately *admitted* into evidence. n9 An exhibit offered into evidence, but excluded by the court, is a necessary part of the record if the circuit court will be called on to rule regarding its admissibility. n10

[2] Record on Appeal Must Include Transcript of Proceedings

The transcript, if any, of the district court proceedings must be included in the record on appeal. n11

Within 14 days after the notice of appeal if filed, or an order is entered disposing of the last timely remaining motion of a type specified in *Fed. R. App. P. 4(a)(4)(A)*, whichever is later, the appellant must either order a transcript, n12 or file a certificate stating that no transcript will be ordered. n13

Unless the entire transcript is ordered, the appellant must within the 14 days provided in *Fed. R. App. P. 10(b)(1)* file a statement of the issues that the appellant intends to present on the appeal, and must serve on the appellee copies of both the order of transcript (or certificate that it will not be ordered), and the statement of issues. n14 If the entire transcript is not ordered, and 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. n15

At the time of ordering a transcript, the ordering party must make satisfactory arrangements with the reporter for paying the cost of the transcript. n16 By statute, the reporter may require any party requesting a transcript to prepay the estimated fee. n17

[3] Statement of Evidence When Transcript 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 court clerk in the record on appeal. n18

The term "unavailable" is not defined in the rule but includes the failure to record portions of a trial, n19 and inadvertent destruction of reporter's notes before transcription. n20

[4] Record on Appeal Must Include Certified Copy of Docket Entries

The final part of the record on appeal is a certified copy of the docket entries prepared by the district court clerk. n21 Docket entries include, in chronological order, brief descriptions of the following: n22

- All documents filed with the clerk
- Oral and written orders made by the district court
- Processes issued and returned
- Appearances
- Verdicts and judgments rendered

The basic purpose behind the rule is to establish those entries that were actually docketed by the district court clerk, and to prevent parties from attempting to argue that entries were included in the docket when such entries were not docketed by the clerk. n23

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsBriefsCivil ProcedureAppealsRecords on AppealEvidenceDocumentary EvidenceWritingsTranscripts & TranslationsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. App. P. 10(a)(1).*

(n2)Footnote 2. *United States v. Gilbertson, 111 F.2d 978 (7th Cir. 1940)* .

(n3)Footnote 3. *United States v. International Business Mach. Corp., 67 F.R.D. 618, 619 (S.D. N.Y. 1975)* .

(n4)Footnote 4. *Kori Corp. v. Wilco Marsh Buggies and Draglines, Inc., 761 F.2d 649, 653 (Fed. Cir. 1985)* , *cert. denied, 474 U.S. 902 (1985)* .

(n5)Footnote 5. *Brown v. United States, 277 F.2d 201, 202 (8th Cir. 1960)* .

(n6)Footnote 6. *United States v. Sclafani, 487 F.2d 245, 253 n.7 (2d Cir. 1973)* , *cert. denied, 414 U.S. 1023 (1974)* .

(n7)Footnote 7. *Fleming v. Gulf Oil Corp., 547 F.2d 908, 911 (10th Cir. 1977)* .

(n8)Footnote 8. *Fed. R. App. P. 10(a)(1).*

(n9)Footnote 9. *United States v. Burke, 781 F.2d 1234, 1242 (7th Cir. 1985)* (excluded transcripts of taped conversations marked as exhibits allowed as part of record).

(n10)Footnote 10. *Texas & Pacific Ry. v. Buckles, 232 F.2d 257, 261 (5th Cir. 1956)* , *cert. denied, 351 U.S. 984 (1956)* (hospital record offered in evidence but not brought forward in record on appeal was not reviewable by court).

(n11)Footnote 11. *See Fed. R. App. P. 10(a)(2).*

(n12)Footnote 12. *See Fed. R. App. P. 10(b)(1)(A).*

(n13)Footnote 13. *See Fed. R. App. P. 10(b)(1)(B).*

(n14)Footnote 14. *Fed. R. App. P. 10(b)(3)(A).*

(n15)Footnote 15. *Fed. R. App. P. 10(b)(3)(B).*

(n16)Footnote 16. *Fed. R. App. P. 10(b)(4).*

(n17)Footnote 17. *28 U.S.C. § 753(f).*

(n18)Footnote 18. *Fed. R. App. P. 10(c).*

(n19)Footnote 19. *Cameo Convalescent Ctr., Inc. v. Senn, 738 F.2d 836, 842 (7th Cir. 1984)* , *cert. denied, 469 U.S. 1106 (1985)* .

(n20)Footnote 20. *Murphy v. St. Paul Fire & Marine Ins. Co., 314 F.2d 30, 31 (5th Cir. 1963)* , *cert. denied, 375 U.S. 906 (1963)* .

(n21)Footnote 21. *Fed. R. App. P. 10(a)(3).*

(n22)Footnote 22. *See Fed. R. Civ. P. 79(a).*

(n23)Footnote 23. *Waldorf v. Shuta, 142 F.3d 601, 620 (3rd Cir. 1998)* .

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CHAPTER 48 Appeals to Court of Appeals *
F. The Record on Appeal

4-48 Federal Litigation Guide § 48.72

§ 48.72 Agreed Statement in Lieu of Record on Appeal

In place of the record on appeal, 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 court's resolution of the issues. If the statement is truthful, the statement (and 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. A copy of the agreed statement may be filed in place of the appendix required by *Fed. R. App. P. 30*. n1

The purpose of the agreed statement is to provide an inexpensive method of bringing the record before the circuit court in cases where the only questions presented depend on facts or evidence that is not in dispute. n2 An agreed statement may make unnecessary an expensive transcription.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsBriefsCivil ProcedureAppealsRecords on AppealCivil ProcedureAppealsReviewabilityGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. App. P. 10(d).*

(n2)Footnote 2. *Ocasio v. Bryan, 374 F.2d 11, 14 (3d Cir. 1967) .*

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CHAPTER 48 Appeals to Court of Appeals *
F. The Record on Appeal

4-48 Federal Litigation Guide § 48.73

§ 48.73 Correction or Modification of Record on Appeal

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 the district court, and the record conformed accordingly. n1 The district court's disposition of the dispute is conclusive, unless a party can establish that the district court misrepresented the contents of the record. n2

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 in any one of the following ways: n3

- By stipulation of the parties
- By the district court before or after the record has been forwarded
- By the court of appeals

All other questions as to the form an content of the record must be presented to the court of appeals. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsBriefsCivil ProcedureAppealsRecords on AppealCivil ProcedureAppealsReviewabilityGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. App. P. 10(e)(1).*

(n2)Footnote 2. *United States v. Mori, 444 F.2d 240, 246 (5th Cir. 1971) , cert. denied, 404 U.S. 913 (1971)* (determination of trial judge in correcting record is conclusive absent showing of intentional misrepresentation of contents of record).

(n3)Footnote 3. *Fed. R. App. P. 10(e)(2).*

(n4)Footnote 4. *Fed. R. App. P. 10(e)(3).*

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CHAPTER 48 Appeals to Court of Appeals *
F. The Record on Appeal

4-48 Federal Litigation Guide §§ 48.74 through 48.79

[Reserved]

§§ 48.74[Reserved]

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CHAPTER 48 Appeals to Court of Appeals *
G. Review or Enforcement of Administrative Orders

4-48 Federal Litigation Guide § 48.80

§ 48.80 Rules Governing Procedure for Review or Enforcement of Administrative Order

Fed. R. App. P. 15-20 govern the procedure for the review or enforcement by a circuit court of an order of an agency, board, commission, or officer. n1 All other provisions of the Federal Rules of Appellate Procedure apply to the review or enforcement of an administrative order by a court of appeals, except for the following rules: n2

- *Fed. R. App. P. 3-14*, which govern appeals from judgments or orders of the district court, and appeals from decisions of the Tax Court
- *Fed. R. App. P. 22-23*, which govern habeas corpus proceedings

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewReviewabilityGeneral OverviewCivil ProcedureAppealsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. App. P. 15.*

(n2)Footnote 2. *Fed. R. App. P. 14.*

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CHAPTER 48 Appeals to Court of Appeals *
G. Review or Enforcement of Administrative Orders

4-48 Federal Litigation Guide § 48.81

§ 48.81 Nature of Proceedings for Review or Enforcement of Administrative Order

There are two general types of proceedings governed by *Fed. R. App. P. 15-20*: a petition for review of an agency order, and an application for enforcement of an agency order. n1

Fed. R. App. P. 15 does not in itself give the circuit court jurisdiction to review or enforce an agency decision. n2 Jurisdiction is established for review and enforcement of administrative proceedings by the particular statute that governs the powers of each individual agency. n3 Furthermore, the Judicial Review Act grants to the circuit court exclusive jurisdiction to enjoin, set aside, suspend, or determine the validity of final orders of several agencies, including the Federal Communications Commission, Federal Maritime Commission or Maritime Administration, Atomic Energy Commission, and the Interstate Commerce Commission. n4 In the absence of a statutory provision granting jurisdiction to the circuit courts to review administrative proceedings, district courts have jurisdiction to review agency decisions. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewReviewabilityGeneral OverviewAdministrative LawJudicial ReviewReviewabilityJurisdiction & VenueAdministrative LawJudicial ReviewStandards of ReviewGeneral OverviewCivil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsRecords on Appeal

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. App. P. 15.*

(n2)Footnote 2. *Office of Governor v. Department of Health & Human Servs., 997 F.2d 1290, 1292 (9th Cir. 1993)* (*Fed. R. App. P. 15* merely prescribes procedure for review of agency action by court of appeals authorized by statute to make review).

(n3)Footnote 3. *See, e.g., 29 U.S.C. § 160(e), (f)* (giving jurisdiction to circuit courts to enforce or review orders of National Labor Relations Board).

(n4)Footnote 4. *See 28 U.S.C. § 2342.*

(n5)Footnote 5. *See 28 U.S.C. § 1331.*

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CHAPTER 48 Appeals to Court of Appeals *
G. Review or Enforcement of Administrative Orders

4-48 Federal Litigation Guide § 48.82

§ 48.82 Petition for Review of Administrative Order

[1] Review of Agency Order Is Initiated by Filing Petition for Review

Review of an agency order is initiated by filing a petition for review. n1 The petition may seek review of an order of an agency, board, commission, or officer, and a petition for review may be denominated as a petition to enjoin, a petition to suspend, a petition to modify, or a notice of appeal, whichever form is indicated by the applicable statute. n2 The petition for review must be filed with the clerk of the circuit court that is 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. n3

The applicable statutes provide time limits for filing the petition for review. n4 If the applicable statute does not specify a time limit, the time for filing for review is subject only to the doctrine of laches. n5

[2] Contents of Petition for Review

Form 3 in the Appendix of Forms to the Federal Rules of Appellate Procedure is a suggested form of a petition for review. n6

The petition must include the following information: n7

1. The petition must 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. n8

2. The petition must name the agency as a respondent. Even though not named in the petition, the United States is a respondent if required by statute.

3. The petition must specify the order or part of the order to be reviewed.

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewReviewabilityGeneral OverviewAdministrative LawJudicial ReviewStandards of ReviewGeneral OverviewCivil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsBriefs

FOOTNOTES:

(n1)Footnote 1. *See Fed. R. App. P. 15(a)(1).*

(n2)Footnote 2. *Fed. R. App. P. 15(a)(4).*

(n3)Footnote 3. *See Fed. R. App. P. 15(a)(1).*

(n4)Footnote 4. *See, e.g., 28 U.S.C. § 2344* (providing for 60-day time limit for petitions to review).

(n5)Footnote 5. *Griffith Co. v. NLRB, 545 F.2d 1194, 1197 n.3 (9th Cir. 1976) , cert. denied, 434 U.S. 854 (1977)* (petition to review NLRB order was timely filed under doctrine of laches).

(n6)Footnote 6. *See Fed. R. App. P. 15(a)(3).*

(n7)Footnote 7. *Fed. R. App. P. 15(a)(2).*

(n8)Footnote 8. *Fed. R. App. P. 15(a)(2)(A).*

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CHAPTER 48 Appeals to Court of Appeals *
G. Review or Enforcement of Administrative Orders

4-48 Federal Litigation Guide § 48.83

§ 48.83 Application for Enforcement of Administrative Order

[1] Filing Application and Answer

An application for enforcement of an administrative order must be filed with the clerk of a court of appeals authorized to enforce the order. n1 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. n2

Although neither *Fed. R. App. P. 15* nor any of the statutes governing the various administrative agencies specify a time limit for filing an application for enforcement, the doctrine of laches applies. n3 Within 21 days after an application for enforcement is filed, the respondent must serve an answer on the petitioner, and file it with the clerk. If the respondent fails to answer within this time, judgment will be awarded for the relief sought. n4

[2] Contents of Application for Enforcement

The application for enforcement must include the following information: n5

- A concise statement of the proceedings in which the order was entered.
- The facts on which venue is based. Venue is generally provided by the statutes governing the particular agency involved. Many statutes governing the powers and procedures of the individual agencies specify that an application for enforcement of an agency decision may be brought in the United States Court of Appeals for the District of Columbia, in addition to whichever circuit court has personal and subject matter jurisdiction over the matter. n6
- The relief requested.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewReviewabilityGeneral OverviewAdministrative LawJudicial ReviewStandards of ReviewGeneral OverviewCivil ProcedureAppealsGeneral

Overview

FOOTNOTES:

(n1)Footnote 1. *Fed. R. App. P. 15(b)(1).*

(n2)Footnote 2. *Fed. R. App. P. 15(b)(1).*

(n3)Footnote 3. *NLRB v. Searle Auto Glass, Inc., 762 F.2d 769, 772 (9th Cir. 1985)* (in absence of statutory time limit, party asserting that application is untimely must establish that more time has elapsed than was necessary, and that party was prejudiced by delay).

(n4)Footnote 4. *Fed. R. App. P. 15(b)(2).*

(n5)Footnote 5. *Fed. R. App. P. 15(b)(3).*

(n6)Footnote 6. *See, e.g., 29 U.S.C. § 160(e), (f).*

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CHAPTER 48 Appeals to Court of Appeals *
G. Review or Enforcement of Administrative Orders

4-48 Federal Litigation Guide § 48.84

§ 48.84 Serving Petition for Review or Application for Enforcement

At the time of filing, the petitioner or applicant must give the clerk enough copies of the petition or application to serve each respondent. n1 The petitioner or applicant is responsible for serving a copy of the petition or application on all other parties admitted to participate in the agency proceedings. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewReviewabilityGeneral OverviewAdministrative LawJudicial ReviewStandards of ReviewGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedureAppealsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. App. P. 15(c)(3).*

(n2)Footnote 2. *Fed. R. App. P. 15(c)(1).*

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CHAPTER 48 Appeals to Court of Appeals *
G. Review or Enforcement of Administrative Orders

4-48 Federal Litigation Guide § 48.85

§ 48.85 No Automatic Stay of Administrative Order Pending Review

Ordinarily, if a petitioner seeks to suspend the implementation of an agency decision or order pending review in the circuit court, the petitioner must file a motion with the agency for a stay of the order. n1 If the statute creating the agency expressly covers the conditions under which the agency will grant a stay, those conditions control. n2 Absent any specific statutory regulation, a general statute governs stays of administrative orders pending review, and provides that an agency may postpone the effective date of an action taken by it when required by justice. n3

If a motion for a stay pending review has been denied by the agency, the petitioner may file a motion to the court of appeals or one of its judges.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewReviewabilityGeneral OverviewAdministrative LawJudicial ReviewStandards of ReviewGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic StaysCivil ProcedureAppealsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. App. P. 18(a)(1)*; *see Superior Trucking Co. v. United States, 614 F.2d 481, 485 (5th Cir. 1980)* .

(n2)Footnote 2. *Superior Trucking Co. v. United States, 614 F.2d 481, 485 (5th Cir. 1980)* .

(n3)Footnote 3. *5 U.S.C. § 705*.

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CHAPTER 48 Appeals to Court of Appeals *
G. Review or Enforcement of Administrative Orders

4-48 Federal Litigation Guide §§ 48.86 through 48.89

[Reserved]

§§ 48.86[Reserved]

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CHAPTER 48 Appeals to Court of Appeals *
H. Preparing Appellate Briefs

4-48 Federal Litigation Guide § 48.90

§ 48.90 Required Contents of Appellant's and Appellee's Briefs

An appellant's brief must contain all of the following items, under appropriate headings, and in the order indicated:

1. A corporate disclosure statement, if required by *Fed. R. App. P. 26.1*. n1

2. A table of contents, with page references. n2

3. A table of authorities, with cases alphabetically arranged, statutes, and other authorities. Each item must have references to the pages of the brief where they are cited. n3

4. A jurisdictional statement, including each of the following:

(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. n4

(b) The basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions, and stating relevant facts establishing jurisdiction. n5

(c) The filing dates establishing the timeliness of the appeal or petition for review. n6

(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. n7

5. A statement of the issues presented for review. n8

6. A statement of the case, briefly indicating the nature of the case, the course of proceedings, and the disposition below. n9

7. A statement of facts relevant to the issues submitted for review, with appropriate references to the record. n10

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. n11

9. The argument, which must contain the appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies. n12 For each issue, the brief must include 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. n13

10. A short conclusion stating the precise relief sought. n14

11. A certificate of compliance with type-volume and page limitations, if required by *Fed. R. App. P. 32(a)(7)*. n15

The appellee's brief must include the same contents as the appellant's brief, except that the following do not need to be included unless the appellee is dissatisfied with the appellant's statement:

1. A jurisdictional statement. n16

2. A statement of the issues on appeal. n17

3. A statement of the case. n18

4. A statement of the facts. n19

5. A statement of the standard of review. n20

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsBriefsCivil ProcedureAppealsReviewabilityNotice of Appeal

FOOTNOTES:
(n1)Footnote 1. *Fed. R. App. P. 28(a)(1)*.

(n2)Footnote 2. *Fed. R. App. P. 28(a)(2)*.

(n3)Footnote 3. *Fed. R. App. P. 28(a)(3)*.

(n4)Footnote 4. *Fed. R. App. P. 28(a)(4)(A)*.

(n5)Footnote 5. *Fed. R. App. P. 28(a)(4)(B)*.

(n6)Footnote 6. *Fed. R. App. P. 28(a)(4)(C)*.

(n7)Footnote 7. *Fed. R. App. P. 28(a)(4)(D)*.

(n8)Footnote 8. *Fed. R. App. P. 28(a)(5)*.

(n9)Footnote 9. *Fed. R. App. P. 28(a)(6)*.

(n10)Footnote 10. *Fed. R. App. P. 28(a)(7).*

(n11)Footnote 11. *Fed. R. App. P. 28(a)(8).*

(n12)Footnote 12. *Fed. R. App. P. 28(a)(9)(A).*

(n13)Footnote 13. *Fed. R. App. P. 28(a)(9)(B)*; *see Harris v. Folk Constr. Co., 138 F.3d 365, 367 n.1 (8th Cir. 1998)* .

(n14)Footnote 14. *Fed. R. App. P. 28(a)(10).*

(n15)Footnote 15. *Fed. R. App. P. 28(a)(11).*

(n16)Footnote 16. *Fed. R. App. P. 28(b)(1).*

(n17)Footnote 17. *Fed. R. App. P. 28(b)(2).*

(n18)Footnote 18. *Fed. R. App. P. 28(b)(3).*

(n19)Footnote 19. *Fed. R. App. P. 28(b)(4).*

(n20)Footnote 20. *Fed. R. App. P. 28(b)(5).*

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CHAPTER 48 Appeals to Court of Appeals *
H. Preparing Appellate Briefs

4-48 Federal Litigation Guide § 48.91

§ 48.91 Contents of Reply Brief

The appellant may file a brief in reply to the appellee's brief. An appellee who has cross-appealed may file a supplemental brief in reply to the appellant's response to the issues presented by the cross-appeal. Unless the court permits, no further briefs may be filed. A reply brief must contain a table of contents and a table of authorities. n1

If an issue is raised for the first time in a reply brief, that issue will not be considered by the court. n2 However, the appellant may respond to arguments raised for the first time in the appellee's brief. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsBriefs

FOOTNOTES:
(n1)Footnote 1. *Fed. R. App. P. 28(c).*

(n2)Footnote 2. *Sands v. Runyon, 28 F.3d 1323, 1332 (2d Cir. 1994) .*

(n3)Footnote 3. *EEOC v. Union Bank, 408 F.2d 867, 868-869 (9th Cir. 1969) .*

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CHAPTER 48 Appeals to Court of Appeals *
H. Preparing Appellate Briefs

4-48 Federal Litigation Guide § 48.92

§ 48.92 Cross-Appellate Briefs; Briefs in Cases Involving Multiple Appellants or Appellees

If a cross-appeal is filed, the party who files a notice of appeal first is deemed the appellant. If notices are filed on the same day, the plaintiff in the lower court proceeding is deemed the appellant. These designations may be modified by agreement of the parties or by court order. n1 Filing the first notice of appeal has import implications because the appellant (the party who files the notice of appeal first) files the first brief, is responsible for preparing the Appendix pursuant to *Fed. R. App. P. 30*, and is entitled to open and close the oral argument. n2 While *Fed. R. App. P. 28(g)* and *(h)* do not permit the appellee's brief to be lengthier because it includes a cross-appeal, the appellee, as cross-appellant, can have the last word at the briefing stage by filing a reply to the appellant-cross-appellee's answering brief. n3

With respect to an appellee's cross-appeal and response to appellant's brief, the appellee's brief must conform to the requirements of *Fed. R. App. P. 28(a)(1)-(11)*. However, an appellee who is satisfied with appellant's statement need not include a statement of the case or of the facts. n4

If a case involves 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. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsBriefsCivil ProcedureAppealsReviewabilityGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. App. P. 28(h)*; *see also Fed. R. App. P. 15.1*.

(n2)Footnote 2. *Fed. R. App. P. 28(h)*, *30*, *31*, *34(c)-(d)*.

(n3)Footnote 3. *Fed. R. App. P. 28(c)*.

(n4)Footnote 4. *Fed. R. App. P. 28(h)*.

(n5)Footnote 5. *Fed. R. App. P. 28(i).*

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CHAPTER 48 Appeals to Court of Appeals *
H. Preparing Appellate Briefs

4-48 Federal Litigation Guide § 48.93

§ 48.93 References to Record on Appeal; Reproduction of Statutes, Rules, Regulations, and Other Laws

When necessary, the litigants must refer specifically to those parts of the record that support the facts and arguments relied on. n1 Failure to cite to the record may result in a waiver of the argument. n2

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, or may be supplied to the court in pamphlet form. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsBriefsCivil ProcedureAppealsRecords on Appeal

FOOTNOTES:
(n1)Footnote 1. *Fed. R. App. P. 28(a)(9)(A).*

(n2)Footnote 2. *McGoldrick Oil Co. v. Campbell, Athey & Zukowski, 793 F.2d 649, 653 (5th Cir. 1986)* (appellant's argument in brief stricken because argument was without any references to supporting evidence in record).

