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Chapter 1 PREPARING, FILING, & SERVING MOTIONS

1-1 Moore's AnswerGuide: Fed Civil Motion Practice 1.syn

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Chapter 1 PREPARING, FILING, & SERVING MOTIONS
PART A: PROCEDURAL CONTEXT

1-1 Moore's AnswerGuide: Fed Civil Motion Practice § 1.01

§ 1.01 Procedural Context--Preparing, Filing, and Serving Motions

The purpose of a motion is to bring a matter to the court's attention for decision. Motion practice is a central component of the litigation process at all phases, and it is rare that a federal case is tried without pretrial motion practice. Pretrial motions are useful in testing the strengths and weaknesses of a case, narrowing the issues prior to trial, or resolving cases without the need for trial. When used effectively, pretrial motions can save time and reduce litigation costs.

Motions should be in writing, unless made during a recorded hearing or at trial. The Federal Rules of Civil Procedure do not limit the variety of motions that may be made. Thus, a party may bring a motion as to any matter requiring a ruling or order from the court, even if the motion is not specifically authorized by the Federal Rules, so long as the motion identifies the relief sought and states the grounds justifying the requested order.

More often than not, parties and their counsel use motion practice as an effective tool for controlling the focus and pace of litigation. Unfortunately, some litigants try to abuse the system by bringing frivolous motions or motions designed to delay or harass their opponents. Not only do federal district judges have little, if any, tolerance for such misconduct, but many local district court rules include specific warnings against bringing motions for illegitimate purposes, under penalty of sanctions.

Despite the potential benefits of motion practice, under some circumstances, parties may prefer to engage in less time-consuming and resource-intensive alternatives. Accordingly, the local rules of some district courts require parties to attempt to resolve disputed issues by stipulation prior to bringing a motion before the court. In lieu of formal motions, district court judges are sometimes willing to render decisions based on oral presentations at a pretrial conference, or based on letter briefs submitted in advance of a pretrial conference. If the assigned judge requires a pre-motion conference and accepts correspondence in advance of the conference, the parties should keep in mind that their communications with the court may be a substitute for formal motion practice and therefore should be drafted with cites to relevant authority in support of the arguments presented.

The timing of motions is generally determined by the circumstances of each particular case, including the court's initial scheduling order. However, parties do tend to time their motion practice in accordance with the normal ebb and flow of the litigation process. For example, some motions, such as motions challenging jurisdiction or calling into question the sufficiency of the pleadings, are more appropriate to early stages of litigation. Other motions, such as motions to compel

discovery or motions for protective orders, are more likely to be brought after the litigation has progressed into the fact-gathering stage. There are some motions that not appropriate until close to the trial date, such as motions to exclude evidence or motions to sever matters for trial. Finally, parties may still wish to bring motions during or after trial, including motions for judgment as a matter of law or motions for relief from judgment.

Because the Federal Rules allow the parties great latitude with respect to most facets of motion practice, local rules often specify varied and detailed procedural and formatting requirements not addressed in the Federal Rules. Therefore, when filing or responding to a motion, it is critical for parties to consult the local rules of the relevant district court and any applicable rules or standing orders issued by the individual judge assigned to the case. Within the broad framework provided by Federal Rules 5 (service and filing), 6 (timing), 7 (form of motion papers), 10 (format requirements), and 11 (signing and certification), local rules elaborate the contours of all aspects of the timing, content, formatting, supporting documents, service, filing, argument, and resolution of motions. Careful attention to these matters is often vital to the favorable outcome of motion practice.

The wide array of technical and procedural steps involved in motion practice includes the following subjects, which are discussed in this chapter:

1. The governing procedural law of federal motion practice;

2. Papers required in support of and in opposition to motions, including memoranda of law and affidavits or affidavit equivalents;

3. Scheduling a motion return date and computing time;

4. Serving and filing motion papers;

5. Opposing a motion, filing cross-motions or counter-motions, and replying to opposition papers;

6. Oral argument of motions; and

7. Drafting orders on motions.

Each of these steps presents both potential pitfalls that could compromise the substantive outcome of a motion as well as opportunities for making strategic decisions that may render a favorable outcome to motion practice more likely.

In addition to basic motion practice, this chapter also discusses special situations, such as *ex parte* motions, motions to extend time, motions for reconsideration, and motions to compel arbitration.

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Chapter 1 PREPARING, FILING, & SERVING MOTIONS
PART B: PREPARING MOTIONS

1-1 Moore's AnswerGuide: Fed Civil Motion Practice § 1.02

§ 1.02 Checklist for Preparing Motions

☐ Determine governing law. *See § 1.03 below*.

☐ Consider availability of alternatives to noticed motion, such as oral motion, stipulation, or *ex parte* application. *See § 1.07 below*.

☐ Review and comply with procedural prerequisites for motions under local rules and applicable standing orders. *See § 1.04[1] below*.

☐ Determine filing guidelines and timing requirements, after review of applicable timing requirements for filing and serving motions under Federal Rules, local district court rules, and judge's standing orders. *See § 1.04[3] below*.

☐ Prepare motion papers. *See §§ 1.04*, *1.05 below*.

- ○ Combine motion and notice of motion in a single paper, unless local rules direct otherwise. *See § 1.04[2] below*.
- ○ Prepare notice of motion and motion providing requisite notice to court and parties. *See § 1.04 below*.
- ○ Review formatting requirements concerning heading, caption, designation, signature, body of document, page limits, and general document formatting. *See §§ 1.04 -1.06 below*.
- ○ Prepare memorandum of law. *See §§ 1.05*, *1.06 below*.

- Prepare sworn affidavits or declarations and other supporting documentary evidence, as appropriate, in accordance with applicable local rules. *See § 1.06[3], [4] below.*

- Prepare appropriate civil cover sheet if required by local rule. *See § 1.04[4] below.*

☐ Serve motion papers by appropriate means. *See § 1.13 below.*

☐ File motion papers according to local rules. *See §§ 1.10, 1.11 below.*

☐ If seeking expedited hearing date, make *ex parte* application and consider pre-motion conference if prompt or immediate court intervention is necessary. *See § 1.15 below.*

☐ If opposing motion, file and serve opposition to motion in compliance with district court rules and local rules. *See § 1.08[1] below.*

- In opposing motion, decide whether to file cross-motion or counter-motion. *See § 1.08[2] below.*

☐ Draft, serve, and file reply brief in accordance with local rules governing reply papers. *See § 1.08[3] below.*

☐ Prepare order, if required by local rules or judge's standing orders. *See § 1.08[4] below.*

☐ **Search by Topic:** Civil Procedure > Pleading & Practice > Motion Practice

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Chapter 1 PREPARING, FILING, & SERVING MOTIONS
PART B: PREPARING MOTIONS

1-1 Moore's AnswerGuide: Fed Civil Motion Practice § 1.03

§ 1.03 Identifying Sources of Governing Law

All motions and supporting papers, such as affidavits and exhibits, are subject to formal requirements imposed by various sources. Motion practice is governed by the Federal Rules of Civil Procedure, local district court rules, and the standing orders of individual judges. Those rules collectively provide specific standards for motion papers with respect to the following features:

1. Appearance of documents;

2. Procedure for filing with the court; and

3. Manner of service.

[1] Identifying Federal Rules Governing Motions

Motion practice is generally subject to the following Federal Rules:

1. *Fed. R. Civ. P. 5* (service and filing of motions);

2. *Fed. R. Civ. P. 6(c)* (timing of motions);

3. *Fed. R. Civ. P. 7(b)* (form of motions and other papers);

4. *Fed. R. Civ. P. 10* (format requirements for motions and other papers); and

5. *Fed. R. Civ. P. 11* (signing and certification of motions).

Specific types of motions may also be regulated by the particular federal rule or statute governing the relief requested. *See, e.g., Fed. R. Civ. P. 56* (governing motions for summary judgment).

[2] Determining Applicable Local Rules

Local district court rules generally control the details of motion practice, including:

1. Advance notice of motions;

2. Timing of opposition and reply papers;

3. Papers required or permitted to be submitted in support of, or in opposition to, the motion;

4. Formatting requirements for motion papers;

5. Service and filing of papers; and

6. Meet and confer requirements.

Local district court rules may also govern specific types of motions, including the following:

1. Discovery motions;

2. Summary judgment motions;

3. Motions for class action certification;

4. Motions for preliminary injunctions and temporary restraining orders;

5. Motions to dismiss for failure to prosecute;

6. Motions to amend;

7. Motions to vacate a default judgment; and

8. Motions to consolidate.

Warning:

Because local district court rules vary from one district to another, it is imperative to consult the local rules of the particular district in which an action is pending prior to drafting any motion. *See*, *e.g.*, N.D. Cal. L.R. 7-2(a) (motions must be filed and served at least 35 days prior to return date); D. Conn. L.R. 7(a)(1) (return date for motion not set by moving party, but at discretion of court); N.D.N.Y. L.R. 7.1(b)(1) (requiring filing and service of papers on dispositive motions not less than 31 days prior to the return date of the motion); S.D.N.Y. & E.D.N.Y. L.R. 6.1 (no advance notice requirements for motions).

Warning:

Because local district court rules are subject to change, the current local rules should be consulted prior to filing a motion.

[3] Ascertaining Applicable Standing Orders

Judges may also establish their own practical rules and procedures, frequently referred to as standing orders, provided that those rules are consistent with federal law, the rules adopted under *28 U.S.C. §§ 2072* and *2075*, and the relevant district's local rules. *See Fed. R. Civ. P. 83(b).*

Judges' standing orders governing motions often regulate the following elements of motion practice:

1. Pre-motion conference requirements;

2. Procedures for obtaining *ex parte* orders;

3. Availability of oral argument;

4. Times and days of week for motion calendars;

5. Courtesy copies;

6. Page limitations; and

7. Guidelines for stipulations.

Warning:

Because individual rules and procedures vary from one judge to another, it is essential to consult the applicable judge's rules prior to drafting any motion.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 7.03*.
- *Federal Litigation Guide PP 2.02 -2.04*.
- *Fed. R. Civ. P. 5* (serving and filing papers).
- *Fed. R. Civ. P. 6(c)* (timing for motions, notices of hearing, and affidavits).
- *Fed. R. Civ. P. 7(b)* (motions and other papers).
- *Fed. R. Civ. P. 10* (format requirements for motions and other papers).
- *Fed. R. Civ. P. 11* (signing motions).
- *Fed. R. Civ. P. 83* (rules by district courts and judge's directives).

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Chapter 1 PREPARING, FILING, & SERVING MOTIONS
PART B: PREPARING MOTIONS

1-1 Moore's AnswerGuide: Fed Civil Motion Practice § 1.04

§ 1.04 Satisfying Procedural and Formatting Requirements for Motion Papers

[1] 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 or procedures of the assigned judge. *See*, *e.g.*, *Fed. R. Civ. P. 37(a)(1)* (prior to filing motion for order compelling disclosure or discovery, movant must in good faith confer or attempt to confer with party not making disclosure in an effort to secure the disclosure without court action); C.D. Cal. L.R. 7-3 (counsel contemplating the filing of certain motions must first contact opposing counsel to discuss thoroughly, preferably in person, the substance of the contemplated motion and any potential resolution, and must include in notice of motion a statement indicating that motion is made "following the conference of counsel pursuant to L.R. 7-3 which took place on (date)"); S.D.N.Y. & E.D.N.Y. L.R. 37.3(c) (if parties cannot agree on resolution of non-dispositive pretrial dispute, they must notify court either by telephone conference or by letter).

Strategic Point:

Motions may be heard by either a district court judge or a magistrate judge. *See 28 U.S.C. § 636* (empowering magistrate judges to hear motions). In deciding whether to file a particular motion, it is important to keep in mind the characteristics of the judge or magistrate judge who will be deciding the motion. In some districts, however, it is not possible to determine which judge or magistrate judge will be hearing a particular motion because cases are not assigned to an individual judge until trial. Instead, a master calendar system informs counsel as to which motions will be heard by the particular judge assigned to the law and motion department at the relevant time.

[2] Preparing Notice of Motion

The purpose of a notice of motion is to provide notice to the court and the parties of the following information:

1. The relief sought;

2. The date and time on which the motion will be heard, often referred to as the *return date* of the

motion;

3. Where the motion will be heard;

4. The statute or rule, if any, on which the motion is predicated; and

5. The papers, which are submitted in support of the motion.

The motion and notice of motion may be combined in a single document, unless local rules direct otherwise. *See Fed. R. Civ. P. 6(c)(1), 7(b)(1)* (separate documents for motion and notice of motion not required); *but see* S.D.N.Y. & E.D.N.Y. L.R. 6.1(b) (implying that separate notice of motion should accompany motion papers).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 7.03.*
- *Federal Litigation Guide PP 2.30 -2.32.*
- *Bender's Federal Practice Forms* Form No. 7:150.
- *Fed. R. Civ. P. 7(b)* (motions and other papers).

[3] Scheduling Date for Filing Motion

Proceedings in most federal cases will be governed by a scheduling order entered by the judge, which is likely to limit the time for filing various motions. *See Fed. R. Civ. P. 16(b).* As a result, it is wise to prepare in advance of the initial scheduling conference to discuss a timetable for motions. The same is true of status conferences, during which the court might ask the parties to identify any motions that are contemplated, and to propose a timetable for such motions. *See Fed. R. Civ. P. 16(c).*

Warning:

Parties must bring certain motions at specific times or risk waiver. For example, a party will waive the right to object to personal jurisdiction unless the party consolidates its motion to dismiss for lack of personal jurisdiction with other Rule 12 motions. *See Fed. R. Civ. P. 12(g), (h).*

A party must serve a written motion and notice of hearing on other parties to the action at least 14 days prior to the hearing date, unless a different period is fixed by the Federal Rules or by local rule or court order. *See Fed. R. Civ. P. 6(c)(1).* Calculating the notice period for a noticed motion requires the following:

1. Determining the advance notice period applicable to the specific motion by referring to the applicable federal rules, local district court rules, and the judge's rules; and

2. Applying the rules provided by *Fed. R. Civ. P. 6* for computing time.

The five-day period of *Fed. R. Civ. P. 6(c)(1)* is computed under *Fed. R. Civ. P. 6(a)*, so that intermediate weekends and legal holidays are included. *See Fed. R. Civ. P. 6(a)(1)(B).* In computing the advance notice requirements for motions, the day on which the moving papers are served should not be included as part of the minimum advance notice requirement. *See Fed. R. Civ. P. 6(a)(1)(A).* The last day of the notice period should be included; however, if the last day of the period falls on a Saturday, Sunday, legal holiday, or day when the court is inaccessible, the notice period is

extended until the next court day. *See Fed. R. Civ. P. 6(a)(1)(C)*.

The 14-day notice period does not apply in the following circumstances:

1. The motion is *ex parte*;

2. Another Federal Rule provides the applicable time; or

3. The court order sets a different time.

See Fed. R. Civ. P. 6(c)(1)(A)-(C). Furthermore, because the response time for a motion is keyed to service of the motion, three days are added to the end of the 14-day period when service is made by any method other than hand delivery (for example, by fax or e-mail). *See Fed. R. Civ. P. 6(d)*; *see also Fed. R. Civ. P. 5(b)(2)(C)-(F)* (methods for service other than by hand delivery).

Fed. R. Civ. P. 6 acknowledges that the times for serving a notice of motion and for filing responses set out in the rule are likely to be superseded by other rules or orders. The 14-day period will not apply when either the rules set a different time or when a court order sets a different time. *See Fed. R. Civ. P. 6(c)(1)*. Specific timing requirements vary among districts and among individual judges. Local district court rules generally require more than 14 days' advance notice of a motion specified by *Fed. R. Civ. P. 6(b)*.

In fact, virtually every district court has local rules or standing orders that require a much longer period of notice for motions than 14 days. Examples include the following:

- The Northern District of California requires all motions to be served not less than 35 days before the hearing, requires responses to be served and filed not less than 21 days before the hearing date, and permits the filing of a reply to the opposition not less than 14 days before the hearing date. *See* N.D. Cal. L.R. 7-2(a), 7-3(a), (c).

- The Southern District of California requires that motions be filed and served no later than 28 calendar days prior to the Monday on which the motion will be heard. *See* S.D. Cal. L.R. 7.1(e)(1).

- The Northern District of New York requires that motion papers must be filed and served not less than 31 days prior to return date of a motion. *See* N.D.N.Y. L.R. 7.1(b)(1).

- The Western District of New York requires that a notice of motion must be filed and served at least 15 business days prior to the return date of a motion. *See* W.D.N.Y. L.R. 7.1(c).

- The Northern District of Texas gives a party opposing a motion 20 days from the date the motion is filed in which to file a response. *See* N.D. Tex. L.R. 7.1(e).

In addition, other local rules may prescribe additional requirements prior to scheduling a motion return date. *See*, *e.g.*, N.D.N.Y. L.R. 7.1(b)(2) (court conference required prior to making non-dispositive motion). Thus, the applicable local rules and standing orders should be consulted for any additional notice requirements.

Finally, judges' standing orders generally govern the procedure for placing a motion on a judge's calendar. Some judges may hear motions on the same day and time once each week, and do not require permission before serving and filing the motion. Other judges may require the moving party to contact chambers to schedule the motion.

Warning:

District courts enforce local rules in matters of timing. Therefore, it is imperative to review the applicable local court rules prior to filing a motion.

Strategic Point:

If prompt or immediate court intervention is necessary, counsel should consider the pre-motion conference as a substitute for the motion itself. Counsel should write a letter to the court, requesting an immediate pre-motion conference, setting out the relief needed and the arguments and facts in support. The letter may induce opposing counsel to respond promptly with the facts and arguments in opposition. Some judges prefer a request for a telephone conference; however, the court's willingness to participate in any variety of informal procedures, such as telephone conferences, should be ascertained in advance.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 6.04 -6.07.*
- *Federal Litigation Guide P 2.32.*
- *Bender's Federal Practice Forms* Form No. 7:150.
- *Fed. R. Civ. P. 7(b)* (motions and other papers).

[4] Attaching Civil Cover Sheet or Cover Page

Although the Federal Rules do not require a cover page accompanying a motion, most local rules impose such a requirement, and individual judges' standing orders may augment this requirement. The appropriate civil cover sheet is generally available from the court clerk or downloadable from the court's web site.

Strategic Point:

Because a cover sheet provides information for the benefit of the court, it need not be served on opposing parties. See *Richmond, F. & P. R. Co. v. Intermodal Services, Inc., 508 F. Supp. 804, 808 (E.D. Cal. 1981)* (civil cover sheet not among papers to be filed).

[5] Including Appropriate Caption

Motion papers must be formatted in the manner set forth for pleadings in *Fed. R. Civ. P. 10. See Fed. R. Civ. P. 7(b)(2), 10(a).* Every motion must contain a caption including the following information:

1. Name of court;

2. Title of action;

3. File number; and

4. Designation of type of motion.

See Fed. R. Civ. P. 10(a); *see also* Fed. R. Civ. P. Appendix of Forms, Form 1 (Caption). The title of the action need

not include the names of all parties, but should state the names of the first party on each side with an appropriate indication of others parties, such as "et al." *See Fed. R. Civ. P. 10(a).*

Local district court rules often impose additional specific requirements. Local rules may require, for instance, that motion papers include a heading, setting forth the attorney's name, bar number, office address, telephone number and fax, email address, and the party being represented. *See, e.g.*, C.D. Cal. L.R. 11-3.8(e) (requiring that file number be placed on right-hand side of initial page of motion); N.D. Cal. L.R. 7-2(b) (first paragraph of motion must contain notice of motion, second paragraph must contain concise statement of relief sought, and succeeding paragraphs must contain points and authorities in support of motion).

Parties should also be sure to consult standing orders issued by the individual judge to whom the case has been assigned. Standing orders often specify particular requirements regarding courtesy copies, electronic copies, page limits, form of stipulations, or facsimile submissions. District court judges have broad discretion to depart from local rules, including service requirements, if it makes sense to do so and does not jeopardize substantial rights. *See Nunley v. City of Los Angeles, 52 F.3d 792, 795 (9th Cir. 1995)* . Ordinarily, an appropriate application must be made to the court requesting such a departure.

Strategic Point:

The official forms contained in the Appendix of Forms to the Federal Rules of Civil Procedure serve as suggestions for drafting papers including motions. *See Fed. R. Civ. P. 84.* Local district courts often offer their own forms or require the use of particular forms, obtainable from the clerk's office or by downloading from court websites. *See, e.g.*, www.cacd.uscourts.gov (United States District Court for the Central District of California).

The clerk of the court may not reject a motion solely because it is not presented in proper form as required by the Federal Rules or by any local rule or practice. *See Fed. R. Civ. P. 5(d)(4), 83(a)(2), (b);* *McClellon v. Lone Star Gas Co., 66 F.3d 98, 101 (5th Cir. 1995)* (clerk could not reject pleading because it failed to conform to pleading requirements). Note, however, that the *court* itself may reject papers on this basis or sanction counsel for failure to follow formatting requirements. *See Transamerica Corp. v. National Union Fire Ins. Co., 143 F.R.D. 189, 191 (N.D. Ill. 1992)* (*Fed. R. Civ. P. 5(d)(4)* does not preclude court from striking offending memorandum after it is filed).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 7.03.*
- *Federal Litigation Guide PP 2.41 -2.43.*

[6] Complying With Specific Local Rules

The Federal Rules do not specifically address the physical formatting of motion papers. These features are governed by a variety of local district court rules, which provide page-number limitations, detailed specifications for laying out motion papers, and requirements regarding number of copies to be filed.

The Federal Rules do not establish page limitations for motions; however, most local rules set some page limitations. *See, e.g.*, N.D. Cal. L.R. 7-2(b) (motion must be "one filed document" not exceeding 25 pages in length); N.D. Cal. L.R. 7-4(b) (briefs or memoranda filed with opposition papers may not exceed 25 pages of text and the reply brief or memorandum may not exceed 15 pages of text, except by court's express order); N.D.N.Y. L.R. 7.1(a)(1) (memoranda of law are limited to 25 pages, unless leave of court is obtained prior to filing). Judges' standing orders may also specify

page limitations and should therefore be consulted.

Various district courts impose different local rules regarding such aspects of formatting as the following features:

1. Heading;

2. Caption;

3. Designation;

4. Signature and signature block;

5. Separate numbered paragraphs in body of document;

6. Page limitations;

7. Type of paper;

8. Margins, spacing, lines per page;

9. Format of quotations;

10. Typeface;

11. Pagination;

12. Footers;

13. Prepunched holes;

14. Binding;

15. Citation to authorities; and

16. Format of exhibits and attachments.

For example, the local rules governing preparation of motion papers in the Central District of California impose the following requirements:

1. All pleadings, motions, and other papers, must be submitted on opaque, unglazed, white paper (includes recycled paper) not less than 13-point weight. The paper must be 81/2 by 11 inches, numbered on the left margin with no more than 28 lines per page. Only one side of the paper may be used. The lines of each page must be double spaced and numbered consecutively with line 1 beginning at least one inch below the top edge of the paper. *See* C.D. Cal. L.R. 11-3.2.

2. All documents must be numbered consecutively at the bottom of each page. *See* C.D. Cal. L.R. 11-3.3.

3. A proportionally spaced type face or a monospaced typeface may be used. A proportionally spaced face must be 14-point or larger unless the court orders otherwise. A monospaced face may not contain more than 101/2 characters per inch. *See* C.D. Cal. L.R. 11-3.1.1.

4. All pleadings, motions, and other papers, including exhibits, presented for filing with the court, must be typewritten or printed, or prepared by a photocopying or other duplicating process that will produce clear and permanent copies equally legible to printing, in black or dark blue ink. *See* C.D. Cal. L.R. 11-3.1.

5. All documents presented for filing must be prepunched with two normal-size holes (approximately 1/4 inch diameter), centered 23/4 inches apart, 1/2 to 5/8 inches from the top edge of the document. No page of any document may have any rider or attachment. All pages must be firmly bound at the top and backed. The backing may not extend more than one inch below the pages bound and must have the short title of the document typed in the lower right-hand corner. *See* C.D. Cal. L.R. 11-3.5.

6. The typing or printing on the document must be double spaced, including citations and quotations. However, footnotes may be single spaced, as may real property descriptions, and corporate surety bonds on printed forms if they comply generally with the space requirements of the rule. *See* C.D. Cal. L.R. 11-3.6-11-3.6.3.

7. Quotations from cited cases or other authorities more than one sentence in length must be clearly indented not less than 5 spaces nor more than 20 spaces. *See* C.D. Cal. L.R. 11-3.7.

Many district courts have local rules requiring that additional copies of documents be filed along with the original. *See*, *e.g.*, E.D. & W.D. Ark. L.R. 5.5(a) (requiring two additional copies); E.D. Cal. L.R. 5-133(d)(2) (one additional legible copy always required, and three additional copies required in cases proceeding before three-judge courts); N.D. Ill. L.R. 5.2(e) (requiring one additional copy).

Parties should also consult the assigned judge's standing orders regarding courtesy copies. Some judges require courtesy copies, and others refuse to accept them. *See*, *e.g.*, W.D.N.Y. L.R. 7.1(i) (courtesy copies of motion papers should not be given to the judge unless specifically requested by court). If the judge permits the delivery of courtesy copies, those copies should be filed with the clerk and contemporaneously delivered to chambers, which will allow the court the opportunity to understand the moving party's position at the earliest possible time.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 7.03*.
- *Federal Litigation Guide PP 2.03 -2.04, 2.40 -2.41*.
- *Fed. R. Civ. P. 7(b)* (motions and other papers).
- *Fed. R. Civ. P. 83* (rules by district courts and judge's directives).

Moore's AnswerGuide: Federal Civil Motion Practice

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Chapter 1 PREPARING, FILING, & SERVING MOTIONS
PART B: PREPARING MOTIONS

1-1 Moore's AnswerGuide: Fed Civil Motion Practice § 1.05

§ 1.05 Determining Content of Motion

Although the Federal Rules contain no formal formatting specifications for the body of a motion, it must comply with the following general requirements:

1. Be in writing, unless made during a hearing or trial;

2. State the grounds with particularity; and

3. Set forth the relief or order sought.

See Fed. R. Civ. P. 7(b).

[1] Stating Grounds for Motion With Particularity

A written motion must state with particularity the grounds for seeking the order or relief the movant is requesting. *See Fed. R. Civ. P. 7(b)(1)(B)*; *Evans v. Pearson Enters., Inc., 434 F.3d 839, 853-854 (6th Cir. 2006)* (district court did not err in denying requests for leave to amend complaint, when requests were included in responses to opposing party's motions and did not state grounds for request with particularity); *United States ex rel. Doe v. Dow Chem. Co., 343 F.3d 325, 330-331 (5th Cir. 2003)* (district court properly denied motion to amend that did not offer grounds on which amendment should be permitted).

The particularity requirement of *Fed. R. Civ. P. 7* is nevertheless flexible and has been interpreted liberally by the courts. *See Feldberg v. Quechee Lakes Corp., 463 F.3d 195, 197 (2d Cir. 2006)* (citing **Moore's** for proposition that particularity requirement is flexible and has been interpreted liberally by courts); *Intera Corp. v. Henderson, 428 F.3d 605, 613 (6th Cir. 2005)* (court must construe particularity requirement liberally). In the absence of a showing of prejudice, the court will usually consider the substance of a motion rather than its form. Motions worded very generally have been found sufficiently particular when the opposing party had notice of the specific basis for the motion. *See Cambridge Plating Co. v. Napco, Inc., 85 F.3d 752, 761 (1st Cir. 1996)* ("Courts routinely take into consideration other closely filed pleadings to determine whether sufficient notice of the grounds for the motion are given and the opposing party has a fair opportunity to respond."); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin,*

957 F.2d 515, 516 (7th Cir. 1992) (brief filed contemporaneously with motion cured insufficiency of grounds in motion and satisfied *Fed. R. Civ. P. 7(b)(1)*).

Warning:

When a motion does not give adequate notice of the grounds relied on, a court will usually summarily deny the motion. *See, e.g., Feldberg v. Quechee Lakes Corp., 463 F.3d 195, 197 (2d Cir. 2006)* (motion to amend judgment that did not state any grounds at all was insufficient under *Fed. R. Civ. P. 7* because it did not apprise opposing party of grounds for motion; consequently, motion did not extend time to appeal dismissal of complaint); *Riley v. Northwestern Bell Tel. Co., 1 F.3d 725, 726-727 (8th Cir. 1993)* (failure to comply with technical form as well as failure to state with particularity grounds of motion will lead to dismissal of motion).

Strategic Point:

Local district court rules or individual judges' orders may add to the particularity requirements of *Fed. R. Civ. P. 7* by requiring that written motions be accompanied by briefs containing legal argument. *See Intera Corp. v. Henderson, 428 F.3d 605, 614 (6th Cir. 2005)* (applying local rule requiring memorandum in support of *Fed. R. Civ. P. 59(e)* motion).

Exception:

Conclusory assertions may sometimes be permissible in motions. *See, e.g.*, Fed. R. Civ. P., Appendix of Forms, Form 19 (sufficient to set forth as grounds for a motion to dismiss that "the complaint fails to state a claim upon which relief may be granted").

[2] Specifying Relief Sought

Every motion must also specify the relief sought. *See Fed. R. Civ. P. 7(b)(1)(C)*; *Moore v. Indiana, 999 F.2d 1125, 1131 (7th Cir. 1993)* (plaintiff's cursory motion failed to convey plaintiff's intention to add 13 new defendants and change nature of claim); *Snellman v. Ricoh Co., 836 F.2d 528, 532 (Fed. Cir. 1987)* . 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. Furthermore, the papers submitted in support of the motion must justify the relief. *See Gaskin v. Pennsylvania, 231 F.R.D. 195, 196 n.1 (E.D. Pa. 2005)* (denying motion to intervene that failed to state type of intervention sought or grounds for motion and did not provide proposed pleading).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 7.03.*
- *Federal Litigation Guide PP 2.32, 2.34.*
- *Fed. R. Civ. P. 7(b)* (motions and other papers).

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Chapter 1 PREPARING, FILING, & SERVING MOTIONS
PART B: PREPARING MOTIONS

1-1 Moore's AnswerGuide: Fed Civil Motion Practice § 1.06

§ 1.06 Preparing to File Motion and Supporting Documents

[1] Complying With Rule 11 Signature Requirement

Written motions must be signed by at least one attorney of record in the attorney's individual name, or personally by a party if that party is unrepresented. *See Fed. R. Civ. P. 11(a)*; *Giebelhaus v. Spindrift Yachts, 938 F.2d 962, 966 (9th Cir. 1991)* (typewritten name not sufficient for signature). A motion must also state the signer's address, e-mail address, and telephone number, in either the heading or the signature block.

Warning:

The court may strike an unsigned motion, unless the omission is promptly corrected after being called to the attention of the person whose signature is required. *See Fed. R. Civ. P. 11(a)*.

A court may allow papers to be signed by "electronic means." *Fed. R. Civ. P. 5(d)(3)*; *see § 1.11 below*. Each court with an electronic case filing system (ECF) has a local rule or standing order setting out procedures governing signatures. *See* former *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 *Fed. R. Civ. P. 5(d)*). 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 *Fed. R. Civ. P. 11*. The password and login numbers assigned to a filing user effectively ensure the genuineness of the filing user's signature.

Fed. R. Civ. P. 11(b) provides that a motion must be prepared only after an inquiry reasonable under the circumstances, must not be presented for any improper purpose, and must contain nonfrivolous legal argument accompanied by evidentiary support. *See Fed. R. Civ. P. 11(b)*. Signing a motion presented to the court certifies that, to the best of the signer's knowledge based on a reasonable inquiry, the following conditions are true:

1. The document is not being presented for an improper purpose and that it has a basis in law and in fact;

2. The 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;

3. The allegations and facts are supported by the evidence; and

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

See Fed. R. Civ. P. 11(b).

Strategic Point:

Counsel should be sure to consult applicable local rules, because each district may have additional requirements for signatures and signature blocks. Some district courts, for example, may permit or even require motions to be filed, signed, or verified by electronic means. A local rule may *require* electronic filing, however, only if it allows for reasonable exceptions. *See Fed. R. Civ. P. 5(d)(3).*

Warning:

A *Fed. R. Civ. P. 11* violation is sanctionable. *See Fed. R. Civ. P. 11(c)*; *Holgate v. Baldwin, 425 F.3d 671, 680 (9th Cir. 2005)* (district court told to reconsider, on remand, whether sanctions awarded against attorney for filing frivolous claims were sufficient to deter him and others like him in future); *MHC Inv. Co. v. Racom Corp., 323 F.3d 620, 627-628 (8th Cir. 2003)* (sanction of $25,000 was not excessively large when this amount was necessary to deterrence). *See §§ 7.02 -7.06 below.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 11.10 -11.11.*
- *Federal Litigation Guide P 2.43.*
- *Fed. R. Civ. P. 11* (signing motions)

[2] Adhering to Privacy Protection Requirements

[a] Redacting Certain Personal Information From Filings

In compliance with the E-Government Act of 2002 and *Fed. R. Civ. P. 5.2*, federal courts must make electronic filings and paper filings scanned into electronic form available online through the courts' websites. *See Fed. R. Civ. P. 5.2(a).* Because court filings frequently contain personal information such as social security or bank account numbers, the corresponding electronic filing and storage create privacy concerns. As a result, unless the court orders otherwise, filings that contain an individual's social-security number, taxpayer identification number, date of birth, the name of an individual known to be a minor, or a financial-account number, may include *only* the following information:

1. The last four digits of a social-security number or taxpayer identification number;

2. The year of an individual's birth;

3. The minor's initials; or

4. The last four digits of the financial-account number.

See Fed. R. Civ. P. 5.2(a).

The court may issue a protective order requiring redaction of additional information or limiting remote electronic access to a particular filing. *See Fed. R. Civ. P. 5.2(e).* The redaction requirement applies to both electronic and paper filings, and includes trial exhibits filed with the court. *See Fed. R. Civ. P. 5.2*, advisory committee note of 2007. A party may file a redacted filing together with a reference list that identifies and specifies a unique identifier for each item. *See Fed. R. Civ. P. 5.2(g).* The list is filed under seal and may be identified as of right.

Alternatively, the court may order that a filing be made under seal without redaction. *See Fed. R. Civ. P. 5.2(d).* A party also has the option of filing an unredacted copy under seal; the copy must be kept as part of the court record. *See Fed. R. Civ. P. 5.2(f).*

[b] Identifying Information Exempt From Redaction Requirement

The redaction requirement discussed above does not apply to the following information:

1. A financial-account number that identifies the subject property in a forfeiture proceeding;

2. The official record of an administrative, agency, or state-court proceeding;

3. The record of a court or tribunal proceeding that was not subject to the redaction requirement when originally filed;

4. Social Security appeals and immigration cases, or filings under seal; or

5. A pro se filing in a habeas corpus action.

See Fed. R. Civ. P. 5.2(a)-(d).

Warning:

A party waives *Fed. R. Civ. P. 5.2* protection by filing his or her own personally identifiable information without redaction and not under seal. *See Fed. R. Civ. P. 5.2(h).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 5.2.01 -5.2.06.*
- *Federal Litigation Guide §§ 1.44, 2.68.*
- *Fed. R. Civ. P. 5.2* (privacy protection).

[3] Including Supporting Papers

Apart from notice of the hearing on a written motion, the Federal Rules do not specify the papers required to be submitted in support of a motion or opposition to a motion. However, in general, a party's moving papers should include:

1. Notice of motion;

2. Memorandum of law;

3. Supporting affidavits or affidavit equivalents; and

4. Supporting evidence attached to the moving papers as exhibits.

The notice of motion should list the papers that are submitted in support of the motion. Although the Federal Rules do not require filing a memorandum of law, local district court rules generally do. *See*, *e.g.*, C.D. Cal. L.R. 7-5 (a brief but complete supporting memorandum containing the points and authorities on which the moving party may rely must be served and filed with the notice of motion, along with the evidence on which the moving party will rely in support of the motion).

Absent specific requirements in the applicable local rules governing the contents of a memorandum of law, the memorandum in support of a motion should generally include the following:

1. Statement of the issues presented;

2. Statement of the facts;

3. Legal arguments applying controlling law to facts; and

4. Table of contents and table of authorities.

A motion may be supported by an affidavit, which must be sworn before a notary public or other person empowered to administer oaths. Affidavits must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify as to the matters stated. *See*, *e.g.*, *Fed. R. Civ. P. 56(c)(4)* (same requirements apply to declarations). In lieu of an affidavit, a motion may generally be supported by an unsworn declaration, certificate, verification, or statement, signed as true under penalty of perjury, and dated. Unsworn written statements should take substantially the form specified in *28 U.S.C. § 1746*. *See Goldman, Antonetti, Ferraiuoli, Axtmayer & Hertell v. Medfit Int'l, Inc., 982 F.2d 686, 689 (1st Cir. 1993)* . Affidavits, together with a supporting memorandum of law, often serve as the sole basis for the court's ruling. *See Fed. R. Civ. P. 78(b)*.

Timing:

If a motion is supported by affidavits or affidavit equivalents, the affidavits or equivalents must be served with the motion. *See Fed. R. Civ. P. 6(c)(2)*.

Warning:

Counsel should consult local rules for specifications regarding required affidavits or other supporting papers.

Strategic Point:

If a motion constitutes a nongovernmental corporate party's first appearance in an action, it should be accompanied by a corporate disclosure statement as specified in *Fed. R. Civ. P. 7.1*. *See Fed. R. Civ. P. 7.1*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 7.03.*
- *Federal Litigation Guide PP 2.34 -2.36.*
- *Bender's Federal Practice Forms* Form Nos. 7:200-7:201.
- *Fed. R. Civ. P. 7(b)* (motions and other papers).

[4] Submitting Evidence in Support of Motion

Parties may submit documents, such as deposition transcripts, responses to written discovery, transcripts from other proceedings, stipulations, and other documentary evidence in support of a motion. Some courts require those documents to be authenticated by an affidavit or affidavit equivalent of an individual having first-hand knowledge of the documents. Parties should attach such support documents as exhibits to the authenticated affidavit or affidavit equivalent, if required, and the documents should be clearly labeled with exhibit tags.

Strategic Point:

When evaluating a motion to dismiss, a court may consider documents attached to the complaint. *See Fed. R. Civ. P. 10(c).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 7.03.*
- *Federal Litigation Guide P 2.36.*
- *Fed. R. Civ. P. 7(b)* (motions and other papers).

[5] 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:

1. A federal statute is questioned and neither the United States nor any of its agencies, officers, or employees is a party in an official capacity; or

2. A state statute is questioned and neither the state nor any of its agencies, officers, or employees is a party in an official capacity.

See Fed. R. Civ. P. 5.1(a).

In addition, the moving party must 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. *See Fed. R. Civ. P. 5.1(a)(2).* 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. *See Fed. R. Civ. P. 5.1(d).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 5.1.01 -5.1.06.*
- *Federal Litigation Guide PP 1.43, 2.24.*
- *28 U.S.C. § 2403* (intervention by United States on question of constitutionality).
- *Fed. R. Civ. P. 5.1* (constitutional challenge to statute).

[6] Arguing Motions

The Federal Rules do not address oral argument on motions. Instead, local rules and judges' rules generally regulate oral argument. *See Fed. R. Civ. P. 78(a). Fed. R. Civ. P. 78* authorizes a court to establish regular times and places for oral hearings on motions. *See Fed. R. Civ. P. 78(a).* Nevertheless, there is no legal requirement for any actual hearing. *See, e.g., Mann v. Conlin, 22 F.3d 100, 103 (6th Cir. 1994)* (motion to dismiss properly decided without oral argument); *O.R. Sec. v. Professional Planning Assocs., 857 F.2d 742, 746 n.3 (11th Cir. 1988)* (motion to vacate arbitration award properly decided without oral argument); *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F.2d 404, 411 (1st Cir. 1985)* (motion for summary judgment properly decided without oral argument). In fact, local rules denying hearings on all kinds of motions have been upheld as valid. *See, e.g., EEOC v. Bay Shipbuilding Corp., 668 F.2d 304, 309 (7th Cir. 1981)* .

Local rules and local practice vary widely regarding whether the court will give the parties the opportunity to present oral argument on a motion. Some courts eliminate oral argument on some or all types of motions unless there is an express request for it in the moving or opposing papers. *See, e.g.*, S.D.N.Y. & E.D.N.Y. L.R. 6.1(c) (parties and their attorneys shall only appear to argue the motion if so directed by the court by order or by individual rule or upon application); N.D.N.Y. L.R. 7.1(h) (on all motions except motions for reconsideration, the parties must appear for oral argument on the scheduled return date, unless the court, at its own discretion or at the request of a party, determines a motion without oral argument).

Regardless of the rules and the regular practice, a judge has the discretion to determine a motion before the scheduled hearing date if all the papers have been filed and the court determines that oral argument could not change a decision. *See, e.g.,*, N.D.N.Y. L.R. 7.1(h) (parties should be prepared to have their motion papers serve as the sole method of argument on a motion); W.D.N.Y. L.R. 7.3 (court may notify parties that oral argument will not be heard on any given motion).

Warning:

Once a date for oral argument is scheduled, a motion will typically not be resolved before that date. *See Borden, Inc. v. Meiji Milk Products Co., 919 F.2d 822, 828 (2d Cir. 1990)* (early resolution would be improper and unorthodox).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 78.01 -78.03.*
- *Federal Litigation Guide PP 2.110 -2.111.*
- *Bender's Federal Practice Forms* Form No. 7:300.

- *Fed. R. Civ. P. 78(a)* (court may establish regular times and places for oral hearings on motions).

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1-1 Moore's AnswerGuide: Fed Civil Motion Practice § 1.07

§ 1.07 Considering Alternatives to Noticed Motion

[1] Making Oral Motions

Although motions must generally be made in writing, a motion may be made orally during a hearing or trial that is being electronically or stenographically recorded. *See Fed. R. Civ. P. 7(b)(1)(A)*; *United States v. Vulpis, 961 F.2d 368, 371 (2d Cir. 1992)* (*Fed. R. Civ. P. 7(b)(1)* allows motions to be made orally during hearing recorded in open court); *Taragan v. Eli Lilly & Co., 838 F.2d 1337, 1340-1341 (D.C. Cir. 1988)* (oral motion during recorded court proceedings permitted because court and parties were on notice of motion and opposing party could adequately interpose response).

Common examples of motions that are made orally include motions to exclude evidence, motions for judgment as a matter of law, and motions for mistrial. An oral motion is not required to be supported by any writing. *See Meriwether v. Coughlin, 879 F.2d 1037, 1042 (2d Cir. 1989)* . Judges ordinarily authorize oral motions in trial or pre-trial proceedings only if the issues do not require briefing, there is no prejudice to the opposing party, and the opposing party consents.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 7.03.*
- *Federal Litigation Guide PP 2.10, 2.11.*

[2] Using Stipulation in Lieu of Motion

When appropriate, counsel may substitute a stipulation for a noticed motion. Although there is no general Federal Rule governing stipulations, specific rules expressly authorize stipulations under certain circumstances. *See, e.g., Fed. R. Civ. P. 15(a)* (amended pleadings); *Fed. R. Civ. P. 29* (discovery stipulations); *Fed. R. Civ. P. 41(a)(1)* (voluntary dismissal); *Fed. R. Civ. P. 48* (stipulations about number of jurors and verdict); *Fed. R. Civ. P. 53(f)(3)* (master's factual findings); *Fed. R. Civ. P. 59(c)* (extending time to file responsive affidavits on motion for new trial).

In fact, the entire pretrial process contemplates stipulations. For example, a represented party must authorize at least one

of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at the pretrial conference. *See Fed. R. Civ. P. 16(c)(1).*

Strategic Point:

Stipulations expressly authorized by the Federal Rules generally should be in writing. *See, e.g., Fed. R. Civ. P. 41(a)(1)(A)(ii)* (stipulated dismissal must be signed by all parties). Even when a written stipulation is not expressly required by the Federal Rules, the better practice is to have the stipulation in writing (except, perhaps, when the stipulation is already reflected in a pretrial order). Keep in mind that judges may have standing orders governing the use of discretionary stipulations.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 7.03.*
- *Federal Litigation Guide P 2.21.*
- *Bender's Federal Practice Forms* Form Nos. 6:1-6:3, 7:600.

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§ 1.08 Opposing and Defending Noticed Motions

[1] Drafting, Filing and Serving Opposition Papers

The basic formatting requirements for moving papers also apply to opposition papers. *See Fed. R. Civ. P. 7(b)(2), 10(a)*; *see also § 1.04 above*. In addition, opposition papers are served using the same methods available for service of motion papers. *See Fed. R. Civ. P. 5(b)(2)*; *see also § 1.13 below*. Finally, opposition papers must be filed with the clerk of the court, together with proof of service. *See Fed. R. Civ. P. 5(d)(1)*; *see also §§ 1.10 -1.11 below*.

Strategic Point:

Parties should consult their local district court rules, individual judge's rules, and standing orders to determine whether additional requirements for formatting motions and opposition papers apply.

Warning:

Failure to file a timely opposition may be construed as consent to grant a motion or some other request. *See Martinez v. Stanford, 323 F.3d 1178, 1181 (9th Cir. 2003)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 7.03*.
- *Federal Litigation Guide PP 2.80 -2.85*.
- *Fed. R. Civ. P. 5* (serving and filing papers).

[2] Making Cross-Motions or Counter-Motions

A cross-motion or counter-motion (the terms are interchangeable) is a motion filed in response to a different motion, which seeks a separate order regarding issues related to the subject matter of the original motion. *See Reiffin v.*

*Microsoft Corp., 1998 U.S. Dist. LEXIS 10518, at *4-*6 (N.D. Cal. 1998) , rev'd and remanded on other grounds, 214 F.3d 1342 (Fed. Cir. 2000) .*

The Federal Rules do not specifically address cross-motions or counter-motions. A cross-motion or counter-motion is simply an independent motion. A party seeking to make a cross-motion or counter-motion should therefore determine whether the applicable local rules and judges' standing orders permit cross-motions and counter-motions. If so, those motions may also serve as opposition to the original motion, provided that the papers clearly state their dual purpose. *See*, *e.g.*, N.D.N.Y. L.R. 7.1(c) (cross-motion may be served and filed at the time opposition papers to the original motion are filed and served; cross-motion brief must be joined with the opposition brief).

Timing:

A party should serve and file a cross-motion or counter-motion before the deadline for filing opposition papers. If opposition to a cross-motion or counter-motion cannot reasonably be made within the time otherwise required, the party should request an extension of time from the court.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 7.03.*
- *Federal Litigation Guide PP 2.90 -2.94.*

[3] Replying to Opposition Papers

Filing a reply gives the moving party another opportunity to make its case, since a proponent can rarely anticipate an opponent's every argument. However, a party may not use a reply brief to introduce either new facts or a different legal argument. *See Lujan v. National Wildlife Fed'n, 497 U.S. 871, 894-895, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990) .*

Strategic Point:

Parties should consult applicable judges' rules to determine whether the court will accept reply briefs because some judges permit reply papers only under limited circumstances. If a party needs to obtain the court's permission in order to file a reply, the request itself should make the points and authorities that will be asserted in the reply.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 7.03.*
- *Federal Litigation Guide PP 2.100 -2.101.*

[4] Converting Decision on Motion Into Order

An order is any directive by the court other than a judgment. Local district court rules or individual judges' standing orders may require the prevailing party on a motion to prepare a proposed order in accordance with the court's ruling. *See*, *e.g.*, N.D. Cal. L.R. 7-2(c) (motion must be accompanied by proposed order, unless excused by the judge who will hear the motion).

The Federal Rules do not specify the order's required contents. Format for orders on motions is thus a matter of local practice and the preferences of the individual judge. In the absence of a local district court rule specifying the form and content of the order, the order should include the following information:

1. Case caption, including case number;

2. Title of order;

3. Recitation of papers considered in connection with the motion (for appellate purposes);

4. Factual findings, if required;

5. Statement of specific relief granted; and

6. Signature block for the judge.

The order should also record the issues that were decided, as well as those issues that were not decided in a manner that provides an adequate record for appeal. Some statement of the reasons for a decision on a motion may be helpful; however, formal findings are unnecessary except in the case of orders granting or refusing interlocutory injunctions. *See Fed. R. Civ. P. 65, 52(a)(2).*

The court may require the prevailing party to meet with opposing counsel to reach an agreement regarding the wording of the proposed order. Other local rules may impose additional requirements. *See, e.g.*, S.D.N.Y. & E.D.N.Y. L.R. 77.1(b) (party that obtains entry of order or judgment must append to or endorse upon it a list of the names of the parties entitled to be notified of the entry thereof, and the names and addresses of their respective attorneys).

Strategic Point:

An order deciding an immediately appealable motion must also conform to the requirements of *Fed. R. Civ. P. 54(a)*, so that the form of order should not include recitals of pleadings, a master's report, or a record of prior proceedings. *See Fed. R. Civ. P. 54(a).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 7.03*, 54.03.
- *Federal Litigation Guide PP 2.120 -2.121.*
- *Bender's Federal Practice Forms* Form No. 7:400.
- *Fed. R. Civ. P. 54(a).*

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§ 1.09 Checklist for Filing Motions

☐ Check local district court rules to determine whether electronic filing is permitted or required. *See §§ 1.10[1], 1.11 below.*

☐ File within reasonable time after service, as determined by local rules. *See § 1.10[1] below.*

☐ Prepare and file appropriate certificate of service. *See § 1.10[2] below.*

☐ Comply with local rules and judge's standing orders governing number of additional or courtesy copies to be filed. *See § 1.10[1] below.*

☐ If filing electronically:

- ○ Identify and comply with local rules regarding electronic file formats. *See § 1.11[2][a] below.*
- ○ Identify and comply with local rules regarding filing of attachments and exhibits. *See § 1.11[2][b] below.*
- ○ Identify and comply with local rules regarding electronic signatures. *See § 1.11[2][c] below.*
- ○ Retain original signed document for period of no less than maximum allowable time to complete appellate process. *See § 1.11[2] below.*

☐ **Search by Topic:** Civil Procedure > Pleading & Practice > Motion Practice

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§ 1.10 Complying With Appropriate Filing Requirements

[1] Determining Permissible Methods and Time of Filing

A party must file a motion with the court within a reasonable time after service. *See Fed. R. Civ. P. 5(d)*. Although *Fed. R. Civ. P. 5* seems to anticipate that a time limit for filing after service will vary depending on the particular circumstances of the case, some district courts have local rules that define a "reasonable time" as a specific number of days. *See*, *e.g.*, E.D. & W.D. Ark. L.R. 5.4 (five days is reasonable); D. Minn. L.R. 5.3 (10 days is reasonable); D.S.D. L.R. 5.1(A) (papers must be filed within 10 days after service).

Filing ordinarily occurs when the papers are tendered to the clerk of the court. *See Fed. R. Civ. P. 5(d)(2)(A)*; *Flying Cross Check, L.L.C. v. Cent. Hockey League, Inc., 153 F. Supp. 2d 1253, 1257 (D. Kan. 2001)* (filing under *Fed. R. Civ. P. 5(d)(2)(A)* occurs with delivery of papers into actual possession or custody of clerk). Although filing may be accomplished by mailing the papers to the clerk's office, filing in this manner is not effective until the papers are received in the clerk's office. *See Raymond v. Ameritech Corp., 442 F.3d 600, 604-605 (7th Cir. 2006)* (summary judgment response not timely filed when it was mailed prior to midnight on day due, but did not reach clerk until after deadline); *Clark v. Milam, 152 F.R.D. 66, 69 (S.D. W. Va. 1993)* (when party mails papers to clerk's office, filing complete when papers received by clerk or placed in clerk's post office box).

Exception:

A judge may permit papers to be filed directly with him or her. If so, the judge must note the filing date and immediately transmit the papers to the clerk's office. *See Fed. R. Civ. P. 5(d)(2)(B)*. The court has complete discretion as to whether to permit this type of filing, and this procedure generally is used only when it is considered essential to protect a party. If a court authorizes this procedure, however, filing is complete at the time of tender of the papers to the judge, rather than when they are transmitted by the judge to the clerk's office. *See Hernandez v. Aldridge, 902 F.2d 386, 388 (5th Cir. 1990)* (parties have no control over delays between receipt and filing, thus filing is timely if received by court within applicable period).

Filing by facsimile or other electronic means may be allowed or required by local rule. Numerous courts have local rules concerning filing by facsimile, sometimes as a matter of course. *See*, *e.g.*, D. Colo. L.R. 5.1(A), (B) (filing must be to telephone number specified by clerk and filings transmitted after 5:00 p.m. are considered filed as of next day). Local

rules of other courts set out specific procedural rules that must be followed whenever a party chooses to file a paper by facsimile. *See*, *e.g.*, N.D. Cal. L.R. 5-2 (paper must contain filing attorney's own fax number; facsimile signature constitutes signature for all purposes; paper is transmitted to courtroom clerk, not general clerk's office; additional judge's copies must be filed, etc.).

Local rules of several courts restrict facsimile filing to cases of dire emergency, and, even then, some require pre-authorization. *See*, *e.g.*, M.D. Ga. L.R. 5.2, 5.3 (permitted only in compelling circumstances, only when pre-authorized, and even then, fax filing must be confirmed with conventional filing); D. Nev. L.R. 5-2 (fax filing limited to death penalty cases); D. Or. L.R. 5.3, 11.3 (facsimile filings allowed only in emergency situations and with advance authorization by judge; conventional filing must follow within three days). Local rules of a few courts still prohibit facsimile filing altogether. *See*, *e.g.*, D. Wyo. L.R. 5.1(h) ("Paper transmitted by facsimile shall not be accepted for filing").

Local rules may also allow motions to be filed, signed, or verified by electronic means that are consistent with specified standards, provided that reasonable exceptions are allowed. *See Fed. R. Civ. P. 5(d)(3)*. For additional information on electronic filing, *see § 1.11 below*.

Although *Fed. R. Civ. P. 5(d)(4)* expressly states that the court clerk may not refuse to accept tendered papers on the basis that they are not in the form required by the Federal Rules or by local rules, some district courts nevertheless have local rules specifying the format in which papers must be filed and expressly authorize the clerk to reject filings that do not conform with the required format. *See*, *e.g.*, D.D.C. L.R. 5.1(i) ("A paper that does not conform to the requirements of this Rule and *Rule 10(a) of the Federal Rules of Civil Procedure* shall not be accepted for filing"); N.D. Ga. L.R. 5.1(J), (K) (papers that fail to comply with rules for titling filings and for use of assigned case number on filings will not be accepted for filing).

Warning:

Parties should be careful to consult local rules regarding specific filing guidelines, because each district typically specifies how and when electronic filing is required. Judges' rules must also be consulted to determine whether courtesy copies will be accepted. *See § 1.11 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 5.30 -5.32*.
- *Federal Litigation Guide PP 2.63*, *2.64*.
- *Fed. R. Civ. P. 5(d)* (filing papers).

[2] Complying With Certificate of Service of Requirements

Motions must be accompanied by a certificate of service. *See Fed. R. Civ. P. 5(d)*. The Federal Rules do not provide specific requirements for the certificate of service; however, the certificate should contain at least the following information:

1. Name of party and attorney served;

2. Date of service;

3. Method of service;

4. Address where service was made; and

5. Certificate by the serving party that service of the pleading or paper was made.

See Fed. R. Civ. P. 5(d); *Rivera v. M/T Fossarina, 840 F.2d 152, 155 (1st Cir. 1988)* .

Parties should be sure to consult local rules for additional requirements because most district courts impose specific conditions on the content of the certificate of service. *See*, *e.g.*, D. Del. L.R. 5.2(a); N.D. Ill. L.R. 5.5(a), (b); M.D. La. L.R. 5.3; W.D. Tex. L.R. 5(b)(2) (proof of traditional, as opposed to electronic, service). For instance, local rules often require that the certificate of service show the time and manner of service and the name of the person served. *See*, *e.g.*, D. Alaska L.R. 5.1(a)(2); D.D.C. L.R. 5.3; D.N.J. L.R. 5.1(b). Local rules also commonly provide that proof of service should be made either by written acknowledgment of service, by affidavit, or by certification of the attorney. *See*, *e.g.*, D. Alaska L.R. 5.1(a)(2); S.D. Cal. L.R. 5.2; D.R.I. L.R. 5.1(a)(1).

If a paper is filed without the required certificate of service, a court may disregard it; however, the absence of a certificate of service does not require the court to render the paper invalid if service is not contested or if actual service is established by other means. *See Russell v. City of Milwaukee, 338 F.3d 662, 666 (7th Cir. 2003)* (court is not obligated to disregard paper for lack of certificate of service if it finds by other evidence that paper was, in fact, served on parties).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 5.20 -5.21*, *5.30*.
- *Federal Litigation Guide PP 2.65*, *2.66*.
- *Bender's Federal Practice Forms* Form Nos. 5:1-5:5.
- *Fed. R. Civ. P. 5(d)* (filing and service).

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1-1 Moore's AnswerGuide: Fed Civil Motion Practice § 1.11

§ 1.11 Adhering to Local Rules Governing Electronic Filings

[1] Determining Standards for Electronic Filing

A court may, by local rule, permit or require papers to be filed by electronic means. *See Fed. R. Civ. P. 5(d)(3)*. When electronic filing is mandatory, rather than simply permitted as an alternative, local rules must allow for reasonable exceptions in order to avoid imposing any unnecessary hardship. *See Fed. R. Civ. P. 5(d)(3)*; *Fed. R. Civ. P. 5*, advisory committee note of 2006 (local rules will facilitate gradual convergence on uniform exceptions). Furthermore, *Fed. R. Civ. P. 5(d)(3)* contemplates that electronic filing systems adopted by courts in their local rules should be equal to paper filing systems in at least the following matters:

> 1. A declaration under penalty of perjury or affidavit that is filed electronically under an appropriate local rule should be accorded the same weight as a physically filed declaration; and
>
> 2. Public access to electronically filed documents should be governed by the same standards as physically filed documents.

See Fed. R. Civ. P. 5(d)(3), advisory committee note of 1996.

Although participation in electronic case filing was initially subject to the parties' consent, the trend is clearly toward making participation in the electronic filing and service regime mandatory, especially because *Fed. R. Civ. P. 5* was amended in December 2006 to permit district courts to adopt local rules requiring mandatory participation. *See*, *e.g.*, *Fed. R. Civ. P. 5(d)(3)* (local rules may require electronic filing); N.D. Ohio L.R. 5.1(c) ("The Court requires attorneys to receive notice of filings electronically and to file documents electronically, absent a showing of good cause, unless otherwise excused by the rules, procedures or Orders of the Court."); E.D.N.Y. Admin. Order 2004-08 (June 22, 2004) (all civil and criminal cases must be filed electronically, only pro se cases automatically excluded). A district court's local rule may require filing by electronic means only if reasonable exceptions are allowed. *See Fed. R. Civ. P. 5(d)(3)*. Nevertheless, a party claiming an exemption typically bears the burden of proof. *See* E.D.N.Y. CM/ECF User's Guide, p. 2 (Sept. 2005) ("Requests by attorneys for an exemption to the mandatory policy will be considered for good cause hardship reasons only").

A paper filed electronically in compliance with local rules constitutes a written paper for purposes of the Federal Rules. *See Fed. R. Civ. P. 5(d)(3)*. Many district courts have adopted local rules, standing orders, or administrative orders governing electronic filing. *See*, *e.g.*, N.D. Ohio L.R. 5.1, 16.3(b)(2)(B); D.N.M. L.R. 5.5, 5.6, 83.6. Electronic case filing is often made mandatory by local rule. *See*, *e.g.*, E.D.N.Y. Admin. Order 2004-08, pp. 2, 3 (June 22, 2004) (electronic case filing mandatory for all civil cases other than pro se cases and for all criminal cases; exemption will be granted for good cause hardship reasons only); N.D. Ohio L.R. 5.1(c) (court requires attorneys to receive notice of filings electronically and to file documents electronically, absent a showing of good cause, unless otherwise excused by the rules, procedures or Orders of the court).

Ordinarily, parties may not file sealed documents electronically, for protection of the parties. Some courts still insist that all papers filed under seal use paper filing methods only. *See*, *e.g.*, N.D. Ohio Electronic Filing Policies and Procedures Manual, p. 19 (Nov. 1, 2006) ("Sealed documents will not be filed electronically, but rather manually and served upon the parties in accordance with the applicable Federal Rules of Civil and Criminal Procedure and the Local Rules for filing and service of non-electronic documents."). Other courts have been less rigorous in excluding sealed papers from electronic filing, occasionally permitting sealed matters to be filed electronically, with the clerk ensuring that sealed papers remain unavailable to the public. *See, e.g.*, W.D. Mo. CM/ECF Civil and Criminal Administrative Procedures Manual, Part VI (June 2006) ("The clerk's office will not make electronically available documents that have been sealed or otherwise restricted by court order.").

Local rules or other court orders specify the time--normally at the initial scheduling conference attended by counsel--when the parties may consent to electronic filing of papers with the court. *See*, *e.g.*, N.D. Ohio L.R. 16.3(b)(2)(B) (suitability of case for electronic filing determined at case management conference). The national program to replace existing case-management systems in all federal district courts with the electronic Case Management/Electronic Case Filing System ("CM/ECF") involves both hardware and software that guarantees that every federal district can handle electronic case filings. Although the CM/ECF system is mandatory for case management, courts retain the option to delay or decline participation in the electronic case-filing system. Electronic filing and service through the CM/ECF system is nevertheless expected to be an almost universal norm for practice in federal district courts.