(n3)Footnote 3. *Fed. R. App. P. 28(f).*

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CHAPTER 48 Appeals to Court of Appeals *
H. Preparing Appellate Briefs

4-48 Federal Litigation Guide § 48.94

§ 48.94 Page Limitations and Formatting Requirements

If a brief does not conform to the technical formatting requirements of *Fed. R. App. P. 32* or applicable local rules, adverse consequences may result, such as dismissal of the appeal, rejection of the brief, or imposition of a monetary sanction. n1

All briefs must comply with the following page limitations and formatting requirements: n2

- **Page limitations.** A principal brief may not exceed 30 pages, and a reply brief 15 pages. Alternatively, a principal brief is acceptable if it contains no more than 14,000 words; if it uses a monospaced face, it is acceptable if it contains no more than 1,300 lines of text. A reply brief is acceptable if it contains no more than half of the type volume specified in *Fed. R. App. P. 32(a)(7)(B)(i)*. 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. Only one side of the paper may be used.

- **Spacing and margins.** 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.

- **Typeface.** 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. The brief may use either a proportionally spaced or a monospaced face. A monospaced face may not contain more than 10 1/2 characters per inch. A proportionally spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 14-point or larger.

- **Type of paper.** The brief may be reproduced by any process that yields a clear black image on light paper. The paper must be 8 1/2 by 11 inches, opaque and unglazed.

- **Clarity.** Text must be reproduced with a clarity that equals or exceeds the output of a laser printer. 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.

- **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. The front cover of a brief must contain:
  - The number of the case centered at the top
  - The name of the court
  - The title of the case
  - The nature of the proceeding (*e.g.*, Appeal, Petition for Review), and the name of the court, agency, or board below
  - The title of the brief, identifying the party or parties for whom the brief is filed
  - The name, office address, and telephone number of counsel representing the party for whom the brief is filed
- **Binding.** The brief may be bound in any manner that is secure, does not obscure the text, and permits the brief to lie reasonably flat when open.
- **Local variation.** Every court of appeals must accept a brief that complies with the form requirements listed above. By local rule or order in a particular case, a court of appeals may accept a brief that does not meet all of the form requirements. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsBriefsCivil ProcedureAppealsRecords on Appeal

FOOTNOTES:
(n1)Footnote 1. *Doyle v. Hasbro, Inc., 103 F.3d 186, 196 (1st Cir. 1996)* (because appellants' single-spaced brief violated *Fed. R. App. P. 32(a)* and violated page limit imposed by *Fed. R. App. P. 28(g)*, court awarded double costs); *Hamblen v. County of L.A., 803 F.2d 462, 464 (9th Cir. 1986)* (appeal dismissed for multiple violations, including cover that failed to identify nature of proceeding or lower court decision that was subject of appeal).

(n2)Footnote 2. *Fed. R. App. P. 32(a).*

(n3)Footnote 3. *Fed. R. App. P. 32(d).*

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CHAPTER 48 Appeals to Court of Appeals *
H. Preparing Appellate Briefs

4-48 Federal Litigation Guide § 48.95

§ 48.95 Local Rules Often Include Additional Requirements for Appellate Briefs

Each of the requirements for appellate briefs set forth in the Federal Rules of Appellate Procedure may be modified by a circuit's local rules. n1

Although it is by no means an exhaustive list, the following are some common examples of required portions of the brief which have been added by local rule:

- A brief summary of the argument
- A statement setting forth any pending case which is related to the case on appeal
- A certificate of counsel setting forth all persons interested in the outcome of the appeal

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsBriefsCivil ProcedureAppealsRecords on Appeal

FOOTNOTES:
(n1)Footnote 1. *Fed. R. App. P. 28(g), 47.*

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CHAPTER 48 Appeals to Court of Appeals *
H. Preparing Appellate Briefs

4-48 Federal Litigation Guide § 48.96

§ 48.96 Appendix to Brief

[1] Contents of Appendix

The appellant must prepare and file an appendix to a brief containing all of the following: n1

- The relevant docket entries in the proceeding below.
- The relevant portions of the pleadings, charge, findings, or opinion.
- The judgment, order, or decision in question.
- Other parts of the record to which the parties wish to direct the court's attention.

The appellant should not include in the appendix memoranda of law in the district court unless they have independent relevance. n2 However, exhibits not entered into evidence should be included as part of the appendix if their admissibility is in issue. Alternatively, 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. n3

[2] Appendix Filing Requirements

Unless filing is deferred under *Fed. R. App. P. 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 four 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. n4

[3] Format of 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 included 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, such as captions, subscriptions, and acknowledgments should be omitted. n5

An appendix must comply with the formatting requirements for a brief, as specified in *Fed. R. App. P. 32(a)*, with the following exceptions: n6

- The cover of a separately bound appendix must be white.

- An appendix may include a legible photocopy of any document found in the record or of a printed judicial or agency decision.

- 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 opened.

Every court of appeals must accept an appendix to a brief that complies with the form requirements listed above. By local rule or order in a particular case, a court of appeals may accept an appendix to a brief that does not meet all of the form requirements. n7

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsBriefsCivil ProcedureAppealsRecords on Appeal

FOOTNOTES:
(n1)Footnote 1. *Fed. R. App. P. 30(a)(1).*

(n2)Footnote 2. *Fed. R. App. P. 30(a)(2)*; *United States v. Noall, 587 F.2d 123, 125 n.1 (2d Cir. 1978)* .

(n3)Footnote 3. *Fed. R. App. P. 30(e).*

(n4)Footnote 4. *Fed. R. App. P. 30(a)(3).*

(n5)Footnote 5. *Fed. R. App. P. 30(d).*

(n6)Footnote 6. *Fed. R. App. P. 32(b).*

(n7)Footnote 7. *Fed. R. App. P. 32(d).*

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CHAPTER 48 Appeals to Court of Appeals *
H. Preparing Appellate Briefs

4-48 Federal Litigation Guide § 48.97

§ 48.97 Deadline for Serving and Filing Appellate Briefs

The appellant must serve and file a brief within 40 days after the record is filed. n1 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, and must file it at least seven days prior to oral argument. The court of appeals may shorten this schedule for all cases, for classes of cases, or by order for specific cases. n2 For good cause, the court may extend any of the briefing deadlines. n3

The appellant and appellee must each file 25 copies of their respective briefs, and must serve two copies on counsel for each separately represented party. An unrepresented party proceeding in forma pauperis must file four 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. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsBriefsCivil ProcedureAppealsRecords on AppealCivil ProcedureAppealsReviewabilityTime Limitations

FOOTNOTES:
(n1)Footnote 1. *Fed. R. App. P. 31(a)(1).*

(n2)Footnote 2. *Fed. R. App. P. 31(a)(1).*

(n3)Footnote 3. *Fed. R. App. P. 26(b).*

(n4)Footnote 4. *Fed. R. App. P. 31(c).*

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CHAPTER 48 Appeals to Court of Appeals *
H. Preparing Appellate Briefs

4-48 Federal Litigation Guide § 48.98

§ 48.98 Practical Guidelines for Writing Appellate Briefs

The following guidelines should be considered when writing an appellate brief:

- *Arguments should be decisive*. Each argument should either win the case on its own, or materially advance the client's position. Based on the arguments in the brief, the court should be able to decide and write an opinion in favor of the client.

- *Arguments should be sound*. It makes no sense to present arguments in which the attorney has little or no confidence. They will detract from the other arguments, cost the client additional fees unnecessarily, and waste the time of the appellate court. Particularly if there are a number of possible arguments to make, eliminate the weaker arguments, and present only the most compelling ones in the brief.

- *Arguments should be complete*. The arguments should cover each issue raised on appeal. They should also answer any arguments that the other side has raised or inevitably will raise. Very little, if anything, should be left to the court's imagination.

- *Arguments should reflect the appropriate standard of review*. In most cases, appellate courts will accept the factual findings of the court below unless the attorney persuades the court that the findings are "clearly erroneous." Thus, arguments on the facts usually will not prevail. n1

- *Arguments should be material*. The error raised in the court of appeals must be prejudicial error; it must have affected the final result at trial. Otherwise, the court of appeals is without power to help the client. An appeal cannot be won unless correction of the errors raised would be likely to change the result below. For example, a particular jury instruction may be erroneous, but if it is on an immaterial issue or was corrected by other instructions, the court of appeals will not reverse the judgment because of that error.

- *Arguments should ordinarily not be newly-raised on appeal*. An appellant ordinarily may not present as a ground for reversal "an issue which was not presented to the trial court and which it, therefore, had no opportunity to decide." n2 This rule is not, however, a bar to reanalyzing trial issues, to modifying

them somewhat, or to using new legal theories to support an argument which has been raised below. But the attorney should be able to make a logical connection between the modified argument and one presented below.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsBriefsCivil ProcedureAppealsReviewabilityGeneral OverviewCivil ProcedureAppealsReviewabilityTime Limitations

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 52(a).*

(n2)Footnote 2. *See, e.g., Marx v. Loral Corp., 87 F.3d 1049, 1055 (9th Cir. 1996)* (appellate court will not consider arguments not raised in district court unless there are exceptional circumstances).

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CHAPTER 48 Appeals to Court of Appeals *
H. Preparing Appellate Briefs

4-48 Federal Litigation Guide § 48.99

§ 48.99 Sanctions for Frivolous Appeal

[1] Circuit Court Has Discretion to Award Damages and Costs to Appellee

"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." n1 Damages may be in the form of attorney's fees or a lump-sum monetary penalty. Single or double costs are calculated under the provisions of *Fed. R. App. P. 39*.

By its terms, *Fed. R. App. P. 38* applies only to appellees. Accordingly, it may not be used by an appellant to recover damages and costs from an appellee. n2

A statement or request in a brief does not constitute adequate notice. Only a separately filed, timely motion is sufficient. n3 Absent such a motion, notice must be sent to the appellant by the circuit court. n4

[2] Determination of Frivolousness

A court may impose sanctions under *Fed. R. App. P. 38* only if it determines that the appeal is frivolous. There is no precise formula for determining whether an appeal is frivolous. Generally, the circuit court will determine first if the arguments advanced on appeal have any merit. If the result of the appeal is obvious, and the arguments advanced are entirely without merit, the appeal is frivolous. n5 If the appellant's brief and oral argument fail to address the issues presented on appeal, the court will also find the appeal frivolous. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsBriefsCivil ProcedureAppealsCosts & Attorney FeesCivil ProcedureAppealsFrivolous Appeals

FOOTNOTES:
(n1)Footnote 1. *Fed. R. App. P. 38*.

(n2)Footnote 2. *Walker v. City of Bogalusa, 168 F.3d 237, 240 (5th Cir. 1999)* .

(n3)Footnote 3. *Sims v. Great-West Life Assurance Co., 941 F.2d 368, 371 (5th Cir. 1991)* .

(n4)Footnote 4. *See In re Bero, 110 F.3d 462, 466-467 (7th Cir. 1997)* (even though appellee's brief on merits requested sanctions for frivolous appeal, and appellant's brief replied to that request, because no separate motion for sanctions was made, circuit court was required to send appellant notice of probable sanctions and opportunity to respond).

(n5)Footnote 5. *Evenow v. M/V Neptune, 163 F.3d 1108, 1119 (9th Cir. 1998)* .

(n6)Footnote 6. *Kurzweg v. Marple, 841 F.2d 635, 641 (5th Cir. 1988)* .

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CHAPTER 48 Appeals to Court of Appeals *
H. Preparing Appellate Briefs

4-48 Federal Litigation Guide §§ 48.100 through 48.109

[Reserved]

§§ 48.100[Reserved]

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CHAPTER 48 Appeals to Court of Appeals *
I. Oral Argument

4-48 Federal Litigation Guide § 48.110

§ 48.110 Right to Oral Argument

Oral argument must be allowed in every case it is requested, unless a panel of three judges who have examined the briefs and record unanimously agree that oral argument is unnecessary for any one of the following reasons: n1

- The appeal is frivolous
- The dispositive issue or issues have been authoritatively decided
- 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

If no party requests oral argument, the case may be decided on the record and briefs. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsBriefsCivil ProcedureAppealsFrivolous Appeals

FOOTNOTES:
(n1)Footnote 1. *Fed. R. App. P. 34(a)(2).*

(n2)Footnote 2. *Insurance Co. of N. Am. v. Black, 606 F.2d 650, 653 (5th Cir. 1979)* (case decided on brief because oral argument not requested).

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CHAPTER 48 Appeals to Court of Appeals *
I. Oral Argument

4-48 Federal Litigation Guide § 48.111

§ 48.111 Oral Argument Procedure

The clerk must advise all parties whether oral argument will be scheduled, and if so, the date, time, and place, as well as 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. n1

If the appellee fails to appear for argument, the court *must* hear the 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. n2

The appellant opens and concludes the argument. Counsel must not read at length from briefs, records, or authorities. n3 If there is a cross-appeal, *Fed. R. App. P. 28(h)* 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. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsBriefsCivil ProcedureAppealsRecords on Appeal

FOOTNOTES:
(n1)Footnote 1. *Fed. R. App. P. 34(b).*

(n2)Footnote 2. *Fed. R. App. P. 34(e).*

(n3)Footnote 3. *Fed. R. App. P. 34(c).*

(n4)Footnote 4. *Fed. R. App. P. 34(d)*; *see also § 48.92* (discussing Rule 28(h).

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CHAPTER 48 Appeals to Court of Appeals *
I. Oral Argument

4-48 Federal Litigation Guide §§ 48.112 through 48.119

[Reserved]

§§ 48.112[Reserved]

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CHAPTER 48 Appeals to Court of Appeals *
J. Standards of Review

4-48 Federal Litigation Guide § 48.120

§ 48.120 Including Statement of Standard of Review in Appeal

Standards of review frame issues on appeal by defining the level and the limits of a circuit court's power of review. The appellate rules now require a brief to include a statement of the standard of review for each issue. n1

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. App. P. 28(a)(9)(B).*

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CHAPTER 48 Appeals to Court of Appeals *
J. Standards of Review

4-48 Federal Litigation Guide § 48.121

§ 48.121 Jury Verdicts Reviewed for Sufficiency of Evidence

[1] Understanding Substantial Evidence Rule

A jury verdict supported by substantial evidence must stand. The issue of whether there was substantial evidence to support the verdict must be preserved for appeal. If preserved, the circuit court reviews jury findings for sufficiency of the evidence. n1

In making its determination, the jury need not exclude every reasonable hypothesis and may choose between alternative constructions of the evidence.

The reviewing court may not reweigh the evidence or reassess the credibility of witnesses. Rather, it must view all the evidence, all reasonable inferences, and all credibility determinations in the light most favorable to the verdict. If, in that light, the evidence is such that a rational finder of fact could come to the same conclusion, then there is sufficient evidence to support the verdict. n2

This standard is highly deferential to the jury's collective judgment, affirming one of the most important principles of democracy. n3

Based upon its honored position, a jury has the sole power to determine the facts before it; the power of the trial court is limited to determining the law. Of course, a circuit court may reverse a jury verdict if there has been procedural or legal error, or if the verdict was brought about by improper extrinsic influences on the jurors; but the courts generally refuse to look into the deliberation process itself. The jury brings to the matter the needed finality as well as the collective judgment of the community which demand the court's deference. n4

[2] Evaluating Sufficiency of Evidence in Civil Cases

In civil cases, due process principles mandate that the standard of review for sufficiency of the evidence for a finding of fact is based on whether any rational trier of fact could have reached the same conclusion based on the evidence in the record. n5

Trial by jury is a fundamental guaranty of the rights of the people, and judges should not search the evidence with meticulous care to deprive litigants of jury trials. n6

Thus, where the facts are genuinely disputed, a trial court may not take the case from the jury absent waiver by the parties, legal insufficiency of the pleadings, or complete failure of proof; a circuit court may affirm or reverse a finding for legal error or for insufficiency of evidence, but it may not reweigh the evidence or substitute its conclusions for the findings of the jury. n7

This rule precludes a federal court from entering a judgment that ignores or negates any relevant finding by the jury. If a verdict contains inconsistent findings, a federal court is powerless to correct it. Instead, the trial court is limited to viewing the verdict so as to harmonize the conflicting answers, if possible. If that is not possible, there must be a new trial. n8

The same rule precludes a federal court from increasing an inadequate jury award of damages, although the trial court may, by remittitur, reduce an excessive award on consent of the plaintiff. n9

If the award is inadequate or the parties do not accept a remission of excess damages, a court is powerless to impose a different award on the parties, and there must be a new trial. n10 The circuit court has the power to review a denial of a motion to set aside a verdict as excessive. n11

FOOTNOTES:

(n1)Footnote 1. *See Three Boys Music Corp. v. Bolton, 212 F.3d 477, 482 (9th Cir. 2000)* .

(n2)Footnote 2. *See Porous Media Corp. v. Pall Corp., 110 F.3d 1329, 1337-1338 (8th Cir. 1997)* .

(n3)Footnote 3. *See Dimick v. Schiedt, 293 U.S. 474, 485-486, 55 S. Ct. 296, 79 L. Ed. 603 (1935)* .

(n4)Footnote 4. *See United States v. Powell, 469 U.S. 57, 67, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984)* .

(n5)Footnote 5. *See Leblanc-Sternberg v. Fletcher, 67 F.3d 412, 429 (2d Cir. 1995)* .

(n6)Footnote 6. *See Galloway v. United States, 319 U.S. 372, 406-407, 63 S. Ct. 1077, 87 L. Ed. 1458 (1945)* .

(n7)Footnote 7. *See Galloway v. United States, 319 U.S. 372, 401-405, 63 S. Ct. 1077, 87 L. Ed. 1458 (1945)* .

(n8)Footnote 8. *See Leblanc-Sternberg v. Fletcher, 67 F.3d 412, 428 (2d Cir. 1995)* .

(n9)Footnote 9. *See Dimick v. Schiedt, 293 U.S. 474, 486-487, 55 S. Ct. 296, 79 L. Ed. 603 (1935)* .

(n10)Footnote 10. *See Dimick v. Schiedt, 293 U.S. 474, 486-487, 55 S. Ct. 296, 79 L. Ed. 603 (1935)* .

(n11)Footnote 11. *See Eiland v. Westinghouse Elec. Corp., 58 F.3d 176, 183 (5th Cir. 1995)* .

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CHAPTER 48 Appeals to Court of Appeals *
J. Standards of Review

4-48 Federal Litigation Guide § 48.122

§ 48.122 Trial Court's Findings of Fact Reviewed for Clear Error

[1] Understanding the Clear Error Standard

Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. n1

Absent exceptional circumstances, the Supreme Court applies a clearly erroneous standard of review to factual findings made by a state court, even when those findings relate to a constitutional issue. n2

A factual finding is clearly erroneous when the appellate court, after reviewing the complete record, is left with the definite and firm conviction that a mistake has been committed. n3 A mistake has been committed if the factual finding seems so improbable as to belie belief, n4or is incredible on the admitted facts, n5 or is inconceivable, n6 or is internally inconsistent. n7

When the Supreme Court is the only court of review, it will review the district courts factual findings for clear error. This is particularly so if the key evidence in the case consisted primarily of documents and expert testimony, and credibility evaluations played a minor role in the district courts finding. On the other hand, in a case in which a trial court's factual findings have been reviewed and affirmed by an intermediate appellate court, the Supreme Court will not lightly overturn the concurrent findings of the two lower courts. n8

The clearly erroneous rule does not apply to conclusions of law. n9

[2] Rationale for Deference to Trial Court

The requirement of deference to the trial court's findings of fact rests upon the expertise of the trial court. Since it presides at the trial, a trial court is in a better position than an appellate court to determine credibility and to weigh the evidence. A trial court's role is to hear the evidence and then to determine the facts proven. With experience in fulfilling that role comes expertise. n10 Given that expertise, permitting a less-expert appellate court to retry the facts would risk having less accuracy in findings and would waste valuable appellate-court expertise and resources. n11

Further, the litigants have already marshaled their proof for trial to persuade the trial court of the merit of their position. To require the prevailing party to expend additional resources to persuade another panel of judges and to permit the

losing party to have a second chance is requiring too much. n12

[3] Plausible Finding Cannot Be Error

In reviewing a trial court's factual findings, the reviewing court may not retry issues of fact or substitute its judgment for the trial court's findings. The reviewing court is proscribed from reviewing the record de novo as though it were sitting on the bench of the trial court. If there are two possible views of the evidence, the trial court's preference for one of them cannot be clearly erroneous. Even if the appellate court believes that it would have found differently, so long as the trial court's factual finding is plausible, the appellate court may not reverse it. n13

A circuit court may not avoid deference to the trial court's factual finding by making its own finding but denominating it something else for example, an independent determination of discriminatory purpose, a mixed question, dividing ultimate facts from subsidiary facts, or a conclusion of law. n14 In such a case, a circuit court would usurp the power of a trial court. n15

[4] Considering Basis of Trial Court's Findings

Findings based upon oral testimony and, therefore, the credibility of witnesses command great respect from an appellate court. It is the trial court's province to judge credibility of witnesses, resolve conflicts in testimony, assess the weight of the testimony, and determine the meaning of ambiguous testimony. It is the trial court which is uniquely in a position to evaluate the variations in demeanor, tone, and responsiveness to questions that serve as the basis for credibility determinations. When a trial court decides to credit one or another of the witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, and bases its findings on that witness's testimony, the trial court's finding can almost never be clear error. n16

However, the trial court may not insulate its factual findings from review by denominating them credibility determinations. For example, if the record reveals extrinsic evidence, such as documents or other objective evidence, which shows that testimony is inconsistent or incredible and that a reasonable fact finder would not believe it, then there is clear error. n17

Other factors than demeanor may underlie determinations of credibility, and thus permit an appellate court to review the propriety of a trial courts evaluation of testimony. Documents or other direct evidence may contradict the testimony of the witness relied upon by the trial court, or the witness's testimony may be so inconsistent or implausible that it should not be credited. In those cases an appellate court may find clear error. n18

Ordinarily, a trial court's exclusion of evidence is reviewed for abuse of discretion. However, if the exclusion rests upon a trial court's erroneous interpretation of law and the evidence, if admitted, would have been material to the finding, then there is clear error. n19

The clearly erroneous standard also applies to findings made by the trial court that are based upon documents, or undisputed or stipulated facts, and the inferences drawn by the trial court from those documents or facts. n20

A trial court adopts or rejects the findings of fact made by a referred factfinder, such as a magistrate judge or special master, under the clearly erroneous standard. Similarly, on appeal, the trial court's adoption or rejection of findings made by a referred factfinder, as well as the findings actually made, are reviewed for clear error. n21

The Supreme Court has criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements unsupported by citations to the record. n22 In these cases, there is concern for overreaching and exaggeration by the attorneys who prepare the proposed findings. However, even if the trial court adopts findings of fact proposed by a party without change, the Supreme Court

has indicated that if there is no reason for the reviewing court to believe that the trial court accepted the proposed findings uncritically, then there is no basis for a more stringent review. n23

[5] Absent or Inadequate Findings

Given absent or inadequate findings of fact by the trial court, an appellate court may nevertheless review the result so long as it can obtain a full understanding of the issues and there is no prejudice to any party. A full understanding is available when the record provides sufficient detail for the appellate court to discern the factual basis of the trial court's decision or when the appeal turns on questions of law rather than fact. In those cases, an appellate court need not remand to supplement the record. n24

However, if the record omits a crucial finding, such as a finding on an element required for proof of the claim, an appellate court may not supply that finding. Similarly, if the record lacks sufficient information to indicate the factual basis for the trial court's finding, then no review is possible since the circuit court cannot determine if the finding was erroneous. A remand to the trial court to supply the absent finding, to supplement the record, or to clarify the finding is required. n25

[6] Determining Clear Error

The clearly erroneous standard of review does not require the conclusion that no reasonable person would make the same determination, only that the appellate court is firmly convinced that it would have decided differently. A finding of fact is clearly erroneous if the finding does not meet the correct legal standard, or if it is based upon an incorrect understanding of the substantive law. A factual finding will also be clearly erroneous if there is no evidence tending to show a required element of the claim, or if there is no basis in the record to support the finding, or if it is based on a fundamental confusion of the facts as revealed by the record. n26

FOOTNOTES:

(n1)Footnote 1. *See Fed. R. Civ. P. 52(a).*

(n2)Footnote 2. *See Hernandez v. New York, 500 U.S. 352, 366, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991) .*

(n3)Footnote 3. *See Thornton v. Brown, 47 F.3d 194, 196 (7th Cir. 1995) .*

(n4)Footnote 4. *See Mar Oil, S.A. v. Morrissey, 982 F.2d 830, 842 (2d Cir. 1993) .*

(n5)Footnote 5. *See Carr v. Allison Gas Turbine Div. Gen. Motors, 32 F.3d 1007, 1011 (7th Cir. 1994) .*

(n6)Footnote 6. *See United States v. Fidelity Capital Corp., 920 F.2d 827, 840 (11th Cir. 1991) .*

(n7)Footnote 7. *See Todd v. Corporation Life Ins. Co., 945 F.2d 204, 208 (7th Cir. 1990) .*

(n8)Footnote 8. *See Hunt v. Cromartie, 532 U.S. 234, 121 S. Ct. 1452, 1458-1459, 149 L. Ed. 2d 430, 444 (2001) .*

(n9)Footnote 9. *See Pullman-Standard v. Swint, 456 U.S. 273, 287, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982) .*

(n10)Footnote 10. *See Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 574-575, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985) .*

(n11)Footnote 11. *See Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 575, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985) .*

(n12)Footnote 12. *See Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 575, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985)* .

(n13)Footnote 13. *See Thornton v. Brown, 47 F.3d 194, 196-197 (7th Cir. 1995)* .

(n14)Footnote 14. *See Pullman-Standard v. Swint, 456 U.S. 273, 285-288, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982)* .

(n15)Footnote 15. *See Amadeo v. Zant, 486 U.S. 214, 228, 108 S. Ct. 1771, 100 L. Ed. 2d 249 (1988)* .

(n16)Footnote 16. *See Sedor v. Frank, 42 F.3d 741, 746 (2d Cir. 1994)* .

(n17)Footnote 17. *See Metzen v. United States, 19 F.3d 795, 797-798 (2d Cir. 1994)* .

(n18)Footnote 18. *See Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 575, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985)* .

(n19)Footnote 19. *See Mobil Exploration v. Cajun Constr. Servs., 45 F.3d 96, 99 (5th Cir. 1995)* .

(n20)Footnote 20. *See Hiram Walker & Sons, Inc. v. Kirk Line, 30 F.3d 1370, 1376 (11th Cir. 1994)* .

(n21)Footnote 21. *See Sockwell v. Phelps, 20 F.3d 187, 190 (5th Cir. 1994)* .

(n22)Footnote 22. *See Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 572, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985)* .

(n23)Footnote 23. *See Lamb v. Emhart Corp., 47 F.3d 551, 557 (2d Cir. 1995)* .

(n24)Footnote 24. *See Savic v. United States, 918 F.2d 696, 700 (7th Cir. 1990)* .

(n25)Footnote 25. *See Banker v. Nighswander, Martin & Mitchell, 37 F.3d 866, 871-872 (2d Cir. 1994)* .

(n26)Footnote 26. *See Mobil Exploration v. Cajun Constr. Servs., 45 F.3d 96, 99 (5th Cir. 1995)* .

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CHAPTER 48 Appeals to Court of Appeals *
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4-48 Federal Litigation Guide § 48.123

§ 48.123 Conclusions of Law Reviewed Independently

[1] Evaluating De Novo Review

A trial court's conclusions on questions of the application, interpretation, and construction of law are reviewed de novo on appeal. n1 The de novo standard has often been termed plenary or independent review. n2

However it is characterized, the de novo standard of review means not only that the conclusions of law made by a trial court are not binding on the circuit court, but also that the appellate court owes no deference to the trial court's conclusions. n3 Rather, the circuit court, in reviewing the record, is empowered to make its own determination as to the meaning and correct application of any particular question of law. So a circuit court may substitute its own judgment regarding a conclusion of law made by the trial court. n4

However, a circuit court may not retry the evidence or make new findings of fact. n5

[2] Understanding Rationale for De Novo Review

Unfettered review of legal questions by appellate courts best serves the dual goals of doctrinal coherence and economy of judicial administration. n6 Independent appellate review of lower court's conclusions of law also promotes convergent development of the law among the federal courts, encourages consistent application of the law across federal jurisdictions, and prevents forum shopping. n7

[3] Review of Mixed Questions of Law and Fact

Since the distinction between questions of law and questions of fact is vexing and there may be no principle that can unerringly distinguish between them, n8 some questions blur any distinction entirely and are denominated mixed questions of law and fact. Mixed questions are described as: questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated. n9

To complicate the matter, the characterization of a mixed question of law and fact for one purpose does not govern its characterization for all purposes. n10

There is some authority from the Supreme Court that, in general, mixed questions of law and fact are reviewed de novo. n11

In the context of constitutional claims, an appellate court may independently review the underlying facts if the conclusion of the existence of a constitutional right is so intermingled with a factual finding that an analysis of the facts is necessary. n12

On the other hand, the Supreme Court has held that deferential review rather than de novo review is warranted when it appears that the trial court is better positioned to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine. n13 The Supreme Court has not settled on the much-mooted issue of the appropriate standard of review for mixed questions, n14 and continues to decide the appropriate standard for review of a particular mixed question on an ad hoc basis. n15

The circuit courts differ on the question of the appropriate standard of review for mixed questions of law and fact. In the majority of circuits, mixed questions are generally reviewed de novo since they require the consideration of legal concepts and the correct application of the law to the facts by the fact finder. However, if the applicable legal standard provides for a strictly factual test, such as a question of state of mind or reasonableness, the standard of review of the factual findings is clearly erroneous, but the application of the law to the facts is reviewed de novo. n16

In a few circuits, there is no general rule. Rather, the standard of review of a mixed question depends on where the mixed question falls along a degree-of-deference continuum; the more fact dominated the mixed question, the more deference given to the trial court. n17 In the Seventh Circuit, mixed questions are reviewed for clear error. n18

FOOTNOTES:

(n1)Footnote 1. *See Pullman-Standard v. Swint, 456 U.S. 273, 287-288, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982)* .

(n2)Footnote 2. *See Salve Regina College v. Russell, 499 U.S. 225, 231-232, 111 S. Ct. 1217, 113 L. Ed. 2d 190 (1991)* .

(n3)Footnote 3. *See Salve Regina College v. Russell, 499 U.S. 225, 238, 111 S. Ct. 1217, 113 L. Ed. 2d 190 (1991)* .

(n4)Footnote 4. *See Banker v. Nighswander, Martin & Mitchell, 37 F.3d 866, 873 (2d Cir. 1994)* .

(n5)Footnote 5. *See Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573-574, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985)* (standard is clear error)

(n6)Footnote 6. *See Salve Regina College v. Russell, 499 U.S. 225, 231, 111 S. Ct. 1217, 113 L. Ed. 2d 190 (1991)* .

(n7)Footnote 7. *See Salve Regina College v. Russell, 499 U.S. 225, 234, 111 S. Ct. 1217, 113 L. Ed. 2d 190 (1991)* .

(n8)Footnote 8. *See Pullman-Standard v. Swint, 456 U.S. 273, 288, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982)* .

(n9)Footnote 9. *See Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982)* .

(n10)Footnote 10. *See United States v. Gaudin, 515 U.S. 506, 522, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995)* .

(n11)Footnote 11. *See Strickland v. Washington, 466 U.S. 668, 698, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)* .

(n12)Footnote 12. *See Bose Corp. v. Consumers Union of the United States, 466 U.S. 485, 513-514, 104 S. Ct.*

1949, 80 L. Ed. 2d 502 (1984) .

(n13)Footnote 13. *See Salve Regina College v. Russell, 499 U.S. 225, 233, 111 S. Ct. 1217, 113 L. Ed. 2d 190 (1991)* .

(n14)Footnote 14. *See Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982)* .

(n15)Footnote 15. *See Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424, 121 S. Ct. 1678, 1683-1688, 149 L. Ed. 2d 674, 683-691 (2001)* .

(n16)Footnote 16. *See Cooper Tire & Rubber Co. v. St. Paul Fire & Marine, 48 F.3d 365, 369 (8th Cir. 1995)* ; *Banker v. Nighswander, Martin & Mitchell, 37 F.3d 866, 870 (2d Cir. 1994)* ; *Sweatman v. Commercial Union Ins. Co., 39 F.3d 594, 600 (5th Cir. 1994)* ; *Keys Jet Ski, Inc. v. Kays, 893 F.2d 1225, 1227 (11th Cir. 1990)* .

(n17)Footnote 17. *See Sierra Fria Corp. v. Donald J. Evans, P.C., 127 F.3d 175, 181 (1st Cir. 1997)* ; *Feder v. Evans-Feder, 63 F.3d 217, 223-224 (3d Cir. 1995)* ; *Sandberg v. Virginia Bankshares, 979 F.2d 332, 344 (4th Cir. 1992)* .

(n18)Footnote 18. *See G.J. Leasing Co. v. Union Elec. Co., 54 F.3d 379, 382 (7th Cir. 1995)* .

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CHAPTER 48 Appeals to Court of Appeals *
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4-48 Federal Litigation Guide § 48.124

§ 48.124 Discretionary Determinations Reviewed for Abuse of Discretion

[1] Abuse of Discretion by Trial Court

Federal district courts have discretion in managing cases and in controlling litigation before them. However, discretionary choices are not left to a court's inclination, but to its judgment; and its judgment is to be guided by sound legal principles and is not unfettered by meaningful standards or shielded from thorough appellate review. n1 Discretionary rulings and determinations made by a district court are reviewed for abuse of discretion.

The standard is deferential to the district court's familiarity with the proceedings and evidence in the case. The court presiding over the proceedings likely has insights not found in the record as to the credibility of witnesses and the quality of the evidence. n2

Moreover, it is impractical to formulate a rule because the questions at issue involve multifarious, fleeting, special, narrow facts that utterly resist generalization. n3 Since the district court is in a better position to decide than the circuit court, its decision must be given deference. n4

On the other hand, because of the seriousness of a default judgment, the district court's exercise of discretion in entering a default judgment is subject to careful review, and even a slight abuse of discretion may justify reversal. n5

Abuse of discretion is found if the district court's decision rests upon a clearly erroneous finding of fact, upon an errant conclusion of law, or upon improper application of law to the facts. n6

[2] Abuse of Discretion by Administrative Agency

The standard of review for an agency's determination is prescribed by the statute in the relevant enabling act. n7 The Administrative Procedure Act, governing the majority of agency determinations, provides that an agency decision, to the extent that it is reviewable, may be set aside only if it is arbitrary, capricious, an abuse of discretion, not in accordance with law, unconstitutional, in excess of agency authority, unsupported by substantial evidence after a hearing on the record, or unwarranted by facts that are subject to trial de novo by a reviewing court. n8 Most importantly, it remains the reviewing court's role ultimately to determine questions of law, interpretations of constitutionality, and the meaning and applicability of agency action. n9

The standard is deferential to the expertise of the agency, its familiarity with the proceedings before it, and the scant record developed in most instances. Thus, a reviewing court may not substitute its judgment for that of the agency, must limit its review to the record at the time the agency acted, and may not consider subsequent matters. n10 Nevertheless, a reviewing court should make a thorough, probing, in-depth review of the agency action, n11 and must judge the propriety of an agency's determination solely by the grounds invoked by the agency. n12 If those grounds are inadequate or improper, the court is powerless to affirm the administrative action.

In reviewing a statutory interpretation by an agency, a court must give effect to any congressional intent that can be ascertained; if the record is silent on congressional intent, the agency interpretation must be a permissible construction or a reasonable interpretation of the statute or the agency has abused its discretion. n13 Moreover, if Congress has expressly delegated to the agency the authority to elucidate a specific statutory provision, the courts must accept the agency's interpretation unless it is arbitrary, capricious, or manifestly contrary to the statute. n14 In such a situation, the agency's interpretation is not displaced by a prior judicial decision construing the statute, unless the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. n15

In reviewing an agency action, a circuit court will find that the agency has abused its discretion if it relied on factors the enabling act did not intend for it to rely on, failed to consider important aspects of the matter, gave an explanation that was either counter to the evidence or too implausible to be derived from the evidence, n16 or made a clear error in judgment. n17 An agency has the duty to follow its own regulations, and a failure to follow applicable regulations may lead to reversal of the agency action. n18

If an agency interpretation of ambiguous regulations is first put forward in the course of litigation, a court will defer to that interpretation only if the interpretation reflects the agency's fair and considered judgment. n19

A circuit court of appeals reviewing an administrative decision is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry. Rather, if the administrative agency has not decided an issue that is necessary to resolve the matter, the proper course usually is to remand to the agency for additional investigation or explanation. n20

FOOTNOTES:

(n1)Footnote 1. *See Albemarle Paper Co. v. Moody, 422 U.S. 405, 416, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975)* .

(n2)Footnote 2. *See Schlumberger Techs., Inc. v. Wiley, 113 F. 3d 1553, 1557-1558 (11th Cir. 1997)* .

(n3)Footnote 3. *See Pierce v. Underwood, 487 U.S. 552, 560-562, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988)* .

(n4)Footnote 4. *See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 399-405, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)* .

(n5)Footnote 5. *See Lacy v. Sitel Corp., 227 F.3d 290, 293 (5th Cir. 2000)* .

(n6)Footnote 6. *See Paolella v. Browning-Ferris, Inc., 158 F.3d 183, 189 (3d Cir. 1998)* .

(n7)Footnote 7. *See 5 U.S.C. 706.*

(n8)Footnote 8. *See 5 U.S.C. 706.*

(n9)Footnote 9. *See 5 U.S.C. 706.*

(n10)Footnote 10. *See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 414, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971)* .

(n11)Footnote 11. *See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971)* .

(n12)Footnote 12. *See ICC v. Brotherhood of Locomotive Engrs, 482 U.S. 270, 290, 107 S. Ct. 2360, 96 L. Ed. 2d 222 (1987)* .

(n13)Footnote 13. *See Barnhart v. Thomas, 540 U.S. 20, 124 S. Ct. 376, 157 L. Ed. 2d 333, 338-342 (2003)* .

(n14)Footnote 14. *See Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170-171, 127 S. Ct. 2339, 168 L. Ed. 2d 54 (2007)* .

(n15)Footnote 15. *See National Cable & Telecomm. Assn v. Brand X Internet Servs., 545 U.S. 967, 980-984, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005)* .

(n16)Footnote 16. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)* .

(n17)Footnote 17. *See Blanco v. INS, 68 F.3d 642, 646-647 (2d Cir. 1995)* .

(n18)Footnote 18. *See Nelson v. INS, 232 F.3d 258, 262 (1st Cir. 2000)* .

(n19)Footnote 19. *See Akzo Nobel Salt, Inc. v. Federal Mine Safety & Health Review Commn, 212 F.3d 1301, 1304 (D.C. Cir. 2000)* .

(n20)Footnote 20. *See Gonzales v. Thomas, 547 U.S. 183, 185-186, 126 S. Ct. 1613, 164 L. Ed. 2d 358 (2006)* .

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CHAPTER 48 Appeals to Court of Appeals *
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4-48 Federal Litigation Guide § 48.125

§ 48.125 Reviewing Harmless Error

[1] Understanding Harmless Error Rule and Its Rational

On review, a circuit court must ignore any error that does not affect a substantial right of the party complaining of the error. n1

The purpose of the harmless-error rule is to avoid reversal after trial based upon a rigid, mechanical, or technical application of the rules of appellate review given significant evidence of liability. n2 A verdict may not be set aside for insignificant errors that likely did not influence the outcome of the trial and that, if corrected, likely would not change the result of a new trial. n3

Errors that have been properly raised at trial and properly preserved for appeal are reviewed for harmlessness. n4

[2] Determining Whether Error is Harmless

An error is a deviation from a legal rule. n5 An error is harmless if it caused no prejudice to a substantial right of the party complaining of the error. n6 If the error could not have affected the fairness of the trial or influenced the verdict, it cannot be harmful. n7

In civil cases, if the error is not preserved for review, it is deemed waived. n8 Once an error is preserved for review, the reviewing court will not reach it unless it finds that the error affected a substantial right and was harmful. This places the burden of persuasion that the error was harmless upon the party who benefited from the error. n9

[3] Fundamentally Harmful Errors

There are some errors that are not subject to harmless error analysis because they are so fundamentally harmful that they amount to reversible error per se. These include:

- Denial of right to jury trial for serious offense n10
- Denial of right to public trial n11

- Denial of right to counsel at trial n12
- Denial of right to self-representation at trial n13

FOOTNOTES:

(n1)Footnote 1. *See Fed. R. Evid. 103.*

(n2)Footnote 2. *See Kotteakos v. United States, 328 U.S. 750, 760, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946) .*

(n3)Footnote 3. *See Chapman v. California, 386 U.S. 18, 21, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) .*

(n4)Footnote 4. *See Fed. R. Civ. P. 61.*

(n5)Footnote 5. *See United States v. Olano, 507 U.S. 725, 732-733, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) .*

(n6)Footnote 6. *See United States v. Olano, 507 U.S. 725, 734, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) .*

(n7)Footnote 7. *See United States v. Olano, 507 U.S. 725, 733, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) .*

(n8)Footnote 8. *See United States v. Olano, 507 U.S. 725, 733, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) .*

(n9)Footnote 9. *See Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) .*

(n10)Footnote 10. *See Duncan v. Louisiana, 391 U.S. 145, 156-158, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968) .*

(n11)Footnote 11. *See Waller v. Georgia, 467 U.S. 39, 49-50 n.9, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) .*

(n12)Footnote 12. *See Gideon v. Wainwright, 372 U.S. 335, 344-345, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) .*

(n13)Footnote 13. *See McKaskle v. Wiggins, 465 U.S. 168, 177 n.8, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984) .*

* Chapter 48 was rewritten in 2000 by Andrew E. Westley, Esq., of San Francisco, California.

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CHAPTER 49 Settlements

4-49 Federal Litigation Guide 49.syn

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§ 49.02 Alternative Dispute Resolution in Aid of Settlement

§ 49.03 Counsel Must Prepare for Settlement Discussions
[1] Understanding Issues, Facts, Law, and Client Objectives
[2] Understanding Client Objectives
[3] Injecting Reality Into Client Expectations
[4] Understanding Opponent's Objectives
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§ 49.04 Attorney's Ethical Duties and Considerations During Settlement
[1] Obtaining Client's Authority to Settle
[2] Communicating Offers and Demands to Client
[3] Refraining From Communicating With Represented Parties
[4] Avoiding Conflicts of Interest
[5] Confidentiality of Settlement Negotiations

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§ 49.11 Role of Judicial Officer in Settlement Conference

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§ 49.20 Rule 68 Provisions Regarding Offers of Judgment

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§ 49.22 Types of Costs Contemplated by Rule 68

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§ 49.24 Judgment for Plaintiff Required

§ 49.25 Determining Whether Judgment Is More Favorable

§ 49.26 Only Defending Parties May Make Offers of Judgment

§ 49.27 Deadline for Making Offer of Judgment

§ 49.28 Offer of Judgment Must Be in Writing and Served on All Parties

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§ 49.30 Effect of Ambiguity in Offer of Judgment
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[3] Seeking Clarification of Offer of Judgment

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[2] Deadline for Filing Motion
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[2] Recitation of Disputed Matters
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§ 49.44 Court Approval of Settlement

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[2] Use of Form
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[4] Rule 68 Varies General Rule Permitting Prevailing Plaintiff to Recover Costs
[5] Recovering Costs

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CHAPTER 49 Settlements

4-49 Federal Litigation Guide Scope

Scope

SCOPE

The ability to negotiate a successful settlement is an important aspect of an attorney's job. This chapter explores the procedures and techniques involved in settling a dispute.

The chapter initially addresses the legal and ethical limitations placed on counsel's conduct regarding settlement. These limitations affect (1) relationships with clients, with opposing counsel, and with the opposing party, (2) the settlement agreement itself, and (3) counsel's conduct when negotiating the settlement.

The chapter then discusses the basic techniques of negotiating a settlement, including setting the time for settlement negotiation, establishing credibility as an adversary, initiating the negotiations, and making and reacting to counter-offers. Also analyzed is the use of settlement conferences and pretrial procedures, motions, and discovery in facilitating settlement.

After examining the confidentiality of settlement negotiations, the chapter covers the drafting of the settlement agreement, providing many examples of specific clauses that might be included in the agreement. The chapter then highlights the problem of contribution as it relates to settlements.

Completing the chapter is an exploration of offers of judgment, the effect of the tax laws on settlements, and the use of structured settlements.

Appendices containing a survey of local district court rules pertaining to discovery and settlement case histories appear at the end of the chapter.

The chapter includes a sample form of Offer of Judgement, as well as a sample Acceptance of Offer of Judgement.

For expanded coverage of offers of judgment, ***see*** MOORE'S Federal Practice, Ch. 68, ***Offer of Judgment*** (Matthew Bender 3d ed.).

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CHAPTER 49 Settlements
A Preparing for Settlement

4-49 Federal Litigation Guide § 49.01

§ 49.01 General Settlement Incentives

In all litigation, the adverse consequences of potential defeat provide the parties with an incentive to settle in advance of trial; settlement provides certainty. n1

Settlement serves the interests of plaintiffs as well as defendants, in that it allows each to avoid the financial costs, burdens, stress, and time associated with litigation. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsReleases From LiabilityGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Delta Air Lines, Inc. v. August, 450 U.S. 346, 352, 101 S. Ct. 1146, 67 L. Ed. 2d 287 (1981)* .

(n2)Footnote 2. *See In re Drexel Burnham Lambert Group Inc., 995 F.2d 1138, 1143 (2d Cir. 1993)* .

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CHAPTER 49 Settlements
A Preparing for Settlement

4-49 Federal Litigation Guide § 49.02

§ 49.02 Alternative Dispute Resolution in Aid of Settlement

In view of the serious case backlog in the federal court system, judicial intervention in the settlement process is considered a necessity. Without such intervention, the federal courts would be hopelessly congested with little chance for civil litigants to get a trial within a reasonable time; conversely, judicial intervention frequently helps to avoid the expense of litigation. n1

Federal courts have joined in the general movement seeking methods other than litigation for resolving disputes. As a result, a party filing suit in federal court today will likely be asked to consider some form of settlement assistance, from participating in a pretrial settlement conference, to submitting to alternative dispute resolution (ADR) procedures such as mediation or arbitration.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Bilello v. Abbott Lab., 825 F. Supp. 475, 481 (E.D.N.Y. 1993)* .