Strategic Point:

Electronic case filing has been authorized not only by local rules, but also by standing orders and administrative orders. *See*, *e.g.*, N.D. Ohio L.R. 5.1, 16.3(b)(2)(B); D.N.M. L.R. 1.5(d), 5.5, 5.6, 83.6; W.D. Mo. En Banc Order (Nov. 5, 1998); E.D.N.Y. Admin. Orders 97-12 (Oct. 23, 1997), 2004-08 (June 22, 2004). Until national standards or rules are promulgated, local rules of court, as well as their standing or administrative orders, will continue to govern virtually all aspects of electronic case filings.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 5.31*.
- *Federal Litigation Guide PP 2.65 -2.67*; *8B.01 -8B.77*.
- *Bender's Federal Practice Forms* Form Nos. 5:21-5:22.
- *Fed. R. Civ. P. 5(d)* (filing papers).

[2] Complying With Electronic Filing Procedures

[a] Formatting Documents

Under the CM/ECF system, the filing party becomes responsible for initial creation of a docket entry. As part of the process of filing a motion, the filing party is required to provide the information that identifies the paper with the correct case and to provide a description of the document being filed by selecting from a series of computer screens listing designated titles and descriptions of motions and other papers (including attachments or exhibits). *See*, *e.g.*, N.D. Ohio ECF User Manual, pp. 16-24 (Feb. 2004) (screen-by-screen illustration of filing process). The electronically created docket is the official court docket record. *See*, *e.g.*, E.D.N.Y. Admin. Order 97-12, Parts 4.c, 4.d. (Oct. 23, 1997).

The Judicial Conference has issued non-binding technical standards for CM/EDF filing, some of which have been selectively incorporated into the local rules and other orders of a number of district courts, such as the following provisions:

1. Requirement that documents be submitted in a Portable Document Format (PDF);

2. Rejection of hyperlinks to outside and unfiled documents;

3. Requirement that document formatting be consistent with any national archiving requirements, and

4. Permission of digital signatures based on a public-private key encryption technology.

Most courts require a log-in number and password identification number to gain access to the electronic case-filing system, which are assigned when an attorney enrolls in the program. Courts that have adopted CM/ECF-based electronic filing and service regimes have included certain protocols in their local rules or other orders to ensure that in cases governed by the electronic filing regime, the filings occur in a uniform way, and often make available or require completion of a tutorial on electronic filing, which involves step-by-step instructions.

Although there are no binding national standards governing electronic case filing, virtually every court that has adopted CM/ECF-based electronic filing requires that documents be converted into a Portable Document Format (PDF) prior to electronic filing. *See*, *e.g.* N.D. Ohio, Electronic Filing User's Manual, p. 7 (Feb. 2004) ("Only PDF (Portable Document Format) documents may be filed with the court using the ECF system."); E.D.N.Y. CM/ECF User's Manual, p. 7 (Sept. 2005) ("Only documents in PDF format may be filed electronically."). According to *Fed. R. Civ. P. 5*, however, only a judge may reject a filing for failure to comply with such a formatting requirement. *See Fed. R. Civ. P. 5*, advisory committee note of 1991. Thus, although papers that do not comply with a court's protocols and format requirements for electronic filings may be unrecognized and unrecognizable by the court's system, unretrievable through that system, and unable to be located by other parties to the case, such papers should nevertheless be considered filed, because the clerk has no more power to refuse to "file" the electronic document than the clerk would have to refuse to file a paper that fails to conform to any other format requirement. *See Fed. R. Civ. P. 5(d)(4)*.

[b] Electronically Filing Attachments and Exhibits

Under most CM/ECF systems, a court will accept attachments and exhibits only if converted into electronic format. *See*, *e.g.*, N.D. Ohio ECF Users Manual, pp. 21, 22 (Feb. 2004) (offering detailed instructions on how to file scanned attachments once they are converted into PDF format). Alternatively, some courts require that only relevant portions of particularly lengthy exhibits or attachments must be scanned. If only part of the document is filed, however, other parties retain the right to submit other portions of the document. In cases in which it is impossible to convert an exhibit to an electronic format, many courts have provisions in the governing rules or orders that permit use of conventional paper filing or special electronic procedures that may be used to deal with unusual situations involving exhibits and attachments. *See*, *e.g.*, N.D. Ohio Electronic Filing Policies and Procedures Manual, p. 15 (June 2006); E.D.N.Y. CM/ECF User's Guide, pp. 9, 15 (Sept. 2005) (exhibits filed in hard copy must have cover sheet containing case

caption, assigned judge and docket number, and label indicating that the documents are "Original Exhibits to [name of ECF filed document]").

[c] Submitting Electronic Signatures and Verifications

Local rules may permit or require motion papers to be signed or verified by electronic means, if the means for electronic filing comply with technical standards, if any, established by the Judicial Conference of the United States. *See Fed. R. Civ. P. 5(d)(3)*. An attorney's log-in and password identification number constitute a signature for all pleadings and papers filed electronically with the court for all purposes, including possible sanctions under *Fed. R. Civ. P. 11*. *See*, *e.g.*, W.D. Mo. CM/ECF Civil and Criminal Administrative Procedures Manual, pp. 15, 16 (September 2008) (Attorney/Participant Registration Form: "Pursuant to *Federal Rule of Civil Procedure 11*, Every pleading, motion, and other paper (except list [sic], schedules, statement or amendments thereto) shall be signed by at least one attorney of record or, if the party is not represented by an attorney, all papers shall be signed by the party. An attorney's/participant's password issued by the court combined with the user's identification, serves as and constitutes the attorney/participant's signature.").

Each court that allows electronic case filing has a local rule or standing order setting out procedures governing signatures. Under some local rules or court orders, documents submitted electronically must also include a signature block with the name of the attorney preceded by a "/s/" notation where the signature would ordinarily appear, and may require that the attorney retain the original, executed document for a set period of time. *See*, *e.g.*, W.D. Mo. CM/ECF Civil and Criminal Administrative Procedures Manual, Part II.G.1. (September 2008) (electronically filed documents must indicate a signature, *e.g.*, "/s/Jane Doe").

When documents such as affidavits must be verified, court rules typically provide either that the attorney retain the original document for a fixed period of time. *See*, *e.g.* W.D. Mo. CM/ECF Civil and Criminal Administrative Procedures Manual, Part II.G.1 (September 2008). ("Documents which must bear original signatures or which require either verification or an unsworn declaration under any rule or statue, shall be filed electronically with originally executed copies maintained by the filer for two (2) years after final resolution of the action, including final disposition of all appeals."). Papers signed by multiple persons who are not participating in the court's electronic case-filing system are handled in various ways by the courts. If multiple persons sign a document, the filing attorney must file the document electronically, indicating each signatory in the filed electronic document with a notations such as "/s/ Jane Doe" for each signatory.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 5.31*.
- *Federal Litigation Guide PP 2.65 -2.67*; *8B.01 -8B.77*.
- *Bender's Federal Practice Forms* Form Nos. 5:21-5:22.
- *Fed. R. Civ. P. 5(d)* (filing papers).

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Chapter 1 PREPARING, FILING, & SERVING MOTIONS
PART D: SERVING MOTIONS

1-1 Moore's AnswerGuide: Fed Civil Motion Practice § 1.12

§ 1.12 Checklist for Serving Motions

☐ Determine when written motion must be served. *See §§ 1.04[3], 1.10 above*.

☐ Determine whether exception applies to service requirement. *See § 1.13[1] below*.

☐ Determine who must receive service:

- ○ Attorney for a represented party unless the court orders service on the party. *See § 1.13[1] below*.
- ○ Party if not represented by counsel. *See § 1.13[1] below*.

☐ Serve affidavits and other documents in support of motion on each party. *See § 1.13[1] below*.

☐ Consult available methods of service and decide on appropriate method. *See § 1.13[2] below*.

- ○ Service by personal delivery. *See § 1.13[2][a] below*.
- ○ Service by mail. *See § 1.13[2][b] below*.
- ○ Electronic service. *See § 1.13[2][c] below*.
- ○ Service by alternative delivery methods if authorized. *See § 1.13[2][d] below*.

☐ File timely certificate of service with court. *See § 1.10[2] above*.

☐ **Search by Topic:** Civil Procedure > Pleading & Practice > Motion Practice

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Chapter 1 PREPARING, FILING, & SERVING MOTIONS
PART D: SERVING MOTIONS

1-1 Moore's AnswerGuide: Fed Civil Motion Practice § 1.13

§ 1.13 Serving Motion Papers

[1] Serving All Required Parties

Parties must serve all written motions, other than *ex parte* motions, on every party that has made an appearance in the action, even in the case of a motion that seeks only relief with respect to one of the parties. *See Fed. R. Civ. P. 5(a)(1)(D)*; *Kirsch v. Smith, 853 F. Supp. 301, 304 (E.D. Wis. 1994)* (plaintiff required to serve all parties to action with motion for TRO); *but see Lehman v. Kornblau*, 206 F.R.D. 345, 346-347 (E.D.N.Y. 2001) (rule does not apply to nonparties). Once an appearance has been made, *Fed. R. Civ. P. 5(a)* entitles the party to receive service of all subsequent pleadings and papers. *See Radack v. Norwegian America Line Agency, Inc., 318 F.2d 538, 541-542 (2d Cir. 1963)* ("once a party makes an appearance in an action, he is entitled to notice of all proceedings taken in that action thereafter").

Along with the written motion, a party must also serve any supporting or opposing papers on every party to the action. *See Fed. R. Civ. P. 5(a)(1), 6(c)(2)*; *Evans v. Miller, 1994 U.S. Dist. LEXIS 17647, at *8 (N.D. Ill. 1994)* (local rule required that evidence in support of motion, in addition to affidavits, be served with the motion).

Exception:
A party in default for complete failure to appear need not be served with motions. *See Fed. R. Civ. P. 5(a)*; *D'Angelo v. Potter, 221 F.R.D. 289, 292 (D. Mass. 2004)* (defendant that has been served with summons and does not appear and answer within required period, is party in default for *Fed. R. Civ. P. 5(a)* purposes); *but see Radack v. Norwegian America Line Agency, Inc., 318 F.2d 538, 541-542 (2d Cir. 1963)* (parties who appeared at early stage of proceedings, but failed to appear at subsequent stages, still entitled to notice of dismissal of action).

If a party is represented by counsel, all parties to the action must serve motion papers on the party's counsel instead of serving the party directly, unless the court orders otherwise. *See Fed. R. Civ. P. 5(b)(1)*. However, a party must directly serve all parties that are not represented by counsel. *See Fed. R. Civ. P. 5(b)(1)*; *McKinney v. Waterman S.S. Corp., 925 F.2d 1, 5 (1st Cir. 1991)* ; *cf. Irwin v. Department of Veterans Affairs, 498 U.S. 89, 93, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990)* (no material difference between service received by attorney or by attorney's office). In a class action, service or notice to the attorney of record constitutes service or notice to the entire class. *See United States v. Pend Oreille Pub. Util. Dist. No.1, 28 F.3d 1544, 1553 (9th Cir. 1994)* (service on class representative constitutes notice to

class).

Exception:

If a party cannot accomplish personal service or service by mail or electronic means on the attorney or unrepresented party because there is no known address for the attorney or the party, service may be made by leaving the papers with the clerk of the court. *See Fed. R. Civ. P. 5(b)(2)(D).*

Warning:

If a party directly serves a represented party, without obtaining prior approval of the court, the service will be invalid, and it may also be a violation of professional ethics. *See Fed. R. Civ. P. 5(b)(1)*; *Bueford v. Resolution Trust Corp., 991 F.2d 481, 487 (8th Cir. 1993)* (notice to party directly when represented by counsel may violate professional ethics).

Strategic Point:

Parties should consult local district court rules and individual judge's standing orders because each district may have additional requirements for serving motions.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 5.03.*
- *Federal Litigation Guide PP 2.60, 2.61.*
- *Fed. R. Civ. P. 5* (serving and filing pleadings and other papers).

[2] Choosing Service Method

Fed. R. Civ. P. 5 authorizes multiple methods of service. In addition to personal delivery of a copy of the document, a party may accomplish service by mailing a copy of the document or by delivering of a copy of the document to the court clerk when the person to be served has no known address. Alternatively, if a party to be served consents in writing to electronic service or if the parties are participating in a court sponsored electronic filing and service regime, a party may be served by whatever electronic means to which that party has consented or that the court has authorized. *See Fed. R. Civ. P. 5(b)(2), 5(d)(3)*; *Klaske v. Spherion Corp., 2006 U.S. Dist. LEXIS 29433, at *5-*8 (E.D. Pa. 2006)* (although plaintiff's counsel claimed he was unaware that defendants attempted electronic service of summary judgment motion, record evidenced counsel's written consent; thus, court refused to set aside entry of summary judgment).

Fed. R. Civ. P. 5(b)(2) provides that service of motion papers must be made by one of the following methods:

1. Handing a copy to the attorney, or the party, if unrepresented;

2. Leaving a copy at the attorney's office, or if the party is unrepresented, at the party's office, with a clerk or other person in charge (*see Irwin v. Department of Veterans Affairs, 498 U.S. 89, 93, 111 S. Ct. 453, 112 L. Ed. 2d 435* (no material difference between service on attorney or on attorney's office);

3. Leaving a copy in a conspicuous place in the office, if no one is in charge;

4. Leaving a copy at the party's dwelling house or usual place of abode with someone of suitable age and

discretion residing there, if there is no office or the office is closed;

5. Mailing a copy to the party's last known address;

6. Leaving a copy with the clerk of the court if the party to be served has no known address;

7. Sending a copy by electronic means, if the party consents in writing;

8. Delivering a copy by any other means that the party consents to in writing; or

9. Using the court's transmission facilities to send a copy by electronic means, if local rules permit and the party has consented in writing.

See Fed. R. Civ. P. 5(b)(2).

Warning:

Service by any method other than delivery by hand (*e.g.*, service by mail) will extend the time for response by three days. *See Fed. R. Civ. P. 6(d).* When a party serves motion papers electronically under *Fed. R. Civ. P. 5(b)(2)(E)*, for example, and the receiving party must or may respond or take some action within a prescribed period after service, three days are added *after* the prescribed period for response would otherwise expire. *See Fed. R. Civ. P. 6(d)*, *Fed. R. Civ. P. 6*, advisory committee note of 2001. *See Flores v. Emerich & Fike, 2006 U.S. Dist. LEXIS 63251, at *20 (E.D. Cal. 2006)* (three additional days are added under *Fed. R. Civ. P. 6(d)* for electronic service).

[a] Serving by Personal Delivery

When making service by personal delivery, the serving party may either hand the papers directly to the attorney or unrepresented party, or it may leave the papers at the attorney's or party's office with a clerk or other person in charge, or, if no one is in charge, the papers may be in a conspicuous place in the office. *See Fed. R. Civ. P. 5(b)(2)(B)(i)*; *Fluor Eng'rs & Constructors v. Southern Pac. Transp. Co., 753 F.2d 444, 449 n.7 (5th Cir. 1985)* (handing attorney copy of paper sufficient when party previously appeared). If the office is closed, or the person to be served has no office, the serving party may leave the papers at the person's dwelling house or usual place of abode with a person of suitable age and discretion who resides there. *See Fed. R. Civ. P. 5(b)(2)(B)(ii).* It is not acceptable service, however, to slip the papers under the office door of an attorney whose office is closed. *See Sinett Inc. v. Blairex Laboratories, Inc., 909 F.2d 253, 254 (7th Cir. 1990)* (despite deadline for service of motion for new trial looming, slipping papers under door was improper service).

[b] Serving by Mail

Service by mail is accomplished by mailing the paper to the attorney or the unrepresented party at his or her last known address. *See Fed. R. Civ. P. 5(b)(2)(C).* Service need not be by registered or certified mail, or return receipt requested, but is accomplished when the document is deposited, with proper postage affixed, in a U.S. Postal Service mailbox or Post Office. *See Fed. R. Civ. P. 5(b)(2)(C)*; *Theede v. United States DOL, 172 F.3d 1262, 1266 (10th Cir. 1999)* ; *Rivera v. M/T Fossarina, 840 F.2d 152, 155 (1st Cir. 1988)* .

Service by mail is complete when the document is placed in the custody of the U.S. Postal Service or dropped into a post office box, not at the time of receipt. *See Fed. R. Civ. P. 5(b)(2)(C)*; *Rivera v. M/T Fossarina, 840 F.2d 152, 155 (1st Cir. 1988)* ("Service by mail is complete upon mailing ... even if it is not received"). Nonreceipt or nonacceptance of the papers has no effect on the validity of the service. *See Fed. R. Civ. P. 5(b)(2)(C)*; *Russell v. City of Milwaukee,*

338 F.3d 662, 666 (7th Cir. 2003) (critical event in service procedure under *Fed. R. Civ. P. 5* is mailing, not receipt, of papers sought to be served; nonreceipt or nonacceptance has no effect on validity of service); *Dunlap v. Transamerica Occidental Life Ins. Co., 858 F.2d 629, 632 (11th Cir. 1988)* (motion properly mailed constitutes effective service even though not received by plaintiff or counsel). If nonreceipt can be proven, however, it is within the court's discretion to extend any applicable response period pertaining to the served paper. *See Fed. R. Civ. P. 6(b)*; *Russell v. City of Milwaukee, 338 F.3d 662, 666 (7th Cir. 2003)* (nonreceipt of paper may justify court in making finding of excusable neglect on part of intended recipient and permit him or her to take any required action or make any appropriate response out of time).

[c] Using Electronic Service

If the party being served has consented in writing to delivery by electronic means, service may be made electronically. *See Fed. R. Civ. P. 5(b)(2)(E)*. Electronic service is often facilitated through a court-established clearinghouse system. Electronic case-filing systems (Case Management/Electronic Case Filing or CM/ECF) give federal courts the capacity to maintain electronic case files and permit parties to file papers and other documents electronically, as well as to make service by using the court's facilities to transmit all documents filed in a case. *See Fed. R. Civ. P. 5(b)(3)*; *Coppedge v. District of Columbia, 2005 U.S. Dist. LEXIS 7091, at *6 (D.D.C. 2005)* (under D.D.C. L.R. 5.4(b)(6), an attorney or pro se party who obtains CM/ECF password consents to electronic service of all documents, subsequent to original complaint, that are filed by electronic means).

Fed. R. Civ. P. 5(d)(3) specifically authorizes courts to mandate participation in electronic filing and service regimes, as long as reasonable exceptions are also established. *See Fed. R. Civ. P. 5(d)(3)*. These programs are increasingly common and are generally mandatory. As part of the agreement to participate in the program, a party who files a paper electronically generally must also agree to be served electronically. Therefore, a party filing a motion under these programs is required only to notify all parties who are entitled to service that a paper is being filed electronically with the court. The notice of an electronic filing may be sent by e-mail, facsimile, or other means. Once notified, a party can view or download via the internet the electronically filed document, which is stored in the court's computer database. *See*, *e.g.*, W.D. Mo. CM/ECF (June 2006); N.D. Ohio App. B (Jan. 1, 2006).

Service by electronic means is complete upon transmission, which ordinarily occurs when the sender completes the last act that must be performed by the sender, such as when a party sends an e-mail message with the document attached by pressing a computer's "send" key. *See Fed. R. Civ. P. 5(b)(2)(C)*, *(E)*; *Fed. R. Civ. P. 5*, advisory committee note of 2001. Ordinarily, 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. *See Fed. R. Civ. P. 5*, advisory committee note of 2001.

Exception:

If the party making service by electronic means learns that the attempted service did not reach the person to be served, service is not complete. *See Fed. R. Civ. P. 5(b)(2)(E)*. Service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery. *See Fed. R. Civ. P. 5(b)(2)(F)*. In such a case, the person attempting electronic service must either try again or show circumstances that justify dispensing with service. *See Fed. R. Civ. P. 5*, advisory committee note of 2001.

[d] Serving by Alternative Methods

If the party being served has consented in writing to an alternative method of delivery, such as service through the court's transmission facilities or service by facsimile, service may be made by that method of delivery if authorized by local rule. *See Fed. R. Civ. P. 5(b)(2)(E)*, *(b)(3)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 5.04 -5.05*.
- *Federal Litigation Guide P 2.62*.
- *Bender's Federal Practice Forms* Form Nos. 5:1-5:4.
- *Fed. R. Civ. P. 5* (serving and filing pleadings and other papers).
- *Fed. R. Civ. P. 6(d)* (allowing for additional time after certain kinds of service).

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Chapter 1 PREPARING, FILING, & SERVING MOTIONS
PART E: COMPUTING TIME

1-1 Moore's AnswerGuide: Fed Civil Motion Practice § 1.14

§ 1.14 Determining Rules for Computation of Time

[1] Computing Time Under Rule 6(a)

Fed. R. Civ. P. 6(c) sets out some minimum times for service of motions and notices of hearings of motions. Except for those motions that may be heard *ex parte*, a motion and a notice of the hearing of the motion must be served at least 14 days before the time specified for the hearing, unless a different period is fixed by the Rules or by order of the court. *See Fed. R. Civ. P. 6(c)(1)*. Any affidavits in response to a motion may be served not later than seven days before the hearing. *See Fed. R. Civ. P. 6(c)(2)*. Opposing affidavits served or filed after this period need not be accepted or considered by the court; however, the court has discretion to accept late responses. *See Fed. R. Civ. P. 6(c)(2)*; *Orsi v. Kirkwood, 999 F.2d 86, 91 (4th Cir. 1993)* (court may accept late affidavits in its discretion if valid excuse or excusable neglect shown).

Fed. R. Civ. P. 6(a) prescribes the following rules for computing the advance notice required for motions:

1. Exclude the day on which the moving papers are served;

2. Count every day including intermediate Saturdays, Sundays, and legal holidays;

3. Include the last day of the notice period, *unless* it is a Saturday, Sunday, legal holiday, or--if the act requires filing a paper in court--a day on which weather or other conditions make the clerk's office inaccessible; and

4. When the last day is excluded, the period is automatically extended until the next day that is not a Saturday, Sunday, legal holiday, or the next day on which the clerk's office is accessible.

See Fed. R. Civ. P. 6(a)(1).

Legal holidays include New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, the Congress, or the state where the district court is located. *See Fed. R. Civ. P.*

6(a)(6).

Strategic Point:

A legal holiday may include a day that is a holiday according to state law, even if the clerk's offices of the federal district courts located in that state are open for business on that day. *See Environmental Defense Fund v. Thomas, 657 F. Supp. 302, 306-307 (D.D.C. 1987)* , *aff'd sub nom. Environmental Defense Fund v. Reilly, 909 F.2d 1497 (D.C. Cir. 1990)* (90-day EPA response period ended on Sunday and following day was Inauguration Day, a legal holiday in District of Columbia, so period was extended until Tuesday).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 5.32*, *6.04 -6.05*, 6.21[5], [7].
- *Bender's Federal Practice Forms* Form No. 6:50.
- *Fed. R. Civ. P. 6* (computing time)

[2] Extending or Shortening Notice Period

The 14-day notice period specified by *Fed. R. Civ. P. 6(c)* for most written motions may be either extended or shortened. If service is made by any of the following methods, the time to respond will be extended by three days:

1. Mail;

2. To the court clerk, based on no known address; or

3. Electronic means, with written consent.

See Fed. R. Civ. P. 5(b)(2)(C)-(F), *6(d).*

The automatic three-day extension is three calendar days, not three business days. *See*, *e.g.*, *IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993)* .

The minimum and maximum time periods for noticing motions and filing responses do not operate if the court sets a different time by court order. The rule makes it plain that the parties may ask the court to change the notice period and response times for motions, and parties may ask the court to do so for good cause. A change in the notice and response times may be made on *ex parte* application. *See Fed. R. Civ. P. 6(c)(1)(C).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 6.06*, 6.21[5], [7].
- *Federal Litigation Guide PP 2.32[2]*, *[3]*, *2.50 -2.53*.
- *Bender's Federal Practice Forms* Form Nos. 6:1, 6:10, 6:12, 6:41, 6:50.

- *Fed. R. Civ. P. 6* (computing and extending time).

[3] Determining Exceptions to Rule 6(c)

The 14-day notice period is inapplicable when a different notice provision is specifically established by a more specific Federal Rule. *See Fed. R. Civ. P. 6(c)(1)(B)*. Therefore, the following rules are not subject to the 14-day notice period of *Fed. R. Civ. P. 6(c)(1)*:

1. *Fed. R. Civ. P. 65(b)(4)* requires only two days' notice, or shorter notice as set by the court, when moving to dissolve a temporary restraining order that was granted without notice to the restrained party. *See Fed. R. Civ. P. 65(b)(4)*; and

2. *Fed. R. Civ. P. 55(b)(2)* requires that a motion to obtain a default judgment against a party that has appeared in the action be served on that party at least seven days prior to the hearing on the motion. *See Fed. R. Civ. P. 55(b)(2)*.

More commonly, the 14-day period for notice of motions is superseded by local rules setting notice periods considerably longer than 14 days for motions. *Fed. R. Civ. P. 6(c)(1)(C)* also allows the 14-day notice period to be changed by court order, and a party may make an *ex parte* application for such a court order by showing good cause. *See Fed. R. Civ. P. 6(c)(1)(C)*; *Anderson v. Davila, 125 F.3d 148, 156-157 (3d Cir. 1997)* (good cause shown to shorten notice period for hearing on injunction due to seriousness of allegations).

The court may shorten the advance notice otherwise required for a motion. A party may, for good cause, apply *ex parte* for an order setting a different time. *See Fed. R. Civ. P. 6(c)(1)(C)*. In addition, the parties may shorten the notice period by stipulation.

Warning:

Counsel making motions should not rely solely on provisions of *Fed. R. Civ. P. 6(c)(1)* for determining the amount of notice given for a motion, but should also review: (1) the Federal Rule governing that particular type of motion; (2) all local rules; (3) all standing orders of the judge to whom the case is assigned, and (4) any particular order that might have been made in connection with the present, individual motion.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 6.06*, 6.21.
- *Federal Litigation Guide PP 2.32[3]*, *2.52*.
- *Bender's Federal Practice Forms* Form Nos. 6:1, 6:10, 6:12, 6:41, 6:50.
- *Fed. R. Civ. P. 6(c)* (timing for motions, notices of hearing, and affidavits).

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Chapter 1 PREPARING, FILING, & SERVING MOTIONS
PART F: EX PARTE APPLICATIONS

1-1 Moore's AnswerGuide: Fed Civil Motion Practice § 1.15

§ 1.15 Making *Ex Parte* Application

[1] Determining Circumstances Warranting *Ex Parte* Application

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 party may bring a motion before the court *ex parte*, which typically involves contact with the court without the advance knowledge or contemporaneous participation of all other parties.

Parties often bring *ex parte* applications to try to extend the time period within which an act is required or allowed to be done, if the prescribed time period has not yet expired. *See Fed. R. Civ. P. 6(b)(1)(A)*. Other examples of orders that parties frequently seek by bringing *ex parte* motions include the following:

1. Temporary restraining orders, pending the hearing of a motion for preliminary injunctive relief; or

2. Orders extending time to plead or to respond to discovery when the deadline is near.

Ex parte practice occurs on an expedited basis with varying degrees of participation by the responding party. In some districts, local district court rules permit one-sided practice in which the moving party may appear in court with little or no notice to other parties. In other courts, local rules may require a good-faith effort to advise opposing counsel of the date, time, and substance of the proposed *ex parte* application.

Warning:

Parties should be sure to consult the applicable local district court rules and the standing orders of the assigned judge governing procedure for *ex parte* motions, which vary considerably among districts and among individual judges.

[2] Preparing *Ex Parte* Application

An application for *ex parte* relief typically includes the following components:

1. An application;

2. A memorandum of law;

3. Supporting affidavits or declarations; and

4. A proposed form of order.

Papers submitted in support of the application should place particular focus on the reasons justifying immediate relief.

Warning:

A court may deny an *ex parte* motion even when the underlying request is warranted, if the supporting papers do not demonstrate that bypassing the regular noticed motion procedure is necessary.

Because a party may bring an *ex parte* motion without giving notice to the other parties in the proceeding, they are specifically excluded from the service provisions of *Fed. R. Civ. P. 5. See Fed. R. Civ. P. 6(c)(1)(A), 5(a)(1)(D).* Notice of *ex parte* motions thus need not be served on other parties to the action. *See Fed. R. Civ. P. 5(a)(1)(D), 6(c)(1)(A);* *Nunley v. City of Los Angeles, 52 F.3d 792, 794-795 (9th Cir. 1995)* (under Rules 5(a)(1)(D) and 6(c)(1)(A), service of *ex parte* motions is not required); *Welch v. Folsom, 925 F.2d 666, 669 (3d Cir. 1991)* (federal prisoners' motion for reconsideration was *ex parte* and did not warrant service, since *Fed. R. Civ. P. 5(a)(1)(D)* suggests that motion need not be served if it may be heard *ex parte*). Note, however, that *ex parte* motions must be filed with the court. *See Fed. R. Civ. P. 5(a)(1)(D).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.)* §§ 6.21[5], *7.03.*
- *Federal Litigation Guide P 2.33.*
- *Bender's Federal Practice Forms* Form No. 6:41.
- *Fed. R. Civ. P. 6(c)* (timing for motions).

Moore's AnswerGuide: Federal Civil Motion Practice

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Chapter 1 PREPARING, FILING, & SERVING MOTIONS
PART G: MOTION TO EXTEND TIME

1-1 Moore's AnswerGuide: Fed Civil Motion Practice § 1.16

§ 1.16 Moving for Extension or Enlargement of Time Under Rule 6(b)(1)

A party may request an extension--also called an enlargement by some courts--when it needs additional time to act beyond the period of time fixed by the Federal Rules, court order, local district court rule, or notice of motion. *See Fed. R. Civ. P. 6(b)(1)*. If a party makes a request to extend time before the original time or its extension expires, *Fed. R. Civ. P. 6(b)* provides that the court may grant the request without motion or notice. *See Fed. R. Civ. P. 6(b)(1)(A)*. After the time has expired, a request to extend time must be made by motion. The court may grant the motion if the party failed to act because of excusable neglect, determined by reference to a four-part test taking into account all relevant circumstances surrounding the party's omission. *See Fed. R. Civ. P. 6(b)(1)(B)*; *Pioneer Inv. Serv. Co v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 395, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993)* .

Strategic Point:

Parties may stipulate to an enlargement of time; however, the stipulation must be approved by the court. *See In re Sonoma V, 703 F.2d 429, 431-432 (9th Cir. 1983)* (parties may not agree to enlargement of time under *Fed. R. Civ. P. 6(b)* without court approval (citing **Moore's**)); D. Conn. L.R. 7(b)(1) (agreement of counsel as to any extension of time does not of itself extend any time limitation or provide good cause for failing to comply with a deadline established by the Federal Rules of Civil Procedure, the local rules, or the court).

[1] Determining Scope of Rule 6(b)(1)

Fed. R. Civ. P. 6(b)(2) lists certain time periods provided by other rules that may not be extended under the general extension provision of *Fed. R. Civ. P. 6(b)(1)*. The listed time periods may be extended, if at all, only to the extent permitted by the specific rules establishing those time periods. *See Fed. R. Civ. P. 6(b)(2)*. The time periods specifically excepted from extension by *Fed. R. Civ. P. 6(b)(2)* are the following:

1. The 28-day period after entry of judgment for renewal of a motion for judgment as a matter of law after trial. *See Fed. R. Civ. P. 50(b)*;

2. The 28-day period after the jury has been discharged, when it failed to return a verdict, for a motion to

direct entry of judgment in accordance with a previous motion for judgment as a matter of law. *See Fed. R. Civ. P. 50(b)*;

3. The 28-day period for a motion for a new trial by the party against whom judgment as a matter of law has been rendered. *See Fed. R. Civ. P. 50(d)*;

4. The 28-day period for amended or additional findings or for amendment of the judgment. *See Fed. R. Civ. P. 52(b)*;

5. The 28-day period after entry of judgment for filing a motion for a new trial. *See Fed. R. Civ. P. 59(b)*;

6. The 28-day period after entry of judgment for the trial court to order a new trial on its own initiative. *See Fed. R. Civ. P. 59(d)*;

7. The 28-day period after entry of judgment for filing a motion to alter or amend the judgment. *See Fed. R. Civ. P. 59(e)*; and

8. The one-year time period provided by *Fed. R. Civ. P. 60(c)(1)* for a motion for relief from a judgment, order, or proceeding on any of the first three grounds stated in *Fed. R. Civ. P. 60(b)*. *See Fed. R. Civ. P. 60*.

Strategic Point:

Although these time periods are computed according to the general rules of computation contained in *Fed. R. Civ. P. 6(a)*, because they run from the entry of judgment rather than from the service of a paper, these time periods are not subject to the automatic three-day extension provided by *Fed. R. Civ. P. 6(d)*.

Exception:

Because *Fed. R. Civ. P. 6(b)* applies only to time periods established by the Federal Rules, federal courts may not use *Fed. R. Civ. P. 6(b)* to extend time periods established by statutes. *See Hammons v. International Playtex, Inc., 676 F. Supp. 1114, 1118 (D. Wyo. 1988)* , *vacated and remanded with orders to dismiss by party stipulation*, *872 F.2d 963 (10th Cir. 1989)* (*Fed. R. Civ. P. 6(b)(2)* does not permit federal courts to enlarge time periods established by statute).

[2] Requesting Extension Prior to Expiration of Time Period

If a request for an extension of time is available and the party makes a request 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. *See Fed. R. Civ. P. 6(b)(1)(A)*. A district court will be comparatively liberal in granting a request for an extension of time for cause that is made prior to the expiration of the period.

If an extension is requested before the time period has expired, the court may grant an extension for good cause, and will typically be liberal in granting the request. *See*, *e.g.*, D. Conn. L.R. 7(b)(1) (clerk may grant initial motions for extensions of time of up to 30 days with respect to certain motions); D. Conn. L.R. 7(b)(2) (all other motions for extensions of time must be decided by a judge, and will not be granted except for good cause). *Fed. R. Civ. P. 6* does not specify what constitutes "good cause." Although some sort of reason must be offered for the extension, the court will likely grant the extension unless it has been given some reason to deny it such as the fact that the moving party has been negligent, lacked diligence, acted in bad faith, or abused the privilege of prior extensions. *See Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 583-584 (1st Cir. 1994)* (district court has great leeway for granting or denying enlargements, but court did not abuse its discretion in denying motion when appellants had amended complaint three

times, obtained at least five enlargements, and filed final enlargement request so counsel could go on vacation).

Fed. R. Civ. P. 6(b) states that an extension request made prior to the expiration of the time period may be made with or without motion or notice. *See Fed. R. Civ. P. 6(b)(1)(A)*. Therefore, the requesting party need not file a formal motion for extension or give notice to the opposing party when the request is made. The prudent course, however, is always to file a motion that complies with *Fed. R. Civ. P. 7(b)* when requesting an extension of a time period. *See Fed. R. Civ. P. 7(b)(1)(A)*.

[3] Requesting Extension After Expiration of Time Period

By contrast, after the prescribed time period has expired, a party must make a motion requesting an extension of time. *See Fed. R. Civ. P. 6(b)(1)(B)*; *Smith v. District of Columbia, 430 F.3d 450, 456-457 (D.C. Cir. 2005)* (district court abused discretion in entertaining late motion for summary judgment when no motion to extend deadline for filing summary judgment motions had been made). Thus, unless made during a hearing or trial, the motion must be in writing and must state both the relief sought and the grounds for the relief sought. *See Smith v. District of Columbia, 430 F.3d 450, 456-457 (D.C. Cir. 2005)* (post-deadline motion must contain high degree of formality and precision, putting opposing party on notice that motion is at issue and that response may be made).

The moving party must show cause and demonstrate that the failure to act was the result of excusable neglect, and the motion seeking the extension must state the specific reasons for the request and include facts to support the assertion of excusable neglect. It is not enough merely to assert that excusable neglect caused the delay. *See United States v. Premises Known as Lots 14, 15, 16, 19, 47, & 48, 682 F. Supp. 288, 290 (E.D.N.C. 1987)* (party seeking extension is required to demonstrate excusable neglect); *Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co., 120 F.R.D. 51, 52-53 (N.D. Ill. 1988)* ("excusable neglect" requires demonstration of good faith by parties seeking enlargement).

A finding of excusable neglect depends on both a demonstration of good faith by the moving party and a reasonable basis for noncompliance within the specified time period. *See Bleitner v. Welborn, 15 F.3d 652, 654 (7th Cir. 1994)* (delay of a few weeks in moving to extend deadline for filing response to habeas corpus petition was brief, nonprejudicial, and not inexcusably neglectful); *Georgopolous v. International Bhd. of Teamsters, 164 F.R.D. 22, 22-23 (S.D.N.Y. 1995)* (excusable neglect shown when defense counsel failed to file timely answer because of good-faith reliance on stipulation between parties for extension that never was submitted to court); *United States v. Premises Known as Lots 14, 15, 16, 19, 47, & 48, 682 F. Supp. 288, 290 (E.D.N.C. 1987)* (excusable neglect requires good faith and some reasonable basis for noncompliance).

In determining whether neglect is excusable, the court will take into account all relevant circumstances, including the following:

1. The danger of prejudice to the opposing party;

2. The length of the delay and its potential impact on judicial proceedings;

3. The reason for the delay, including whether it was within the reasonable control of the moving party; and

4. Whether the moving party acted in good faith.

See Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 395, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993) (listing excusable neglect factors); *Nafziger v. McDermott Int'l, Inc., 467 F.3d 514, 522-524 (6th Cir. 2006)* (governing legal standard for excusable neglect determinations requires balancing of five principal factors: (1) danger of

prejudice to opposing party; (2) length of delay and its potential impact on judicial proceedings; (3) reason for delay; (4) whether delay was within reasonable control of moving party; and (5) whether moving party acted in good faith (citing *Pioneer*)); *Raymond v. Ameritech Corp., 442 F.3d 600, 606 (7th Cir. 2006)* (court must take into account all relevant circumstances surrounding party's omission, including factors listed in *Pioneer*).

The burden to show either cause or excusable neglect is on the party seeking the extension. *See Baden v. Craig-Hallum, Inc., 115 F.R.D. 582, 585 (D. Minn. 1987)* (whether before or after expiration of 120-day time period for service pursuant to *Fed. R. Civ. P. 4*, burden to show good cause in *Fed. R. Civ. P. 6(b)* motion is on party who was required to complete service).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 6.06*, 6.21[5], [7].
- *Federal Litigation Guide PP 2.32[2], [3], 2.50 -2.53*.
- *Bender's Federal Practice Forms* Form Nos. 6:1, 6:10, 6:12, 6:41, 6:50.
- *Fed. R. Civ. P. 6(b)* (extending time).

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Chapter 1 PREPARING, FILING, & SERVING MOTIONS
PART H: MOTIONS FOR RECONSIDERATION

1-1 Moore's AnswerGuide: Fed Civil Motion Practice § 1.17

§ 1.17 Contemplating Motion for Reconsideration

[1] Considering Whether Motion for Reconsideration Is Appropriate

Motions for reconsideration are not expressly authorized in federal practice and not technically recognized by the Federal Rules. *See United States v. Emmons, 107 F.3d 762, 764 (10th Cir. 1997)* (federal rules do not recognize motion for reconsideration). Nevertheless, district courts are regarded as possessing an inherent common law power to rescind, reconsider or modify their interlocutory orders. *See City of L.A. v Santa Monica BayKeeper, 254 F.3d 882 (9th Cir. 2001)* (district court's power to rescind, reconsider, or modify interlocutory orders over which it has jurisdiction is derived from common law, not from Federal Rules).

A motion for reconsideration, however, is appropriate only in very limited circumstances, such as when new evidence is discovered, when there has been an intervening change in the controlling law, or if the initial decision was clearly erroneous or manifestly unjust. *See Ellis v. United States, 313 F.3d 636, 647-648 (1st Cir. 2002)* .

Warning:

Many courts have local rules expressly forbidding motions for reconsideration except in extremely limited circumstances. Even when not expressly forbidden, attempts to continue argument on a matter after a court has ruled are, in some circumstances, considered contempt of court. Furthermore, motions for reconsideration may have the effect of antagonizing the judge to whom reconsideration motions are addressed. Therefore, this form of motion should be used with extreme caution.

Warning:

A motion for reconsideration should not be used to revisit issues that have been previously decided. *See Brown v Kinross Gold, U.S.A., 378 F. Supp. 2d 1280, 1288 (D. Nev. 2005)* . The court will not grant the motion unless there is a need to correct a clear error of law or to prevent manifest injustice.

If the court alters its original decision on a motion for reconsideration, its initial order is modified accordingly and the case is controlled by the decision rendered in response to the motion to reconsider. If the court denies reconsideration, or reconsiders but rules that its initial order was correct, the case remains subject to the initial order.

[2] Anticipating Construal of Motion for Reconsideration

Courts will generally interpret an unspecified motion for reconsideration in one of two ways:

1. Courts are likely to treat a motion for reconsideration filed within 10 days after entry of judgment as a motion to alter or amend judgment under *Fed. R. Civ. P. 59(e). See St. Paul Mercury Ins. Co. v. Fair Grounds Corp., 123 F.3d 336, 339 (5th Cir. 1997)* (because Federal Rules do not recognize general motion for reconsideration, timely motion for "reconsideration" will be treated as *Fed. R. Civ. P. 59(e)* motion to alter or amend judgment); *Square D Co. v. Fastrak Softworks, 107 F.3d 448, 450 (7th Cir. 1997)* (motion for "reconsideration" filed within 10 days after entry of district court's order treated as *Fed. R. Civ. P. 59(e)* motion).

2. Alternatively, a motion for reconsideration filed more than 10 days after entry of judgment is treated as a motion seeking relief from judgment under *Fed. R. Civ. P. 60(b). See Hatfield v. Board of County Comm'rs, 52 F.3d 858, 861 (10th Cir. 1995)* (motion filed more than 10 days after entry of judgment is considered under *Fed. R. Civ. P. 60*).

Fed. R. Civ. P. 60(b) explicitly contemplates a motion filed in response to an order. By contrast, *Fed. R. Civ. P. 59(e)*, which was adopted in order to clarify that the district court has the power to rectify its own mistakes in the period immediately following the entry of judgment, encompasses only motions to alter or amend a judgment rather than nonfinal orders. *See White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 450, 102 S. Ct. 1162, 71 L. Ed. 2d 325 (1982)* (district court empowered to rectify its own mistakes in period immediately following entry of judgment). Accordingly, *Fed. R. Civ. P. 60(b)* governs motions filed in response to nonfinal orders as well as judgments, whereas *Fed. R. Civ. P. 59(e)* governs only motions to alter or amend judgments. *See Broadway v. Norris, 193 F.3d 987, 989 (8th Cir. 1999)* ; *United States v. Real Property & Residence Located at Route 1, Box 111, Firetower Rd., 920 F.2d 788, 791 (11th Cir. 1991)* (*Fed. R. Civ. P. 59(e)* governs motions to alter or amend substantive aspect of judgment; *Fed. R. Civ. P. 60(b)* applies to collateral matters).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 59.01 -59.05, 60.01 -60.03.*
- *Federal Litigation Guide PP 45.20, 45.31, 45.39.*
- *Fed. R. Civ. P. 59(e)* (altering or amending judgment).
- *Fed. R. Civ. P. 60(b)* (relief from judgment or order).

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Chapter 1 PREPARING, FILING, & SERVING MOTIONS
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1-1 Moore's AnswerGuide: Fed Civil Motion Practice § 1.18

§ 1.18 Moving for Reconsideration Under Rule 59(e)

Fed. R. Civ. P. 59(e) provides for a motion to alter or amend a judgment involving reconsideration of matters properly encompassed in a decision on the merits. *See Fed. R. Civ. P. 59(e). Fed. R. Civ. P. 59(e)* thus encompasses a wide variety of motions; however, any motion to amend or alter a judgment must seek a substantive alteration of the judgment, rather than a clerical correction. *See United States v. Deutsch, 981 F.2d 299, 300-301 (7th Cir. 1992)* (substantive motion is one that if granted results in substantial alteration in judgment, not just in correction of clerical error or in purely procedural order, such as order granting time extension).

Fed. R. Civ. P. 59(e) authorizes the filing of a written motion to alter or amend a judgment after its entry. A motion to alter or amend a judgment must demonstrate why the court should reconsider its previous decision and set forth facts or law of a strongly convincing nature to induce the court to reverse its earlier decision. *See Intera Corp. v. Henderson, 428 F.3d 605, 611-614 (6th Cir. 2005)* (*Fed. R. Civ. P. 59(e)* motion identifies grounds for motion with sufficient particularity if it includes concise reference to rule or other authority for requested alteration or amendment of judgment); *Dale & Selby Superette & Deli v. United States Dep't of Agric., 838 F. Supp. 1346, 1347-1348 (D. Minn. 1993)* (motion to amend must demonstrate why court should reconsider judgment and set forth facts or law of strongly convincing nature).

District courts have considerable discretion in determining whether to grant or deny a motion to alter or amend. *See In re Prince, 85 F.3d 314, 324 (7th Cir. 1996)* (decision to grant or deny *Fed. R. Civ. P. 59(e)* motion is discretionary); *Lavespere v. Niagara Mach. & Tool Works, 910 F.2d 167, 174 (5th Cir. 1990)* (district courts have considerable, although not unlimited, discretion in deciding whether to reopen case on motion for reconsideration). Such discretion is not limitless, however, and it should be kept in mind that the reconsideration of a previous order is an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources. *See Sussman v. Salem, Saxon & Nielsen, P.A., 153 F.R.D. 689, 694 (M.D. Fla. 1994)* (court has considerable discretion in reconsidering issues; reconsideration is extraordinary remedy to be used sparingly); *Pennsylvania Ins. Guaranty Ass'n v. Trabosh, 812 F. Supp. 522, 524 (E.D. Pa. 1992)* (finality of judgment and conservation of judicial resources require that reconsideration motion should be sparingly granted).

Fed. R. Civ. P. 59 is silent with respect to the grounds for a motion for reconsideration; however, a court will ordinarily grant a motion to alter or amend a judgment only in the presence of one of the following circumstances:

1. To take account of an intervening change in controlling law;

2. To take account of newly discovered evidence;

3. To correct clear legal error; or

4. To prevent manifest injustice.

See EEOC v. Lockheed Martin Corp., 116 F.3d 110, 112 (4th Cir. 1997) (motion to alter or amend may be granted: (1) to accommodate intervening change in law; (2) to account for new evidence not available at trial; (3) to correct clear error of law; or (4) prevent manifest injustice).

A *Fed. R. Civ. P. 59(e)* motion to alter or amend a judgment may not be used to relitigate the same matters already determined by the court. *See Mantle Ranches v. United States Park Serv., 950 F. Supp. 299, 300 (D. Colo. 1997)* (motion for reconsideration does not give losing attorney second bite at apple). Furthermore, a motion to alter or amend generally may not be used to raise arguments, or to present evidence, that could reasonably have been raised or presented before the entry of judgment. *See Uphoff v. Elegant Bath, Ltd., 176 F.3d 399, 410 (7th Cir. 1999)* (*Fed. R. Civ. P. 59(e)* motion may not be used to raise new legal theories that party had ability to address in first instance); *Sault Ste. Marie Tribe of Chippewa Indians v. Engler, 146 F.3d 367, 374 (6th Cir. 1998)* (*Fed. R. Civ. P. 59(e)* motion should not be used to raise arguments that could have been made before judgment was rendered); *Federal Deposit Ins. Corp. v. World University Inc., 978 F.2d 10, 16 (1st Cir. 1992)* (*Fed. R. Civ. P. 59(e)* motion may not be used to argue new legal theory). Finally, a *Fed. R. Civ. P. 59(e)* motion may not be brought on the basis of clerical errors, procedural matters, or an argument that a better case could be presented in a second trial. *See White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 451-452, 102 S. Ct. 1162, 71 L. Ed. 2d 325 (1982)* (*Fed. R. Civ. P. 59(e)* motion only to support reconsideration of matters properly encompassed in decision on merits); *Phelps v. Hamilton, 122 F.3d 1309, 1324 (10th Cir. 1997)* (*Fed. R. Civ. P. 59(e)* motion should be granted only to correct manifest errors of law or to present newly discovered evidence).

Strategic Point:

A motion for reconsideration of an order granting or denying class certification that is filed within the 14-day period for seeking an interlocutory appeal tolls the time for making the application for the discretionary appeal. Thus, an application for appeal will be timely if filed within 14 days after the motion for reconsideration is determined. *See Fed. R. Civ. P. 23(f)*; *Shin v. Cobb County Bd. of Educ., 248 F.3d 1061, 1063-1065 (11th Cir. 2001)* (when motion to reconsider class certification order is filed within 10 days after certification order, 14-day period to file *Fed. R. Civ. P. 23(f)* petition does not start to run until district court rules on motion for reconsideration); *but see McNamara v. Felderhof, 410 F.3d 277, 280-281 (5th Cir. 2005)* (motion to reconsider class certification ruling did not toll 10-day time limit when motion was not timely filed after order denying certification).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 59.01 -59.05.*
- *Federal Litigation Guide P 45.56.*
- *Bender's Federal Practice Forms* Form Nos. 7:451, 59:1-59:15.

- *Fed. R. Civ. P. 59(e)* (altering or amending judgment).

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Chapter 1 PREPARING, FILING, & SERVING MOTIONS
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1-1 Moore's AnswerGuide: Fed Civil Motion Practice § 1.19

§ 1.19 Seeking Correction of Clerical Errors Under Rule 60(a)

[1] Determining Scope of Rule 60(a)

Fed. R. Civ. P. 60(a) enables a court to ensure that its orders are an accurate reflection of the true actions and intent of the court and the parties, by authorizing correction of clerical mistakes in a judgment, order, or other part of the record. *See Fed. R. Civ. P. 60(a). Fed. R. Civ. P. 60(a)* is limited to correcting clerical or mechanical mistakes that cause an order to reflect something other than what was actually decided or what actually transpired. The rule permits correction of clerical mistakes committed by the court, the clerk of the court, a party, or a jury. *See United States v. Kellogg (In re West Tex. Mktg. Corp.), 12 F.3d 497, 503-504 (5th Cir. 1994)* ("A mistake correctable under Rule 60(a) need not be committed by the clerk or the court and Rule 60(a) is even available to correct mistakes by the parties").

A mistake is deemed to be clerical for the purposes of *Fed. R. Civ. P. 60(a)* when it misrepresents the court's intention, in that the record indicates that the court intended to do one thing but, by virtue of a clerical mistake or oversight, did another. Errors that may be corrected under *Fed. R. Civ. P. 60(a)* are generally of one of the following types:

1. An transcription error;

2. A computational error;

3. A simple transposition error;

4. A numerical error affecting a calculation; or

5. A docketing error resulting in the issuance by the court of an erroneous order.

Furthermore, *Fed. R. Civ. P. 60(a)* may also be invoked to resolve an ambiguity in an order so that it will more clearly reflect the court's intent and to ensure that the court's purpose is fully implemented. *See Burton v. Johnson, 975 F.2d 690, 694 (10th Cir. 1992)* .

Fed. R. Civ. P. 60(a) is not limited to clerical errors of commission, but also expressly states that the court has the

power to correct a clerical or other mistake arising from oversight or omission, as long as the omission misrepresents the court's intentions. *See Fed. R. Civ. P. 60(a)*. Resolution of a dispute over the correctability of an error or omission will generally turn on what evidence there is in the record as to the court's actual intent at the time of the original order. *See Harman v. Harper, 7 F.3d 1455, 1457 (9th Cir. 1993)* ("So long as the court's correction was intended to conform to the original intention of the court, the invocation of Rule 60(a) was proper"); *In re Frigitemp Corp., 781 F.2d 324, 328 (2d Cir. 1986)* ("There is no clear indication in the record that when the district court ruled on the Trustee's preference claims, it decided to grant prejudgment interest"). In occasional cases, a statute may establish that an omission is an indisputably clerical mistake.

Fed. R. Civ. P. 60(a) does not authorize a change that would affect the substantive rights of the parties. *See Britt v. Whitmire, 956 F.2d 509, 515 (5th Cir. 1992)* (*Fed. R. Civ. P. 60(a)* does not permit change in summary judgment order to dismiss all instead of some of plaintiff's claims because that change would affect substantive rights, and it was not clear that, at time of original order, trial court intended to grant summary judgment on all claims); *Blanton v. Anzalone, 813 F.2d 1574, 1577 n.2 (9th Cir. 1987)* ("The basic distinction between 'clerical mistakes' and mistakes that cannot be corrected pursuant to Rule 60(a) is that the former consist of 'blunders in execution' whereas that latter consist of instances where the court *changes its mind,* either because it made a legal or factual mistake in making its original determination, or because on second thought is has decided to exercise its discretion in a manner different from the way it was exercised in the original determination.").

[2] Moving for Correction Under Rule 60(a)

A district court may exercise the power conferred by *Fed. R. Civ. P. 60(a)* either on its own motion or on the motion of a party. *See Fed. R. Civ. P. 60(a)* (court may correct mistake "on motion or on its own, with or without notice").

Strategic Point:

Because *Fed. R. Civ. P. 60(a)* specifically authorizes the correction of errors "with or without notice," it is possible that the court could entertain such a motion on an *ex parte* basis, without service on other parties. As a practical matter, however, it is unlikely that any court would agree to hear such a motion on a truly *ex parte* basis.

Timing:

There is no time limit on *Fed. R. Civ. P. 60(a)* relief. A district court may correct a clerical mistake any time except during the pendency of an appeal, even after an appellate court has decided the case. As a result, *Fed. R. Civ. P. 60(a)* relief is strictly confined to those errors that simply misrepresent the court's original intention. *See Warner v. Bay St. Louis, 526 F.2d 1211, 1212 (5th Cir. 1976)* ("To allow a party to correct alleged errors of law at any time by the mechanism of Rule 60(a) would significantly weaken the policy of finality [of judgments] as embodied in the Federal Rules." (citing **Moore's**)).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 60.10 -60.13*.
- *Federal Litigation Guide PP 44.60 -44.62*.
- *Bender's Federal Practice Forms* Form No. 60:1.
- *Fed. R. Civ. P. 60(a)* (correction of judgment or order).

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§ 1.20 Moving for Reconsideration Under Rule 60

[1] Determining Scope of Rule 60(b)

Fed. R. Civ. P. 60(b) enables a court to grant relief from a final order or judgment. *See McCormick v. City of Chicago, 230 F.3d 319, 326-327 n.6 (7th Cir. 2000)* (there is nothing in *Fed. R. Civ. P. 60(b)* or in law to suggest that it applies only to decisions rendered final by entry of judgment under *Fed. R. Civ. P. 58*). *Fed. R. Civ. P. 60(b)* applies to final judgments or orders only. Thus, *Fed. R. Civ. P. 60(b)* does not govern relief from interlocutory orders, with regard to which there is something left for the court to decide after issuing the order. *See Adams v. Lever Bros. Co., 874 F.2d 393, 394 (7th Cir. 1989)* (order dismissing case but giving parties 90 days to reinstate was not final order, although subsequent order denying plaintiff's motion to reinstate action was final order).

Exception:

The motion procedure provided by *Fed. R. Civ. P. 60* for relief from final orders or judgments is not a fundamental right, but may be waived contractually. For example, parties may waive *Fed. R. Civ. P. 60* relief in an agreement to submit a claim to alternative dispute resolution. *See Bledsoe v. Dalkon Shield Claimants Fund (In re A.H. Robins Co.), 112 F.3d 160, 161-163 (4th Cir. 1997)* (Dalkon Shield claimants' voluntary agreement to submit claims to alternative dispute resolution (ADR) included express waiver of right to seek judicial remedies; trial court properly construed that provision as waiving right to seek *Fed. R. Civ. P. 60(b)* relief from ADR outcome).

[2] Moving for Reconsideration Under Rule 60(b)

Fed. R. Civ. P. 60 requires that relief from a judgment or order be sought by means of a duly noticed motion. *See Fed. R. Civ. P. 60(b).*

Fed. R. Civ. P. 60(b) sets forth the following grounds for moving a district court for relief from an order of the court:

1. Mistake, inadvertence, surprise, or excusable neglect;

2. Newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under *Fed. R. Civ. P. 59(b)*;

3. Fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; or

4. Any other reason that justifies relief.

See Fed. R. Civ. P. 60(b)(1). The catch-all provision justifying relief on the basis of "any other reason" is sparingly applied by courts.

The decision as to whether relief should be granted is committed to the sound discretion of the court. *See Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 59 v. Superline Transp. Co., 953 F.2d 17, 19 (1st Cir. 1992)* ("Motions brought under Civil Rule 60(b) are committed to the district court's discretion and denials thereof are reviewed only for an abuse of that discretion").

A motion under *Fed. R. Civ. P. 60(b)* must be made within a reasonable time. With respect to motions predicated on the first three reasons listed above, a reasonable time is limited to no more than one year after the entry of the order. *See Fed. R. Civ. P. 60(c)(1)*. The court lacks power to grant specified motions that are filed beyond this time limit. *See Ackermann v. United States, 340 U.S. 193, 197, 71 S. Ct. 209, 95 L. Ed. 207 (1950)* . The court otherwise has broad discretion in determining whether a motion has been brought within a reasonable time. *See White v. American Airlines, Inc., 915 F.2d 1414, 1425 (10th Cir. 1990)* (district court permissibly concluded that motion filed within the one-year time limit was untimely because it was not filed within a reasonable time). Whether the moving party acted promptly or was dilatory in bringing the motion is a factor that the court is free to weigh in exercising its discretion on the motion. *See American Metals Service Export Co. v. Ahrens Aircraft, Inc., 666 F.2d 718, 720-721 (1st Cir. 1981)* ("we see no abuse of discretion in the court's weighing heavily against defendant its five-month delay in seeking relief").

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 60.21 -60.69.*
- *Federal Litigation Guide PP 45.31, 45.39, 46.01 -46.100.*
- *Bender's Federal Practice Forms* Form Nos. 7:451, 60:10.
- *Fed. R. Civ. P. 60(b)* (relief from judgment or order).

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Chapter 1 PREPARING, FILING, & SERVING MOTIONS
PART I: PETITION TO COMPEL ARBITRATION

1-1 Moore's AnswerGuide: Fed Civil Motion Practice § 1.21

§ 1.21 Moving to Compel Arbitration

Under the Federal Arbitration Act, a party aggrieved by the failure to arbitrate under a written agreement providing for arbitration of disputes, may bring a proceeding in federal district court to compel arbitration. *See 9 U.S.C. §§ 1-14*. Thus, the Federal Arbitration Act serves as a basis for making a motion or application for a district court order requiring arbitration under a private agreement.

Section 4 of the Act provides that a party that is aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition a district court for an order directing that such arbitration proceed in the manner provided for in such agreement. *See 9 U.S.C. § 4*. This section does not, on its own, provide a basis for federal question jurisdiction: there must also exist an independent basis for jurisdiction, such as diversity jurisdiction. *See Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n. 32, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)* . Whether a party is aggrieved by another's failure to arbitrate is a question of fact. *See Dean Witter Reynolds Inc. v. Prouse, 831 F. Supp. 328 (S.D.N.Y. 1993)* . Ordinarily, however, proof that a demand for arbitration has been made and rejected will establish a party's right to proceed in court. If there is no issue as to the making of the arbitration agreement or the failure to comply, the court will order arbitration. If there is an issue, the court must proceed to trial.

Warning:

A party may not be compelled to submit to class arbitration under the Federal Arbitration Act without a contractual basis for concluding that the party agreed class-wide arbitration would be available. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., ___ U.S. ___, 130 S. Ct. 1758, 176 L. Ed. 2d 605, 624 (2010)* .

[1] Formulating Demand for Arbitration

Although Section 4 of the Federal Arbitration Act provides no specific requirements governing the content of a motion to compel arbitration, it is customary for the motion to include the following information:

1. A short description of the dispute to be submitted to arbitration; and

2. The amount of damages sought (if known).

3. If the moving party is free to choose its own arbitrator (as opposed to situations in which an institutional body makes the decision), the motion to compel arbitration should also include the following:

a. A statement that the claimant already has selected its arbitrator;

b. The name, address, and telephone number of the claimant's arbitrator; and

c. A request that the respondent choose its arbitrator and communicate its choice to the claimant in a timely fashion.

Warning:

The rules of some arbitral organizations require that demands for arbitration be written and served in a specific manner and set precise time limits for responding to them.

[2] Filing Demand for Arbitration

A motion to compel arbitration should be brought in the federal district court that, but for the existence of the arbitration agreement, would have jurisdiction over the underlying transaction. *See 9 U.S.C. § 4*; *Prudential-Bache Secur., Inc. v. Fitch, 966 F.2d 981 (5th Cir. 1992)* .