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CHAPTER 49 Settlements
A Preparing for Settlement

4-49 Federal Litigation Guide § 49.03

§ 49.03 Counsel Must Prepare for Settlement Discussions

[1] Understanding Issues, Facts, Law, and Client Objectives

As with the rest of the litigation process, success in settling a case requires that counsel engage in extensive preparation. Prior to settlement discussions, counsel must research, understand, and be able to articulate the following:

- Issues in controversy
- Facts surrounding the controverted issues
- Law applicable to the facts and issues in controversy
- Client's objectives n1
- Objectives of the opposing party and opposing counsel n2
- Monetary value of the case n3

[2] Understanding Client Objectives

It is essential that counsel understand the client's objectives in initiating or defending against litigation. Toward that end, counsel should ask the client to answer the following questions:

- At a minimum, what must the client obtain to agree to settle the case?
- Ideally, what would the client like to achieve in settling the case?

Money rather than principle usually matters most to clients. However, counsel should be aware that clients may have non-monetary goals as well. For example, a client alleging gender-based employment discrimination may be willing to accept a smaller monetary settlement in exchange for the ability to publicize the fact and terms of the settlement. Counsel should therefore be prepared to look for innovative solutions such as structured pay-outs, payment in kind, future commercial relations, concessions, apologies, admissions, establishment of training or recruiting programs, or

correction of a defect. Be wary of hidden personal goals that will interfere with settlement. Revenge and spite do not lend themselves to compromise.

[3] Injecting Reality Into Client Expectations

Counsel must be prepared to inject reality into the client's objectives. Unrealistic expectations prevent wise settlements. Thus, before engaging in settlement discussions, counsel should provide the client with an honest assessment of:

- The likelihood of success at trial
- The amount of damages likely to be awarded
- The time and expenses likely to be incurred if the case settles later or goes to trial
- The physical and emotional toll litigation may exact on the client
- The difficulties of enforcing a judgment against the opposing party
- The likelihood of an appeal by the opposing party if the client prevails at trial

[4] Understanding Opponent's Objectives

Understanding an opposing party's thinking and feelings regarding a case may be as important as analyzing the issues. The opposing party's real objectives in litigation may not always be what they seem on the face of the pleadings, or what opposing counsel says.

Accordingly, counsel should be alert for indications of the *real* objectives of the opposing party in initiating or defending against litigation. The potential for successful settlement increases when at least some of the objectives of all the parties are met by the terms of the settlement.

[5] Valuing the Case

After evaluating the facts, issues, and law applicable in the case, counsel must determine its monetary value. Though every case is unique, some general factors to be considered in attempting to place a value on the claims at issue include:

- Present economic damages suffered by the plaintiff, including:
  - Lost income
  - Medical or other bills incurred as a result of the conduct at issue
  - Lost profits
  - Replacement costs
  - Interest
- Future damages reasonably certain to be incurred by the plaintiff

- Nonmonetary damages such as pain and suffering, or loss of goodwill incurred by the plaintiff
- The economic cost of protracted litigation
- Whether the plaintiff will be seen as sympathetic by the court or jury
- The defendant's ability to pay, both actual and apparent
- Case venue: whether in a"liberal" or"conservative" award geographic area
- The reputation, ability, and experience of the attorneys in the case

To get a further idea of the potential value of the case, counsel should also consider reviewing cases reported in jury verdict reporters with similar fact patterns. Examples of such jury verdict reporters include the Association of Trial Lawyers of America *ATLA Record,* LRP's *Jury Verdict and Settlement Summaries,* and Shepard's *Verdicts, Settlements & Tactics*. Counsel should also consider discussing the case discretely with attorneys experienced in the type of litigation involved to get an idea of how those attorneys would value the case; client confidences and privileged communications must be preserved. n4

These factors should be continually reviewed as the case progresses. Discovery results and motion practice can dramatically alter a valuation upward or downward.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsReleases From LiabilityGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See* [2], [3], *below*.

(n2)Footnote 2. *See* [4], *below*.

(n3)Footnote 3. *See* [5], *below*.

(n4)Footnote 4. *See § 49.04*.

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CHAPTER 49 Settlements
A Preparing for Settlement

4-49 Federal Litigation Guide § 49.04

§ 49.04 Attorney's Ethical Duties and Considerations During Settlement

[1] Obtaining Client's Authority to Settle

The decision to settle a case rests with the client, not the attorney. n1 An attorney must have either actual or apparent authority from the client to settle a case. n2 A client does not automatically bestow the authority to settle a case merely by retaining counsel. n3

[2] Communicating Offers and Demands to Client

An attorney has an obligation to promptly submit nonfrivolous offers of settlement to the client, unless prior discussions between the attorney and client make it clear that the proposal will be unacceptable to the client. n4

Even delay in finalizing a settlement agreement has been sanctioned under federal law. n5

[3] Refraining From Communicating With Represented Parties

Attorneys may not communicate directly with a party represented by counsel absent that counsel's presence or consent. n6

Though the parties themselves are free to engage in direct settlement discussions without their attorneys, it may be an ethical violation for an attorney to use the client or a third party to violate the prohibition on direct communication with represented parties. n7

[4] Avoiding Conflicts of Interest

An attorney is not to allow his or her own interests, financial or otherwise, to influence the attorney's professional advice. Accordingly, an attorney is required to evaluate a settlement offer on the basis of the *client's* interest, without regard to the attorney's own interest in obtaining a fee. n8

The attorney should identify and avoid conflicts that may arise during settlement discussions.

[5] Confidentiality of Settlement Negotiations

Evidence concerning efforts to settle or compromise a dispute is generally inadmissible to prove the existence or amount of liability. n9

However, otherwise discoverable evidence is not excludable merely because it is presented in the course of settlement negotiations. Likewise, exclusion is not required when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. n10

Both the timing of the settlement offer and the existence of a disputed claim are relevant in determining whether an offer is made to settle or compromise a claim. n11 Thus, counsel should seek a written agreement specifying ground rules of confidentiality.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewLegal EthicsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See* A.B.A., Model Rules of Professional Conduct, Rule 1.2(a); A.B.A., Model Code of Professional Responsibility EC 7-7; A.B.A., Informal Ethics Opinion No. 925.

(n2)Footnote 2. *See Garabedian v. Allstates Eng. Co., 811 F.2d 802, 803 (3d Cir. 1987)* .

(n3)Footnote 3. *Fennell v. TLB Kent Co., 865 F.2d 498, 501-502 (2d Cir. 1989)* ; *Edwards v. Born, Inc., 792 F.2d 387, 390 (3d Cir. 1986)* .

(n4)Footnote 4. *See* A.B.A., Model Rules of Professional Conduct 1.2(a), 1.4.

(n5)Footnote 5. *Forman v. Mount Sinai Medical Ctr., 128 F.R.D. 591, 605-606 (S.D.N.Y. 1989)* .

(n6)Footnote 6. A.B.A., Model Code of Professional Responsibility DR 7-104; A.B.A., Model Rules of Professional Conduct 4.2.

(n7)Footnote 7. *See Miano v. AC&R Advertising, Inc., 148 F.R.D. 68, 82 (S.D.N.Y. 1993)* ; A.B.A., Model Rules of Professional Conduct 8.4(a) and comment.

(n8)Footnote 8. *See Evans v. Jeff D., 475 U.S. 717, 728, n.14, 106 S. Ct. 1531, 89 L. Ed. 2d 747 (1986)* (*citing* A.B.A., Model Code of Professional Responsibility EC 7-7-EC 7-9; A.B.A., Model Rules of Professional Conduct 1.2(a).

(n9)Footnote 9. *Fed. R. Evid. 408*; *see also Fed. R. Evid. 409*.

(n10)Footnote 10. *Fed. R. Evid. 408*.

(n11)Footnote 11. *See, e.g., Pierce v. F.R. Tripler & Co., 955 F.2d 820, 827 (2d Cir. 1992)* .

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CHAPTER 49 Settlements
A Preparing for Settlement

4-49 Federal Litigation Guide § 49.05

§ 49.05 CHECKLIST: Preparing for Settlement Discussions

As plaintiff's counsel, taking the following steps and determining a settlement strategy may significantly increase the amount of damage exposure. As defendant's counsel, the amount of damage exposure may be significantly reduced:

- ☐ Research the following prior to any settlement discussions:
  - ☐ Issues in controversy.
  - ☐ Facts surrounding issues in controversy.
  - ☐ Law applicable to facts and issues in controversy.
  - ☐ Client's objectives in initiating or defending against litigation.
- ☐ Determine what the settlement agreement *must* contain to obtain the client's authority to settle the case.
- ☐ Provide client with honest assessment of:
  - ☐ Likelihood of success at trial.
  - ☐ Amount of damages likely to be awarded at trial.
  - ☐ Time and expenses likely to be incurred if case goes to trial.

- ☐ Physical and emotional toll litigation may exact on client.
- ☐ Difficulties of enforcing judgment against opposing party.
- ☐ Likelihood of an appeal by opposing party if client prevails at trial.

☐ Determine objectives of opposing party in initiating or defending against action.

☐ Determine monetary value of case by considering:

- ☐ Present economic damages suffered by plaintiff.
- ☐ Future damages reasonably certain to be incurred by plaintiff.
- ☐ Noneconomic damages incurred by plaintiff.
- ☐ Economic cost of protracted litigation.

☐ Whether plaintiff is sympathetic.

☐ Defendant's actual and apparent ability to pay.

☐ Case venue.

☐ Reputation, ability, and experience of attorneys in case.

☐ Review cases reported in jury verdict reporters with similar fact patterns to assist in determining potential monetary value of case.

☐ Counsel may wish to discuss the case discretely with attorneys experienced in the type of litigation involved to get an idea of how those attorneys would value the case; client confidences and privileged communications must be preserved.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral Overview

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CHAPTER 49 Settlements
A Preparing for Settlement

4-49 Federal Litigation Guide §§ 49.06 through 49.09

[Reserved]

§§ 49.06[Reserved]

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CHAPTER 49 Settlements
B. Preparing for and Attending Initial Pretrial Conference and Subsequent Settlement Conferences

4-49 Federal Litigation Guide § 49.10

§ 49.10 Preparing for and Attending Initial Pretrial Conference

The court has the discretion to direct the attorneys for the parties and any unrepresented parties to attend a pretrial conference or conferences for the purpose of, among other things, facilitating settlement of the case. At any pretrial conference, the court may take appropriate action regarding settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule. n1

Counsel should consult the rules of the assigned judge regarding pretrial and settlement conferences.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial Conferences

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 16(a)(5)*; *Fed. R. Civ. P. 16(c)(2)(I)*.

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4-49 Federal Litigation Guide § 49.11

§ 49.11 Role of Judicial Officer in Settlement Conference

If the case is to be tried without a jury, the district judge will rarely get involved in actual settlement discussions. Occasionally, the district judge will seek the consent of all parties for direct involvement, in which event the parties have a difficult choice to make. Before giving or withholding consent, efforts should be made to determine the judge's methods of dealing with settlement negotiations, particularly when they fail. Even if the case will be tried with a jury, it can be dangerous to involve the district judge in settlement negotiations, as well as worrisome to withhold consent if requested. Many lawyers prefer a nonjudicial mediator that the parties choose.

The judge's role in the settlement process varies based on his or her temperament, style, philosophy, and the nature of the case. Examples of typical judicial activity during a settlement conference include:

- Meeting with counsel for all sides at once
- Meeting separately with counsel for each side for candid evaluation of the parties' prospects and the costs of continuing litigation
- Bringing the parties into negotiations when that appears productive
- Requiring or requesting the presence of the person who will pay, such as an insurer
- Staying proceedings or continuing the trial pending negotiations in expectation of a settlement agreement

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial Conferences

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CHAPTER 49 Settlements
B. Preparing for and Attending Initial Pretrial Conference and Subsequent Settlement Conferences

4-49 Federal Litigation Guide § 49.12

§ 49.12 Sanctions for Failing to Obey Settlement Conference Rules or Orders

A district court judge may not *force* the parties to settle. n1

However, the judge may impose sanctions, including default or dismissal, for failure by a party or the party's attorney to obey pretrial conference rules and orders. n2

Sanctions may be awarded if a settlement conference participant attends the conference substantially unprepared. Parties and their counsel may also be sanctioned if they fail in their obligation to participate in good faith at the settlement conference. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial ConferencesLegal EthicsSanctionsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Dawson v. United States, 68 F.3d 886, 896-897 (5th Cir. 1995)* ; *Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985)* .

(n2)Footnote 2. *Fed. R. Civ. P. 16(f)(1).*

(n3)Footnote 3. *See Fed. R. Civ. P. 16(f)*; *see also Guillory v. Domtar Industries Inc., 95 F.3d 1320 (5th Cir. 1996)* .

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CHAPTER 49 Settlements
B. Preparing for and Attending Initial Pretrial Conference and Subsequent Settlement Conferences

4-49 Federal Litigation Guide §§ 49.13 through 49.19

[Reserved]

§§ 49.13[Reserved]

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CHAPTER 49 Settlements
C. Making or Responding to Offer of Judgment

4-49 Federal Litigation Guide § 49.20

§ 49.20 Rule 68 Provisions Regarding Offers of Judgment

Any time more than 14 days before the date set for trial, a party defending against a claim may serve on the adverse party an offer to allow judgment to be taken against the defending party as specified in the offer. If, within 14 days after service of the offer, the adverse party serves written notice of acceptance of the offer, and either party files the offer and notice of acceptance together with proof of service, the clerk must then enter judgment. n1

However, if the adverse party does not accept the offer, and the judgment finally obtained by the adverse party is less favorable than the offer, the offeree must pay the costs incurred by the defending party after making the offer. n2 The primary purpose of the offer of judgment rule is to promote settlements and avoid protracted litigation--an offer that is accepted terminates the case. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentAcceptancesCivil ProcedureSettlementsOffers of JudgmentCounteroffersCivil ProcedureSettlementsOffers of JudgmentMaking of OffersCivil ProcedureSettlementsSettlement AgreementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 68(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 68(d)*; *see also Bogan v. City of Boston, 489 F.3d 417, 430-431 (1st Cir. 2007)* .

(n3)Footnote 3. *Pastor v. State Farm Mut. Auto. Ins. Co., 487 F.3d 1042, 1043 (7th Cir. 2007)* .

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CHAPTER 49 Settlements
C. Making or Responding to Offer of Judgment

4-49 Federal Litigation Guide § 49.21

§ 49.21 Rule 68 Varies General Rule Permitting Prevailing Plaintiff to Recover Costs

Rule 68 offers of judgment serve as cost-shifting tools designed to encourage settlement by forcing a plaintiff to weigh the risk of incurring post-offer costs and fees even if the plaintiff is successful on the claim. n1

Normally, a prevailing plaintiff is allowed to recover costs as a matter of course. n2

Rule 68 varies this general rule by providing that if the judgment or settlement ultimately obtained by the plaintiff is less than the Rule 68 offer, the plaintiff:

- Cannot recover costs from the date the offer was made to the end of suit n3
- Must pay costs incurred by the defendant after the rejected offer was made n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentCounteroffersCivil ProcedureSettlementsOffers of JudgmentMaking of OffersCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Delta Air Lines, Inc. v. August, 450 U.S. 346, 352* , & n.8, *101 S. Ct. 1146, 67 L. Ed. 2d 287 (1981)* (citing Moore's).

(n2)Footnote 2. *Fed. R. Civ. P. 54(d).*

(n3)Footnote 3. *Marek v. Chesny, 473 U.S. 1, 8-9, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1985)* .

(n4)Footnote 4. *Delta Air Lines, Inc. v. August, 450 U.S. 346, 352, 101 S. Ct. 1146, 67 L. Ed. 2d 287 (1981)* .

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CHAPTER 49 Settlements
C. Making or Responding to Offer of Judgment

4-49 Federal Litigation Guide § 49.22

§ 49.22 Types of Costs Contemplated by Rule 68

As used in Rule 68, the term *costs* refers to all costs properly awardable in an action under the relevant substantive statute or other authority. In addition, absent congressional expressions to the contrary, where the underlying statute defines costs to include attorney's fees, those fees must be included as costs for purposes of the cost-shifting provisions of Rule 68. Accordingly, plaintiffs in such actions cannot recover attorney's fees for post-offer services after rejecting a Rule 68 offer that is more favorable than the ultimate verdict at trial. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentCounteroffersCivil ProcedureSettlementsOffers of JudgmentMaking of OffersCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Marek v. Chesny, 473 U.S. 1, 6, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1985)* .

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CHAPTER 49 Settlements
C. Making or Responding to Offer of Judgment

4-49 Federal Litigation Guide § 49.23

§ 49.23 Offer of Judgment Does Not Need to Refer to Costs

Lump sum offers of judgment are permissible. It is immaterial whether the offer of judgment recites that costs are included, whether it specifies the amount the defendant is allowing for costs, or whether it refers to costs at all. As long as the offer does not implicitly or explicitly provide that it does *not* include costs, it is a valid Rule 68 offer of judgment. If the offer does not state that costs are included, and an amount for costs is not specified, the court will be obliged by the terms of Rule 68 to include in its judgment an additional amount sufficient to cover costs. If an offer recites that costs are included, or specifies an amount for costs, its acceptance prohibits an additional claim for costs. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentCounteroffersCivil ProcedureSettlementsOffers of JudgmentMaking of OffersCivil ProcedureSettlementsSettlement AgreementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Marek v. Chesny, 473 U.S. 1, 7-9, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1985) .*

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CHAPTER 49 Settlements
C. Making or Responding to Offer of Judgment

4-49 Federal Litigation Guide § 49.24

§ 49.24 Judgment for Plaintiff Required

The cost-shifting penalty of Rule 68 n1 applies only if the judgment obtained is less favorable to the plaintiff than the offer of judgment made by the defendant. n2 This includes judgments obtained through summary judgment as well as at trial. n3

If judgment is awarded in favor of the defendant, Rule 68 does not apply. n4

Courts are split as to whether Rule 68 applies to cases that end in settlement and a stipulated dismissal. n5

Accordingly, attorneys representing parties to a stipulated dismissal should insist on a clear written agreement on this subject.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See § 49.21.*

(n2)Footnote 2. *Fed. R. Civ. P. 68(d).*

(n3)Footnote 3. *Liberty Mut. Ins. Co. v. EEOC, 691 F.2d 438, 442 (9th Cir. 1982) .*

(n4)Footnote 4. *Delta Air Lines, Inc. v. August, 450 U.S. 346, 354, 101 S. Ct. 1146, 67 L. Ed. 2d 287 (1981) .*

(n5)Footnote 5. *Compare Johnston v. Penrod Drilling Co., 803 F.2d 867, 870 (5th Cir. 1986)* (in case involving joint offer by two defendants followed by settlement with one and judgment against the other, Rule 68's reference to "the judgment finally obtained" does not permit consideration of amount received in settlement); *Good Timez v. Phoenix Fire & Marine Ins. Co., 754 F. Supp. 459, 462-463 (D.V.I. 1991)* (*Fed. R. Civ. P. 68* not applicable to action settled without trial); *Hutchison v. Wells, 719 F. Supp. 1435, 1442-1444 (S.D. Ind. 1989)* (*Fed. R. Civ. P. 68* not

applicable to action settled without trial); *EEOC v. Hamilton Standard Div., 637 F. Supp. 1155, 1158 (D. Conn. 1986)* (*Fed. R. Civ. P. 68* not applicable to settlement and stipulated dismissal) *with People v. Operation Rescue Nat'l, 80 F.3d 64, 72 (2d. Cir. 1996)* (noting split of authority without deciding the issue); *Lang v. Gates, 36 F.3d 73, 75-77 (9th Cir.)* , *cert. denied sub nom., Yagman & Yagman v. Gates, 513 U.S. 1017 (1994)* (failure to apply *Fed. R. Civ. P. 68* to settlements would contradict intent of rule); *Alcan Elec. & Eng'g Co. v. United States, 27 Fed. Cl. 327, 328-329 (1992)* (holding Court of Federal Claims Rule 68, identical in relevant respects to Federal Rule 68, applicable to judgments entered upon stipulation).

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CHAPTER 49 Settlements
C. Making or Responding to Offer of Judgment

4-49 Federal Litigation Guide § 49.25

§ 49.25 Determining Whether Judgment Is More Favorable

The cost-shifting provisions of Rule 68 apply only where the judgment recovered by the plaintiff is not more favorable than the defendant's offer of judgment. n1

In determining whether a judgment was less favorable than the offer, courts consider all relief awarded, n2 including:

- Monetary recovery, including punitive and compensatory damages and monetary awards such as back pay n3

- Pre-offer costs n4

When non-monetary relief is included in determining whether the judgment was less favorable than an offer, valuation of the non-monetary relief may be problematic. n5

A plaintiff's rejection of a Rule 68 offer that would provide the plaintiff with all the relief he or she could possibly recover at trial, under the condition that the judgment be kept confidential, does not justify the district court's entry of a judgment in favor of the defendant. n6

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentAcceptancesCivil ProcedureSettlementsSettlement AgreementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 68(d).*

(n2)Footnote 2. *See, e.g., Garrity v. Sununu, 752 F.2d 727 (1st Cir. 1984)* ; *Domanski v. Funtime, Inc., 149 F.R.D. 556, 557-558 (N.D. Ohio 1993)* ; *Lish v. Harper's Magazine Found., 148 F.R.D. 516, 520 (S.D.N.Y. 1993)* ; *Chestnut Hill Gulf, Inc. v. Cumberland Farms, Inc., 749 F. Supp. 331, 333 (D. Mass. 1990) , aff'd in part and rev'd in part on other grounds, 940 F.2d 744 (1st Cir. 1991)*; *Association for Retarded Citizens v. Olson, 561 F. Supp. 495,*

498-499 (D.N.D. 1982) , *aff'd as modified on other grounds*, *713 F.2d 1384 (8th Cir. 1983)* ; *but see Real v. Continental Group, Inc., 653 F. Supp. 736, 738-739 (N.D. Cal. 1987)* (because of difficulties of quantifying value of injunctive relief, "the better course is to compare monetary awards only").

(n3)Footnote 3. *See Real v. Continental Group, Inc., 653 F. Supp. 736, 738-739 (N.D. Cal. 1987)* .

(n4)Footnote 4. *See Corder v. Gates, 947 F.2d 374, 380-381 (9th Cir. 1991)* .

(n5)Footnote 5. *Compare BIC Leisure Prod., Inc. v. Windsurfing Int'l, Inc., 850 F. Supp. 224, 235 (S.D.N.Y. 1994) with Lish v. Harper's Magazine Found., 148 F.R.D. 516, 520 (S.D.N.Y. 1993)* .

(n6)Footnote 6. *See McCauley v. Trans Union, L.L.C., 402 F.3d 340, 341-342 (2d Cir. 2005)* .