Circuit Split:

Section 4 permits a court to order arbitration only within its own district, even if the parties' agreement calls for arbitration elsewhere. Some courts have interpreted the statute consistently with this provision. *See Texaco, Inc. v. American Trading Transp. Co., 644 F.2d 1152 (5th Cir. 1981)* ; *Econo-Car International, Inc. v. Antilles Car Rentals, Inc., 499 F.2d 1391 (3d Cir. 1974)* . Some courts, however, take the view that arbitration can be compelled in *any* district in which the party resisting arbitration has commenced litigation. *See Purdy v. Monex International Ltd., 867 F.2d 1521 (5th Cir. 1989)* ; *National Iranian Oil Co. v. Ashland Oil, 817 F.2d 326 (5th Cir. 1987)* . Yet other courts have held that arbitration must be compelled at the location specified in the agreement. *See Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH, 585 F.2d 39 (3d Cir. 1978)* ; *Remy Amerique, Inc. v. Touzet Distribution, S.A.R.L., 816 F. Supp. 213 (S.D.N.Y. 1993)* .

Service of a motion under the Federal Arbitration Act follows the same course as motions brought under the Federal Rules. The moving party must allow five days for response. *See 9 U.S.C. § 4*; *Unionmutual Stock Life Ins. Co v. Beneficial Life Ins. Co., 774 F.2d 524 (1st Cir. 1985)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.)* §§ 81.08[1] (applicability of Federal Rules), 102.106[8][a] (diversity jurisdiction), 103.31[6] (federal question jurisdiction), 110.48[2] (venue).
- *Bender's Federal Practice Forms* Form Nos. 81:50, 81:53, 81:55, 81:56.
- *9 U.S.C. §§ 1-14* (Federal Arbitration Act).

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Chapter 2 MOTIONS AFFECTING THE PLEADINGS

1-2 Moore's AnswerGuide: Fed Civil Motion Practice 2.syn

§ 2.syn Synopsis to Chapter 2: MOTIONS AFFECTING THE PLEADINGS

§ 2.01 Procedural Context--Motions Affecting the Pleadings

§ 2.02 Motion for Leave to File Amended Pleading in General

§ 2.03 Relating Amendment Back to Original Pleading for Statute of Limitations Purposes

§ 2.04 Refusing to Grant Leave to Amend Without Providing Reason for Decision Is Abuse of Discretion

§ 2.05 Responding to Opponent's Motion to Amend Is Permissive, Not Required

§ 2.06 Moving for Leave to File Supplemental Pleading

[1] Seeking Leave to File Supplemental Pleading Pursuant to Rule 15(d)

[2] Court Will Consider Some Foman Factors When Deciding Whether to Allow Party to File Supplemental Pleadings

§ 2.07 Moving for More Definite Statement Pursuant to Rule 12(e)

[1] Seeking Clarification of Opponent's Pleadings Pursuant to Rule 12(e)

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§ 2.08 Moving to Strike Opponent's Pleading Pursuant to Rule 12(f)

[1] Striking Pleadings Permitted by Rule 12(f) but Disfavored by Courts

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§ 2.09 Checklist for Moving to Add or Drop Party

§ 2.10 Moving to Add or Drop Party

[1] Seeking to Add Party to Lawsuit Generally

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[1] Impleader Must Be Based on Derivative Liability of Non-Party

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§ 2.13 Moving to Intervene Pursuant to Rule 24

[1] Deciding to Intervene in Lawsuit Pursuant to Rule 24

[2] Filing Application to Intervene in Lawsuit Pursuant to Rule 24; Procedural Requirements

[3] Complying With Timing Requirements for Filing Rule 24 Application to Intervene

[4] Moving to Intervene as of Right

[a] Intervening as of Right Under Federal Statute

[b] Intervening as of Right When No Statutory Basis Exists

[5] Moving for Permissive Intervention Pursuant to Rule 24(b)

§ 2.14 Moving to Substitute Party Pursuant to Rule 25

[1] Understanding Reasons Why Party May Be Substituted Pursuant to Rule 25

[2] Moving to Substitute Party That Has Died During Litigation Pursuant to Rule 25(a)

[a] Complying With Timing and Service Requirements for Rule 25(a) Motion

[b] Moving for Extension of Time Under Rule 6(b) to File Motion for Substitution Based on Death of Party

[3] Moving to Substitute Party That Has Become Incompetent During Litigation

[4] Moving to Substitute Party That Has Transferred Interest Pursuant to Rule 25(c)

[a] Understanding Transfer of Interest

[b] Rule 25(c) Motion Has No Effect on Jurisdiction, Venue, or Substantive Rights

§ 2.15 Moving to Appoint Guardian Ad Litem Pursuant to Rule 17(c)

[1] Understanding Reasons for Appointment of Guardian Ad Litem

[2] Determining Incompetency Before Appointing Guardian Ad Litem

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Chapter 2 MOTIONS AFFECTING THE PLEADINGS
PART A: PROCEDURAL CONTEXT

1-2 Moore's AnswerGuide: Fed Civil Motion Practice § 2.01

§ 2.01 Procedural Context--Motions Affecting the Pleadings

Deciding when to bring a motion affecting the pleadings and determining how best to present that motion are important questions that counsel must consider at an early stage in the litigation. Those decisions can significantly impact the course of the litigation and even the outcome of the case. As soon as possible after the commencement of a lawsuit, counsel should carefully review the Federal Rules governing motions affecting the pleadings, such as motions to bring a new party into the case, drop a party from the case, introduce new facts, claims, or defenses or remove current facts, claims, or defenses from a pleading. Before preparing any motion that would affect the pleadings, counsel should be sure to consult local district court rules and individual judge's rules and standing orders to determine whether additional requirements apply.

If a party seeks to change a pleading it has already filed or to file an additional pleading, counsel may request leave from the court to file an amended pleading or a supplemental pleading. *See §§ 2.02 -2.06 below*.

If a party wishes to attack specific facts, claims, or defenses included in its opponent's pleading, it may file a motion to strike pursuant to *Fed. R. Civ. P. 12(f)*. *See § 2.08 below*. A party may also seek to clarify its opponent's pleading by filing a motion for a more definite statement pursuant to *Fed. R. Civ. P. 12(e)*. *See § 2.07 below*.

A party may bring a nonparty into the case by filing a motion requesting leave from the district court to do any of the following things, depending on the circumstances of the case:

1. File an amended pleading (*see §§ 2.02 -2.05 below*);

2. File a supplemental pleading (*see § 2.06 below*);

3. Implead (*see § 2.12 below*);

4. Intervene (*see § 2.13 below*);

5. Add a party (*see §§ 2.09, 2.10 below*); and

6. Substitute a party (*see § 2.14 below*).

A party that wishes to remove another party from the case may file a motion requesting leave to file an amended pleading, a motion to drop a party, or, under certain circumstances, a motion to substitute a party. *See §§ 2.02 -2.06*, *2.09*, *2.14 below*. Additionally, counsel may request leave to file a motion to appoint a guardian ad litem for a minor or incompetent party. *See § 2.15 below*.

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Chapter 2 MOTIONS AFFECTING THE PLEADINGS
PART B: MOVING FOR LEAVE TO FILE AMENDED OR SUPPLEMENTAL PLEADING

1-2 Moore's AnswerGuide: Fed Civil Motion Practice § 2.02

§ 2.02 Motion for Leave to File Amended Pleading in General

Fed. R. Civ. P. 15 permits a party to amend an original pleading. A party may amend a pleading once without asking the court for leave or the adverse party to consent. However, subsequent amendments are not permitted without first obtaining leave from the court. Thus, if a plaintiff wishes to amend a complaint more than once, plaintiff's counsel must seek leave from the court. A court will grant leave to amend under its discretion if "justice so requires." *Fed. R. Civ. P. 15(a)(2)*. Generally, a district court freely permits parties to amend their pleadings when it finds that the amendments will aid in the presentment of the merits and will not cause prejudice to any party.

Alternatively, a party may amend its pleading by obtaining the consent of the adverse party, which must be in writing in order to be effective. *Fed. R. Civ. P. 15 (a)*. A party may amend a pleading in order to:

1. Correct errors;

2. Add facts discovered during the litigation;

3. Add claims or defenses;

4. Add, substitute, or drop parties; or

5. Conform pleadings to the evidence after trial.

When a party seeks to amend a pleading, it should prepare, serve, and file a document that incorporates the amendments and replaces the prior pleading. Because a complete amended pleading will supersede the previous one, a movant must be careful not to omit any previously pleaded claims or named parties. Any claim alleged in the earlier pleading, but not added to the amended one, will be deemed waived. Similarly, parties accidentally omitted from the amended pleading will not be bound by a later judgment. *See International Controls Corp v. Vesco, 556 F.2d 665, 668 (2d Cir. 1977)* .

Timing:

A party seeking to amend its pleading must be sure to comply with the strict timing requirements set forth in *Fed. R. Civ. P. 15(a)(1)* that permit parties to amend their pleadings only: (1) 21 days after

> serving it; or (2) 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.

Unless the court orders otherwise, a party must file a response to an amended pleading within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later. *Fed. R. Civ. P. 15(a)(3)*. Because this is a relatively brief time period, it is crucial that the responding party review its opponent's amended pleading and act swiftly. If the responding party cannot file a response within this limited time period, the court may extend the response period at the responding party's request or the parties may agree to stipulate to an extension of time. *Fed. R. Civ. P. 15(a)(3)*.

Circuit Split:

Counsel should be aware that, in some jurisdictions, the right to amend may be cut off by dismissal. Both the Seventh Circuit and the Ninth Circuit allow a party to amend its pleading as of right, even after dismissal. *See Mayes v. Leipziger, 729 F.2d 605, 607-608 (9th Cir. 1984)* ; *see also Camp v. Gregory, 67 F.3d 1286, 1289 (7th Cir. 1995)* . By contrast, other circuits have concluded that the plaintiff's right to amend terminates on dismissal of the case. *See, e.g., Acevedo-Villalobos v. Hernandez, 22 F.3d 384, 388 (1st Cir. 1994)* (right to amend terminates after dismissal of complaint absent express grant of leave to amend); *Elfenbein v. Gulf & Western Industries, Inc., 590 F.2d 445, 448 n.1 (2d Cir. 1978)* (plaintiff had right to amend without leave after motion to dismiss was filed; however, the right terminated once motion to dismiss was granted).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 15.01 -15.14*.
- *Federal Litigation Guide PP 1.80*; *1.120*, *1.121*.
- *Bender's Federal Practice Forms* Form Nos. 15:1-15:83.
- *Fed. R. Civ. P. 15(a)*.

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Chapter 2 MOTIONS AFFECTING THE PLEADINGS
PART B: MOVING FOR LEAVE TO FILE AMENDED OR SUPPLEMENTAL PLEADING

1-2 Moore's AnswerGuide: Fed Civil Motion Practice § 2.03

§ 2.03 Relating Amendment Back to Original Pleading for Statute of Limitations Purposes

In some circumstances, the statute of limitations on a particular claim may expire before a party files an amended pleading, but if the claim relates back to the date of the original pleading, it will not be barred despite the expiration of the statute of limitations.

An amendment will relate back to the filing date of the original pleading if the asserted claim or defense arises from the same conduct, transaction, or occurrence set out in the original pleading. *Fed. R. Civ. P. 15(c)*. Alternatively, an amendment that adds or changes parties will relate back within the period for service of process of the original complaint, provided that the new party: (1) has received such notice of the action that it will not be prejudiced in defending on the merits; and (2) has actual or constructive knowledge that, but for a mistake concerning the party's identity, it would have been named in the original pleading. *Fed. R. Civ. P. 15(c)(1)(C)*.

"Mistake" is determined by focusing on the defendant's, rather than the plaintiff's knowledge. That is, the question under Rule 15(c)(1)(C)(ii) is not whether the plaintiff knew or should have known the identity of the proper defendant, but whether the party brought in by the amendment knew or should have known that it would have been named as a defendant but for an error. Information in the plaintiff's possession is relevant only if it bears on the defendant's understanding of whether the plaintiff made a mistake regarding the proper party's identity. *See Krupski v. Costa Crociere S. p. A., ___ U.S. ___, 130 S. Ct. 2485, 177 L. Ed. 2d 48, 57 (2010)* .

The court may apply the state law that establishes the limitations period to determine whether relation back is permissible. *DeRienzo v. Harvard Indus., 357 F.3d 348, 353 (3d Cir. 2004)* ; *Saxton v. ACF Indus., 254 F.3d 959, 962-964 (11th Cir. 2001)* ; *see Fed. R. Civ. P. 15*, committee note of 1991 ("Whatever may be the controlling body of limitations law, if that law affords a more forgiving principle of relation back than the one provided in this rule, it should be available to save the claim").

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 15.19, 15.20.*

- *Federal Litigation Guide P 1.123*.
- *Bender's Federal Practice Forms* Form Nos. 15:1-15:83.
- *Fed. R. Civ. P. 15(c)*.

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Chapter 2 MOTIONS AFFECTING THE PLEADINGS
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1-2 Moore's AnswerGuide: Fed Civil Motion Practice § 2.04

§ 2.04 Refusing to Grant Leave to Amend Without Providing Reason for Decision Is Abuse of Discretion

There is a strong presumption in favor of granting a motion for leave to file an amended pleading. *Eminence Capital, L.L.C. v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003)* . Therefore, the party opposing the amendment has the burden of showing that the court should deny the motion. *See DCD Programs Ltd. v. Leighton, 833 F.2d 183, 187 (9th Cir. 1987)* .

In *Foman v. Davis, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)* , the Supreme Court held that it is an abuse of discretion for a district court to refuse to grant leave without providing a reason justifying its decision. Upon review, if the court's rationale is not readily evident either from its written opinion or the record, an appellate court will most likely reverse the district court's order. Furthermore, as a consequence of *Foman*, a district court must also consider the following factors when determining whether to grant or deny a motion for leave to file an amended pleading:

1. **Movant's undue delay**. A district court will most likely find undue delay, either prejudicial or bad faith, when the movant either knew or should have known the facts or issues contained in the proposed amendment, yet offered no legitimate reason for their exclusion from the earlier pleading. *See In re Fritz Cos. Secs. Litig., 282 F. Supp. 2d 1105, 1110-1111 (N.D. Cal. 2003)* .

2. **Movant's bad faith or dilatory motive.** If a court finds that the movant acted in bad faith by filing its motion, especially if any of the other *Foman* factors are present, it will most likely deny the motion. For example, a court may determine that the movant acted in bad faith by trying to delay the proceedings in an attempt to gain an unfair advantage over an opponent by introducing new matters at the last possible moment. *See Sorosky v. Burroughs Corp., 826 F.2d 794, 805 (9th Cir. 1987)* . A court may also find that a movant acted in bad faith by seeking to add a party defendant for the sole purpose of destroying diversity jurisdiction.

3. **Undue prejudice to opposing party.** Prejudice may occur if, because of the amendment, an opposing party is likely to bear a significant amount of additional expenses or suffer significant delays in the resolution of the dispute. A finding of undue prejudice is more likely to occur when the addition of claims or parties increases the scope and complexity of the action or requires the court to reopen discovery. *See Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990)* .

4. **Futility of amendment.** Unlike the other *Foman* factors, futility by itself can justify the court's denial of a motion for leave to amend. The district court has broad discretion when deciding whether to deny an amendment as futile, especially when the plaintiff has previously been given leave to amend. *See Miller v. Yokohama Tire Corp., 358 F.3d 616, 622 (9th Cir. 2004)* . An amendment is futile if it fails to state a legally sufficient claim or defense and it is inevitable that a claim will suffer defeat. *California v. Neville Chem. Co., 358 F.3d 661, 673-674 (9th Cir. 2004)* .

5. **Repeated failure to cure deficiencies by amendments previously allowed**. While this factor standing alone will not usually cause the district court to deny a motion to amend, the court may certainly factor into its balancing test whether a party previously amended its pleading or otherwise had the opportunity to amend, but neglected to act on that opportunity when it had the chance.

In addition to the *Foman* factors enumerated above, the district court may also consider its ability to manage the case if the amendment is allowed as well as general principles of judicial economy (i.e., how the amendment will affect the use of judicial resources and the impact on the judicial system). *Chitimacha Tribe of Louisiana. v. Harry L. Laws Co., 690 F.2d 1157, 1163 (5th Cir. 1982)* . If the deadline for amending pleadings set in a scheduling order has passed, the court must first determine whether there is good cause for amending the scheduling order before deciding whether amendment of the complaint is proper under *Fed. R. Civ. P. 15(a)*. *Great Northern Ins. Co. v. Ruiz, 688 F. Supp. 2d 1362, 1376 (S.D. Ga. 2010)* (only after determining good cause exists for amending scheduling order does court then decide whether amendment is proper under Rule 15(a)); *see Trim Fit, LLC v. Dickey, 607 F.3d 528, 531 (8th Cir. 2010)* (appellate court found no abuse of discretion in district court's denial of motion to amend scheduling order because opposing party would have been prejudiced by amendment of counterclaim more than 13 months after deadline and only 15 days before trial). One reason for denying leave to amend the scheduling order and, as a consequence, denying leave to amend the pleadings, is prejudice to the opposing party. *See Trim Fit, LLC v. Dickey, 607 F.3d 528, 531 (8th Cir. 2010)* (court may deny motion to amend after scheduling order deadline "based on undue prejudice to the other party").

Strategic Point:

A party asserting that its opponent's amended pleading fails to state a claim for relief may be more likely to succeed on a subsequent *Fed. R. Civ. P. 12(b)(6)* motion than in the context of opposing the adverse party's request for leave to amend based on futility of the amendment. *See Saes Getters S.p.A. v. Aeronex, Inc., 219 F. Supp. 2d 1081, 1086 (S.D. Cal. 2002)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 15.15*.
- *Federal Litigation Guide P 1.122*.
- *Bender's Federal Practice Forms* Form Nos. 15:1-15:83.
- *Fed. R. Civ. P. 15*.

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Chapter 2 MOTIONS AFFECTING THE PLEADINGS
PART B: MOVING FOR LEAVE TO FILE AMENDED OR SUPPLEMENTAL PLEADING

1-2 Moore's AnswerGuide: Fed Civil Motion Practice § 2.05

§ 2.05 Responding to Opponent's Motion to Amend Is Permissive, Not Required

Due process entitles a defendant to notice of the amended pleading and an opportunity to respond. *See Fed. R. Civ. P. 1, 15*; *see also Nelson v. Adams USA Inc., 529 U.S. 460, 465-466, 120 S. Ct. 1579, 146 L. Ed. 2d 530 (2000)* . Although *Fed. R. Civ. P. 15* permits a party to respond to its opponent's amended pleading if the party has already served and has filed an answer to the original complaint, a response is not mandatory. *Fed. R. Civ. P. 15(a)*. Accordingly, a party's failure to serve an amended answer will not waive any affirmative defense asserted in the original answer. *Stanley Works v. Snydergeneral Corp., 781 F. Supp 659, 664-665 (E.D. Cal. 1990)* .

Although no response is required, it can be advantageous for several reasons for a party to amend its original responsive pleading. For example, amending an answer not only ensures that the matters identified in the original answer are still at issue, but it also offers a review of the allegations so that a party may ascertain whether it has fully stated all required denials and applicable affirmative defenses. Furthermore, a defendant may wish to file an amended answer, if the amended complaint changes the theory or scope of the case, or adds new facts that have not yet been admitted or denied. *See § 2.02 above* regarding time requirements for filing a responsive pleading.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 15.17*.
- *Bender's Federal Practice Forms* Form Nos. 15:1-15:83.
- *Fed. R. Civ. P. 1, 15*.

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1-2 Moore's AnswerGuide: Fed Civil Motion Practice § 2.06

§ 2.06 Moving for Leave to File Supplemental Pleading

[1] Seeking Leave to File Supplemental Pleading Pursuant to Rule 15(d)

A party may file a motion for leave to file a supplemental pleading under *Fed. R. Civ. P. 15(d)*. Supplemental pleadings differ from amended pleadings in that supplemental pleadings incorporate transactions or occurrences that have occurred after the filing of an original pleading. Amended pleadings, on the other hand, incorporate events that occurred before the original pleading was filed. Although the allegations in a supplemental pleading must be related to the original pleading, they do not have to arise out of the same occurrence or transaction. *Quaratino v. Tiffany & Co., 71 F.3d 58, 66 (2d Cir. 1995)* .

A party may choose to file a supplemental pleading to accomplish a variety of goals. For instance, a party may use a supplemental pleading to add new claims or defenses, add new parties, add new facts or events, or change the relief requested. *Fed. R. Civ. P. 15(d)*; *Concerned Area Residents for the Env't v. Southview Farm, 834 F. Supp. 1410, 1413 (W.D.N.Y. 1993)* . A court may permit a supplemental pleading even if the original pleading is defective and fails to state a claim for relief or a defense, as long as after-occurring events demonstrate that the plaintiff has a right to relief. *Fed. R. Civ. P. 15(d)*. Moreover, a court may grant a motion for leave to file a supplemental pleading in situations where jurisdiction or venue would be improper if a party were to assert a claim in a separate action.

The filing of a supplementary pleading is not mandatory. Accordingly, a party that chooses not to file a supplemental pleading is not barred by res judicata from pursuing the claims in a later action. *See Fed. R. Civ. P. 15(d)*. A party that chooses to file a motion for supplemental pleadings must move for leave from the court. *Fed. R. Civ. P. 15(d)*. As long as the court has jurisdiction, the court may allow a party to file a supplemental pleading at any stage in the lawsuit. *Novak v. National Broadcasting Co., 724 F. Supp. 141, 145 (S.D.N.Y. 1989)* . The court will also impose a time limit on the filing. *See Fed. R. Civ. P. 15(d)*.

Like an amended pleading, the claims included in a supplemental pleading may relate back to the date of the original complaint if the requirements under *Fed. R. Civ. P. 15(c)* are satisfied, even if the statute of limitations has expired. *See § 2.03 above*. Moreover, a court may allow relation back when the allegations in the supplemental complaint would not justify the commencement of a new action. Conversely, supplemental pleadings that rely on facts that occurred after the expiration of the statute of limitations may not relate back.

Circuit Split:

Some courts have held that the same principles that allow the court to freely grant leave to parties who seek to amend their pleadings also apply to supplemental pleadings. *See, e.g., Quaratino v. Tiffany & Co., 71 F.3d 58, 66 (2d Cir. 1995)* ; *see also §§ 2.02, 2.06 above*. However, the Fifth Circuit has stated that while *Fed. R. Civ. P. 15(a)(2)* provides that courts should freely give leave, *Fed. R. Civ. P. 15(d)* does not. *See Burns v. Exxon Corp., 158 F.3d 336, 343 (5th Cir. 1998)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 15.30*.
- *Federal Litigation Guide PP 1.125, 1.126*.
- *Bender's Federal Practice Forms* Form Nos. 15:100, 15:101.
- *Fed. R. Civ. P. 15(d)*.

[2] Court Will Consider Some *Foman* Factors When Deciding Whether to Allow Party to File Supplemental Pleadings

In determining whether to grant or deny a motion requesting leave to file supplemental pleadings, the court will consider the following factors set forth by the U.S. Supreme Court in *Foman v. Davis, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)* : (1) undue delay; (2) bad faith; (3) dilatory tactics; and (4) undue prejudice to other parties. *See* detailed discussion in *§ 2.04 above*; *see also Sheppard v. River Valley Fitness One, L.P., 2002 U.S. Dist. LEXIS 1947, at *16-*18 (D.N.H. 2002)* .

If the *Foman* factors listed above are found, the court will deny a motion for leave to file supplemental pleading. Moreover, a district court will most likely deny the motion if the events asserted in the proposed pleading did not occur after the original pleading was filed. *See Green v. Kadilac Mortg. Bankers, 936 F. Supp. 108, 117 (S.D.N.Y. 1996)* .

Additionally, the court will generally factor into its balancing test the interests of judicial economy, which generally weigh in favor of granting parties leave to supplement their pleadings. *See Bornholdt v. Brady, 869 F.2d 57, 68 (2d Cir. 1989)* .

A party that wishes to oppose a motion requesting leave to file a supplemental pleading may respond to its opponent's motion only after first obtaining the court's permission. If the court does permit a responsive pleading, it will determine an appropriate time limit for filing the opposition motion. *See Fed. R. Civ. P. 15(d)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 15.30*.
- *Bender's Federal Practice Forms* Form Nos. 15:100, 15:101.
- *Fed. R. Civ. P. 15(d)*.

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Chapter 2 MOTIONS AFFECTING THE PLEADINGS
PART C: MOVING FOR MORE DEFINITE STATEMENT

1-2 Moore's AnswerGuide: Fed Civil Motion Practice § 2.07

§ 2.07 Moving for More Definite Statement Pursuant to Rule 12(e)

[1] Seeking Clarification of Opponent's Pleadings Pursuant to Rule 12(e)

Fed. R. Civ. P. 12(e) authorizes a party to seek clarification of its opponent's pleadings by moving for a more definite statement. *Fed. R. Civ. P. 12(e)* is designed to combat unintelligibility; parties should not misuse it as a substitute for discovery or as a dilatory tactic to postpone filing an answer, or to ascertain the plaintiff's legal theory. *See FRA S.p.A. v. Surg-O-Flex of America, Inc., 415 F. Supp. 421, 427 n.5 (S.D.N.Y. 1976)* . Additionally, if the adverse party's claims are not stated in separate counts, a part may seek further clarity pursuant to *Fed. R. Civ. P. 10*. *See Fed. R. Civ. P. 10*.

A defending party must move for a more definite statement under *Fed. R. Civ. P. 12(e)* before it files an answer to the complaint. If the defending party files other *Fed. R. Civ. P. 12* defenses in response to the complaint but fails to include a *Fed. R. Civ. P. 12(e)* motion for a more definite statement, it will waive its right to make the motion. *See Fed. R. Civ. P. 12(g)*. Conversely, if a pleading is amended by a more definite statement and raises new defenses or objections, the defendant may file a subsequent *Fed. R. Civ. P. 12* motion, provided that the asserted defenses or objections were not available prior to the amendment.

If the court grants the motion, the plaintiff must amend its complaint within 14 days of the court's order to do so. If the plaintiff fails to amend its complaint, the court may strike the pleading or issue any other appropriate order, which could, under certain circumstances, be as severe as dismissal of the action or the imposition of sanctions against the plaintiff for noncompliance.

Parties should bear in mind that motions for a more definite statement are generally disfavored by courts because of the rule that pleadings should be construed liberally in the interests of justice. Accordingly, courts have held that a complaint need only provide fair notice of the claims and assert general allegations to enable the adverse party to answer and prepare for trial. *Tagare v. Nynex Network Sys. Co., 921 F. Supp. 1146, 1153 (S.D.N.Y. 1996)* . As a consequence, courts tend to grant *Fed. R. Civ. P. 12(e)* motions sparingly. *See Oliner v. McBride's Industries, Inc., 106 F.R.D. 14, 17 (S.D.N.Y. 1985)* .

Warning:

In pleading fraud or mistake, the circumstances constituting fraud or mistake must be stated with

particularity. *Fed. R. Civ. P. 9(b)*. The complaint must identify the time, place, and nature of the alleged fraudulent activities, including the content of the misrepresentation. *See Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001)* (dismissal warranted where complainant provided no details of alleged fraudulent statement).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 12.36*.
- *Federal Litigation Guide PP 1.34, 3.140 -3.142*.
- *Bender's Federal Practice Forms* Form Nos. 12:170-12:176.
- *Fed. R. Civ. P. 12(e), (g)*.

[2] Ruling on Motion for More Definite Statement

Fed. R. Civ. P. 12(e) motions for a more definite statement are not only available to plaintiffs; any party may bring a motion for a more definite statement if an adverse party's pleading is so vague or ambiguous that the party cannot reasonably be required to frame a responsive pleading. *See Fed. R. Civ. P. 12(e)*; *see also Gierlinger v. New York State Police, 738 F. Supp. 96, 98 (W.D.N.Y. 1990)* (finding that motion for more definite statement appropriate in order that defendants could formulate answer to complaint).

In ruling on a motion for more definite statement, a court may consider whether the movant already has knowledge of the information it allegedly needs to acquire through further clarification of its opponent's pleading. If a party has general knowledge, but needs more specificity to determine the precise basis for the pleader's claim, the court is more likely to grant a *Fed. R. Civ. P. 12(e)* motion. *See, e.g., Gierlinger v. New York State Police, 738 F. Supp. 96, 98 (W.D.N.Y. 1990)* (in a case featuring multiple defendants, complaint did not explain which defendant was charged with each act); *Precise-Marketing Corp. v. Simpson Paper Co., 1996 U.S. Dist. LEXIS 7337, at *4 (S.D.N.Y. 1996)* (complaint failed to specify which contracts defendant allegedly breached); *Kelly v. L.L. Cool J., 145 F.R.D. 32, 35 (S.D.N.Y. 1992)* (pleading failed to allege whether and when plaintiff registered copyright on disputed work); *Bennett v. Beiersdorf, Inc., 889 F. Supp. 46, 52 (D. Conn. 1995)* (nature of alleged employment contract "completely unclear" from complaint).

On the other hand, if the movant has the ability to file a responsive pleading with its existing knowledge, the court will most likely deny the motion even if the pleading is vague and ambiguous. Furthermore, a district court will tend not to grant a motion for a more definite statement of plaintiff's allegations of damages if plaintiff's complaint merely seeks general damages because plaintiffs, as a general rule, are not required to plead general damages with specificity. *See International Television Productions, Ltd. v. Twentieth Century-Fox Television Div. of Twentieth Century-Fox Film Corp., 622 F. Supp. 1532, 1541 (S.D.N.Y. 1985)* . By contrast, if the plaintiff pleads special damages in a vague or ambiguous manner, a court will most likely grant a motion for a more definite statement as to plaintiff's damages allegations in order to enforce the *Fed. R. Civ. P. 9(g)* specificity requirement. *Fed. R. Civ. P. 9(g)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 12.36*.
- *Federal Litigation Guide PP 3.140 -3.142*.

- *Bender's Federal Practice Forms* Form Nos. 12:170-12:176.
- *Fed. R. Civ. P. 9(g), 12(e).*

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Chapter 2 MOTIONS AFFECTING THE PLEADINGS
PART D: MOVING TO STRIKE PLEADINGS

1-2 Moore's AnswerGuide: Fed Civil Motion Practice § 2.08

§ 2.08 Moving to Strike Opponent's Pleading Pursuant to Rule 12(f)

[1] Striking Pleadings Permitted by Rule 12(f) but Disfavored by Courts

Considered an "extraordinary remedy," a motion to strike an entire pleading is generally disfavored by the courts. *Velez v. Lisi, 164 F.R.D. 165, 166 (S.D.N.Y. 1995)* . However, if a party wishes to remove immaterial, scandalous, or redundant material from its opponent's pleading, a motion to strike may be proper. *Fed. R. Civ. P. 12(f)*. Parties should take note that *Fed. R. Civ. P. 12(f)* may be used only to attack pleadings; motions, briefs, memoranda, objections, or affidavits may not be attacked by a *Fed. R. Civ. P. 12(f)* motion to strike. *See Mayes v. Local 106, Int'l Union of Operating Eng'rs, 1993 U.S. Dist. LEXIS 15142, at *10 (N.D.N.Y. 1993)* . Nevertheless, the district court has inherent power to strike any filed paper that it determines to be abusive or otherwise improper. *In re NASDAQ Market-Makers Antitrust Litig., 164 F.R.D. 346, 349 (S.D.N.Y. 1996)* .