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CHAPTER 49 Settlements
C. Making or Responding to Offer of Judgment

4-49 Federal Litigation Guide § 49.26

§ 49.26 Only Defending Parties May Make Offers of Judgment

Only defending parties may make Rule 68 offers of judgment. The Federal Rules of Civil Procedure do not provide a similar procedure for settlement demands by claimants. n1

If a counterclaim for money damages is asserted against a plaintiff, the plaintiff may make a Rule 68 offer as to that claim, in view of the fact that the plaintiff is the defending party as to the counterclaim. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentAcceptancesCivil ProcedureSettlementsOffers of JudgmentMaking of OffersCivil ProcedureSettlementsSettlement AgreementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Delta Air Lines, Inc. v. August, 450 U.S. 346, 350, 101 S. Ct. 1146, 67 L. Ed. 2d 287 (1981)* .

(n2)Footnote 2. *Simon v. Intercontinental Transp. (ICT) B.V., 882 F.2d 1435, 1439 (9th Cir. 1989)* .

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CHAPTER 49 Settlements
C. Making or Responding to Offer of Judgment

4-49 Federal Litigation Guide § 49.27

§ 49.27 Deadline for Making Offer of Judgment

A Rule 68 offer of judgment must be made at least 14 days before the date set for trial. n1

In computing the 14-day period, intermediate Saturdays, Sundays, and legal holidays are counted. n2

In bifurcated trials where liability is established first, the party found liable may make a Rule 68 offer within a reasonable time not less than 14 days before the date set for a hearing to determine the extent of liability. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentAcceptancesCivil ProcedureSettlementsOffers of JudgmentMaking of OffersCivil ProcedureSettlementsOffers of JudgmentTime LimitationsCivil ProcedureSettlementsSettlement AgreementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 68(a).*

(n2)Footnote 2. *Fed. R. Civ. P. 6(a).*

(n3)Footnote 3. *Fed. R. Civ. P. 68(c).*

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CHAPTER 49 Settlements
C. Making or Responding to Offer of Judgment

4-49 Federal Litigation Guide § 49.28

§ 49.28 Offer of Judgment Must Be in Writing and Served on All Parties

Rule 68 requires the defendants to serve the offer on adverse parties, and thus only a written offer of judgment satisfies Rule 68. n1

The party making the offer of judgment must serve the offer on all parties by delivering a copy to each party's attorney (or if a party is not represented by counsel, by delivering a copy to the party). n2

Offers of judgment are not filed with the court unless and until they are accepted. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentAcceptancesCivil ProcedureSettlementsOffers of JudgmentMaking of OffersCivil ProcedureSettlementsSettlement AgreementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Clark v. Sims, 28 F.3d 420, 424 (4th Cir. 1994)* ; *Grosvenor v. Brienen, 801 F.2d 944, 948-949 (7th Cir. 1986)* .

(n2)Footnote 2. *Fed. R. Civ. P. 5(a), (b).*

(n3)Footnote 3. *See Fed. R. Civ. P. 68(a)*; *Kason v. Amphenol Corp., 132 F.R.D. 197 (N.D. Ill. 1990)* ; § 49.35.

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CHAPTER 49 Settlements
C. Making or Responding to Offer of Judgment

4-49 Federal Litigation Guide § 49.29

§ 49.29 Subsequent Offers of Judgment

The fact that a defending party makes a Rule 68 offer of judgment that the plaintiff does not accept does not preclude a subsequent offer of judgment, provided the subsequent offer meets the requirements of Rule 68. n1

In general, courts have held that Rule 68 offers of judgment may not be revoked during the 14 day period set by the Rule. n2 However, some courts permit revocation or rescission of an offer of judgment before acceptance for good cause shown. Examples might include fraudulent conduct by the offeree, n3 or an obvious mistake promptly communicated to the offeree. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentAcceptancesCivil ProcedureSettlementsOffers of JudgmentCounteroffersCivil ProcedureSettlementsOffers of JudgmentRejectionsCivil ProcedureSettlementsSettlement AgreementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 68(b).*

(n2)Footnote 2. *Ramming v. Natural Gas Pipeline Co., 390 F.3d 366, 370 (6th Cir. 2004) .*

(n3)Footnote 3. *Colonial Penn Ins. Co. v. Coil, 887 F.2d 1236, 1240 (4th Cir. 1989) .*

(n4)Footnote 4. *Cesar v. Rubie's Costume Co., 219 F.R.D. 257, 259 (E.D.N.Y. 2004) .*

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CHAPTER 49 Settlements
C. Making or Responding to Offer of Judgment

4-49 Federal Litigation Guide § 49.30

§ 49.30 Effect of Ambiguity in Offer of Judgment

[1] Ordinary Contract Principles Govern

Offers of judgment are construed in accordance with ordinary contract principles. n1

There must be a "meeting of the minds" and a clear understanding of the terms of the offer for there to be a valid acceptance. In view of the fact that a Rule 68 offer of judgment has significant implications whether it is accepted or rejected, the plaintiff must have a clear understanding of the terms of an offer to be able to make an informed decision whether to accept it. n2

[2] Ambiguities May Invalidate Offer

Ambiguities in an offer may invalidate the offer, or may be construed against the offeror. n3

A common ambiguity in offers of judgment is tracking the language of Rule 68 by using the term *with costs* or *with costs and attorney fees*. Use of such terminology may result in an ambiguity as to whether the offer is in addition to or includes costs. n4

The safer practice is to refrain from using such terms, unless they are accompanied by clarifying language.

[3] Seeking Clarification of Offer of Judgment

A plaintiff may seek clarification of an ambiguous offer of judgment. n5

Initially, the plaintiff should seek clarification from the offering defendant. If clarification is not forthcoming, the plaintiff should consider filing a motion to strike the offer of judgment, n6 and should contemporaneously seek a tolling of the period within which an acceptance would otherwise be required.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentAcceptancesCivil

ProcedureSettlementsOffers of JudgmentCounteroffersCivil ProcedureSettlementsOffers of JudgmentRejectionsCivil ProcedureSettlementsSettlement AgreementsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Goodheart Clothing Co. v. Laura Goodman Enters., 962 F.2d 268, 272 (2d Cir. 1992)* ; *Radecki v. Amoco Oil Co., 858 F.2d 397, 400 (8th Cir. 1988)* .

(n2)Footnote 2. *Whitaker v. Associated Credit Servs., Inc., 946 F.2d 1222, 1226 (6th Cir. 1991)* ; *Radecki v. Amoco Oil Co., 858 F.2d 397, 400 (8th Cir. 1988)* ; *Johnson v. University College, 706 F.2d 1205, 1209 (11th Cir.)* , *cert. denied, 464 U.S. 994 (1983)* .

(n3)Footnote 3. *See Holland v. Roeser, 37 F.3d 501, 504 (9th Cir. 1994)* ; *Arkla Energy Resources v. Roye Realty & Dev., Inc., 9 F.3d 855, 867 (10th Cir. 1993)* .

(n4)Footnote 4. *See, e.g., Robins v. Scholastic Book Fairs, 928 F. Supp. 1027, 1031 (D. Or. 1996)* , *aff'd, 1997 U.S. App. Lexis 13964 (9th Cir. June 12, 1997)* ; *Kyreakakis v. Paternoster, 732 F. Supp. 1287, 1292 (D.N.J. 1990)* .

(n5)Footnote 5. *See Radecki v. Amoco Oil Co., 858 F.2d 397, 402 (8th Cir. 1988)* ; *Boorstein v. City of New York, 107 F.R.D. 31, 35 (S.D.N.Y. 1985)* ; *Cf. Shorter v. Valley Bank & Trust Co., 678 F. Supp. 714, 719-720 (N.D. Ill. 1988)* (court refused to look to extrinsic evidence on intent of offeror when language of offer had clear enough legal meaning).

(n6)Footnote 6. *See § 49.31.*

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CHAPTER 49 Settlements
C. Making or Responding to Offer of Judgment

4-49 Federal Litigation Guide § 49.31

§ 49.31 Motion to Strike Offer of Judgment

[1] Appropriate for Procedural or Substantive Defects

Because an offer of judgment has a binding effect when refused as well as when accepted, defective offers should be stricken to protect the ability of parties to make reasonable decisions regarding the conduct of litigation. n1

A plaintiff may move to strike a Rule 68 offer of judgment for:

- Procedural defects n2
- Substantive defects n3

[2] Deadline for Filing Motion

The court may consider a motion to strike filed after the expiration of the 14-day period for accepting the offer. Indeed, the validity and effect of a Rule 68 offer is usually not determined until the close of the lawsuit, and the filing of the attorney's fee applications. n4

However, the better practice is to file the motion to strike within the 14-day period for accepting the offer, and to contemporaneously seek a tolling of the period within which an acceptance would otherwise be required. Otherwise, the moving party runs the risk that the offer of judgment will be enforced.

[3] Procedure for Filing Motion to Strike Offer of Judgment

A party seeking an order to strike an offer of judgment must make a formal motion to the court. Likewise, the opposing party may file opposing papers.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsOffers of JudgmentAcceptancesCivil ProcedureSettlementsOffers of JudgmentCounteroffersCivil ProcedureSettlementsOffers of JudgmentRejectionsCivil ProcedureSettlementsOffers of

JudgmentWithdrawalsCivil ProcedureSettlementsSettlement AgreementsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See Boorstein v. City of New York, 107 F.R.D. 31, 34 (S.D.N.Y. 1985)* .

(n2)Footnote 2. *See Klawes v. Firestone Tire & Rubber Co., 572 F. Supp. 116, 118 (E.D. Wis. 1983)* .

(n3)Footnote 3. *See Boorstein v. City of New York, 107 F.R.D. 31, 35 (S.D.N.Y. 1985)* .

(n4)Footnote 4. *Boorstein v. City of New York, 107 F.R.D. 31, 34 (S.D.N.Y. 1985)* .

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CHAPTER 49 Settlements
C. Making or Responding to Offer of Judgment

4-49 Federal Litigation Guide § 49.32

§ 49.32 Rejected Offer of Judgment Inadmissible as Evidence at Trial

An unaccepted Rule 68 offer of judgment is not admissible as evidence at trial, except in a proceeding to determine costs. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsOffers of JudgmentAcceptancesCivil ProcedureSettlementsOffers of JudgmentCounteroffersCivil ProcedureSettlementsOffers of JudgmentRejectionsCivil ProcedureSettlementsOffers of JudgmentWithdrawalsCivil ProcedureSettlementsSettlement AgreementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 68(b).*

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CHAPTER 49 Settlements
C. Making or Responding to Offer of Judgment

4-49 Federal Litigation Guide § 49.33

§ 49.33 Deadline for Accepting Offer of Judgment

A notice of acceptance of a Rule 68 offer of judgment must be served on the offering party within 14 days of service of the offer itself. If the offer of judgment is not accepted within that time period, the offer is deemed withdrawn. n1

If the offer of judgment is served to the court clerk, or by mail or by electronic or other means consented to in writing, the deadline for accepting the offer is extended by three additional days. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentAcceptancesCivil ProcedureSettlementsOffers of JudgmentTime Limitations

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 68(b).*

(n2)Footnote 2. *See Fed. R. Civ. P. 6(d).*

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CHAPTER 49 Settlements
C. Making or Responding to Offer of Judgment

4-49 Federal Litigation Guide § 49.34

§ 49.34 Acceptance Must Be Written and Unconditional

An effective notice of acceptance must be in writing. n1

To be effective, the acceptance must be unconditional. A partial acceptance of an offer of judgment is invalid. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentAcceptancesCivil ProcedureSettlementsOffers of JudgmentTime Limitations

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 68(a).*

(n2)Footnote 2. *See Whitcher v. Town of Matthews, 136 F.R.D. 582, 584 (W.D.N.C. 1991)* ; *Freeman v. B&B Assocs., 790 F.2d 145, 152 (D.C. Cir. 1986)* .

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CHAPTER 49 Settlements
C. Making or Responding to Offer of Judgment

4-49 Federal Litigation Guide § 49.35

§ 49.35 Filing Offer and Acceptance

After a claimant timely accepts a valid offer either party may then file the offer and notice of acceptance plus proof of service of the offer and notice of acceptance, and then the clerk is required to enter judgment. n1 Therefore, Rule 68 judgments are self-executing, and once the parties agree on the terms of a Rule 68 judgment, the court has no discretion to withhold its entry or otherwise to modify the terms of the agreement. The clerks function in entering judgment on an accepted offer under the Rule is clerical, and it is an abuse of discretion for the district court to do anything but enter judgment once an offer has been accepted. n2 For the parties, acceptance of a Rule 68 offer and entry of judgment has the effect of cutting off the right to appeal from an earlier action by the district court. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentAcceptancesCivil ProcedureSettlementsOffers of JudgmentMaking of Offers

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 68(a).*

(n2)Footnote 2. *Mallory v. Eyrich, 922 F.2d 1273, 1279 (6th Cir. 1991) .*

(n3)Footnote 3. *Dugas v. Trans Union Corp., 99 F.3d 724, 728-729 (5th Cir. 1996) .*

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CHAPTER 49 Settlements
C. Making or Responding to Offer of Judgment

4-49 Federal Litigation Guide §§ 49.36 through 49.39

[Reserved]

§§ 49.36[Reserved]

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CHAPTER 49 Settlements
D. Drafting Settlement Agreements

4-49 Federal Litigation Guide § 49.40

§ 49.40 Types of Settlements

[1] Lump Sum Payment

[1.--1] Description of Lump Sum Settlement

The most common type of settlement is a lump sum settlement. In lump sum settlements, the defendant agrees to pay the plaintiff with a single check or cash payment, in consideration of which the plaintiff executes a release of the plaintiff's claims. n1

[1.--2] Advantages of Lump Sum Settlement

The major advantage of lump sum settlements is their ease of execution, in that:

- The agreement may be quickly performed by the parties with an exchange of documents
- The court need not monitor performance of the agreement
- Once completed, the parties need not have further contact

[1.--3] Disadvantages of Lump Sum Settlement

The disadvantages of lump sum settlements include the following:

- The defendant is typically required to have immediate access to the necessary monetary amount
- The plaintiff may be required to manage large sums of money with little or no expertise
- The plaintiff may incur tax liability on the lump sum settlement amount n2

[2] Structured Settlement

[2.--1] Description of Structured Settlement

In a structured settlement, the claimant typically receives periodic payments over a period of time, rather than a lump sum, in return for a release of the plaintiff's claims. To provide a source of funds from which to satisfy the defendant's obligation to the plaintiff, the defendant or its liability carrier typically purchases an annuity contract from a life insurance company with the plaintiff as the beneficiary. n3

[2.--2] Advantages of Structured Settlement

Advantages of structured settlements include:

- Allowing the plaintiff a larger total settlement than might be available in a lump sum settlement, while requiring less cash outlay from the defendant than is typically required with a lump sum payment
- Providing the plaintiff with a guaranteed source of income over a period of time, thus relieving the plaintiff of the need to perform financial planning
- If properly implemented, structured settlement payments may result in no (or diminished) tax liability

[2.--3] Disadvantages of Structured Settlement

Disadvantages of structured settlements include:

- The plaintiff's inability to immediately access the total settlement amount on settlement
- The fixed nature of the periodic payments, thus precluding adjustments for inflation or cost of living
- The importance of ensuring the financial stability of any life insurance carrier providing an annuity
- Problems with valuation of structured settlements for purposes of computing attorney's fees

[3] Partial Settlement

A partial settlement is an agreement settling some but not all claims, or an agreement settling claims against some but not all defendants. Once a judgment is entered on the settled claims or defendants, the plaintiff continues the suit as to remaining claims or defendants. n4

Partial settlements present important issues for both settling and nonsettling parties. For example, the plaintiff's counsel must ensure that the agreement releases only those claims or defendants to be discharged. Counsel for the defendants must ensure that the settlement represents their clients' entire responsibility for the plaintiff's claims, particularly when the law provides, in the event the plaintiff prevails in the action, that nonsettling defendants are entitled to a set off from settling defendants.

[4] Sliding Scale Settlement

A sliding scale settlement, or "Mary Carter" agreement, is a partial settlement of amulti-party case in which the liability of a settling defendant is limited in comparison to that of nonsettling defendants. These agreements take their name from the case of *Booth v. Mary Carter Paint Co., 202 So.2d 8 (Fla. Dist. Ct. App. 1967)* . A typical Mary Carter agreement usually has the following features: n5

- Secrecy

- Contracting defendant remains in the lawsuit
- Contracting defendant guarantees plaintiff a certain monetary recovery
- Contracting defendant's liability is decreased in direct proportion to the increase in the non-settling defendants' liability

The key characteristic of a Mary Carter agreement is its secrecy from the nonsettling defendants. If not disclosed to all parties, such settlements may create unfair prejudice to the nonsettling defendants, possibly denying their right to a fair trial, and requiring a new trial. n6

Counsel for the defendants in multi-defendant cases should consider making a discovery motion or request for disclosure of any agreements between the plaintiff and other defendants. In the alternative, counsel may seek a court order imposing a continuing duty on the plaintiff's counsel to promptly disclose all such agreements without the necessity of a motion or discovery request.

[5] Consent Decree

A consent decree usually is a settlement containing an injunction. n7 Unlike typical settlements, the court in a consent decree exercises continuing authority and supervision to ensure that the parties fulfill their express obligations under the decree. n8

The relief provided by a consent decree may properly be broader than what a court could have awarded after trial. A consent decree is valid as long as the agreement resolves a dispute within the court's subject matter jurisdiction, comes within the general scope of the case, and furthers objectives of the law. n9

If a consent judgment resolves a suit affecting the public interest, the court must be satisfied of the fairness of the settlement. n10

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewContracts LawTypes of ContractsSettlement AgreementsTortsProcedureSettlementsJudicial Approval

FOOTNOTES:
(n1)Footnote 1. *See, e.g., Blumel v. Mylander, 165 F.R.D. 113, 116 (M.D. Fla 1996)* .

(n2)Footnote 2. *See 26 U.S.C. § 61(a)* (gross income means all income from whatever source derived); *26 U.S.C. § 104(a)(2)* (damages received in suit or settlement for personal injuries or sickness excludable from taxable income).

(n3)Footnote 3. *See Legal Economic Evaluations, Inc. v. Metropolitan Life Ins. Co., 39 F.3d 951, 953 (9th Cir. 1994)* , *cert. denied, 514 U.S. 1044 (1995)* .

(n4)Footnote 4. *See, e.g., Bank of New York v. Amoco Oil Co., 35 F.3d 643, 649 (2d Cir. 1994)* .

(n5)Footnote 5. *Hoops v. Watermelon City Trucking, Inc., 846 F.2d 637, 640 (10th Cir. 1988)* .

(n6)Footnote 6. *Minpeco, S.A. v. Hunt, 127 F.R.D. 460, 463 (S.D.N.Y. 1989)* .

(n7)Footnote 7. *In re Masters Mates & Pilots Pension Plan & IRAP Litig., 957 F.2d 1020, 1025 (2d Cir. 1992)* ; *Hook v. Arizona, 972 F.2d 1012, 1014 (9th Cir. 1992)* .

(n8)Footnote 8. *Hook v. Arizona, 972 F.2d 1012, 1014 (9th Cir. 1992)* ; *EEOC v. Local 580, Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers, 925 F.2d 588, 593 (2d Cir. 1991)* .

(n9)Footnote 9. Local Number *93 Int'l Assoc. of Firefighters v. City of Cleveland, 478 U.S. 501, 525, 106 S. Ct. 3063, 92 L. Ed. 2d 405 (1986)* .

(n10)Footnote 10. *Janus Films, Inc. v. Miller, 801 F.2d 578, 582 (2d Cir. 1986)* .

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CHAPTER 49 Settlements
D. Drafting Settlement Agreements

4-49 Federal Litigation Guide § 49.41

§ 49.41 Common Settlement Agreement Provisions

[1] Description of Parties

All settlement agreements should contain a section or paragraph naming and describing the parties to the agreement, and naming their counsel. In addition, it is wise to include a clause binding the parties successors, assigns, employees, and representatives.

If any party acts in a representative capacity, the clause describing that party should delineate the capacity in which the representative serves. Similarly, in actions in which a corporate party's representative is signing the agreement on the corporation's behalf, the agreement should describe the corporate representative's authority to bind the corporation.

[2] Recitation of Disputed Matters

The settlement agreement should generally include a recitation of the disputed matters in the case, together with enough facts to clarify the nature of those claims. The agreement should also include the case name, court, and docket number for any litigation settled by the agreement.

[3] Recitation of Parties' Obligations

Settlement agreements should detail the obligations assumed by each party in settlement of disputed claims. For instance, in a lump sum settlement, n1 the agreement might recite that the defendant agrees to give the plaintiff a check or cash in a specified amount, in return for which the plaintiff agrees to execute a release of the plaintiff's claims.

Attempt to anticipate all possible issues regarding settlement terms, and avoid ambiguity. Post-settlement litigation is common.

Counsel for the plaintiff should ensure that the settlement agreement specifies a deadline within which the defendant must make its settlement payments. If a settlement agreement does not provide any specific time for payment, the law implies a requirement to pay within a reasonable time. n2

[4] Release Provisions

The settlement agreement should include a list of the rights, claims, interests, or obligations released as part of the settlement. In addition, the agreement should specify those claims or obligations, if any, not included in the settlement.

While counsel for the defendant may wish to include a release using broad, generallanguage, counsel for the plaintiff should exercise caution in agreeing to such general language. For example:

- Release of "any and all claims," if not limited to the matters at issue in the particular action, may bar later actions related to the same conduct n3

- A party may express an intent to waive attorney's fees by employing broad release language, regardless of whether the release explicitly mentions attorney's fees n4

[5] Other Settlement Provisions

Other provisions typically contained in settlement agreements include:

- Disclaimer by the defendant providing that the settlement is not an admission of the defendant's guilt or liability n5

- Confidentiality clause precluding the parties from divulging all or part of the settlement terms n6

- Choice of law clause specifying the law governing construction of the settlement agreement n7

- Clause providing that the settlement agreement represents the final agreement between the parties, thus precluding introduction of extrinsic evidence to contradict the terms of the agreement n8

- Agreement that the court retains jurisdiction of the case for purposes of enforcement of the settlement; n9 alternatively, restoration of the case if specific settlement terms are not met

- Attorney's fee clause providing that the prevailing party is entitled to attorney's fees in any action to enforce or construe the settlement agreement n10

[6] Signatures

It is wise to have the attorneys as well as the parties themselves execute the settlement agreement. Securing the parties' signatures may forestall later arguments that the settlement was negotiated without a particular party's consent or authority.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentGeneral OverviewCivil ProcedureSettlementsReleases From LiabilityGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewContracts LawTypes of ContractsSettlement Agreements

FOOTNOTES:
(n1)Footnote 1. *See § 49.40[1].*

(n2)Footnote 2. *Janneh v. GAF Corp., 887 F.2d 432, 436 (2d Cir. 1989)* , *cert. denied, 498 U.S. 865 (1990)* .

(n3)Footnote 3. *See, e.g., Union Pacific R.R. Co. v. Mullen, 996 F.2d 348, 351 (8th Cir. 1992)* ; *Sheehan v.*

Atlanta Int'l Ins. Co., 812 F.2d 465 (9th Cir. 1987) .

(n4)Footnote 4. *See Erdman v. Chchise Couty, 926 F.2d 877 (9th Cir. 1991)* ; *Brown v. General Motors Corp., 722 F.2d 1009, 1012 (2d Cir. 1983)* ; *but see Valley Disposal, Inc. v. Central Vt. Solid Waste Management Dist., 71 F.3d 1053, 1058 (2d Cir. 1995)* .

(n5)Footnote 5. *See, e.g., Huertas v. East River Hous. Corp., 992 F.2d 1263, 1268 (2d Cir. 1993)* .

(n6)Footnote 6. *See, e.g., Doe v. City of New York, 15 F.3d 264, 265 (2d Cir. 1994)* .

(n7)Footnote 7. *See, e.g., Nacional Financiera, S.N.C. v. Americom Airlease, Inc., 803 F. Supp. 886, 892 (S.D.N.Y. 1992)* ; *but see Burger King Corp. v. Rudzewicz, 471 U.S. 462, 481-482, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)* .

(n8)Footnote 8. *See, e.g., Health-Chem Corp. v. Baker, 915 F.2d 805, 811 (2d Cir. 1990)* .

(n9)Footnote 9. *See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 381-382, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)* .

(n10)Footnote 10. *See Torres v. Costich, 935 F. Supp. 232, 236 (W.D.N.Y. 1996)* .

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CHAPTER 49 Settlements
D. Drafting Settlement Agreements

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§ 49.42 Putting Oral Settlement on Record

Lawsuits may be settled by oral contracts, which are enforceable under federal law. n1

To avoid disputes concerning the existence or terms of an oral settlement agreement, counsel may request or the judge may require that the agreement be "put on the record" by stating the terms of the settlement in open court where they are transcribed by a court reporter, or entered into the minutes of the court. The court may then dismiss the case, or may indicate that it will wait to dismiss the case until the parties submit written documents memorializing the settlement and requesting dismissal. n2 The transcript may be used as the written agreement, and signed by the parties and counsel.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentGeneral OverviewCivil ProcedureSettlementsReleases From LiabilityGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsIncorporation in Judgments

FOOTNOTES:
(n1)Footnote 1. *See, e.g., Moore v. Beaufort County, 936 F.2d 159, 163 (4th Cir. 1991)* .

(n2)Footnote 2. *See, e.g., Janus Films, Inc. v. Miller, 801 F.2d 578, 583 (2d Cir. 1986)* .

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CHAPTER 49 Settlements
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4-49 Federal Litigation Guide § 49.43

§ 49.43 Filing Stipulation of Dismissal--Action Not Terminated Until Stipulation of Dismissal Filed With Court

Settlements are usually implemented by filing with the court a stipulation of dismissal signed by the settling parties. n1

A stipulation of dismissal is not self-executing. Rather, until the stipulation is filed with the court, the action is not terminated. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsStipulationsCivil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsReleases From LiabilityGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsIncorporation in Judgments

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 41(a)(1).*

(n2)Footnote 2. *See, e.g., Camacho v. Mancuso, 53 F.3d 48, 51 (4th Cir. 1995)* ; *Morris v. City of Hobart, 39 F.3d 1105, 1109 (10th Cir. 1994)* ; *Orsini v. Kugel, 9 F.3d 1042, 1045 (2d Cir. 1993)* ; *Broadcast Music, Inc. v. M.T.S. Enterprises, Inc., 811 F.2d 278, 279 280 n.1 (5th Cir. 1987)* ; *Eitel v. McCool, 782 F.2d 1470, 1472 n. 3 (9th Cir. 1986)* ; *see also Fed. R. Civ. P. 41(a)(1).*

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CHAPTER 49 Settlements
D. Drafting Settlement Agreements

4-49 Federal Litigation Guide § 49.44

§ 49.44 Court Approval of Settlement

Typically, settlement rests solely in the discretion of the parties. However, some types of settlements require judicial approval before suit may be dismissed. Court approval of settlements is required in the following actions:

- Class actions n1
- Shareholder derivative suits n2
- Consent decrees n3

Counsel should consult the local district court rules, or state law in a diversity case, for any other types of settlements requiring court approval.

If court approval of the settlement is required, the court typically schedules a hearing, and notifies persons such as class members affected by the proposed settlement of their right to object to its terms at the hearing. After the hearing, the court must decide whether to accept the proposed settlement. The rationale for requiring court approval is to ensure the settlement is fair to all, though the standard for court approval varies depending on the type of action involved. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsReleases From LiabilityGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsIncorporation in Judgments

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 23(e).*

(n2)Footnote 2. *Fed. R. Civ. P. 23.1(c).*

(n3)Footnote 3. *County of Suffolk v. Stone & Webster Engineering Corp., 106 F.3d 1112, 1117 (2d Cir. 1997) .*

(n4)Footnote 4. *See, e.g., Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982)* ; *see also Fed. R. Civ. P. 23*, *23.1* (class actions).

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4-49 Federal Litigation Guide § 49.45

§ 49.45 CHECKLIST: Drafting Settlement Agreement

The following provisions should be considered for inclusion in all settlement agreements:

- ☐ Names and description of parties to agreement.
- ☐ Clause binding parties' successors, assigns, employees, and representatives.
- ☐ For parties acting in representative capacity, description of capacity in which representative serves.
- ☐ For corporate party, description of corporate representative's authority to bind corporation.
- ☐ Recitation of disputed matters in the case, including facts necessary to clarify nature of parties' claims, as well as case name, court, and docket number for litigation settled by agreement.
- ☐ Obligations assumed by each party in settlement of disputed claims, including a time frame within which obligations must be performed.
- ☐ List of rights, claims, interests, or obligations released as part of settlement.
- ☐ Specific list of claims or obligations, if any, not included in settlement.
- ☐ Other provisions may include:
  - ☐ Defendant's disclaimer of guilt or liability.

☐ Confidentiality clause precluding parties from divulging all or part of settlement terms.

☐ Choice of law clause specifying law governing settlement agreement.

☐ Clause providing settlement agreement represents final agreement between parties.

☐ Agreement allowing court to retain jurisdiction of case for purposes of enforcement of settlement, or alternatively, restoration of case if settlement terms are not met.

☐ Clause allowing attorney's fees to prevailing party in action to enforce or construe settlement agreement.

☐ Signature lines for attorneys and parties.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsReleases From LiabilityGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsIncorporation in JudgmentsContracts LawTypes of ContractsSettlement Agreements

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[Reserved]

§§ 49.46[Reserved]

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CHAPTER 49 Settlements
E. Enforcing Settlement Agreement

4-49 Federal Litigation Guide § 49.60

§ 49.60 Settlement Agreement Is Enforceable Contract

A voluntary settlement agreement is a contract that is binding, and its enforceability is determined under state law. n1

On motion, a district court has the power to summarily enforce a settlement agreement in a case still pending before it. n2

Alternatively, an aggrieved party may bring a separate action for breach of a settlement agreement. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsEnforcementGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsEnforcementBreach of Contract ActionsCivil ProcedureSettlementsSettlement AgreementsEnforcementContemptContracts LawTypes of ContractsSettlement Agreements

FOOTNOTES:
(n1)Footnote 1. *Botefur v. City of Eagle Point, 7 F.3d 152, 156 (9th Cir. 1993)* ; *Davis v. Huskipower Outdoor Equip. Corp., 936 F.2d 193, 196 (5th Cir. 1991)* ; *see, e.g., Shlensky v. Dorsey, 574 F.2d 131, 144 (3d Cir. 1978)* .

(n2)Footnote 2. *See § 49.61[1].*

(n3)Footnote 3. *Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 381-382, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)* ; *See § 49.61[2][b].*

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CHAPTER 49 Settlements
E. Enforcing Settlement Agreement

4-49 Federal Litigation Guide § 49.61

§ 49.61 Court Must Have Jurisdiction Before It May Enforce Settlement Agreement

[1] Enforcement While Case Still Pending Before Court

A district court has authority to summarily enforce a settlement agreement in a case still pending before it. n1

For example, the case may have been settled with respect to some but not all claims or defendants. A settlement agreement may be summarily enforced as long as the case is still pending.

[2] Post-Dismissal Enforcement of Settlement Agreement

[2.--1] Post-Dismissal Enforcement Requires Basis for Jurisdiction

Post-dismissal enforcement of a settlement agreement requires its own basis for jurisdiction. The fact that the settled action was properly in federal court is irrelevant. A federal court has post-dismissal jurisdiction to enforce a settlement agreement only if the party seeking enforcement can demonstrate either that: n2

- The court's dismissal order specifically reserves such authority n3
- The court's order incorporates the terms of the settlement n4

[2.--2] Party Seeking Enforcement May Bring Separate Action

If post-enforcement jurisdiction to enforce the settlement agreement does not exist, n5 the party seeking enforcement of the settlement agreement may bring a separate action for breach of the settlement agreement. If enforcement is sought in federal court, an independent basis for jurisdiction must be established. n6

If an independent basis for federal court jurisdiction cannot be established, enforcement may still be available in state court.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsEnforcementGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsEnforcementBreach of Contract ActionsCivil ProcedureSettlementsSettlement AgreementsEnforcementContempt

FOOTNOTES:

(n1)Footnote 1. *See Ozyagcilar v. Davis, 701 F.2d 306 (4th Cir. 1983)* .

(n2)Footnote 2. *Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377, 381-382, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)* .

(n3)Footnote 3. *See, e.g., Confederated Tribes & Bands of Yakima Indian Nation, 898 F. Supp. 1477, 1483 (W.D. Wash. 1995)* .

(n4)Footnote 4. *See, e.g., Beckless v. Chater, 909 F. Supp. 575, 579 (N.D. Ill. 1995)* .

(n5)Footnote 5. *See* [a], *above*.

(n6)Footnote 6. *See Hagestad v. Tragesser, 49 F.3d 1430, 1432 (9th Cir. 1995)* ; *Langley v. Jackson State Univ., 14 F.3d 1070, 1073 (5th Cir. 1994)* ; *Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 378, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)* .

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CHAPTER 49 Settlements
E. Enforcing Settlement Agreement

4-49 Federal Litigation Guide § 49.62

§ 49.62 Establishing Existence of Valid Agreement and Authority of Counsel

A party seeking to enforce a settlement agreement must establish:

- The existence of a complete, valid settlement agreement n1
- That counsel negotiating the settlement had their respective clients' actual or apparent authority to do so n2

Courts presume that an attorney of record who enters into a settlement agreement purportedly on behalf of a client has the authority to do so. A party seeking to avoid enforcement of a settlement on the basis of lack of authority must show by clear evidence that the settlement was made without the client's authority. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsEnforcementGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsEnforcementBreach of Contract ActionsCivil ProcedureSettlementsSettlement AgreementsEnforcementContemptCivil ProcedureSettlementsSettlement AgreementsValidity

FOOTNOTES:
(n1)Footnote 1. *See United States v. Ward Baking Co., 376 U.S. 327, 334, 84 S. Ct. 763, 11 L. Ed. 2d 743 (1964)* ; *Monaghan v. SZS 33 Assocs., 73 F.3d 1276, 1282-1283 (2d Cir. 1996)* ; *Harrop v. Western Airlines, Inc., 550 F.2d 1143, 1145 (9th Cir. 1977)* .

(n2)Footnote 2. *See Garabedian v. Allstates Eng. Co., 811 F.2d 802, 803 (3d Cir. 1987)* .

(n3)Footnote 3. *Larson v. Heritage Square Associates, 952 F.2d 1533, 1537 (8th Cir. 1992)* .

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CHAPTER 49 Settlements
E. Enforcing Settlement Agreement

4-49 Federal Litigation Guide §§ 49.63 through 49.99

[Reserved]

§§ 49.63[Reserved]

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CHAPTER 49 Settlements
F. Forms

4-49 Federal Litigation Guide § 49.100

§ 49.100 Offer of Judgment

[1] FORM

Offer of Judgment

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

PLEASE TAKE NOTICE that pursuant to *Federal Rules of Civil Procedure, Rule 68*, defendant [*insert name of defendant making offer*] offers to allow judgment to be taken against [*insert either* him, her *or* it, *as appropriate*] in this action in the amount of $ [*insert amount of offer*], inclusive of costs and attorney's fees.

PLEASE TAKE FURTHER NOTICE that this offer of judgment is made for the purposes specified in *Federal Rules of Civil Procedure, Rule 68*, and is not to be construed either as an admission that the defendant is liable in this action, or that the plaintiff has suffered any damages.

[*Date*]

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for Defendant [*name of defendant*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

TO: [*Name of opposing counsel*], Attorney for [*name of party*]

[2] Use of Form

This is a form of offer of judgment by a defendant pursuant to Rule 68. The form can be modified for use by a plaintiff to offer judgment to a defendant on a counterclaim.

Counsel should consult the court clerk in the particular district to ascertain whether the court distributes sample offer of judgment forms.

[3] Timing of Offer and Acceptance of Offer

Any time more than 14 days before the date set for trial, a party defending against a claim may serve on the adverse party an offer to allow judgment to be taken against the defending party as specified in the offer. If, within 14 days after the service of the offer, the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk must enter judgment accordingly. n1

[4] Rule 68 Varies General Rule Permitting Prevailing Plaintiff to Recover Costs

Normally, a prevailing plaintiff is allowed to recover costs as a matter of course. n2 Rule 68 varies this general rule by providing that if the judgment or settlement ultimately obtained by the plaintiff is less than the Rule 68 offer, the plaintiff: n3

- Cannot recover costs from the date the offer was made to the end of suit
- Must pay costs incurred by the defendant after the rejected offer was made

[5] Practice Tip: Offer of Judgment Should Affirmatively State That Costs Are Included

If the offer of judgment does not state that costs are included, and an amount for costs is not specified, the court will be obliged by the terms of Rule 68 to include in its judgment an additional amount sufficient to cover costs. n4

If an offer recites that costs are included, or specifies an amount for costs, its acceptance prohibits an additional claim for costs. n5

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 68(a)*; *see § 49.33*.

(n2)Footnote 2. *Fed. R. Civ. P. 54(d)*.

(n3)Footnote 3. *See § 49.21*.

(n4)Footnote 4. *See § 49.23*.

(n5)Footnote 5. *See § 49.23*.

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CHAPTER 49 Settlements
F. Forms

4-49 Federal Litigation Guide § 49.101

§ 49.101 Acceptance of Offer of Judgment

[1] FORM

Acceptance of Offer of Judgment

[*Insert caption of action and title of document pursuant to local district court rule requirements*]

PLEASE TAKE NOTICE that pursuant to *Federal Rules of Civil Procedure, Rule 68*, plaintiff [*insert name of plaintiff accepting offer*] accepts the offer of judgment of defendant [*insert name of defendant*] dated [*date of offer*], allowing plaintiff to take judgment in this action in the amount of $ [*insert amount of offer*] [*add one of the following:* "inclusive of costs" *or* "together with costs accrued up to the making of said offer"].

[*Date*]

[*Signature of attorney*]

[*Typed or printed name of attorney*]

[*Firm name, if applicable*]

Attorney for Plaintiff [*name of plaintiff*]

[*Attorney's or firm's address, e-mail address, telephone number, and any other identifying information required by local district court rules*]

TO: [*Name of opposing counsel*], Attorney for [*name of party*]

[2] Use of Form

This is a form of acceptance of offer of judgment by a plaintiff pursuant to Rule 68. The form can be modified for use by a defendant to accept an offer of judgment made by a plaintiff on a counterclaim.

[3] Timing of Offer and Acceptance of Offer

Any time more than 14 days before the date set for trial, a party defending against a claim may serve on the adverse party an offer to allow judgment to be taken against the defending party as specified in the offer. If, within 14 days after the service of the offer, the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk must enter judgment accordingly. n1

[4] Rule 68 Varies General Rule Permitting Prevailing Plaintiff to Recover Costs

Normally, a prevailing plaintiff is allowed to recover costs as a matter of course. n2 Rule 68 varies this general rule by providing that if the judgment or settlement ultimately obtained by the plaintiff is less than the Rule 68 offer, the plaintiff: n3

- Cannot recover costs from the date the offer was made to the end of suit
- Must pay costs incurred by the defendant after the rejected offer was made

[5] Recovering Costs

If the offer of judgment does not state that costs are included, and an amount for costs is not specified, the court will be obliged by the terms of Rule 68 to include in its judgment an additional amount sufficient to cover costs. n4

If an offer recites that costs are included, or specifies an amount for costs, its acceptance prohibits an additional claim for costs. n5

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 68(a)*; *see § 49.20*.

(n2)Footnote 2. *Fed. R. Civ. P. 54(d)*.

(n3)Footnote 3. *See § 49.21*.

(n4)Footnote 4. *See § 49.23*.

(n5)Footnote 5. *See § 49.23*.

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CHAPTER 50 Court-Sponsored Alternative Dispute Resolution *

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§ 50.syn Synopsis to Chapter 50: Court-Sponsored Alternative Dispute Resolution *

§ 50.01 Understanding the Purpose of Alternative Dispute Resolution

§ 50.02 ADR Act of 1998 Requires Every District Court to Implement an ADR Program

§ 50.03 Using Court-Sponsored Mediation to Facilitate Settlement

§ 50.04 Evaluating the Role of the Mediator

§ 50.05 Determining Who Should Attend Mediation Session

§ 50.06 Permitting Client to Vent at Mediation Session

§ 50.07 Speaking Candidly With the Mediator

§ 50.08 Seeking Resolution Through Creative Means

§ 50.09 Using Early Neutral Evaluation to Facilitate Settlement

§ 50.10 Timing of Participation in Early Neutral Evaluation

§ 50.11 Preparing for Participation in Early Neutral Evaluation

§ 50.12 Participating in the Early Neutral Evaluation Session

§ 50.13 Maintaining Confidentiality of Early Neutral Evaluation Proceedings

§ 50.14 Using Special Masters to Facilitate Settlement

§ 50.15 Determining Who May Serve as Special Master

§ 50.16 Mediating Disputes With Aid of Special Master

§ 50.17 Advantages of Using Special Masters

§ 50.18 Using Court-Annexed Arbitration to Facilitate Settlement

§ 50.19 Evaluating Validity of Court-Annexed Arbitration

§ 50.20 Understanding Basic Characteristics of Court-Annexed Arbitration

§ 50.21 Using The Mini-Trial to Facilitate Settlement

§ 50.22 Negotiating an Agreement to Participate in a Mini-Trial

§ 50.23 Determining Scope of Discovery Before Mini-Trial

§ 50.24 Determining Length of Mini-Trial

§ 50.25 Determining Who Should Serve as Mini-Trial Panelists

§ 50.26 Maintaining Confidentiality of Mini-Trial Proceedings

§ 50.27 Reaching Settlement After the Mini-Trial
[1] Determining When Settlement Negotiations Should Occur
[2] Determining How the Settlement Process Should Be Structured

§ 50.28 Choosing the Mini-Trial Judge

§ 50.29 Evaluating the Case for Mini-Trial Potential

§ 50.30 Using Mini-Trials in Specific Types of Cases
[1] Using Mini-Trials in Cases With Few Parties
[2] Using Mini-Trials in Cases Where the Parties Have an Ongoing Business Relationship
[3] Using Mini-Trials to Resolve Common Commercial Disputes

§ 50.31 Using Variations on the Mini-Trial to Facilitate Settlement

§ 50.32 Using the Summary Jury Trial to Facilitate Settlement

§ 50.33 Comparing the Summary Jury Trial to the Mini-Trial

§ 50.34 Understanding Summary Jury Trial Procedures

§ 50.35 Determining Who Must Attend Summary Jury Trial

§ 50.36 Understanding the Role of the Jury in Summary Jury Trials

§ 50.37 Evaluating a Case's Potential for Summary Jury Trial

§ 50.38 Considering Possible Reasons Not to Engage in Alternative Dispute Resolution

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CHAPTER 50 Court-Sponsored Alternative Dispute Resolution *

4-50 Federal Litigation Guide Scope

Scope

SCOPE

Court annexed alternative dispute resolution programs have become more prevalent since the passage of the Civil Justice Reform Act in 1990. Indeed, the Alternative Dispute Resolution Act of 1998 requires every federal district court to devise and implement an ADR program to be used in civil actions, including adversary proceedings in bankruptcy. Each district court will administer its own ADR program. As a result of the ADR Act of 1998, most federal civil lawsuits will be referred to some type of ADR process during the litigation. This chapter provides an introduction to the various ADR procedures currently being used in the federal court system, including the following:

- Court-sponsored mediation
- Early neutral evaluation
- Special masters to facilitate settlement
- Court-annexed arbitration
- Mini-trial
- Summary Jury Trial

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CHAPTER 50 Court-Sponsored Alternative Dispute Resolution *

4-50 Federal Litigation Guide § 50.01

§ 50.01 Understanding the Purpose of Alternative Dispute Resolution

The purpose of alternative dispute resolution (ADR) is to provide an efficient and economical means of resolving disputes between parties who might otherwise be involved in lengthy and expensive court proceedings.

Alternative dispute resolution has become increasingly popular in resolving controversies as litigation costs escalate, and court dockets swell. Parties often have their disputes determined before private arbitration and mediation tribunals, such as the American Arbitration Association. This type of private adjudication is favored by the courts. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsArbitrability

FOOTNOTES:
(n1)Footnote 1. *See David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 923 F.2d 245, 248 (2d Cir. 1991)* .

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CHAPTER 50 Court-Sponsored Alternative Dispute Resolution *

4-50 Federal Litigation Guide § 50.02

§ 50.02 ADR Act of 1998 Requires Every District Court to Implement an ADR Program

Court annexed alternative dispute resolution has become more prevalent since the passage of the Civil Justice Reform Act in 1990. n1 The Act specifically encourages the reference of appropriate cases to alternative dispute resolution programs, such as mediation, mini-trial, and summary jury trial. n2

Thus, district courts around the country have adopted various court annexed alternative dispute resolution programs in accordance with the provisions of the Civil Justice Reform Act.

The Alternative Dispute Resolution Act of 1998 requires every federal district court to devise and implement an ADR program to be used in civil actions, including adversary proceedings in bankruptcy. n3 Each district court will administer its own ADR program. As a result of the ADR Act of 1998, most federal civil lawsuits will be referred to some type of ADR process during the litigation. At a minimum, every federal litigator will need to be familiar with the local district court ADR processes and rules.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsArbitrabilityCivil ProcedureAlternative Dispute ResolutionSummary Jury Trials

FOOTNOTES:
(n1)Footnote 1. *See 28 U.S.C. §§ 471-482.*

(n2)Footnote 2. *See 28 U.S.C. § 473(a)(6)(B).*

(n3)Footnote 3. Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (amending *28 U.S.C. §§ 651-658*); effective 10/30/98.

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CHAPTER 50 Court-Sponsored Alternative Dispute Resolution *

4-50 Federal Litigation Guide § 50.03

§ 50.03 Using Court-Sponsored Mediation to Facilitate Settlement

Mediation is a process by which an impartial person, the mediator, facilitates communication between disputing parties to promote understanding, reconciliation, and settlement. Typically, the mediator is an advocate for settlement, and uses the mediation process to help the parties fully explore any potential area of agreement. The mediator generally does not serve as a judge or arbitrator, and has no authority to render any decision on any disputed issue, or to force a settlement. Rather, the parties themselves are responsible for negotiating any resolutions to their dispute.