A defending party raising a *Fed. R. Civ. P. 12* defense in a pre-answer motion must join all other *Fed. R. Civ. P. 12* defenses. *Fed. R. Civ. P. 12(g)*. Thus, a defending party must file a *Fed. R. Civ. P. 12(f)* motion to strike along with all of its other *Fed. R. Civ. P. 12* defenses or it will usually waive its right to bring the motion in the future. *FRA S.p.A. v. Surg-O-Flex of America, Inc., 415 F. Supp. 421, 427 n.5 (S.D.N.Y. 1976)* . Nonetheless, the district court may still consider a motion that would otherwise be waived "if doing so seems proper." *Hoppe v. G.D. Searle & Co., 779 F. Supp. 1413, 1421-1422 (S.D.N.Y. 1991)* .

Timing:

A party must bring a *Fed. R. Civ. P. 12(f)* motion to strike: (1) before responding to the offending pleading; or (2) within 21 days after the pleading is served, if a responsive pleading is not permitted. *Fed. R. Civ. P. 12(e)*. However, the district court has the discretion to extend the time in which a party may move to strike. Thus, a defending party may consider requesting an extension from the court if it needs additional time to prepare a satisfactory motion.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 12.37.*

- *Federal Litigation Guide PP 3.150, 3.151.*
- *Bender's Federal Practice Forms* Form Nos. 12:190-12:196.
- *Fed. R. Civ. P. 12(f), (g).*

[2] Moving to Strike Is Proper Under Certain Limited Circumstances

Although a motion to strike is a proper means for attacking the legal insufficiency of any defense, a court will most likely deny a motion to strike if a defense's sufficiency depends on disputed issues of fact or questions of law.

To succeed on a motion to strike under *Fed. R. Civ. P. 12(f)*, the movant must clearly demonstrate that the challenged material "has no bearing on the subject matter of the litigation and that its inclusion will prejudice the defendants." Additionally, a party may move to strike any of the following material from a pleading:

1. A defense that is insufficient as a matter of law;
2. Impertinent or immaterial matter;
3. Scandalous matter; or
4. Redundant matter.

See Fed. R. Civ. P. 12(f).

Upon review, an appellate court will not overturn a district court's ruling on a motion to strike unless it finds an abuse of discretion. An appellate court may also affirm a district court's improper grant of a motion to strike as harmless error if the party that had material stricken from its pleading did not suffer prejudice by the absence of the material.

Circuit Split:

There is some disagreement among the Circuits as to whether a party can move to strike false pleadings under *Fed. R. Civ. P. 12(f)*. For example, the Fifth Circuit has held that it is improper for a district court to grant a motion striking a pleading that was allegedly false. *See, e.g., Boyd v. United States, 861 F.2d 106, 109 (5th Cir. 1988)* . By contrast, other Circuits, such as the Ninth, have held that a district court may grant a party's *Fed. R. Civ. P. 12(f)* motion to strike pleadings containing false allegations. *See Ellingson v. Burlington Northern, Inc., 653 F.2d 1327, 1329-1330 (9th Cir. 1981)* .

A court may grant a party's motion to strike a claim in its opponent's pleading as "redundant" if the same claim is stated repeatedly in the pleading. Moreover, a court may grant a party's motion to strike "impertinent" or "immaterial" allegations from its opponent's pleading if the allegations are neither responsive nor relevant to the issues implicated in the action. Although a court may also grant a party's motion to strike "scandalous" material from a pleading if the material unnecessarily reflects on the moral character of an individual, it will usually deny the motion unless the challenged material is irrelevant and immaterial to the issues in dispute.

Furthermore, the court also has discretion to strike impertinent, immaterial, scandalous, or redundant material sua sponte, especially when it advances the progress of litigation. However, some courts require a showing of prejudice to the defendant before striking allegations from a complaint. *See In re NASDAQ Market-Makers Antitrust Litig., 164 F.R.D. 346, 350 (S.D.N.Y. 1996)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 12.37.*
- *Federal Litigation Guide PP 3.150 -3.151.*
- *Bender's Federal Practice Forms* Form Nos. 12:190-12:196.
- *Fed. R. Civ. P. 12(f).*

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Chapter 2 MOTIONS AFFECTING THE PLEADINGS
PART E: MOVING TO ADD OR DROP PARTY

1-2 Moore's AnswerGuide: Fed Civil Motion Practice § 2.09

§ 2.09 Checklist for Moving to Add or Drop Party

☐ When seeking to add a party to the lawsuit, consider the following:

○ Determine whether or not proposed party is amenable to service. *See § 2.10[1] below*.

○ Draft motion to amend complaint to add party. State party's name and explain reasons for requested joinder. *See § 2.10[1][c] below*.

○ If required or permitted by local district court rule, prepare memorandum of points and authorities in support of motion that cites to pertinent authority in support of argument that joinder is necessary under *Fed. R. Civ. P. 19* or proper under *Fed. R. Civ. P. 20*. *See § 2.10[1][a] below*.

○ File motion papers with the district court in accordance with the Federal Rules and all applicable local district court rules and individual judge's rules and standing orders. *See §§ 1.09 -1.11 above*.

☐ When moving to drop a party from the lawsuit, consider the following:

○ Draft motion to amend complaint to drop party stating reasons why joinder of party is improper. *See § 2.10[2] below*.

○ Be sure to include prayer for relief or, in the alternative, request severance of the claim against the party. *See § 2.10[2] below*.

○ Draft memorandum of points and authorities in support of motion that cites to relevant authority in support of argument that joinder is not necessary under *Fed. R. Civ. P. 19* or is not proper under *Fed. R. Civ. P. 20*. *See § 2.10[2] below*.

○ Draft amended complaint, attach to motion, file motion papers with the district court, and serve on all parties in accordance with the Federal Rules and individual judge's rules and standing orders. *See §§ 1.12*, *1.13 above*; *see also § 2.10[2] below*.

☐ **Search by Topic:** Civil Procedure > Parties

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Chapter 2 MOTIONS AFFECTING THE PLEADINGS
PART E: MOVING TO ADD OR DROP PARTY

1-2 Moore's AnswerGuide: Fed Civil Motion Practice § 2.10

§ 2.10 Moving to Add or Drop Party

[1] Seeking to Add Party to Lawsuit Generally

A party may file a motion under *Fed. R. Civ. P. 19* to compel the joinder of a person that is considered "required" to the action, and the court must order that the person be made a party. *See Fed. R. Civ. P. 19(a)(1), (2).* Furthermore, *Fed. R. Civ. P. 21* gives the district court the power to add or drop a party at any time, on its own initiative, or by motion, on just terms. *See Fed. R. Civ. P. 21.*

In addition, pursuant to *Fed. R. Civ. P. 20*, a party may seek to add to the lawsuit a party that is not required, but is permitted because the claims against the prospective party arise out of the same transaction, occurrence, or series of transactions and occurrences and there is a common question of law or fact. *See Fed. R. Civ. P. 20(a)(1), (2).*

If a plaintiff seeks to add a party before being served with a responsive pleading, a question may arise as to whether the plaintiff may amend its pleading to add the new party as matter of right under *Fed. R. Civ. P. 15(a)(1)* or whether the plaintiff must file a motion requesting that the court exercise its power to add parties pursuant to *Fed. R. Civ. P. 21.* Once a defendant files a responsive pleading, however, the plaintiff needs to file a motion requesting the court to add a party to the lawsuit.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 19.01 -19.09, 20.01 -20.09, 21.01 -21.06.*
- *Federal Litigation Guide PP 4.01 -4.24.*
- *Bender's Federal Practice Forms* Form Nos. 19:1-19:5.
- *Fed. R. Civ. P. 19, 20, 21.*

[a] Joining Required Parties Pursuant to Rule 19

The most common reason why a party would seek to add a new party to the lawsuit is if the prospective party is required under *Fed. R. Civ. P. 19(a)*. Thus, the party must file a motion compelling joinder of the prospective party. Required parties, which formerly were called "necessary" parties prior to the 2007 restyling of the Federal Civil Rules and are still referred to as "necessary" parties in most of the case law, include the following:

1. An absentee needed to grant complete relief to existing parties in the action;

2. Persons needed to assure that the court's judgment as a practical matter does not impair or impede the absentee's ability to protect its interest in subsequent litigation; or

3. 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.

See Fed. R. Civ. P. 19(a).

If a party fails to join an absentee that is required, *Fed. R. Civ. P. 19* mandates that the district court must cure the nonjoinder, which can be accomplished at any time "on just terms" by ordering a compulsory joinder pursuant to *Fed. R. Civ. P. 21*.

The court faces a dilemma, however, when a party that is required to be joined cannot be joined. Joinder is not feasible if the court cannot obtain personal jurisdiction over the absentee, if the absentee's joinder would destroy diversity of citizenship jurisdiction, or if the absentee has a valid objection to venue. Under those circumstances, nonjoinder of a required party cannot be cured, and the court must decide whether, "in equity and good conscience," it should allow the case to proceed with the existing parties or whether it should dismiss it without prejudice. *Fed. R. Civ. P. 19(b)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 19.01 -19.09, 21.01 -21.06.*
- *Federal Litigation Guide PP 4.01 -4.07.*
- *Bender's Federal Practice Forms* Form Nos. 19:1-19:5.
- *Fed. R. Civ. P. 19, 21.*

[b] Ruling on Motion to Add Party; Court Has Broad Discretion

Fed. R. Civ. P. 21 gives the district court broad discretion in determining whether to add a party to an action. *See New York v. Hendrickson Bros., Inc., 840 F.2d 1065, 1082 (2d Cir. 1988)* . The party bringing the motion bears the burden of showing why the court should grant leave to add a party. *See Cresswell v. Sullivan & Cromwell, 922 F.2d 60, 72 (2d Cir. 1990)* . In exercising its discretion, the court must consider principles of fundamental fairness and judicial efficiency. *See German v. Federal Home Loan Mortg. Corp., 896 F. Supp. 1385, 1400 (S.D.N.Y. 1995)* .

Moreover, the court should consider whether the joinder can be made on "just terms." *Fed. R. Civ. P. 21*. Thus, if an order under *Fed. R. Civ. P. 21* would not prejudice any party, the court would be more likely to grant the motion. *Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 838, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989)* (no prejudice when added defendant was aware of commencement of action or when new party asserts claims arising from same transaction or occurrence as plaintiff's claims). Likewise, the court will most likely grant the motion if it finds that a party failed to join another party in order to try to gain a strategic or tactical advantage in the lawsuit. *See National*

Casualty Co. v. Jordache Enters., 848 F. Supp. 1112, 1118 (S.D.N.Y. 1994) (failure to join party was contrived in order to avoid destruction of diversity jurisdiction).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 21.02.*
- *Federal Litigation Guide PP 4.20 -4.24.*
- *Bender's Federal Practice Forms* Form Nos. 19:1-19:5.
- *Fed. R. Civ. P. 21.*

[c] Amending Pleading to Add Party Pursuant to Rule 15

In addition to adding a party under *Fed. R. Civ. P. 21*, a party may amend its pleading to add a new party under *Fed. R. Civ. P. 15*. Generally, the court will also allow a party to make a minor amendment to its pleading under *Fed. R. Civ. P. 15* in order to change the capacity of a party or correct a misnomer.

A party may amend its pleading to add a new party at any stage of the litigation, even after trial, provided that the due process rights of the party affected by the amendment are preserved. Accordingly, a party may amend its pleading to add a new party after trial if the absent party's claims were clearly litigated by consent, or if some new or separate opportunity for litigating the claims by or against the absent party will be provided. Moreover, if an amendment adds a new party after the statute of limitations has run, the amendment may relate back to the date of the original pleading if the requirements of *Fed. R. Civ. P. 15(c)(1)(C)* are met. *See § 2.03 above*.

Counsel should be advised that amending its pleadings by adding a new party should not be misused as a vehicle for making the defendant liable to additional plaintiffs whose claims were not presented and against whom the defendant had no opportunity to defend. Likewise, liability established against one defendant may not be extended to a new defendant merely by amending the pleading.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 15.16[1].*
- *Bender's Federal Practice Forms* Form Nos. 15:1-15:83.
- *Fed. R. Civ. P. 15.*

[2] Moving to Drop Party Pursuant to Rule 21

Fed. R. Civ. P. 21 allows any party, no matter whether it is a plaintiff or defendant, to bring a motion to drop a party from the action. Moreover, *Fed. R. Civ. P. 21* authorizes the district court to drop a party sua sponte at any stage of the action on terms that are "just." *See Fed. R. Civ. P. 21.* The district court has broad discretion in determining whether to drop a party under *Fed. R. Civ. P. 21. New York v. Hendrickson Bros., Inc., 840 F.2d 1065, 1082 (2d Cir. 1988)* . Just as it does when determining whether or not to add a party, when exercising its discretion, a court must adhere to principles of fundamental fairness and judicial efficiency and consider whether dropping a party would cause prejudice any party to the action. *See German v. Federal Home Loan Mortg. Corp., 896 F. Supp. 1385, 1400 (S.D.N.Y. 1995)* ; *see also § 2.10[1][b], above*.

A party may seek to drop another party from the case for various reasons, including a desire to maintain diversity of citizenship jurisdiction. *Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 832-833, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989)* (dropping dispensable nondiverse party). A party may also drop another party in order to cure a misjoinder, which can occur when: (1) a plaintiff structures the case in violation of permissive party joinder; or (2) the claims asserted against a party do not arise out of the same transaction or occurrence or do not present a common question of law or fact. *Glendora v. Malone, 917 F. Supp. 224, 227 (S.D.N.Y. 1996)* .

Strategic Point:

When a party is dropped from a case under *Fed. R. Civ. P. 21*, all claims asserted by or against the dropped party are dismissed without prejudice. Thus, a claim asserted by or against a misjoined party may be refiled as a separate lawsuit. *Michaels Bldg. Co. v. Ameritrust Co., N.A., 848 F.2d 674, 682 (6th Cir. 1988)* . A court may also cure misjoinder by severing all claims involving the misjoined party. As a consequence, the court will retain jurisdiction over the main action and the severed claim will become a separate action, with which the court can proceed. Courts are more likely to sever claims than dismiss them because dismissal could amount to an abuse of discretion if it prejudices substantial rights of a party. *Central Appalachian Coal Co. v. United Mine Workers, 376 F. Supp. 914, 921 (S.D. W. Va. 1974)* .

Warning:

Although many district courts accept motions to drop parties under *Fed. R. Civ. P. 21*, some may consider *Fed. R. Civ. P. 21* inappropriate for moving to drop a party and require parties to file motions to drop parties pursuant to *Fed. R. Civ. P. 15(a)*. *In re Joint Eastern & Southern Dist. Asbestos Litigation, 124 F.R.D. 538, 541-542 (E.D.N.Y. 1989)* . *See also § 2.10[1][c] above*. Accordingly, counsel should be sure to consult local district court rules as well as individual judge's rules and standing orders carefully to determine which of the Federal Rules are applicable in the court where the case is pending.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 15.16[1], 21.03.*
- *Federal Litigation Guide P 4.23.*
- *Bender's Federal Practice Forms* Form Nos. 21:2-21:4, 21:31-21:33.
- *Fed. R. Civ. P. 21.*

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Chapter 2 MOTIONS AFFECTING THE PLEADINGS
PART F: MOVING FOR LEAVE TO IMPLEAD NON-PARTY

1-2 Moore's AnswerGuide: Fed Civil Motion Practice § 2.11

§ 2.11 Checklist for Moving to Implead Non-Party

☐ Defendant may move to implead non-party that is potentially liable to plaintiff for any claim that is sufficiently derivative of or dependent upon the main claim asserted by plaintiff against defendant, based on one of the following theories of liability (*see § 2.12[1] below*):

- ○ Contribution among tortfeasors;
- ○ Indemnity;
- ○ Subrogation; or
- ○ Other derivative liability, including contractual.

☐ Ensure that prospective third-party defendant is subject to personal jurisdiction. *See § 2.12[3] below*.

☐ Determine whether prospective third-party defendant is subject to jurisdiction under federal jurisdictional statute. *See § 2.12[3], below*.

☐ Ensure that district court may exercise subject matter jurisdiction over impleader claim based upon one or more of the following (*see § 2.12[3] below*):

- ○ Diversity jurisdiction;
- ○ Federal question jurisdiction;

- Supplemental jurisdiction.

☐ File motion to implead with the district court, along with accompanying memorandum of points and authorities including citations to relevant authority in support of argument justifying impleader, in accordance with Federal Rules, local district court rules, and individual judge's rules and standing orders. *See §§ 1.09 -1.11 above*.

☐ Serve copies of impleader motion on all parties to the action. Although the prospective third-party defendant is not considered a party and is therefore not entitled to service of the motion, the defendant may wish to serve the prospective third-party defendant as a courtesy.

- If served within 14 days of filing original answer, leave of court is not required.

- If not served with 14 days of filing original answer, request leave of court, and if granted, serve upon all parties to the action.

☐ After court grants motion to implead, serve prospective third-party defendant with third-party summons and complaint in the original action along with judge's order granting motion.

- After third-party defendant has been successfully impleaded, the defendant may consider asserting any other claims against the third-party defendant, regardless whether transactionally related. Furthermore, the original plaintiff may assert any transactionally related claims against the recently impleaded third-party defendant. *See Fed. R. Civ. P. 18(a)*.

☐ **Search by Topic:** Pleading and Practice > Pleadings > Impleader

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Chapter 2 MOTIONS AFFECTING THE PLEADINGS
PART F: MOVING FOR LEAVE TO IMPLEAD NON-PARTY

1-2 Moore's AnswerGuide: Fed Civil Motion Practice § 2.12

§ 2.12 Moving for Leave to Implead Non-Party

[1] Impleader Must Be Based on Derivative Liability of Non-Party

Although it is the plaintiff that usually dictates which parties are brought into a lawsuit, impleader, authorized by *Fed. R. Civ. P. 14*, provides an effective tool for a defendant wishing to bring a third-party complaint against a non-party that is likely to be held liable to the defendant for claims asserted by the plaintiff. *See Fed. R. Civ. P. 14*.

In order for a defendant to succeed on a motion to implead a non-party, the prospective third-party defendant must be potentially liable to the original defendant for all or part of the original plaintiff's claim against the defendant. *See Fed. R. Civ. P. 14(a)*; *see also Kenneth Leventhal & Co. v. Joyner Wholesale Co., 736 F.2d 29, 31 (2d Cir. 1984)* . An impleader claim may extend to any claim that is sufficiently derivative of or dependent on the main claim, such as a contract claim. *International Paving Sys. v. Van-Tulco, Inc., 866 F. Supp. 682, 686-688 (E.D.N.Y. 1994)* . Although a *Fed. R. Civ. P. 14* impleader claim may be based on any theory of derivative liability, some of the most common include:

1. Assertions for contribution among joint tortfeasors. *See, e.g., Resolution Trust Corp. v. Young, 925 F. Supp. 164, 169 (S.D.N.Y. 1996)* ; and

2. Indemnity and subrogation. *See, e.g., Friedman v. Hartmann, 787 F. Supp. 411, 420 (S.D.N.Y. 1992)* ; *St. Paul Fire & Marine Ins. Co. v. United States Lines Co., 258 F.2d 374, 375-376 (2d Cir. 1958)* .

Warning:

Impleader is not proper when the original and third-party claims arise from different contracts. In this situation, the resolution of the third-party claim is not dependent on the resolution of the main claim. *See Unilease Computer Corp. v. Major Computer, Inc., 126 F.R.D. 490, 493 (S.D.N.Y. 1989)* .

Fed. R. Civ. P. 14 does not require the facts and legal issues in the third-party claim to be completely identical to those in the main action. *Anglo Am. Ins. Group, P.L.C. v. CalFed, Inc., 899 F. Supp. 1070, 1076 (S.D.N.Y. 1995)* . In addition, a third-party defendant may be impleaded even if the impleader claim has not yet accrued as long as the third party may become liable for all or part the plaintiff's judgment. *Andrulonis v. United States, 26 F.3d 1224, 1233-1234*

(2d Cir. 1994) .

The court is likely to grant a motion to implead if it will prevent the parties from enduring the hardship and inconvenience of multiple litigation, which may also yield inconsistent results. *See Olympic Corp. v. Societe Generale, 333 F. Supp. 121 (S.D.N.Y. 1971)* , *aff'd in part and rev'd in part, 462 F.2d 376 (2d Cir. 1972)* . Impleader is not mandatory, however. Thus, if a defending party fails to implead a third party, or if the court refuses to grant the defendant's *Fed. R. Civ. P. 14* motion, the defendant may still assert its claims by bringing a new action against the third party.

After the defendant has successfully impleaded a third party, it may bring additional claims against the third party pursuant to the permissive claim joinder rule authorized by *Fed. R. Civ. P. 18*, regardless whether the new claims are transactionally related to the plaintiff's claim. *See Fed. R. Civ. P. 18(a)*. Additionally, the original plaintiff is entitled to assert any transactionally related claims against the third-party defendant after the third-party defendant has been properly impleaded.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 14.01 -14.42.*
- *Federal Litigation Guide[Middle dot] PP 1.100-1.107.*
- *Bender's Federal Practice Forms* Form Nos. 14:1-14:4.
- *Fed. R. Civ. P. 14*, *18(a).*

[2] Ruling on Rule 14 Motion to Implead Non-Party

The decision of whether to grant or deny a motion for impleader pursuant to *Fed. R. Civ. P. 14* is left to the sound discretion of the district court, which will generally consider the following factors:

1. Whether the movant deliberately delayed or was derelict in filing its motion;
2. Whether impleader would prejudice the plaintiff or third-party defendant;
3. Whether impleader would delay or unduly complicate the trial of the principal action; and
4. Whether the proposed third-party complaint states a claim on which relief may be granted.

See Anglo Am. Ins. Group, P.L.C. v. CalFed, Inc., 899 F. Supp. 1070, 1075 (S.D.N.Y. 1995) .

The district court may also balance any prejudice to the parties against the interests of judicial economy, which in most cases will outweigh the danger of prejudice. *Hicks v. Long Island R.R., 165 F.R.D. 377, 379 (E.D.N.Y. 1996)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 14.01 -14.42.*
- *Federal Litigation Guide PP 1.100 -1.107.*

- *Bender's Federal Practice Forms* Form Nos. 14:1-14:4.
- *Fed. R. Civ. P. 14, 18(a).*

[3] Complying With Jurisdictional Requirements for Impleading Third-Party Defendant

In order for a non-party to be impleaded into an action, it must be possible for the district court to obtain personal jurisdiction over the prospective third party. Moreover, any claim brought under the impleader rule must satisfy federal subject matter jurisdiction requirements. *Fed. R. Civ. P. 82.* If the impleader claim arises under federal law, jurisdiction is proper under the statute governing federal question jurisdiction. *See 28 U.S.C. § 1331.* Diversity jurisdiction will generally not be affected by impleader because the original plaintiff and third-party defendant are not adverse parties. However, if the plaintiff amends the original complaint to assert a claim against the third-party defendant, diversity could be destroyed. *See Chase Manhattan Bank N.A. v. Aldridge, 906 F. Supp. 866, 868-869 (S.D.N.Y. 1995)* .

The district court may also exercise its supplemental jurisdiction over an impleader claim if the claim is sufficiently related to the main claim over which the court has original jurisdiction. *See 28 U.S.C. § 1367.* However, the district court may decline to exercise supplemental jurisdiction over a claim if: (1) the claim raises a novel or complex issue of state law; (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction; (3) the district court has dismissed all claims over which it had original jurisdiction; or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction. *See 28 U.S.C. § 1367.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 14.40 -14.42.*
- *Bender's Federal Practice Forms* Form Nos. 14:1-14:4.
- *Fed. R. Civ. P. 14, 82.*

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Chapter 2 MOTIONS AFFECTING THE PLEADINGS
PART G: MOVING TO INTERVENE

1-2 Moore's AnswerGuide: Fed Civil Motion Practice § 2.13

§ 2.13 Moving to Intervene Pursuant to Rule 24

[1] Deciding to Intervene in Lawsuit Pursuant to Rule 24

Intervention is a procedural device authorized by *Fed. R. Civ. P. 24* that allows a non-party in an action to become a party to a lawsuit without obtaining the consent of any of the existing parties. *See Fed. R. Civ. P. 24*. The most common reason why a non-party would seek to intervene in an action is if the disposition of the action would likely adversely affect the nonparty's interests if it did not participate in the action, i.e., the doctrines of res judicata, collateral estoppel, or stare decisis could be applied, thereby preventing the party from obtaining relief.

Moreover, a non-party may decide to file a motion to intervene under *Fed. R. Civ. P. 24* if the non-party determines that the existing parties to the action may not adequately represent the non-party's interests, which may include:

1. Interest in particular property or a transaction that is the subject of the action;

2. Interest in documents or other discovery materials in the possession of one of the parties;

3. Interest in the effect of a court's decision with regard to a challenge to a statute, regulation, or other government action; or

4. Public interest.

A non-party may also wish to intervene in a lawsuit if its participation would allow the assertion of a claim or defense to be more effective than an independent suit. Thus, a non-party may find intervention advantageous if:

1. The non-party lacks the resources to bring an independent action;

2. The non-party's claim complements existing claims and can be more effectively asserted in the ongoing case;

3. Two distinct claims will benefit by being tried together;

4. Participation in the litigation provides an opportunity to advance the interests of a public interest group or other association; or

5. The non-party has factual information of data particularly helpful to the desired result, or counsel with special capacities to advance the claim.

Strategic Point:

As an alternative to intervention, a party may file an amicus brief or otherwise assist in the litigation, if feasible.

Generally, intervention is liberally permitted by the courts. *See, e.g., Lipsett v. United States, 37 F.R.D. 549, 552 (S.D.N.Y. 1965)* . After a motion to intervene has been granted, the intervenor is treated as if he or she were an original party. *New York News, Inc. v. Newspaper & Mail Deliverers' Union, 139 F.R.D. 291, 293 (S.D.N.Y. 1991)* .

A district court order granting intervention may not be appealed because it is not a final order. *Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 379, 107 S. Ct. 1177, 94 L. Ed. 2d 389 (1987)* . Conversely, a court order denying intervention may be appealed because it is a final collateral order. *Catanzano by Catanzano v. Wing, 103 F.3d 223, 228, 232 (2d Cir. 1996)* .

[2] Filing Application to Intervene in Lawsuit Pursuant to Rule 24; Procedural Requirements

The non-party seeking to intervene must file an application with the district court that must be served on all existing parties in the action pursuant to *Fed. R. Civ. P. 5. See § 1.13[1] above*. The application must be accompanied by a pleading setting forth the claim or defense for which intervention is sought. *Fed. R. Civ. P. 24(c)*. Furthermore, the applicant should specify whether it is seeking intervention of right, permissive intervention, or either one, i.e., in the alternative. *See Catanzano by Catanzano v. Wing, 103 F.3d 223, 234 (2d Cir. 1996)* . The application must include allegations establishing the court's jurisdiction and briefly state the legal grounds supporting intervention, as well as a detailed legal argument citing to relevant authority in an accompanying memorandum of points and authorities.

Alternatively, the applicant may choose to adopt the plaintiff's complaint in its entirety; thus, filing a separate pleading would not be necessary. *Dalva v. Bailey, 158 F. Supp. 204, 207 (S.D.N.Y. 1957)* . However, if the non-party is seeking to join the action as a defendant, and is therefore attaching an answer to its application, the applicant should respond to all allegations in the complaint and state affirmative defenses and proposed counterclaims or crossclaims.

[3] Complying With Timing Requirements for Filing Rule 24 Application to Intervene

An motion to intervene must be "timely" filed. *Fed. R. Civ. P. 24(a), (b)*. In determining whether a motion has been timely filed pursuant to *Fed. R. Civ. P. 24*, the district court will consider:

1. The length of time applicant knew or should have known of its interest in the action before moving to intervene;

2. If any prejudice to existing parties resulted from movant's delay in filing application to intervene;

3. If prejudice to the applicant would result if the motion were denied; and

4. The presence of unusual circumstances mitigating for or against a finding of timeliness.

See United States v. Pitney Bowes, Inc., 25 F.3d 66, 70 (2d Cir. 1994) .

Notwithstanding the above, the timeliness requirement is flexible. *See United States v. Yonkers Bd. of Education, 801 F.2d 593, 594-597 (2d Cir. 1986)* . Therefore, counsel should determine whether local district court rules and individual judge's standing orders apply to *Fed. R. Civ. P. 24* motions and should adhere strictly to all applicable timing restrictions and filing guidelines, including electronic filing requirements.

[4] Moving to Intervene as of Right

[a] Intervening as of Right Under Federal Statute

Pursuant to *Fed. R. Civ. P. 24(a)*, a party may intervene as of right when:

1. A federal statute confers an unconditional right to intervene in the action, or

2. 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.

See Fed. R. Civ. P. 24(a).

Warning:

Only a federal statute will confer an unconditional right to intervene pursuant to *Fed. R. Civ. P. 24(a)(1)*. Thus, even if a state statute appears to grant a right to intervene, the movant must allege that the court's denial of its motion will impair or impede its applicant's interest in order to satisfy the requirements of *Fed. R. Civ. P. 24*.

The United States may intervene as of right in a private civil rights action, or in a case in which the constitutionality of a federal statute affecting the public interest is at issue. *28 U.S.C. § 2403(a)*; *42 U.S.C. § 2000h-2*. Moreover, various branches of the United States may also intervene in actions. For instance, the Secretary of Labor and the Secretary of the Treasury may intervene in certain actions governed by the Employee Retirement Income Security Act. *29 U.S.C. § 1132(h)*. The Director of Patents may also intervene in certain patent and trademark cases. *35 U.S.C. § 146*.

Similarly, state governments may also intervene in an action when the constitutionality of a state statute is at issue. *Merrill v. Addison, 763 F.2d 80, 82 (2d Cir. 1985)* . Private individuals may also intervene in government suits if permitted by statute. *See, e.g., 5 U.S.C. § 702*; *28 U.S.C. § 2348*; *42 U.S.C. § 4911(b)(1)(B)*.

[b] Intervening as of Right When No Statutory Basis Exists

A party may intervene as of right under *Fed. R. Civ. P. 24* if it can establish that:

1. A motion has been timely filed;

2. The applicant has an interest that relates to property or a transaction that is the subject of the action;

3. The disposition of the action will impair or impede the applicant's interest if intervention is not permitted; and

4. The applicant's interest is not adequately represented by the existing parties.

See Butler, Fitzgerald & Potter v. Sequa Corp., 250 F.3d 171, 176 (2d Cir. 2001) .

With regard to the impairment of interest factor, the applicant must show that its ability to protect its interest will be injured as a practical matter if the court denies the motion. *See, e.g., Washington Elec. Coop. Inc. v. Massachusetts Municipal Wholesale Electric Co., 922 F.2d 92, 98 (2d Cir. 1990)* (doctrine of res judicata or collateral estoppel would prejudice applicant's interest).

The burden of demonstrating inadequacy of representation is minimal; the applicant must only show that its interest may not be adequately represented by the existing parties. *Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10, 92 S. Ct. 630, 30 L. Ed. 2d 686 (1972)* . Although this list is not exhaustive, the court may consider the following factors when deciding whether the existing parties can represent the applicant's interest adequately:

1. Collusion between the representative of the proposed intervenor's interests and an opposing party in the underlying litigation;

2. Adversity of interests between the representative and the proposed intervenor;

3. Possible nonfeasance of the representative; and

4. Incompetence of the representative.

If a governmental entity brings an action on behalf of its citizens, the applicant for intervention must prove that the interest is distinct from that of the public at large and that the interest will not be adequately represented by the government. *United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968, 985 (2d Cir. 1984)* .

If the moving party fails to satisfy any of the above criteria, the court may deny the motion to intervene. However, in exercising its discretion, the court may decide to grant the motion if the applicant possesses special expertise that is likely to aid the court in resolving the dispute. *New York Pub. Interest Research Group, Inc. v. Regents of the University of N.Y., 516 F.2d 350, 352 (2d Cir. 1975)* .

[5] Moving for Permissive Intervention Pursuant to Rule 24(b)

A party may move to intervene in an action pursuant to *Fed. R. Civ. P. 24(b)* if:

1. A federal statute confers a conditional right to intervene in the action; or

2. The applicant's claim or defense and the main action have a common question of law or fact.

See Fed. R. Civ. P. 24(b)(2).

As with intervention as of right, a party may cite to a federal statute as a basis for permissive intervention. *See Fed. R. Civ. P. 24(b)(1)(A)*. Alternatively, a party may succeed on a motion to intervene pursuant to *Fed. R. Civ. P. 24(b)* by demonstrating a common question of either law or fact between the applicant's claim and the underlying action. *See Fed. R. Civ. P. 24(b)(1)(B)*; *see also McNeill v. New York City Housing Authority, 719 F. Supp. 233, 250 (S.D.N.Y. 1989)* . The applicant does not have to show a direct interest in the action. *SEC v. United States Realty & Improvement Co., 310 U.S. 434, 459, 60 S. Ct. 1044, 84 L. Ed. 1293 (1940)* . However, there must be an independent basis for subject matter jurisdiction. *See Davila v. Arlasky, 141 F.R.D. 68, 73 (N.D. Ill. 1991)* .

The district court has broad discretion in deciding whether to grant or deny a motion for permissive intervention. *See New York News, Inc. v. Kheel, 972 F.2d 482, 487 (2d Cir. 1992)* . In making its determination, the court may consider

the following factors:

1. The nature and extent of proposed intervenor's interest;

2. Whether these interests are adequately represented; and

3. Whether the intervention will contribute to a full development of the issues presented for adjudication.

See Sackman v. Liggett Group, 167 F.R.D. 6, 23 (E.D.N.Y. 1996) . Furthermore, the district court should consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. *Fed. R. Civ. P. 24(b)(3)*; *see also United States Postal Service v. Brennan, 579 F.2d 188, 191 (2d Cir. 1978)* (prejudice and undue delay are most important factors in determining whether to grant motion for permissive intervention).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 24.01 -24.24.*
- *Federal Litigation Guide PP 4.30 -4.43.*
- *Bender's Federal Practice Forms* Form Nos. 24:1-24:402.
- *Fed. R. Civ. P. 24.*

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Chapter 2 MOTIONS AFFECTING THE PLEADINGS
PART H: MOVING TO SUBSTITUTE PARTY

1-2 Moore's AnswerGuide: Fed Civil Motion Practice § 2.14

§ 2.14 Moving to Substitute Party Pursuant to Rule 25

[1] Understanding Reasons Why Party May Be Substituted Pursuant to Rule 25

Fed. R. Civ. P. 25 expressly authorizes the parties to a lawsuit to substitute new parties for the following reasons:

1. Death of a party;

2. Incompetency of a party;

3. Transfer of a party's interest; or

4. Death or separation from office of a public official who is a party.

See Fed. R. Civ. P. 25.

[2] Moving to Substitute Party That Has Died During Litigation Pursuant to Rule 25(a)

If a party dies during litigation and the claim is not extinguished against the decedent, any party, including the decedent's successor or representative, may file a motion to substitute the deceased party pursuant to *Fed. R. Civ. P. 25(a)*. The district court will ordinarily grant the motion unless the movant does not file it within 90 days after service of a statement noting the death of the party, in which case the district court must dismiss the action as to the deceased party. *See Fed. R. Civ. P. 25(a)(1)*. For a detailed discussion of timing requirements for filing a motion for substitution pursuant to *Fed. R. Civ. P. 25(a)*, *see § 2.14[2][a], below*.

A motion brought by the decedent's representative must specifically identify the representative, who is usually the deceased party's attorney or an attorney who was subsequently hired by the administrator of the decedent's estate. However, when an administrator has not been named within 90 days of the statement of death on the record, the decedent's attorney of record in the pending action has standing to file a motion for extension of time under *Fed. R. Civ. P. 6* to identify a representative of the decedent. *Kernisant v. City of New York, 225 F.R.D. 422, 427-430 (E.D.N.Y. 2005)* .

The determination of whether a claim survives the death of a party is a function of substantive law and is therefore unaffected by *Fed. R. Civ. P. 25(a)*. *Saylor v. Bastedo, 623 F.2d 230, 238 (2d Cir. 1980)* . In diversity actions, federal courts will apply state law to determine the substantive rights involved and whether a state law claim will survive the party's death. *Knauer v. Johns-Manville Corp., 638 F. Supp. 1369, 1387 (D. Md. 1986)* .

The district court has broad discretion in determining whether to grant a motion for substitution based on the death of a party. Thus, in the exercise of its discretion, a court may deny a motion for substitution if it is made long after the party's death and substitution would be unfair to other parties. *See Fed. R. Civ. P. 25(a)*, advisory committee note of 1963.

A court order denying substitution based on the death of a party is final for purposes of appeal. *Saylor v. Bastedo, 623 F.2d 230, 236 (2d Cir. 1980)* . By contrast, an order granting substitution is not final; an appeal from an interlocutory order may be taken under *28 U.S.C. § 1292(b). See Al-Jundi v. Estate of Rockefeller, 757 F. Supp. 206, 207 (W.D.N.Y. 1990)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 25.01 -25.16.*
- *Federal Litigation Guide P 4.51.*
- *Bender's Federal Practice Forms* Form Nos. 25:1-25:41.
- *Fed. R. Civ. P. 25.*

[a] Complying With Timing and Service Requirements for Rule 25(a) Motion

A party filing a motion for substitution based on the death of a party must comply with the express time restrictions set forth in *Fed. R. Civ. P. 25(a)* which provide that the motion must be filed within 90 days of service of the statement noting the death of the party. *See Fed. R. Civ. P. 25(a)(1)*. If the motion is not filed in a timely manner, the court must dismiss the action as to the deceased party. The 90-day time limit for filing a motion for substitution does not commence unless and until a statement noting death has been served. *See Kaldawy v. Gold Service Movers, Inc., 129 F.R.D. 475, 477 (S.D.N.Y. 1990)* . Therefore, if the statement is not served, there is no strict time limit for bringing the motion to substitute. *See Atkins v. City of Chicago, 547 F.3d 869, 874 (7th Cir. 2008)* (the district court erred by dismissing a case on the ground that motion for substitution of the proper party had not been made within 90 days after service of a statement noting the death of the plaintiff, when the statement had never been formally served on the plaintiff's widow). However, counsel should be forewarned that undue delay could provide grounds for a motion to dismiss for failure to prosecute under *Fed. R. Civ. P. 41(b)*.

Strategic Point:

Any party may move for substitution under *Fed. R. Civ. P. 25(a)* in advance of being served with a statement noting death of the party. *See Fed. R. Civ. P. 25(a)*, advisory committee note of 1963.

Furthermore, *Fed. R. Civ. P. 25* expressly states that a motion for substitution based on the death of a party must be served on all parties to the action pursuant to *Fed. R. Civ. P. 5* and on non-parties pursuant to *Fed. R. Civ. P. 4*. *See Fed. R. Civ. P. 4, 5, 25(a)(3). See § 1.13[1] above.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 25.12 -25.13.*
- *Federal Litigation Guide P 4.51.*
- *Bender's Federal Practice Forms* Form Nos. 25:1-25:41.
- *Fed. R. Civ. P. 25(a)(1).*

[b] Moving for Extension of Time Under Rule 6(b) to File Motion for Substitution Based on Death of Party

Counsel may wish to consider moving for an extension of time under *Fed. R. Civ. P. 6(b)* to file a motion for substitution based on the death of a party. *See Fed. R. Civ. P. 25(a)(1)*, advisory committee note of 1963. *Fed. R. Civ. P. 6* provides that the court may in its discretion extend the time for filing a motion if the movant shows excusable neglect. *Fed. R. Civ. P. 6(b). See § 1.16[3] above.*

The party moving for an extension bears the burden of showing that its failure to move for substitution in a timely manner is excusable. The party must show good faith and some reasonable basis for noncompliance, rather than mere inadvertence. *See Zeidman v. General Acci. Ins. Co., 122 F.R.D. 160, 161-163 (S.D.N.Y. 1988)* . A court is likely to grant an extension of time when the movant shows that its delay in filing the motion was due to circumstances beyond its control. *See, e.g., Kernisant v. City of New York, 225 F.R.D. 422, 430-432 (E.D.N.Y. 2005)* (extension warranted when there was unavoidable delay in appointing administrator of decedent's estate); *Knight v. H.E. Yerkes & Assoc., Inc., 135 F.R.D. 67, 72 (S.D.N.Y. 1991)* (granting extension when plaintiff's widow resided abroad and was unfamiliar with English language, executor was unaware of lawsuit because it was not mentioned in will, and there was temporary lack of assets restricting estate's ability to retain counsel).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 25.13[3].*
- *Federal Litigation Guide P 4.51.*
- *Bender's Federal Practice Forms* Form Nos. 6:10-6:34.
- *Fed. R. Civ. P. 6(b).*
- *Fed. R. Civ. P. 25.*

[3] Moving to Substitute Party That Has Become Incompetent During Litigation

Fed. R. Civ. P. 25(b) authorizes a party to file a motion seeking to substitute a party that has become incompetent during the litigation. *Fed. R. Civ. P. 25(b)* expressly states that the motion for substitution must be served on all parties to the action pursuant to *Fed. R. Civ. P. 5* and on non-parties pursuant to *Fed. R. Civ. P. 4. See Fed. R. Civ. P. 4, 5, 25(b); see also § 1.13[1] above.*

If the court grants the motion, it will permit the action to be continued by or against the incompetent party's representative. In exercising its discretion, the district court may deny a motion if a good reason is shown. For example, the court will most likely not allow a party to be substituted if there is evidence demonstrating that the party to be

substituted is not actually incompetent or if the party's incompetency has not been sufficiently proven. Furthermore, the court is likely to deny a motion for substitution if the moving party fails to identify or serve a proper representative.

Warning:

Fed. R. Civ. P. 25 does not define the term "incompetency" or provide for a determination of competency. Accordingly, state law governs the determination of competency. *Fed. R. Civ. P. 25(b)* is also silent with respect to any other procedural requirements. Thus, counsel should be sure to consult local district court rules and individual judge's applicable rules and standing orders before bringing a *Fed. R. Civ. P. 25(b)* motion.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 25.20.*
- *Federal Litigation Guide P 4.52.*
- *Bender's Federal Practice Forms* Form Nos. 25:50-25:61.
- *Fed. R. Civ. P. 25(b).*

[4] Moving to Substitute Party That Has Transferred Interest Pursuant to Rule 25(c)

[a] Understanding Transfer of Interest

If a party transfers an interest during litigation, the court may allow the action to continue with or against the original party. Alternatively, a court, on a motion to substitute brought by a party pursuant to *Fed. R. Civ. P. 25(c)*, may order that the transferee be substituted into the action. As a third option, the court may also direct the transferee be joined with the original party. *See Fed. R. Civ. P. 25(c)*; *see also Unison Realty Corp. v. RKO Theatres, Inc., 35 F.R.D. 232, 233 (S.D.N.Y. 1964)* . A court may wish to join both the transferee and the original party in the action when both of them retain an interest in the outcome of the action and are real parties in interest. *Federal Deposit Ins. Corp. v. Tisch, 89 F.R.D. 446, 448 (E.D.N.Y. 1981)* .

Courts have broadly applied the term "transfer of interest" to include: (1) corporate acquisition; (2) change in ownership of a financial instrument; and (3) a receiver or trustee in bankruptcy succeeding to the assets and liabilities of the debtor. *See Trombino v. Transit Casualty Co., 110 F.R.D. 139, 147 (D.R.I. 1986)* . However, counsel should keep in mind that *Fed. R. Civ. P. 25(c)* does not permit substitution for the "original party" when the "original party" named in the complaint is a corporation that has ceased to exist. *See Automated Info. Processing v. Genesys Solutions Group, 164 F.R.D. 1, 2 (E.D.N.Y. 1995)* .

Timing:

Fed. R. Civ. P. 25(c) applies only to pending litigation. Therefore, a transfer of interest that forms the basis of a motion to substitute must occur after the commencement of an action. *See Horphag Research v. Consac Indus., 116 F.3d 1450, 1453 (Fed. Cir. 1997)* . Transfers of interest that occur prior to an action must be dealt with by filing a motion to amend a pleading. *Unison Realty Corp. v. RKO Theatres, Inc., 35 F.R.D. 232, 233 (S.D.N.Y. 1964)* . Furthermore, *Fed. R. Civ. P. 25(c)* does not provide any time restrictions for when a party must file the motion. Accordingly, courts have found that a motion to substitute on transfer of interest can be made at any time. *See Air Line Pilots Asso. International v. Texas International Airlines, Inc., 567 F. Supp. 78, 81 (S.D. Tex. 1983)* . Nonetheless, the district court

has the discretion to deny an untimely *Fed. R. Civ. P. 25(c)* motion.

[b] Rule 25(c) Motion Has No Effect on Jurisdiction, Venue, or Substantive Rights

Substitution under *Fed. R. Civ. P. 25(c)* does not affect subject matter jurisdiction even when jurisdiction is based on diversity of citizenship. Thus, the district court will retain jurisdiction over the substituted party, provided that it was properly established over the original party. *See Freeport-McMoRan, Inc. v. K N Energy, Inc., 498 U.S. 426, 428-429, 111 S. Ct. 858, 112 L. Ed. 2d 951 (1991)* . Moreover, substitution under *Fed. R. Civ. P. 25(c)* does not affect venue or personal jurisdiction; nor does it affect substantive rights when the appropriate party is joined to the lawsuit. *See, e.g., ELCA Enters. v. Sisco Equip. Rental & Sales, 53 F.3d 186, 191 (8th Cir. 1995)* ; *Minnesota Mining & Mfg. Co. v. Eco-Chem, Inc., 757 F.2d 1256, 1264 (Fed. Cir. 1985)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 25.30, 25.31.*
- *Federal Litigation Guide P 4.53.*
- *Bender's Federal Practice Forms* Form Nos. 25:70-25:80.
- *Fed. R. Civ. P. 25(c).*

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Chapter 2 MOTIONS AFFECTING THE PLEADINGS
PART I: MOVING TO APPOINT GUARDIAN AD LITEM

1-2 Moore's AnswerGuide: Fed Civil Motion Practice § 2.15

§ 2.15 Moving to Appoint Guardian Ad Litem Pursuant to Rule 17(c)

[1] Understanding Reasons for Appointment of Guardian Ad Litem

Pursuant to *Fed. R. Civ. P. 17(c)*, the court may appoint a guardian ad litem to represent a minor or incompetent person that lacks the capacity to participate as a party to a lawsuit and whose interests are not otherwise being represented. The court may decide, upon motion brought by a party, or sua sponte, to appoint a guardian ad litem even when the person lacking legal capacity already has a general guardian or other lawful representative. *Ad Hoc Committee of Concerned Teacherson behalf of Minor & Under-Age Students etc. v. Greenburgh # 11 Union Free School Dist., 873 F.2d 25, 29-30 (2d Cir. 1989)* (*Fed. R. Civ. P. 17(c)* gives court power to authorize someone other than lawful representative to sue on behalf of minor or incompetent person when representative is unable, unwilling, or refuses to act or has interests that conflict with those of minor or incompetent).

Strategic Point:

Instead of appointing a guardian ad litem, *Fed. R. Civ. P. 17(c)* authorizes the court to permit a "next friend," a relative, teacher, or other individual who is concerned for the welfare of a minor or incompetent person, to sue on that person's behalf.

[2] Determining Incompetency Before Appointing Guardian Ad Litem

Before ruling on a party's motion to appoint a guardian ad litem for an incompetent person pursuant to *Fed. R. Civ. P. 17(c)*, the district court should hold a hearing to determine if the person is in fact incompetent. A full adversary hearing is not required, however, because representation by a guardian ad litem only deprives the party of the right to control the litigation, but it does not prevent the party from having its "day in court." *See Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)* . Due process mandates that the party whose competency is in question must be given notice and an opportunity to be heard. *See Thomas v. Humfield, 916 F.2d 1032, 1033-1034 (5th Cir. 1990)* .

If a district court decides to appoint a guardian sua sponte, it will not be required to conduct a competency hearing absent actual documentation or testimony by a mental health professional, a court of record, or a relevant public agency

regarding the party's competency. *Ferrelli v. River Manor Health Care Ctr., 323 F.3d 196, 200-203 (2d Cir. 2003)* .

Fed. R. Civ. P. 17 does not provide whether federal or state law should be the governing authority in the court's determination of competency. However, courts have found that state law, the law of the party's domicile specifically, should govern an incompetency determination. Moreover, courts have held that, when determining competency, the district court may consider any other factors consistent with due process. *See Thomas v. Humfield, 916 F.2d 1032, 1035 (5th Cir. 1990)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 17.22 -17.25.*
- *Bender's Federal Practice Forms* Form Nos. 17:50-17:81.
- *Fed. R. Civ. P. 17(c).*

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Chapter 3 DISMISSALS

1-3 Moore's AnswerGuide: Fed Civil Motion Practice 3.syn

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[b] Challenging Jurisdiction Based on Diversity of Citizenship

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[d] Standing, Ripeness, Mootness

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Chapter 3 DISMISSALS
PART A: PROCEDURAL CONTEXT

1-3 Moore's AnswerGuide: Fed Civil Motion Practice § 3.01

§ 3.01 Procedural Context--Dismissals

Fed. R. Civ. P. 12 expressly allows a defendant to raise specific defenses by filing a motion to dismiss prior to answering the complaint. Listed as subsections (b)(1) through (7) of *Fed. R. Civ. P. 12*, the following defenses may be grounds for a Rule 12(b) motion: (1) lack of subject matter jurisdiction; (2) lack of personal jurisdiction; (3) improper venue; (4) insufficient process; (5) insufficient service of process; (6) failure to state a claim on which relief can be granted; and (7) failure to join an indispensable party under *Fed. R. Civ. P. 19*.

At any time, the parties or the court may raise the defense of lack of subject matter jurisdiction, which cannot be waived. Thus, defenses going to the court's lack of subject matter jurisdiction, such as the plaintiff's lack of standing, lack of ripeness for adjudication, and mootness, can be raised either at the pleading stage, on a motion for summary judgment, at trial, or on appeal.

Likewise, a defendant may try to dismiss the case by arguing that the plaintiff failed to state a claim or to join an indispensable party in a Rule 12(b) motion, in any pleading allowed under *Fed. R. Civ. P. 7(a)*, or at trial on the merits. A party may assert failure to state a claim as part of a Rule 12(c) motion for judgment on the pleadings after the pleadings close and before trial. Other Rule 12(b) defenses are waived, however, if the defendant omits them from the first motion to dismiss or responsive pleading.

Defendants frequently use Rule 12(b) dismissal motions and Rule 12(c) motions for judgment on the pleadings to attack the complaint in an effort to obtain outright dismissal of the action and/or to narrow the scope of the claims.

In addition to Rule 12 motions, this chapter includes a discussion of motions by plaintiffs for voluntary dismissal under *Fed. R. Civ. P. 41(a)*, and motions by defendants for involuntary dismissals under *Fed. R. Civ. P. 41(b)*.

Finally, this chapter concludes with a discussion of motions to disqualify judges pursuant to *28 U.S.C. §§ 144* and/or *455*.

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Chapter 3 DISMISSALS
PART B: MOVING TO DISMISS PURSUANT TO RULE 12(b)

1-3 Moore's AnswerGuide: Fed Civil Motion Practice § 3.02

§ 3.02 Checklist for Moving to Dismiss Pursuant to Rule 12(b)

☐ Determine time to respond to complaint or other pleading and compute time to respond. *Fed. R. Civ. P. 6(a)(1), (3), 12(a)(1).*

☐ Determine applicable defenses that are available under *Fed. R. Civ. P. 12(b)*:

- ○ Lack of subject matter jurisdiction. *Fed. R. Civ. P. 12(b)(1)*; *see § 3.03 below.*
  - Lack of standing.
  - Lack of ripeness for adjudication.
  - Mootness.
- ○ Lack of personal jurisdiction. *Fed. R. Civ. P. 12(b)(2)*; *see § 3.04 below.*
- ○ Improper venue. *Fed. R. Civ. P. 12(b)(3)*; *see § 3.05 below.*
- ○ Insufficient process. *Fed. R. Civ. P. 12(b)(4)*; *see § 3.06 below.*
- ○ Insufficient service of process. *Fed. R. Civ. P. 12(b)(5)*; *see § 3.07 below.*
- ○ Failure to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*; *see § 3.08 below.*
- ○ Failure to join a party under *Fed. R. Civ. P. 19. Fed. R. Civ. P. 12(b)(7)*; *see § 3.09 below.*

☐ All available Rule 12 defenses must be joined in one motion. *See Fed. R. Civ. P. 12(g)(2).*

☐ Avoid waiver by including every available Rule 12 defense. *Fed. R. Civ. P. 12(g), 12(h)(1).* The following defenses are waived if not raised in a Rule 12 motion:

- ○ Lack of personal jurisdiction.
- ○ Improper venue.
- ○ Insufficiency of process.
- ○ Insufficiency of service of process.

☐ Consider non-movant's options in responding to motion to dismiss, including filing amended complaint or voluntary dismissal. *See Fed. R. Civ. P. 15(a)(1)(A).*

☐ File and serve motion to dismiss motion for judgment on the pleadings in compliance with rules governing motion practice. *See §§ 1.09 -1.11, 1.12, 1.13 above.*

☐ **Search by Topic:**

- ○ Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Motions to Dismiss
- ○ Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Failure to State Claims

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Chapter 3 DISMISSALS
PART B: MOVING TO DISMISS PURSUANT TO RULE 12(b)

1-3 Moore's AnswerGuide: Fed Civil Motion Practice § 3.03

§ 3.03 Moving to Dismiss for Lack of Subject Matter Jurisdiction Pursuant to Rule 12(b)(1)

[1] Understanding Subject Matter Jurisdiction

Subject matter jurisdiction is the authority of the court to adjudicate the type of controversy in the action. *See Carlisle v. United States, 517 U.S. 416, 434-435, 116 S. Ct. 1460, 134 L. Ed. 2d 613 (1996)* (defining subject matter jurisdiction as the "authority [of the court] to adjudicate the type of controversy involved in the action").

A federal court has subject matter jurisdiction over an action that either arises under federal law, or when there is complete diversity of citizenship between the parties and the amount in controversy exceeds $75,000. *28 U.S.C. §§ 1331, 1332.*

[2] Raising Defense of Lack of Subject Matter Jurisdiction

Fed. R. Civ. P. 12(b)(1) provides that a party may assert the defense of "lack of subject-matter jurisdiction" by motion. *See Fed. R. Civ. P. 12(b)(1).*

[3] Asserting Grounds for Motion to Dismiss for Lack of Subject Matter Jurisdiction

[a] Challenging Jurisdiction Based on Amount in Controversy

A party may challenge diversity jurisdiction on the ground that the amount in controversy falls below the minimum jurisdictional amount for bringing suit in federal court. *See 28 U.S.C. § 1332(a).* The amount in controversy is determined from the complaint itself. *See Horton v. Liberty Mut. Ins. Co., 367 U.S. 348, 353, 81 S. Ct. 1570, 6 L. Ed. 2d 890 (1961)* ("The general federal rule has long been to decide what the amount in controversy is from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed in 'good faith.' ").

[b] Challenging Jurisdiction Based on Diversity of Citizenship

A party may challenge diversity jurisdiction on the ground that the action is not between: (1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States, and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state as plaintiff and citizens of a State or of different

states. *See 28 U.S.C. § 1332(a)(1)-(4).*

[c] Challenging Federal Question Jurisdiction

A party may challenge federal question jurisdiction on the ground that the action does not arise under the Constitution, laws, or treaties of the United States. *See 28 U.S.C. § 1331.*

[d] Standing, Ripeness, Mootness

As discussed below, a motion for dismiss for lack of subject matter jurisdiction can be based on:

1. Lack of standing. *See § 3.13 below.*

2. Lack of ripeness for adjudication. *See § 3.14 below.*

3. Mootness. *See § 3.15 below.*

[4] Lack of Subject Matter Jurisdiction May Be Raised at Any Time by Party or *Sua Sponte*

At any time, a party may raise the defense of lack of subject matter jurisdiction, which cannot be waived. *See Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir. 1995)* ("Subject matter jurisdiction cannot be conferred or waived by consent, estoppel, or failure to challenge jurisdiction early in the proceedings.").

Also, if the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action. *Fed. R. Civ. P. 12(h)(3)*; *see also Things Remembered v. Petrarca, 516 U.S. 124, 132 n.1, 116 S. Ct. 494, 133 L. Ed. 2d 461 (1995)* ("[o]f course, every federal court, whether trial or appellate, is obliged to notice want of subject matter jurisdiction on its own motion").

[5] Dismissal for Lack of Subject Matter Jurisdiction Has No Claim Preclusive Effect

Dismissal for lack of subject matter jurisdiction is not a judgment on the merits, and it therefore has no *res judicata* effect. *Thompson v. County of Franklin, 15 F.3d 245, 253 (2d Cir. 1994)* (dismissals for lack of subject matter jurisdiction is not on merits and not accorded *res judicata* effect); *Verret v. Elliot Equipment Corp., 734 F.2d 235, 238 (5th Cir. 1984)* (dismissal under *Fed. R. Civ. P. 12(b)(1)* is never on merits of claim, and always without prejudice); *Shockley v. Jones, 823 F.2d 1068, 1073 (7th Cir. 1987)* (dismissal for lack of subject matter jurisdiction not on merits, and preclusive effect limited to precise jurisdictional issue decided).

[6] Facial Versus Factual Challenges to Subject Matter Jurisdiction

There are two types of challenges to subject matter jurisdiction that a party can make under *Fed. R. Civ. P. 12(b)(1)*:

1. **Facial Attack.** A facial attack accepts the allegations in the complaint as true and questions whether the complaint alleges a sufficient basis for subject matter jurisdiction. *See Oaxaca v. Roscoe, 641 F.2d 386, 391 (5th Cir. 1981)* ("[a] motion to dismiss for want of subject matter jurisdiction can take the form of a facial attack on the complaint, requiring the court merely to assess whether the plaintiff has alleged a sufficient basis of subject matter jurisdiction, taking all allegations in the complaint as true"); *see also Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir. 1990)* (per curiam) (facial attacks on the complaint require the court merely to look and see if the plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion).

2. **Factual Attack.** A factual attack challenges the existence of subject matter jurisdiction in fact,

irrespective of the allegations in the complaint, and the court may consider matters outside the pleadings, such as testimony and affidavits. *See Garcia v. Copenhaver, Bell & Assocs., M.D.'s, P.A., 104 F.3d 1256, 1260-1261 (11th Cir. 1997)* (factual attacks challenge the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered).

[7] Burden on Party Asserting Jurisdiction

When the defense of lack of subject matter jurisdiction is asserted, the party arguing that subject matter jurisdiction exists has the burden of proving its existence. *See Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 507 (2d Cir. 1994)* (burden of proving jurisdiction on party asserting it).

[8] Ruling on Motion to Dismiss for Lack of Subject Matter Jurisdiction; Court May Look Beyond Pleadings

A court determining a motion to dismiss for lack of subject matter jurisdiction may look beyond the pleadings and weigh evidence offered in support or opposition to the motion. *See, e.g., Gonzalez v. United States, 284 F.3d 281, 287-288 (1st Cir. 2002)* (*Fed. R. Civ. P. 12(b)(1)* motion need not be converted to summary judgment motion, even when court considers material outside pleadings, including affidavits and deposition transcripts); *Montez v. Dep't of the Navy, 392 F.3d 147, 149 (5th Cir. 2004)* (when subject matter jurisdiction is challenged, court is free to weigh evidence and resolve factual disputes in order to satisfy itself that it has power to hear case); *Safe Air v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004)* (district court was not required to convert motion to dismiss for lack of subject matter jurisdiction into one for summary judgment merely because court considered evidence outside complaint).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 12.30.*
- *Federal Litigation Guide PP 3.50 -3.55.*
- *Moore's AnswerGuide: Federal Pretrial Civil Litigation § 4.32[2].*
- *Bender's Federal Practice Forms* Form Nos. 12:10-12:12, 12:16.
- *Fed. R. Civ. P. 12(b)(1).*

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Chapter 3 DISMISSALS
PART B: MOVING TO DISMISS PURSUANT TO RULE 12(b)

1-3 Moore's AnswerGuide: Fed Civil Motion Practice § 3.04

§ 3.04 Moving to Dismiss for Lack of Personal Jurisdiction Pursuant to Rule 12(b)(2)

[1] Overview of Personal Jurisdiction

[a] Personal Jurisdiction Requirement

For a court to render a binding decision consonant with due process, it must have personal jurisdiction over the parties, that is, the power to require the parties to obey its decrees. *See Burnham v. Superior Court of California, 495 U.S. 604, 608-609, 110 S. Ct. 2105, 109 L. Ed. 2d 631 (1990)* (the judgment of a court lacking jurisdiction is void). A forum court may exercise either general jurisdiction or specific jurisdiction over a nonresident defendant. *See Rano v. Sipa Press, Inc., 987 F.2d 580, 587 (9th Cir. 1993)* ("A state may assert either general or specific jurisdiction over a nonresident defendant.").