The proceedings during a mediation session generally are confidential and absolutely privileged. In proceedings to enforce a settlement agreement, state law governs whether and to what extent communications and conduct occurring during mediation are protected from disclosure or subsequent evidentiary use when state substantive law is the source of the rule of decision on the claim to which the proffered evidence from the mediation is relevant. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Olam v. Congress Mortgage Co., 68 F. Supp. 2d 1110, 1125 (N.D. Cal. 1999)* .

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4-50 Federal Litigation Guide § 50.04

§ 50.04 Evaluating the Role of the Mediator

Mediation is distinguished from adjudication by the role played by the "neutral." In its simplest terms, mediation is a process of negotiation among the parties to a dispute which is "facilitated" by a neutral third party who is experienced in communication and negotiation techniques. Unlike a judge or arbitrator, the neutral mediator has no power to impose a solution on the parties. The mediator's only function is to help the parties find a way to resolve their differences consensually.

The role of the specially court-trained mediators in these court-sponsored programs is to work with the parties and their counsel to improve communication across party lines, to help the parties clarify their understanding of their own and their opponent's interests, to probe the strength and weaknesses of each party's legal position, to identify areas of agreement, and to come up with options for a mutually agreeable resolution to the dispute.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsGeneral Overview

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4-50 Federal Litigation Guide § 50.05

§ 50.05 Determining Who Should Attend Mediation Session

Often, the rules of the particular Civil Justice Expense and Delay Reduction Plan dictate who must attend the mediation session. Even though the parties themselves might not be *required* to attend, counsel nevertheless should consider having the parties attend, particularly if counsel has determined that settlement is desirable.

There is no substitute for giving the parties themselves a first-hand look at the case from the point of view of the opposing party. The parties often have a stilted view of the case; appearing before a neutral generally acts as a reality check.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsGeneral Overview

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CHAPTER 50 Court-Sponsored Alternative Dispute Resolution *

4-50 Federal Litigation Guide § 50.06

§ 50.06 Permitting Client to Vent at Mediation Session

One of the benefits of appearing before a neutral for a mediation in an informal setting is that the clients are given an opportunity to vent their anger and frustration over the facts surrounding the underlying litigation. Often, the only obstacle to settlement may be the client's need to express his or her view of the situation directly to the opposing party, without interruption by counsel.

Counsel should not seek to restrict the parties from talking at the mediation. Of course, counsel will want to advise their clients not to make damaging admissions, even though mediation proceedings are confidential, and communications made in connection with the sessions generally may not be used for any purpose in any pending or future proceeding.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsGeneral Overview

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4-50 Federal Litigation Guide § 50.07

§ 50.07 Speaking Candidly With the Mediator

It is important to keep in mind that the sole function of the mediator is to facilitate a settlement. The mediator has no authority to render decisions, or to disclose to the judge anything regarding the mediation session. Whereas the practitioner justifiably might tend not to divulge to a judge or magistrate judge the client's true bottom-line settlement position for fear that it might impact the client's case on the merits, those same considerations generally should not come into play with non-judicial neutrals.

The practitioner should seek assurances that the mediator will not disclose to opposing counsel those matters that are requested to be kept confidential. Provided the neutral agrees, counsel should then feel free to speak candidly with the neutral regarding the clients' true bottom-line settlement positions. If those positions are far apart, the neutral can save time and call a halt to the sessions. On the other hand, if the positions are within a reasonable range, the neutral can rely upon his or her training to bring the parties to a resolution.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsGeneral Overview

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4-50 Federal Litigation Guide § 50.08

§ 50.08 Seeking Resolution Through Creative Means

Mediators are often trained to be creative in problem-solving. In actions seeking monetary damages, mediators often will seek non-monetary concessions from the parties in an effort to resolve the case. For example, in a sexual harassment suit, the alleged wrongdoer might be asked to apologize. Likewise, in a commercial breach of contract dispute between a supplier and a buyer, the parties might be asked to consider an agreement regarding future business dealings.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsGeneral Overview

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CHAPTER 50 Court-Sponsored Alternative Dispute Resolution *

4-50 Federal Litigation Guide § 50.09

§ 50.09 Using Early Neutral Evaluation to Facilitate Settlement

Early neutral evaluation (ENE) is a process in which the parties obtain from an experienced neutral evaluator a nonbinding, reasoned, oral evaluation of the merits of the case, which was developed under the aegis of Chief Judge Robert F. Peckham and Magistrate Judge Wayne D. Brazil of the United States District Court for the Northern District of California. n1

While the procedure was developed primarily as a means of making litigation more streamlined and less expensive, it has the potential for being an important settlement tool as well. Through ENE, the parties have an opportunity to narrow and clarify the issues in dispute and to submit the dispute to a neutral third party for assessment early in the proceedings.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. Brazil, Kahn, Newman & Gold, *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution, 69 Judicature 279 (1986)*; Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution, 37 Rutgers L. Rev. 253, 275-277* (1985).

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4-50 Federal Litigation Guide § 50.10

§ 50.10 Timing of Participation in Early Neutral Evaluation

ENE generally takes place at a very early stage of the litigation, often within three or four months after the complaint has been filed. The evaluation session, which usually lasts several hours, is held on neutral territory (generally at the evaluator's office) at a time agreed upon by all participants.

ENE is similar to court-annexed mediation, but the neutral evaluator's principal focus is to help the parties to identify and evaluate the key issues of the case. It is not unusual, however, for the evaluator to be asked by the parties to assist them in settlement discussions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsGeneral Overview

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4-50 Federal Litigation Guide § 50.11

§ 50.11 Preparing for Participation in Early Neutral Evaluation

Parties participating in ENE are generally required to deliver a written evaluation statement to the neutral evaluator and to the other parties before the ENE session. The statement should identify any legal or factual issues whose early resolution might reduce the scope of the dispute or contribute significantly to the productivity of settlement discussions and should indicate what discovery will expedite case preparation and help in assessing the strengths and weaknesses of the parties' positions. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. Brazil, Kahn, Newman & Gold, *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution, 69 Judicature 279, 281 (1986).*

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4-50 Federal Litigation Guide § 50.12

§ 50.12 Participating in the Early Neutral Evaluation Session

The parties generally must be in attendance at the ENE session, accompanied by the lawyer expected to be handling the trial of the case. After the evaluator's opening statement, each party generally makes a brief (15-30 minute) presentation of its case, setting forth the facts and describing the evidence needed to support its view of the case. During a presentation, the evaluator may interrupt or pose questions.

After all presentations are concluded, the evaluator attempts to identify areas where there is no real dispute and to probe the reasons for disagreement where a dispute actually exists. The evaluator also attempts to identify the facts needed to resolve the dispute, dividing those facts into two categories: those that are as yet unknown to the parties, and those as to which the parties disagree. The evaluator may also attempt to develop a "discovery plan" in order to ascertain the unknown facts and may explore the nature of the evidence that each party claims it will present to support its view of the facts that are in dispute.

Finally, the evaluator offers to give the parties an opinion of the strengths and weaknesses of each party's case and, if possible, offers a valuation, stating an assessment of the likelihood of a finding of liability and the amount of damages that could be awarded if the matter proceeded to trial. Often at this stage, and before giving the evaluation, the evaluator will ask the parties if they are interested in exploring settlement. If they are, the parties may decide to meet on their own or they may continue to work towards a settlement with the assistance of the evaluator. If the parties do not wish to discuss settlement as a result of the evaluation session, the evaluator works with the parties in an attempt to develop a case management plan which will enable the litigants to proceed with the case as efficiently and economically as possible.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsGeneral Overview

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4-50 Federal Litigation Guide § 50.13

§ 50.13 Maintaining Confidentiality of Early Neutral Evaluation Proceedings

The proceedings during a neutral evaluation session generally are confidential and absolutely privileged. Neither the litigants nor the evaluator generally may disclose to the court or to anyone else what occurred during the session. This assurance of confidentiality encourages candor on the part of the participants and discourages posturing and game-playing which are often time consuming and counter-productive to reaching a resolution of the dispute.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsGeneral OverviewLegal EthicsClient RelationsConfidentiality of Information

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CHAPTER 50 Court-Sponsored Alternative Dispute Resolution *

4-50 Federal Litigation Guide § 50.14

§ 50.14 Using Special Masters to Facilitate Settlement

A special master appointed by the court may serve a useful function in helping litigants to resolve the dispute between the parties and facilitating the settlement of a case. Under Rule 53(a), the court is authorized to appoint a special master to address pretrial matters that cannot be addressed effectively and in a timely manner by an available district judge or magistrate judge. n1 A master's pretrial duties may include some forms of settlement negotiations that a judge may not otherwise undertake. n2 The parties may also consent to the appointment of a special master, in which case the parties will be given greater latitude in determining the precise role the special master will play in the case. n3 Whether appointed on the court's initiative or by consent of the parties, the special master's duties will be specifically set forth in the order appointing the master. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMastersAppointmentsCivil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 53(a)(1)(C).*

(n2)Footnote 2. *Fed. R. Civ. P. 53* Committee Note (2003).

(n3)Footnote 3. *Fed. R. Civ. P. 53(a)(1)(A).*

(n4)Footnote 4. *Fed. R. Civ. P. 53(b).*

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4-50 Federal Litigation Guide § 50.15

§ 50.15 Determining Who May Serve as Special Master

One of the benefits of the special master procedure is that Rule 53 does not limit who may serve as the special master. Thus, while the court may appoint a magistrate judge or a private practitioner, the court may also appoint a retired judge, a law professor or any other individual the court believes (or the parties agree) would be of assistance in the case. This would include, for example, non-lawyers with specialized expertise in a technical area key to the resolution of the dispute.

Similarly, there is no limitation on the number of special masters who may be appointed (it would be possible, for instance, for the court to appoint a technical expert to assist a mediation professional as special master in a case). Compensation of the special master is set by the court and must be paid either by a party or parties, or from a fund or subject matter of the action within the court's control. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMastersGeneral OverviewCivil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *Fed. R. Civ. P. 53(g)(2).*

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4-50 Federal Litigation Guide § 50.16

§ 50.16 Mediating Disputes With Aid of Special Master

Special masters may be appointed to perform a variety of duties in a case, including the mediation of disputes in a deliberate attempt to achieve settlement. This may occur in cases that do not involve particularly technical or complex issues. n1

Because the settlement master in such cases acts as a mediator and does not adjudicate the dispute, the appointment on the court's own initiative does not run afoul of *Federal Rule of Civil Procedure 53*'s limitations on the special master's role in the case.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMastersGeneral OverviewCivil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. Cooley, *Query: Could Settlement Masters Help Reduce the Cost of Litigation and the Workload of Federal Courts?, 88 Judicature 59 (1984).*

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4-50 Federal Litigation Guide § 50.17

§ 50.17 Advantages of Using Special Masters

Because special masters can be empowered under Rule 53 to take evidence, subpoena witnesses, hold hearings, rule on evidentiary objections and make findings of fact, there can be advantages to also using the special master as a "settlement judge." n1 To the extent a particular question of fact becomes an obstacle to settlement, the specialmaster can take evidence on the issue and issue a finding of fact. n2

In addition, if a special master has been appointed to supervise discovery and other pretrial aspects of a case, the special master's close familiarity with the issues may make it possible for the special master to play a particularly effective role in settlement discussions. Finally, the special master's expertise in a particular area, or availability to accommodate lengthy settlement discussions, may provide significant benefits to the parties during the settlement process.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMastersGeneral OverviewCivil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Fed. R. Civ. P. 53(g)(1).*

(n2)Footnote 2. *See Fed. R. Civ. P. 53(c).*

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CHAPTER 50 Court-Sponsored Alternative Dispute Resolution *

4-50 Federal Litigation Guide § 50.18

§ 50.18 Using Court-Annexed Arbitration to Facilitate Settlement

For years many disputes have been resolved by arbitration, either because the parties have contractually agreed to it or because courts have required or strongly encouraged the litigants to engage in the process. n1 A number of districts around the country have implemented mandatory or voluntary arbitration programs for certain types of cases.

Unlike private arbitration which occurs based on the agreement of the parties, court-annexed arbitration is mandatory for certain types of cases, depending on the eligibility rules applicable in particular jurisdictions. Generally, eligible cases are those that involve claims for $150,000 or less, exclusive of punitive damages, interest and costs, and do not involve significant equity claims.

The arbitration awards in such programs are not binding, and the losing party generally may seek a trial de novo within 30 days after the filing of the arbitration award. n2 If the party requesting the trial *de novo* fails to obtain a more favorable judgment at the conclusion of trial, however, costs may be assessed against that party under local rules. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionJudicial ReviewCivil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. Under the Federal Arbitration Act, *9 U.S.C. §§ 1-14*, arbitration agreements are enforceable in federal court and motions or applications can be made for orders requiring arbitration under private agreements between the parties. Section 15 of the Act was passed in 1988 as a pro-arbitration measure to speed judicial decisions of arbitrability so the benefits derived from prompt arbitration are not lost in the appeal process. *See, e.g., PaineWebber Inc. v. Elahi, 87 F.3d 589, 600 (1st Cir. 1996)* .

(n2)Footnote 2. *See 28 U.S.C. § 655(a)*.

(n3)Footnote 3. *See, e.g.*, M.D. Fla. R. 8.06(d). This mirrors *Fed. R. Civ. P. 68*, which provides that if after trial a party obtains less than the amount for which the other side made an offer to settle certain costs may be assessed against

the party who rejected the offer.

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CHAPTER 50 Court-Sponsored Alternative Dispute Resolution *

4-50 Federal Litigation Guide § 50.19

§ 50.19 Evaluating Validity of Court-Annexed Arbitration

One of the first federal programs for court-annexed arbitration was challenged in Kimbrough v. Holiday Inn n1 on the ground that the program violated the litigants' right to a jury trial as guaranteed by the *Seventh Amendment* and that it violated the *equal protection clause of the Fifth Amendment*.

The *Kimbrough* court rejected these challenges, reasoning that the *Seventh Amendment* does not prohibit the courts from developing new methods of introducing evidence or finding facts. Moreover, because the compulsory arbitration program under attack provided for trial *de novo* upon the request of either party, the program was not a final determination of the disputants' rights, and therefore, there was no violation of the *Seventh Amendment*.

The *Kimbrough* court further reasoned that differential treatment afforded litigants by virtue of the jurisdictional limits of the program, procedural differences from one program to another, and by disincentives imposed to discourage filing for a trial *de novo* did not violate the litigants' equal protection rights because theywere rationally related to the government's strong interest in promoting a fast and efficient system of resolving disputes. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureAlternative Dispute ResolutionValidity of ADR MethodsCivil ProcedureSettlementsGeneral OverviewCivil ProcedureTrialsJury TrialsRight to Jury Trial

FOOTNOTES:
(n1)Footnote 1. *478 F. Supp. 566 (E.D. Pa. 1979) . See also Tiedel v. Northwestern Mich. College, 865 F.2d 88 (6th Cir. 1988) .*

(n2)Footnote 2. *478 F. Supp. at 575-576 . See* Levin & Golash, *Alternative Dispute Resolution in Federal District Courts, 37 U. Fla. L. Rev. 29, 45*-48 (1985).

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4-50 Federal Litigation Guide § 50.20

§ 50.20 Understanding Basic Characteristics of Court-Annexed Arbitration

While the precise characteristics of court-annexed arbitration programs differ from jurisdiction to jurisdiction, most share the following basic characteristics: n1

- *Eligibility Requirements*. Most programs are limited to civil actions for damages and do not deal with actions seeking equitable remedies. The jurisdictional amounts range up to $150,000. n2

- *Pre-Hearing Stage*. The parties conduct discovery which is usually limited because of time constraints. The parties also select the arbitrator or the arbitration panel. Parties either select the arbitrator from an approved list or have one selected for them by the program administrator. In some jurisdictions parties may stipulate to the number of arbitrators who will hear the case. n3

- *The Hearing and Decision*. The hearing is usually brief and informal with time limits between one and three hours imposed by most rules. Evidentiary rules vary but are often less formal than those employed at trial. Some jurisdictions prohibit testimony of witnesses entirely, while others admit written statements by witnesses upon advance notice to the opposing party or parties. Some programs provide that the arbitrator must issue a decision immediately at the conclusion of the hearing while others allow the arbitrator from seven to thirty days to do so. n4

- *Trial De Novo*. The arbitrator's decision is never final and binding in court-annexed programs because all court-annexed arbitration programs provide that either party may request a trial *de novo* after the decision. To discourage unnecessary or frivolous appeals, however, many programs provide some sort of disincentive to requesting trial *de novo*. For example, in some jurisdictions if the requesting party fails to better its award after trial *de novo,* it must pay all or part of the opposing party's costs, and in some cases must also pay the opposing party's attorneys' fees. n5

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See generally* Ebiner & Betancourt, *Court-Annexed Arbitration: The National Picture,* The Rand Corporation, Institute for Civil Justice (1985) [hereinafter Ebiner & Betancourt, *Court-Annexed Arbitration*]; Hubble, *Court-Annexed Arbitration: The Trend Toward Mandatory Arbitration Travels Across the Country and Into Oklahoma's Western District, 57 Okla. B.J. 3179, 3180*-3181 (1986).

(n2)Footnote 2. *Ebiner & Betancourt, Court-Annexed Arbitration, supra n.7, at 9-10.*

(n3)Footnote 3. *Id. at 8*, 9-10.

(n4)Footnote 4. *Id. at 16.*

(n5)Footnote 5. *Ebiner & Betancourt, Court-Annexed Arbitration, n.7, supra at 9-10*, 11.

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CHAPTER 50 Court-Sponsored Alternative Dispute Resolution *

4-50 Federal Litigation Guide § 50.21

§ 50.21 Using The Mini-Trial to Facilitate Settlement

The mini-trial is a voluntary, private, nonbinding procedure in which counsel and experts provide summary presentations before top management representatives for each of the parties. The mini-trial is presided over by a neutral third party or judge chosen by the parties. The neutral may have specialized expertise regarding the nature of the dispute. The representatives or panelists chosen by each side are present to facilitate settlement after the proceedings. The precise rules for the mini-trial are agreed upon in advance between the parties. n1 The purpose of a mini-trial is to present the theories, strengths, and weaknesses of the parties' claims, as an aid to resolving the dispute. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See generally* Center for Public Resources, *The CPR Legal Program Mini-Trial Handbook, Corporate Dispute Management,* at MH-1-MH-126 (1982).

(n2)Footnote 2. *See generally* Nelson, *Common Problems on the Road to a Successful Mini-Trial,* 2 Current Problems in Fed. Civ. Prac. (PLI) at 127-140 (1986).

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4-50 Federal Litigation Guide § 50.22

§ 50.22 Negotiating an Agreement to Participate in a Mini-Trial

Participation in a mini-trial generally will require the parties to reach agreement regarding the mini trial proceedings. The parties may choose to utilize form mini-trial agreements which have been prepared for general use by such organizations as the American Arbitration Association and the Center for Public Resources. However, even these form agreements provide choices with respect to certain fundamental aspects of the mini-trial. n1 The following are several of the most important issues which the parties will confront:

- How much discovery should be permitted before the proceedings?
- How much time should the parties allow for the mini-trial hearing?
- Who should serve as panelists?
- Should the proceedings be confidential?
- When should settlement negotiations occur?
- How should the settlement process be structured?
- How should the neutral judge be chosen?

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See* Center for Public Resources, *The CPR Legal Program Mini-Trial Handbook, Corporate Dispute Management,* at MH-102-MH-114 (1982). *See also* 3 Alternatives, May, 1985, at 8 for a model mini-trial agreement developed by the Center for Public Resources for use in resolving business disputes.

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CHAPTER 50 Court-Sponsored Alternative Dispute Resolution *

4-50 Federal Litigation Guide § 50.23

§ 50.23 Determining Scope of Discovery Before Mini-Trial

In many instances, only limited pretrial discovery is permitted before the mini-trial takes place. For example, the parties may agree that each side will have only a limited number of pretrial depositions before the mini-trial, but without prejudice to their right to do additional pretrial discovery if the case is not resolved at the mini-trial stage. The parties generally should exchange briefs or summaries and outlines to assist both sides in evaluating the case. This will also eliminate surprise and confusion during the limited time scheduled for the conduct of the proceeding.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsGeneral Overview

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CHAPTER 50 Court-Sponsored Alternative Dispute Resolution *

4-50 Federal Litigation Guide § 50.24

§ 50.24 Determining Length of Mini-Trial

The mini-trial itself is very limited in time and scope. Generally, the attorneys will argue the matter and a few key witnesses will be presented for each side. The attorneys' arguments must have some factual support or they are subject to objection, although the supporting facts themselves need not all be introduced in evidence.

One day is sufficient for most mini-trials. n1 In extremely complex cases, the mini-trial proceeding may take several days depending on the nature of the claims and the willingness of the parties to commit the time and resources to the process.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See* Comm. on Corp. Couns., *Subcomm. on Alternative Means of Dispute Resolution Rep.,* A.B.A. Sec. of Litigation, at 27-28.

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4-50 Federal Litigation Guide § 50.25

§ 50.25 Determining Who Should Serve as Mini-Trial Panelists

The selection of the client representatives to serve as panelists with the neutral judge is a very important component of the process. These are the individuals who will actually be involved in attempting to settle the dispute. While each case may suggest the need for a particular expertise or qualification, the most important factor is the authority of the panelists to bind their party to the settlement. In selecting the representatives for the panel, counsel should bear in mind three general rules:

- The panelists should generally be business people and not lawyers. Lawyers may act in a narrower or less conciliatory manner than business people would, and this may limit, rather than expand, settlement prospects.

- It is preferable to select business people who were not directly involved in the underlying dispute. Prior involvement in the dispute could color their judgment on settlement issues.

- The business people should come from a division of the client whose "bottom line" will not be affected by a settlement. Objectivity is the key.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsGeneral Overview

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4-50 Federal Litigation Guide § 50.26

§ 50.26 Maintaining Confidentiality of Mini-Trial Proceedings

The mini-trial proceedings are private and generally not recorded or transcribed. The proceedings themselves probably are confidential under *Federal Rule of Evidence 408* as part of settlement negotiations. However, there are two problems in relying on Rule 408 for confidentiality of the mini-trial procedure or any ADR technique. First, the rule may not prevent the discovery of materials or statements made in the course of settlement negotiations, even if otherwise inadmissible. n1 Second, such evidence may be admissible for impeachment. n2

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsGeneral OverviewEvidenceRelevanceCompromise & Settlement NegotiationsLegal EthicsClient RelationsConfidentiality of Information

FOOTNOTES:
(n1)Footnote 1. *Morse/Diesel, Inc. v. Fidelity & Deposit Co., 122 F.R.D. 447, 449 (S.D.N.Y. 1988)* .

(n2)Footnote 2. *E.g., Stainton v. Tarantino, 637 F. Supp. 1051, 1081-1082 (E.D. Pa. 1986)* .

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4-50 Federal Litigation Guide § 50.27

§ 50.27 Reaching Settlement After the Mini-Trial

[1] Determining When Settlement Negotiations Should Occur

At the conclusion of the mini-trial, the panelists who have attended the proceeding on behalf of the parties will normally attempt to settle the dispute. Negotiations should begin immediately, while the case is fresh in everyone's mind. The mini-trial presumably will have given them a better idea than they had originally of what the disputed issues are, what the facts underlying the issues may be, and how the matter might come out at the conclusion of a real trial. If the parties do not settle on their own, the neutral judge will talk to them separately or together and give them ideas of how the case likely would be decided at trial, suggesting ways in which the case might be settled.

[2] Determining How the Settlement Process Should Be Structured

Two important questions must be considered with regard to the structure of the settlement negotiations that follow the mini-trial:

> *Should the parties' lawyer be present?* While it is difficult to generalize, it is often best if only the business people "panelists" participate in the settlement discussions. Having just played the role of the advocate, the lawyer may find it difficult to serve effectively as a conciliator. In addition, the lawyer and the clients may have different views regarding the settlement value of the case after the mini-trial is concluded, and it may be easier for the business client to reach a settlement acting "privately," without the presence of counsel.
>
> *Should the neutral judge be present?* This is a more difficult issue to analyze. If the representatives of the parties have developed rapport with that individual, the judge's presence may be very helpful. On the other hand, if the parties are not familiar with the neutral judge, the presence may inhibit the sort of give and take which can be instrumental to a creative settlement. The neutral judge may be more effective if called on only when the panelists have a major disagreement or have reached a deadlock. At the least, the neutral judge must be available to give an opinion concerning legal issues involved in the case or an opinion based upon an experience in trying cases, either as a lawyer or judge.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsGeneral Overview

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4-50 Federal Litigation Guide § 50.28

§ 50.28 Choosing the Mini-Trial Judge

The quality of the neutral judge, and the respect the parties have for him or her, are crucial to the effectiveness of the overall proceeding. The judge needs to understand and have an instinct for the real issues in the case and the respective needs of the parties. In addition, the neutral judge must be skilled at facilitating settlement discussions.

In those instances where the selection is difficult, it may be best to select a neutral judge who is well known and whose credibility and qualifications are unquestioned. Various panels of well respected lawyers or retired judges are available from which third party neutrals may be chosen. n1

In some cases, it may make sense to retain a well known or well respected individual at an early stage merely to assist the parties in negotiating and implementing the mini-trial procedures. Yet another "neutral" may be selected later to hear the controversy. While this would increase the parties' expense, it may be a small price to pay if it means the difference between success or failure in settling the case.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. For example, the Center for Public Resources has compiled a Judicial Panel consisting of well-known lawyers, former judges and academics.

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4-50 Federal Litigation Guide § 50.29

§ 50.29 Evaluating the Case for Mini-Trial Potential

The issues most often confronted in negotiating and conducting a mini-trial are the following:

- How should the parties evaluate a dispute for mini-trial potential?
- How should one party attempt to convince another that a mini-trial makes sense?
- How should the mini-trial proceeding itself be structured?
- How should the parties choose the third party neutral?
- How should the parties structure the settlement discussions which follow the "information exchange?"

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsGeneral Overview

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4-50 Federal Litigation Guide § 50.30

§ 50.30 Using Mini-Trials in Specific Types of Cases

[1] Using Mini-Trials in Cases With Few Parties

While it is certainly possible to conduct a mini-trial when numerous parties are involved, the difficulties encountered in multi-party cases may be more substantial than in two party litigation. Convincing two parties (and their counsel) to conduct a mini-trial is likely to be easier than convincing multiple parties to do so. Also, the likelihood of reaching a settlement is inversely proportional to the number of parties involved. The more parties involved, the greater the chances of complications in reaching a resolution of the dispute.

[2] Using Mini-Trials in Cases Where the Parties Have an Ongoing Business Relationship

Mini-trials are most likely to succeed when the parties are highly motivated to reach a settlement. One important motivating force may be the existence of an on-going business relationship. The mini-trial offers a means to resolve a dispute quickly, before animosities get out of control, and to preserve those relationships in the process.

[3] Using Mini-Trials to Resolve Common Commercial Disputes

Claims of fraud, dishonesty, or "bad faith" may make a mini-trial less likely to succeed. If the case is a straight-forward commercial dispute, however, the parties may preserve their dignity and resolve the matter on a sensible, economic basis. Again, the motivation to settle may be greater if reputation or "personal" issues are not at the heart of the dispute.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsGeneral Overview

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4-50 Federal Litigation Guide § 50.31

§ 50.31 Using Variations on the Mini-Trial to Facilitate Settlement

One variation of the mini-trial that is used occasionally involves conducting the trial with the parties' "executives" present but without any judge at all. n1 The objective then is simply to use the mini-trial to enlighten the executives as to the issues in the case and possibly to persuade them to settle.

Two additional variations have been developed to adapt the mini-trial procedure for use by a court. One was developed by Chief Judge Sherman G. Finesilver of the United States District Court in Denver to aid in settlement of large, complex cases involving issues that require technical expertise. In Judge Finesilver's variation, the court appoints a special master to conduct settlement negotiations using the mini-trial format. n2 The other variation was developed by Judge Robert E. Keeton of the United States District Court in Boston. n3 In Judge Keeton's procedure, which he calls a conditional summary trial, the attorneys make brief presentations to a panel consisting of the judge and an executive from each party who has settlement authority. After the presentation, the party representatives negotiate, with or without the judge. If they reach agreement they submit the settlement to the judge. If they do not reach agreement, each party submits a proposed resolution and the judge picks one of the proposals. This last feature transforms the process into a version of what is known as "baseball arbitration." In "baseball arbitration" the decision-maker cannot propose his own solution but must choose between the resolutions proposed by the disputants. In theory this will motivate the disputants to take more reasoned positions and tone down their proposed resolutions in the hope that the decision-maker will adopt their proposal as the method for resolving the existing dispute. n4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMastersGeneral OverviewCivil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. Center for Public Resources, *The CPR Legal Program Mini-Trial Handbook, Corporate Dispute Management,* at MH-45-MH-48 (1982).

(n2)Footnote 2. *A Federal Judge's ADR Technique: Mini-Trials with Special Masters,* 5 Alternatives, Jan., 1987, at 9-10.

(n3)Footnote 3. *Id*. at 10. *See also Boston Lawyers Assess Two "Court Mini-Trials,"* 4 Alternatives, Nov., 1986, at 1, 11.

(n4)Footnote 4. *Boston Lawyers Assess Two "Court Mini-Trials,"* 4 Alternatives, Nov., 1986, at 11.

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CHAPTER 50 Court-Sponsored Alternative Dispute Resolution *

4-50 Federal Litigation Guide § 50.32

§ 50.32 Using the Summary Jury Trial to Facilitate Settlement

The summary jury trial has been called "the courtroom equivalent of the mini-trial." n1 It is designed to give the attorneys and their clients an indication of what they may expect at the conclusion of a full blown trial. At the summary jury trial, there is no testimony from witnesses. Rather, counsel for the parties give verbal presentations to the jury in which they summarize the anticipated testimony of witnesses, and present exhibits. After being given an abbreviated charge, the jury deliberates and renders an advisory verdict. n2 In large number, cases that go through summary jury trial (SJT) are settled. n3

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureAlternative Dispute ResolutionSummary Jury TrialsCivil ProcedureSettlementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. Henry & Lieberman, *The Manager's Guide to Resolving Legal Disputes,* at 436 (1985). *See,* Posner,*The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations, 53 U. Chi. L. Rev. 366, 387 (1986).*

(n2)Footnote 2. *See* Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 465, 470-471 (1984).

(n3)Footnote 3. Note, *Summary Jury Trials: A "Settlement Technique" That Places a Shroud of Secrecy on our Courtrooms?, 23 Ind. L. Rev. 949, 970 (1990).*

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4-50 Federal Litigation Guide § 50.33

§ 50.33 Comparing the Summary Jury Trial to the Mini-Trial

There are two primary differences between the SJT and the mini-trial. First, the SJT is a court-annexed procedure conducted before an actual judge or magistrate judge, rather than a private procedure conducted outside the court before a neutral third party selected by the litigants. Second, the summary jury trial, as the name indicates, involves the use of actual jurors as fact-finders rather than relying on the neutral third party. The involvement of a jury makes this device especially useful where the only obstacle to settlement is the parties' uncertainty regarding how a jury might assess liability and damages or where the parties emotionally need a "day in court" to air their sides of the controversy.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureAlternative Dispute ResolutionSummary Jury TrialsCivil ProcedureSettlementsGeneral Overview

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4-50 Federal Litigation Guide § 50.34

§ 50.34 Understanding Summary Jury Trial Procedures

While the procedural rules governing the summary jury trial will vary from jurisdiction to jurisdiction, those employed in the Northern District of Ohio, where the technique originated, provide a good prototype. n1

After the completion of discovery and at the point when the case would be ready to go to trial with no motions pending, there occurs a much abbreviated--usually no more than one day--non-binding "trial," presided over by a judge or magistrate judge. No later than three court days before the beginning of the SJT, counsel must submit trial briefs on issues of law and jury instructions. The parties also exchange evidence to be presented before the SJT commences. In addition, there may be a pretrial conference in advance of the SJT, at which the judge hears motions in limine.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureAlternative Dispute ResolutionSummary Jury TrialsCivil ProcedureSettlementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See* Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution,* 103 F.R.D. 461, 481-489 (1984).

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4-50 Federal Litigation Guide § 50.35

§ 50.35 Determining Who Must Attend Summary Jury Trial

Clients generally are required to be in attendance at the SJT. The participation of the parties allows them to see first hand the strengths and weaknesses of their respective cases, to evaluate the chance of success, and to determine the costs and benefits of fully litigating the case. Note that while a SJT may be considered to be part of the settlement process and therefore confidential, the secrecy of such proceedings has repeatedly been attacked on *First Amendment* grounds and is by no means assured. n1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureAlternative Dispute ResolutionSummary Jury TrialsCivil ProcedureSettlementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. *See Day v. NLO, Inc., 147 F.R.D. 148, 152 (S.D. Ohio 1993)* (trial judge's discretion whether or not to hold the SJT in open or closed court).

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4-50 Federal Litigation Guide § 50.36

§ 50.36 Understanding the Role of the Jury in Summary Jury Trials

The jury generally is selected from the court's regular jury pool. n1 Once the jury is impaneled, counsel for both parties present their respective case, combining the opening and closing statements and summarizing the evidence which would be presented and admissible at a trial on the merits. No live testimony is permitted at the SJT and no evidence can be used which has not previously been exchanged or disclosed to the other side. After the case has been presented, the jury is then charged with the law and asked to retire to consider and render a verdict, which need not be unanimous.

While counsel may stipulate that a consensus verdict will be binding, if no such agreement is reached in advance and the parties do not settle the case after the SJT, they may then proceed to an actual trial which is generally scheduled to take place at a relatively early date. In any event, the jurors who are selected for the SJT are not told until after they have rendered a verdict (if they are told at all) that their verdict is not binding on the parties, so as to ensure that their evaluation of the respective merits of each party's case is realistic.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureAlternative Dispute ResolutionSummary Jury TrialsCivil ProcedureSettlementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. The debate also continues as to whether the federal courts lack authority to compel jurors for SJT proceedings. *See Hume v. M & C Management, 129 F.R.D. 506, 510 (N.D. Ohio 1990)* ; *United States v. Exum, 744 F. Supp. 803, 805 (N.D. Ohio 1990)* .

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4-50 Federal Litigation Guide § 50.37

§ 50.37 Evaluating a Case's Potential for Summary Jury Trial

There is no single type of case that is best suited for the SJT. The procedure has been used in cases involving multiple parties as well as those involving two parties, and in cases involving issues ranging from price fixing and antitrust through age, race and gender discrimination to product liability, personal injury, land use and "takings." n1

The characteristic uniting cases that are particularly amenable to resolution by SJT is the reluctance of one or more of the parties to settle because of their uncertainty as to how a jury might perceive the case. Where the desire to "get to the jury" is the principal obstacle to settlement, the SJT provides litigants with an expeditious and relatively low-cost, no-risk way to assess their prospects for success and may motivate them to reassess their offers and demands and to resolve the dispute without resort to a full-blown trial.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureAlternative Dispute ResolutionSummary Jury TrialsCivil ProcedureSettlementsGeneral Overview

FOOTNOTES:
(n1)Footnote 1. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution,* 103 F.R.D. 463, 472 (1984); 5 Alternatives., Jan. 1987, at 1; *In re Shell Oil Refinery, No. 88-1935, 1992 U.S. Dist. LEXIS 5357 (E.D. La. April 9, 1992)* ; *Negin v. City of Mentor, 601 F. Supp. 1502 (N.D. Ohio 1985)* .

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4-50 Federal Litigation Guide § 50.38

§ 50.38 Considering Possible Reasons Not to Engage in Alternative Dispute Resolution

Alternative dispute resolution may not work in the following situations:

- A precedent needs to be established (*e.g.*, a company has a network of dealers who distribute the company's products pursuant to a standard form dealer agreement, and a court decision as to the enforceability of such an agreement is desired)

- The action is of great importance to the party involved, and the party wants to go all out in defending its rights

- A defendant wants to send a message to other potential plaintiffs in the same subject matter area that the party is not an easy settlement mark (*e.g.*, vigorous defense of a trademark to reduce the risk of further misappropriation of the mark)

- A party is suspicious of malfeasance, but does not have solid evidence to prove its case without the benefit of liberal discovery that can only be obtained through litigation

In the event that a case ill-suited for ADR is nevertheless referred for ADR, counsel should advise the neutral of the reasons why the process likely will not be productive. In that event, an experienced neutral generally will shortcut the process so that the parties do not spend unnecessary time and money.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsGeneral Overview

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OFFICIAL FORMS

4-App Federal Litigation Guide Appendix.syn

§ App.syn Synopsis to Appendix App: OFFICIAL FORMS

APPENDIX OF FORMS, FEDERAL RULES OF CIVIL PROCEDURE
Form 1. Caption.
Form 2. 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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Federal Litigation Guide
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OFFICIAL FORMS

4-App Federal Litigation Guide

APPENDIX OF FORMS, FEDERAL RULES OF CIVIL PROCEDURE

[Official] Introductory Statement

1. The following forms are intended for illustration only. They are limited in number. No attempt is made to furnish a manual of forms. Each form assumes the action to be brought in the Southern District of New York. If the district in which an action is brought has divisions, the division should be indicated in the caption.

2. Except where otherwise indicated each pleading, motion, and other paper should have a caption similar to that of the summons, with the designation of the particular paper substituted for the word "Summons." In the caption of the summons and in the caption of the complaint all parties must be named but in other pleadings and papers, it is sufficient to state the name of the first party on either side, with an appropriate indication of other parties. See Rule 4(b), 7(b)(2) and 10(a).

3. In Form 3 and the forms following, the words, "Allegation of jurisdiction," are used to indicate the appropriate allegation in Form 2.

4. Each pleading, motion and other paper is to be signed in his individual name by at least one attorney of record (Rule 11). The attorney's name is to be followed by his address as indicated in Form 3. In forms following Form 3 the signature and address are not indicated.

5. If a party is not represented by an attorney, the signature and address of the party are required in place of those of the attorney.

Form 1. Caption.

(Use on every summons, complaint, answer, motion, or other document.)

United States District Court
for the
_____ District of _____

A B, Plaintiff	)	
v. C D, Defendant	)	
v. E F, Third-Party Defendant	)	Civil Action No. _____
(Use if needed.)	)	
	)	
	)	
	)	

(Name of Document)

Form 2. Date, Signature, Address, E-mail Address, and Telephone Number.

(Use at the conclusion of pleadings and other papers that require a signature.)

Date _____ _____

(Signature of the attorney
or unrepresented party)

_____

(Printed name)

_____

(Address)

_____

(E-mail address)

_____

(Telephone number)

Form 3. Summons.

(Caption--See Form 1.) To *name the defendant* :

A lawsuit has been filed against you.

Within 21 days 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 Federal Rules of Civil Procedure*. The answer or motion must be served on the plaintiff's attorney, _____, whose address is _____. 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 _____ _____

Clerk of Court

(Court Seal)

(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).)

Form 4. Summons on a Third-Party Complaint.

(Caption--See Form 1.) *To name the third-party defendant* :

A lawsuit has been filed against defendant _____, who as third-party plaintiff is making this claim against you to pay part or all of what [he] may owe to the plaintiff _____.

Within 21 days after service of this summons on you (not counting the day you received it), you must serve on the 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, _____, whose address is, _____, and also on the plaintiff's attorney, _____, whose address is, _____. 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 _____ _____

Clerk of Court

(Court Seal)

Form 5. Notice of a Lawsuit and Request to Waive Service of a Summons.

(Caption--See Form 1.) To *(name the defendant--or if the defendant is a corporation, partnership, or association name 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 and sign--See Form 2.)

Form 6. Waiver of the Service of Summons.

(Caption--See Form 1.) To *name 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 _____, 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 and sign--See Form 2.)

(Attach the following to Form 6.)

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.

Form 7. Statement of Jurisdiction.

a. *(For diversity-of-citizenship jurisdiction.)* The plaintiff is [a citizen of *Michigan*] [a corporation incorporated under the laws of *Michigan* with its principal place of business in *Michigan*]. The defendant is [a citizen of *New York*] [a corporation incorporated under the laws of *New York* with its principal place of business in *New York*]. 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).)

Form 8. 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* .

Form 9. Statement Noting a Party's Death.

(Caption--See Form 1.) In accordance with Rule 25(a), *name the person* , who is [a party to this action] [a representative of or successor to the deceased party] notes the death during the pendency of this action of *name* , [*describe as party* in this action].

(Date and sign--See Form 2.)

Form 10. Complaint to Recover a Sum Certain.

(Caption--See Form 1.)

1. (Statement of Jurisdiction--See Form 7.)

(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 and sign--See Form 2.)

Form 11. Complaint for Negligence.

(Caption--See Form 1.)

1. (Statement of Jurisdiction--See Form 7.)

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 and sign--See Form 2.)

Form 12. Complaint for Negligence When the Plaintiff Does Not Know Who Is Responsible.

(Caption--See Form 1.)

1. (Statement of Jurisdiction--See Form 7.)

2. On *date* , at *place* , defendant *name* or defendant *name* 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 and sign--See Form 2.)

Form 13. Complaint for Negligence Under the Federal Employers' Liability Act.

(Caption--See Form 1.)

1. (Statement of Jurisdiction--See Form 7.)

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 and sign--See Form 2.)

Form 14. Complaint for Damages Under the Merchant Marine Act.

(Caption--See Form 1.)

1. (Statement of Jurisdiction--See Form 7.)

2. At the times below, the defendant owned and operated the vessel *name* 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 and sign--See Form 2.)

Form 15. Complaint for the Conversion of Property.

(Caption--See Form 1.)

1. (Statement of Jurisdiction--See Form 7.)

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*.

3. The property is worth $_____.

Therefore, the plaintiff demands judgment against the defendant for $_____, plus costs.

(Date and sign--See Form 2.)

Form 16. Third-Party Complaint.

(Caption--See Form 1.)

1. Plaintiff *name* has filed against defendant *name* 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 and sign--See Form 2.)

Form 17. Complaint for Specific Performance of a Contract to Convey Land.

(Caption--See Form 1.)

1. (Statement of Jurisdiction--See Form 7.)

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 and sign--See Form 2.)

Form 18. Complaint for Patent Infringement.

(Caption--See Form 1.)

1. (Statement of Jurisdiction--See Form 7.)

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 and sign--See Form 2.)

Form 19. Complaint for Copyright Infringement and Unfair Competition.

(Caption--See Form 1.)

1. (Statement of Jurisdiction--See Form 7.)

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 _____ 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 and sign--See Form 2.)

Form 20. Complaint for Interpleader and Declaratory Relief.

(Caption--See Form 1.)

1. (Statement of Jurisdiction--See Form 7.)

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 and sign--See Form 2.)

Form 21. Complaint on a Claim for a Debt and to Set Aside a Fraudulent Conveyance Under Rule 18(b).

(Caption--See Form 1.)

1. (Statement of Jurisdiction--See Form 7.)

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) *name(s)* ; and

(b) the conveyance to defendant *name* be declared void and any judgment granted be made a lien on the property.

(Date and sign--See Form 2.)

Form 30. Answer Presenting Defenses Under Rule 12(b).

(Caption--See Form 1.)

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 and sign--See Form 2.)

Form 31. Answer to a Complaint for Money Had and Received with a Counterclaim for Interpleader.

(Caption--See Form 1.)

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 and sign--See Form 2.)

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.

(Caption--See Form 1.) 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 and sign--See Form 2.)

Form 41. Motion to Bring in a Third-Party Defendant.

(Caption--See Form 1.) The defendant, as third-party plaintiff, moves for leave to serve on *name* a summons and third-party complaint, copies of which are attached.

(Date and sign--See Form 2.)

Form 42. Motion to Intervene as a Defendant Under Rule 24.

(Caption--See Form 1.)

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 and sign--See Form 2.)

[An Intervener's Answer must be attached. See Form 30.]

Form 50. Request to Produce Documents and Tangible Things, or to Enter onto Land Under Rule 34.

(Caption--See Form 1.) 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 and sign--See Form 2.)

Form 51. Request for Admissions Under Rule 36.

(Caption--See Form 1.) 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 and sign--See Form 2.)

Form 52. Report of the Parties' Planning Meeting.

(Caption--See Form 1.)

1. The following persons participated in a Rule 26(f) conference on *date* by *state the method of conferring* :

(*e.g., name* representing the plaintiff.)

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) Disclosure or discovery of electronically stored information should be handled as follows: (briefly describe the parties' proposals, including the form or forms for production.)

(c) The parties have agreed to an order regarding claims of privilege or of protection as trial-preparation material asserted after production, as follows: (briefly describe the provisions of the proposed order.)

(d) (Dates for commencing and completing discovery, including discovery to be commenced or completed before other discovery.)

(e) (Maximum number of interrogatories by each party to another party, along with dates the answers are due.)

(f) (Maximum number of requests for admission, along with the dates responses are due.)

(g) (Maximum number of depositions for each party.)

(h) (Limits on the length of depositions, in hours.)

(i) (Dates for exchanging reports of expert witnesses.)

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 and sign--See Form 2.)

Form 60. Notice of Condemnation.

(Caption--See Form 1.) To *name 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 and sign--See Form 2.)

Form 61. Complaint for Condemnation.

(Caption--See Form 1.)

1. (Statement of Jurisdiction--See Form 7.)

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 and sign--See Form 2.)

Form 70. Judgment on a Jury Verdict.

(Caption--See Form 1.) 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 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 _____ _____

Clerk of Court

Form 71. Judgment by the Court without a Jury.

(Caption--See Form 1.) 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 _____ _____

Clerk of Court

Form 80. 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.

Form 81. Consent to an Assignment to a Magistrate Judge.

(Caption--See Form 1.) 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 _____ _____

Signature of the Party

Form 82. Order of Assignment to a Magistrate Judge.

(Caption--See Form 1.) With the parties' consent, it is ordered that this case be assigned to United States Magistrate Judge _____ of this district to conduct all proceedings and enter final judgment in accordance with *28 U.S.C. § 636(c)* .

Date _____ _____

United States District Judge