[b] General Jurisdiction

"General jurisdiction" is the exercise of personal jurisdiction over a nonresident defendant by a forum not arising out of or related to the defendant's contacts with the forum. *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)* ("When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising 'general jurisdiction' over the defendant."). In order for a forum court to exercise general jurisdiction over a nonresident, there must be continuous and systematic contacts between the nonresident and the forum state. *See International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945)* (a court may exercise personal jurisdiction over a defendant consistent with due process only if he or she has certain minimum contacts with the relevant forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice).

[c] Specific Jurisdiction

A forum may exercise specific jurisdiction over a nonresident defendant if the defendant has purposefully directed his or her activities to forum residents and the resulting litigation derives from alleged injuries that arise out of or relate to those activities. *See Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.8, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984)* ("It has been said that when a State exercises personal jurisdiction over a defendant in a suit arising

out of or related to the defendant's contacts with the forum, the State is exercising 'specific jurisdiction' over the defendant."). In order to be subject to specific jurisdiction, the nonresident's "conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)* ; *Oldfield v. Pueblo de Bahia Lora, S.A., 558 F.3d 1210, 1224 (11th Cir. 2009)* (due process requires an element of foreseeability when determining as part of the personal jurisdiction analysis whether the cause of action arose out of the defendant's contacts with the forum).

[2] Raising Defense of Lack of Personal Jurisdiction Pursuant to Rule 12(b)(2)

A defendant may move for dismissal on the ground of lack of personal jurisdiction pursuant to *Fed. R. Civ. P. 12(b)(2)*. *See Fed. R. Civ. P. 12(b)(2)*. A Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction challenges the court's substantive authority to exercise personal jurisdiction over a nonresident defendant.

[3] Waiving Defense of Lack of Personal Jurisdiction

If not raised in the first Rule 12 motion, a defendant will waive the defense of lack of personal jurisdiction. *See Fed. R. Civ. P. 12(g)(2), (h)(1)*; *see also Uffner v. La Reunion Francaise, S.A., 244 F.3d 38, 40-41 (1st Cir. 2001)* (district court erred when it raised issue of personal jurisdiction *sua sponte* after defendants had waived issue by failing to raise it in first *Fed. R. Civ. P. 12* motion).

Warning:

A defendant may also waive the defense of lack of personal jurisdiction defense if it merely asserts the defense in its answer to the complaint. *See, e.g., Pardazi v. Cullman Medical Center, 896 F.2d 1313, 1317 (11th Cir. 1990)* (insufficient merely to object to personal jurisdiction in answer after filing *Fed. R. Civ. P. 12(b)* motion that did not include objection to personal jurisdiction or to service).

[4] Plaintiff Bears Burden of Proving Personal Jurisdiction

It is the plaintiff's burden to prove personal jurisdiction. *See, e.g., Negron-Torres v. Verizon Communs., Inc., 478 F.3d 19, 23 (1st Cir. 2007)* (plaintiff ultimately bears burden of persuading court that personal jurisdiction exists); *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 566 (2d Cir. 1996)* ("On a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of showing that the court has jurisdiction over the defendant."); *Dever v. Hentzen Coatings, Inc., 380 F.3d 1070, 1072 (8th Cir. 2004)* (plaintiff must plead facts to support personal jurisdiction and, if personal jurisdiction is controverted or denied, has burden of proving those facts).

[5] Court May Allow Jurisdictional Discovery

The court may allow a plaintiff to conduct discovery to uncover pertinent facts supporting the exercise of personal jurisdiction. *See, e.g., United States v. Swiss Am. Bank, Ltd., 274 F.3d 610, 625-627 (1st Cir. 2001)* (court has broad discretion whether to allow jurisdictional discovery); *Butcher's Union Local No. 498 v. SDC Invest., Inc., 788 F.2d 535, 540 (9th Cir. 1986)* (trial court has broad discretion to permit or deny jurisdictional discovery).

A plaintiff seeking jurisdictional discovery must have a colorable case for jurisdiction and must demonstrate to the district court that additional facts might be found if discovery is permitted. *See, e.g., Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc., 334 F.3d 390, 402 (4th Cir. 2003)* ("When a plaintiff offers only speculation or conclusory assertions about contacts with a forum state, a court is within its discretion in denying jurisdictional discovery"); *Cent. States, Southeast & Southwest Areas Pension Fund v. Phencorp Reinsurance Co., 440 F.3d 870, 876-878 (7th Cir. 2006)* (prima facie case for personal jurisdiction is required before party is allowed to conduct jurisdictional discovery).

[6] Court May Hold Evidentiary Hearing

In determining whether personal jurisdiction exists, the court has discretion to rely on written submissions or to conduct a full evidentiary hearing. *See Moran v. Kingdom of Saudi Arabia, 27 F.3d 169, 171 (5th Cir. 1994)* ("The court's denial of an evidentiary hearing is subject to an abuse of discretion standard of review").

If the court does not hold an evidentiary hearing, the plaintiff needs only to make a prima facie case that personal jurisdiction exists. *See PDK Labs v. Friedlander, 103 F.3d 1105, 1108 (2d Cir. 1997)* ("A plaintiff facing a *Fed. R. Civ. P. 12(b)(2)* motion to dismiss made before any discovery need only allege facts constituting a prima facie showing of personal jurisdiction"). The court will accept plaintiff's jurisdictional allegations as true, and will resolve any factual disputes in plaintiff's favor. *See, e.g., Panda Brandywine Corp. v. Potomac Elec. Power Co., 253 F.3d 865, 868-869 (5th Cir. 2001)* (when court did not hold evidentiary hearing, it was required to accept plaintiffs' jurisdictional allegations as true, but it was not required to accept conclusory allegations and could look beyond plaintiffs' allegations and consider provisions in contracts that were involved in suit); *Graphic Controls Corp. v. Utah Med. Prods., 149 F.3d 1382, 1383 n.1 (Fed. Cir. 1998)* (when district court makes prima facie jurisdictional determination and does not hold evidentiary hearing, court must construe pleadings and affidavits in light most favorable to plaintiff). A prima facie case is established if the plaintiff presents sufficient evidence to establish jurisdiction. *See Bellepointe, Inc. v. Kohl's Dep't Stores, 975 F. Supp. 562, 564 (S.D.N.Y. 1997)* (prima facie showing of jurisdiction means plaintiff has pleaded facts sufficient in themselves to establish jurisdiction, not that plaintiff has shown merely some evidence that defendant is subject to jurisdiction).

If the court denies the motion to dismiss, the defendant may proceed to trial on the merits without waiving the jurisdictional challenge. *See Northern Laminate Sales, Inc. v. Davis, 403 F.3d 14, 22-24 (1st Cir. 2005)* (denial of motion to dismiss for lack of personal jurisdiction is not final adjudication; thus, party that has unsuccessfully raised objection to personal jurisdiction may proceed to trial on merits without waiving ability to renew objection).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 12.31.*
- *Bender's Federal Practice Forms* Form Nos. 12:40-12:48.
- *Moore's AnswerGuide: Federal Pretrial Civil Litigation §§ 1.34-1.47, 4.32[3].*
- *Federal Litigation Guide PP 3.60 -3.66.*
- *Fed. R. Civ. P. 12(b)(2).*

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Chapter 3 DISMISSALS
PART B: MOVING TO DISMISS PURSUANT TO RULE 12(b)

1-3 Moore's AnswerGuide: Fed Civil Motion Practice § 3.05

§ 3.05 Moving to Dismiss for Improper Venue Pursuant to Rule 12(b)(3)

[1] Challenging Propriety of Venue

Pursuant to *Fed. R. Civ. P. 12(b)(3)*, a defendant may bring a motion to dismiss for improper venue. *Fed. R. Civ. P. 12(b)(3)*. Alternatively, a defendant may move to transfer the case, either on grounds of improper venue or for reasons of convenience. *See 28 U.S.C. § 1404* (transfer for convenience); *28 U.S.C. § 1406* (transfer for improper venue). Motions to transfer for improper venue, including motions pursuant to *Fed. R. Civ. P. 12(b)(3)*, are discussed in detail in Chapter 4. *See §§ 4.02 -4.08 below*.

Warning:

The defendant will waive the defense of improper venue unless it asserts the defense in its first formal response to the complaint. *See Fed. R. Civ. P. 12(h)*.

[2] Determining Whether Venue Is Improper

The substantive standard for determining whether venue is proper is provided by the general venue statute, *28 U.S.C. § 1391*, or by an applicable special venue statute. *See § 4.03 below*.

[3] Dismissing Case *Sua Sponte* for Improper Venue

Some appellate courts have ruled that a district court may not dismiss an action *sua sponte* for improper venue. *See Janis v. Ashcroft, 348 F.3d 491, 493 (6th Cir. 2003)* ("we question the propriety of the district court's sua sponte dismissal for what was essentially a lack of proper venue"). Other appellate courts have held that the district court may raise the issue of venue *sua sponte*, but have ruled that the court must provide the parties notice and an opportunity to be heard before dismissal. *See Algodonera De Las Cabezas, S.A. v. Am. Suisse Capital, Inc., 432 F.3d 1343, 1345 (11th Cir. 2005)* (district court erred by dismissing case *sua sponte* before receiving any submissions or arguments from parties on propriety of venue).

Warning:

A dismissal for improper venue is not a judgment on the merits. *See, e.g., Baris v. Sulpicio Lines, 74*

F.3d 567, 571 (5th Cir. 1996) (dismissal for improper venue not adjudication on merits).

[4] Determining Which Party Bears Burden of Proof on Rule 12(b)(3) Motion for Improper Venue

The district court has the discretion to decide whether to hold an evidentiary hearing on a motion to dismiss for improper venue. If the court holds an evidentiary hearing, the court may weigh evidence, assess credibility, and make findings of fact that are dispositive on the Rule 12(b)(3) motion. *See Murphy v. Schneider Nat'l, Inc., 362 F.3d 1133, 1140 (9th Cir. 2004)* ("Upon holding an evidentiary hearing to resolve material disputed facts, the district court may weigh evidence, assess credibility, and make findings of fact that are dispositive on the Rule 12(b)(3) motion").

When no evidentiary hearing is held, the plaintiff needs only to make a prima facie showing of venue. *See Mitrano v. Hawes, 377 F.3d 402, 405 (4th Cir. 2004)* (to survive motion to dismiss when no evidentiary hearing is held, plaintiff needs only to make a prima facie showing of venue). The court will take the facts alleged in the complaint to be true, to the extent they are uncontroverted by defendants' affidavits, and the court should make all favorable inferences in favor of upholding venue. *See, e.g., Gulf Ins. Co. v. Glasbrenner, 417 F.3d 353, 355 (2d Cir. 2005)* (if court chooses to rely on pleadings and affidavits, only prima facie showing of venue is required); *Murphy v. Schneider Nat'l, Inc., 362 F.3d 1133, 1137-1140 (9th Cir. 2004)* (when determining motion to dismiss for improper venue, court must draw all reasonable inferences and resolve all factual conflicts in favor of non-moving party, unless court holds evidentiary hearing).

A number of courts have stated that the plaintiff has the burden of proving venue. *See Gulf Ins. Co. v. Glasbrenner, 417 F.3d 353, 355 (2d Cir. 2005)* (if district court holds evidentiary hearing, plaintiff must demonstrate venue by preponderance of evidence); *Nissan Motor Co. v. Nissan Computer Corp., 89 F. Supp. 2d 1154, 1161-1162 (C.D. Cal. 2000)* , *aff'd*, *246 F.3d 675 (9th Cir. 2000)* ("Although there is some disagreement, most courts hold that the plaintiff bears the burden of establishing proper venue"). However, the majority of courts hold that the party challenging venue has the burden of proving its impropriety, because improper venue is an affirmative defense that should be raised and proven by the party challenging venue. *See, e.g., Myers v. American Dental Asso., 695 F.2d 716, 724 (3d Cir. 1982)* (venue is affirmative defense, so that defendant has burden of proof); *Granader v. Peachtree Lane Assocs. (In re Peachtree Lane Assocs.), 150 F.3d 788, 794 (7th Cir. 1998)* (venue is presumed to be proper in district in which case is filed, and party challenging venue bears burden of proving otherwise).

[5] Court May Transfer Case to Proper Venue Instead of Dismissing Case

Even if the defendant's motion seeks dismissal of the plaintiff's case only for improper venue, the district court may instead transfer the case to "any district or division in which it could have been brought." *28 U.S.C. § 1406(a)*; *see also Concession Consultants, Inc., v. Mirisch, 355 F.2d 369, 371 n.3 (2d Cir. 1966)* ("where the motion asks only that the suit be dismissed, the court may properly, *sua sponte*, order it transferred").

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 12.32.*
- *Bender's Federal Practice Forms* Form Nos. 12:60-12:67.
- *Federal Litigation Guide PP 3.80 -3.84.*
- *Fed. R. Civ. P. 12(b)(3).*

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Chapter 3 DISMISSALS
PART B: MOVING TO DISMISS PURSUANT TO RULE 12(b)

1-3 Moore's AnswerGuide: Fed Civil Motion Practice § 3.06

§ 3.06 Moving to Dismiss for Insufficient Process Pursuant to Rule 12(b)(4)

[1] Challenging Form of Process by Bringing Rule 12(b)(4) Motion

Fed. R. Civ. P. 12(b)(4) allows for motions to dismiss for insufficient process. *Fed. R. Civ. P. 12(b)(4)*. A motion to dismiss for insufficient process challenges the form of process rather than the service of process. *See Chilicky v. Schweiker, 796 F.2d 1131, 1136 (9th Cir. 1986)* , *rev'd on other grounds*, *487 U.S. 412, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988)* (motions under *Fed. R. Civ. P. 12(b)(4)* "challenge irregularities in the contents of the summons").

[2] Stating Facts Alleging Insufficient Process Pursuant to Rule 12(b)(4)

In its Rule 12(b)(4) motion, the defendant should state specific facts alleging insufficient process supported by evidence supplied in affidavits. Common examples of insufficient process include the following:

1. Summons missing from the service of process;

2. Incorrect name of defendant on summons;

3. Naming wrong person to be served;

4. Failing to specify number of days defendant had to respond; and

5. Delivering facsimile copy of summons without court seal.

See, e.g., O'Brien v. R.J. O'Brien & Assocs., Inc., 998 F.2d 1394, 1399 (7th Cir. 1993) (arguable deficiencies included incorrect name of defendant, naming wrong person to be served, failing to specify number of days defendant had to reply, and delivering facsimile copy without court seal); *Curry v. Heard, 819 F.2d 130, 132 (5th Cir. 1987)* (summons missing from service of process); *Sanderford v. Prudential Ins. Co., 902 F.2d 897, 900 (11th Cir. 1990)* (return date for responsive pleading missing).

[3] Defendant Waives Objection to Form of Process if Not Timely Asserted

Parties should bear in mind that the defendant will waive its objection to the form of process under *Fed. R. Civ. P. 12(b)(4)* if it does not assert this defense in its first Rule 12 motion, its first responsive pleading, or an amendment allowed by *Fed. R. Civ. P. 15(a)(1)* as a matter of course. *Fed. R. Civ. P. 12(g), (h)(1).*

[4] Court May Extend Time, Dismiss Action, or Quash Service

If the plaintiff does not perfect service of process within 120 days after filing the complaint, *Fed. R. Civ. P. 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. *Fed. R. Civ. P. 4(m)* specifies that any dismissal is without prejudice. *See Fed. R. Civ. P. 4(m)*; *see also Betty K Agencies, LTD v. M/V Monada, 432 F.3d 1333, 1340-1342 (11th Cir. 2005)* (*Fed. R. Civ. P. 4(m)* requires dismissal without prejudice, so that district court erred by dismissing action with prejudice for failure to perfect service). However, on a showing of good cause, the court must extend the time for service for an appropriate period. *Fed. R. Civ. P. 4(m).*

Upon finding that process was insufficient, the court has discretion to dismiss the action without prejudice. *See Romandette v. Weetabix Co., 807 F.2d 309, 311 (2d Cir. 1986)* ("incomplete or improper service will lead the court to dismiss the action *unless it appears that proper service may still be obtained*"). The court may also quash service and direct the plaintiff to effect service within a specified period of time. *See Fed. R. Civ. P. 4(m).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 12.33.*
- *Federal Litigation Guide[Middle dot]PP 3.110-3.113.*
- *Bender's Federal Practice Forms* Form Nos. 12:80-12:84.
- *Fed. R. Civ. P. 12(b)(4).*

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Chapter 3 DISMISSALS
PART B: MOVING TO DISMISS PURSUANT TO RULE 12(b)

1-3 Moore's AnswerGuide: Fed Civil Motion Practice § 3.07

§ 3.07 Moving to Dismiss for Insufficient Service of Process Pursuant to Rule 12(b)(5)

[1] Challenging Service of Process by Bringing Motion Under Rule 12(b)(5)

Fed. R. Civ. P. 12(b)(5) provides for motions to dismiss for insufficient service of process. *Fed. R. Civ. P. 12(b)(5)*. A Rule 12(b)(5) motion challenges the method of serving process, and must specify in what manners the service was defective. *See O'Brien v. R.J. O'Brien Assocs., Inc., 998 F.2d 1394, 1400 (7th Cir. 1993)* (objections to the sufficiency of process "must be specific and must point out in what manner the plaintiff has failed to satisfy the service provision utilized").

[2] Stating Facts Alleging Insufficient Service of Process Pursuant to Rule 12(b)(5)

In its Rule 12(b)(5) motion, the defendant should state specific facts alleging insufficient service process supported by evidence supplied in affidavits. Common examples of insufficient service of process include the following:

1. **Serving the wrong person.** *See, e.g., Sciotti v. St. Gobain Containers, 2007 U.S. Dist. LEXIS 85942, at *11-*12 (W.D.N.Y. 2007)* ("Examples of improper service include serving the wrong person").

2. **Serving an individual not authorized to accept service on behalf of a corporation.** *See, e.g., Adams v. Allied Signal Gen. Aviation Avionics, 74 F.3d 882, 885 (8th Cir. 1996)* ("absent probative evidence that the two corporations are not independently operated, service on an officer of a subsidiary ... does not effect service on the parent corporation").

3. **Improper service by mail.** *See, e.g., Spencer v. Eristoff, 2006 U.S. Dist. LEXIS 56221, at *5-*9 (M.D. Pa. 2006)* (taxpayer failed to effect service of process upon defendants as prescribed by *Fed. R. Civ. P. 4(e)* because service of summonses and complaint via certified mail addressed to the commissioner of the state tax agency, without more, was not sufficient).

[3] Determining Which Party Bears Burden of Proof on Motion for Insufficient Service Pursuant to Rule 12(b)(5)

In all challenges to the sufficiency of either the form of process or service of process, the burden of proof lies with the

party raising the challenge. *See Bally Export Corp. v. Balicar, Ltd., 804 F.2d 398, 404 (7th Cir. 1986)* (defendant bears burden of proof when challenging sufficiency of service of process).

Circuit Split:

Some circuits hold that once a defendant has challenged service under *Fed. R. Civ. P. 12(b)(5)*, the plaintiff bears the burden of establishing its sufficiency. *See, e.g., Grand Entertainment Group v. Star Media Sales, 988 F.2d 476, 488 (3d Cir. 1993)* ("the party asserting the validity of service bears the burden of proof on that issue"); *Brockmeyer v. May, 383 F.3d 798, 801 (9th Cir. 2004)* ("Once service is challenged, plaintiffs bear the burden of establishing that service was valid under Rule 4").

[4] Ruling on Evidentiary Issues When Deciding on Rule 12(b)(5) Motion

In deciding a motion to dismiss for insufficient service, the court may adjudicate factual disputes on the basis of the parties' affidavits. *See, e.g., FROF, Inc. v. Harris, 695 F. Supp. 827, 828-829 (E.D. Pa. 1988)* (court considered parties' affidavits). The court may hold a hearing to resolve contested factual issues regarding the adequacy of service. *See Mintel Learning Tech., Inc. v. Beijing Kaidi Educ. & Tech. Dev. Co., Ltd., 2007 U.S. Dist. LEXIS 27213, at *2 (N.D. Cal. 2007)* (court can hold evidentiary hearing to determine whether service was proper).

[5] Defendant Will Waive Objection to Insufficient Service of Process if Not Timely Asserted

A defendant will waive all objections to service of process under *Fed. R. Civ. P. 12(b)(5)* if it does not object in its first Rule 12 motion, its first responsive pleading, or an amendment allowed by *Fed. R. Civ. P. 15(a)(1)* as a matter of course. *Fed. R. Civ. P. 12(g), (h)(1).*

[6] Ruling on 12(b)(5) Motion; Court May Extend Time, Dismiss Action, or Quash Service

If the plaintiff does not perfect service of process within 120 days after filing the complaint, *Fed. R. Civ. P. 4(m)* allows the district court, either *sua sponte* after notice to the plaintiff or on motion by the party challenging process or service, to dismiss the action. *Fed. R. Civ. P. 4(m). Fed. R. Civ. P. 4(m)* specifies that any dismissal is without prejudice. *See, e.g., Betty K Agencies, LTD v. M/V Monada, 432 F.3d 1333, 1340-1342 (11th Cir. 2005)* (*Fed. R. Civ. P. 4(m)* requires dismissal without prejudice, so that district court erred by dismissing action with prejudice for failure to perfect service). However, on a showing of good cause, the court must extend the time for service for an appropriate period. *Fed. R. Civ. P. 4(m)*

On finding that process was insufficient, the court has discretion to dismiss the action without prejudice. *See Romandette v. Weetabix Co., 807 F.2d 309, 311 (2d Cir. 1986)* ("incomplete or improper service will lead the court to dismiss the action unless it appears that proper service may still be obtained"). Moreover, the court may also quash service and direct the plaintiff to effect service within a specified period of time. *Fed. R. Civ. P. 4(m).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 12.33.*
- *Federal Litigation Guide PP 3.110 -3.113.*
- *Fed. R. Civ. P. 12(b)(5).*

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Chapter 3 DISMISSALS
PART B: MOVING TO DISMISS PURSUANT TO RULE 12(b)

1-3 Moore's AnswerGuide: Fed Civil Motion Practice § 3.08

§ 3.08 Moving to Dismiss for Failure to State a Claim for Relief Pursuant to Rule 12(b)(6)

[1] Asserting That Plaintiff Has Failed to State a Claim Upon Which Relief Can Be Granted Pursuant to Rule 12(b)(6)

Pursuant to *Fed. R. Civ. P. 12(b)(6)*, a party may, prior to filing a responsive pleading, move to dismiss a claim for "failure to state a claim upon which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*.

After the pleadings are closed, a party may also raise the defense of failure to state a claim by filing a motion for judgment on the pleadings, or at trial. *Fed R. Civ. P. 12(h)(2)*; *see also GATX Leasing Corp. v. National Union Fire Ins. Co., 64 F.3d 1112, 1114 (7th Cir. 1995)* ("We review a motion pursuant to Rule 12(c) under the same standard as a motion to dismiss under *Fed. R. Civ. P. 12(b)*").

[2] Asserting Grounds for Rule 12(b)(6) Motion for Failure to State a Claim

A defendant may seek to dismiss the plaintiff's case pursuant to *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim on a wide variety of grounds, depending on the factual circumstances of the case and on whether the plaintiff's claims are governed by a particular federal statute. Listed below are some of the most common grounds for bringing a 12(b) motion for various types of federal cases:

1. Motion to Dismiss for Failure to State Claim--Failure to Exhaust Administrative Remedies. *See Bender's Federal Practice Forms* Form No. 12:100. This motion argues that the plaintiff failed to exhaust its administrative remedies prior to filing suit.

2. Motion to Dismiss for Failure to State Claim--No State Action Alleged in Civil Rights Case. *See Bender's Federal Practice Forms* Form No. 12:102. This motion argues that the defendant did not act under color of law as necessary to state claim for federal civil rights violation. *See Becker v. Evans, 478 F. Supp. 729 (M.D. Pa. 1979)* .

3. Motion to Dismiss for Failure to State Claim--No Allegation of Constitutional Rights in Civil Rights Action. *See Bender's Federal Practice Forms* Form No. 12:103. This motion argues that none of the defendant's alleged actions amounts to a constitutional violation. *See Burke v. Austin Independent*

School Dist., 709 F. Supp. 120 (W.D. Tex. 1987) .

4. Motion to Dismiss for Failure to State Claim--Common-Law Fraud Action. *See Bender's Federal Practice Forms* Form No. 12:104. This motion argues that the plaintiff did not plead all of the elements of fraud with the requisite particularity. *See Indiana Ins. Co. v. Meeker-Magner Ins. Brokers & Consultants, Inc., 594 F. Supp. 262 (N.D. Ill. 1984)* .

5. Motion to Dismiss for Failure to State Claim--Immunity and Issue and Claim Preclusion. *See Bender's Federal Practice Forms* Form No. 12:105. This motion argues that the defendants are immune from the claims asserted and that plaintiff's claims were determined adversely in a prior proceeding, and, therefore, are barred by the doctrines of issue preclusion (collateral estoppel) and claim preclusion (*res judicata*). *See In re Grand Jury Proceedings, Yanagihara Grand Jury, 709 F. Supp. 192 (C.D. Cal. 1989)* .

6. Motion to Dismiss on Ground of Claim Preclusion (Res Judicata). *See Bender's Federal Practice Forms* Form No. 12:106. This motion argues that plaintiff's claims are barred by the doctrines of collateral estoppel and *res judicata*. *See Glick v. Ballentine Produce, Inc., 397 F.2d 590 (8th Cir. 1968)* .

7. Motion to Dismiss and Compel Plaintiff to Submit to Insurance Appraisal. *See Bender's Federal Practice Forms,* Form No. 12:108. This motion is used in connection with insurance disputes, and argues that because the defendant requested an appraisal pursuant to the terms of an insurance policy, the loss should be determined by the contractually agreed mechanism, and the suit dismissed. *See Global Fire Protection Co. v. Federal Ins. Co., 648 F. Supp. 591 (N.D. Ill. 1986)* .

8. Motion to Dismiss or Stay Action--Arbitration Agreement. *See Bender's Federal Practice Forms* Form No. 12:109. The grounds for this motion are that the claims asserted by the plaintiff are covered by an agreement to arbitrate. *See Romnes v. Bache & Co., 439 F. Supp. 833 (W.D. Wis. 1977)* .

9. Motion to Dismiss Combined With Motion for Summary Judgment and Motion to Compel Arbitration--Civil RICO. *See Bender's Federal Practice Forms* Form No. 12:110. This motion to dismiss for failure to state a claim is combined with a motion for summary judgment and a motion to compel arbitration. *See Cady v. A.G. Edwards & Sons, Inc., 648 F. Supp. 621 (D. Utah 1986)* .

10. Motion to Dismiss on the Ground of Statute of Frauds. *See Bender's Federal Practice Forms* Form No. 12:112. This motion argues that it appears from the face of the complaint that the contract in dispute was never reduced to writing and signed by the defendant as required by the applicable Statute of Frauds.

11. Motion to Dismiss on the Ground of Statute of Limitations. *See Bender's Federal Practice Forms* Form No. 12:113. This motion argues that it appears from the face of the complaint that the plaintiff's causes of action are barred by the applicable statute of limitations.

12. Motion to Dismiss--Failure to Timely File Charge of Discrimination With EEOC. *See Bender's Federal Practice Forms* Form No. 12:115. This motion seeks dismissal of a Title VII employment action on the ground that the aggrieved person did not timely file charge of discrimination against an employer with the Equal Employment Opportunity Commission "within 300 days after the alleged unlawful employment practice occurred." *See Bledsoe v. Pilot Life Ins. Co., 473 F. Supp. 864 (M.D.N.C. 1978)* .

13. Motion to Dismiss on Ground on Laches. *See Bender's Federal Practice Forms* Form No. 12:116. This motion argues that plaintiff's claim is barred due to laches and/or plaintiff's delay in bringing the claim.

[3] Moving Party Bears Burden of Proof on Rule 12(b)(6) Motion

Under *Fed. R. Civ. P. 12(b)(6)*, the party moving for dismissal has the burden of showing that no claim has been stated. *See, e.g., Bangura v. Hansen, 434 F.3d 487, 498 (6th Cir. 2006)* ("on a 12(b)(6) motion, the moving party bears the burden of demonstrating that the plaintiff failed to state a claim").

Under the traditional standard set forth in *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)* , the movant must show "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"); *see also Hughes v. Rowe, 449 U.S. 5, 10, 101 S. Ct. 173, 66 L. Ed. 2d 163 (1980)* ("complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). Thus, when assessing the sufficiency of a plaintiff's complaint at the motion-to-dismiss stage, courts do not generally require plaintiffs to meet a high threshold. *See United States v. Baxter Int'l, Inc., 345 F.3d 866, 881 (11th Cir. 2003)* (threshold of sufficiency to which complaint is held at motion-to-dismiss stage is "exceedingly low").

Recently, however, in *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-563, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* , the Supreme Court criticized the "no set of facts" standard set forth in *Conley*, and held that a complaint may not survive a motion to dismiss without some factual context sufficient to state a claim to relief that is "plausible on its face." Accordingly, it appears that a motion to dismiss for failure to state a claim must now be judged according to the "plausibility" standard set out in *Bell Atlantic Corp. v. Twombly*. *See Ashcroft v. Iqbal, -- U.S. --, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 887-888 (2009)* (addressing applicability of *Twombly* standard to all civil actions).

The Seventh Circuit has observed that the plausibility standard does not require the pleading of specific facts, and is not intended to restore the old fact-pleading system. Instead, the plausibility standard calls for attention to several key questions: (1) what, exactly, does it take to give the opposing party "fair notice"; (2) how much detail realistically can be given, and should be given, about the nature and basis or grounds of the claim; and (3) in what way is the pleader expected to signal the type of litigation that is being put before the court. *Swanson v. Citibank, N.A., 614 F.3d 400, 404-405 (2010)* ("plaintiff must give enough details about the subject-matter of the case to present a story that holds together").

[4] Adjudicating Rule 12(b)(6) Motion for Failure to State a Claim

[a] Accepting Plaintiff's Factual Allegations as True on Rule 12(b)(6) Motion

In adjudicating a *Fed. R. Civ. P. 12(b)(6)* motion, the district court must accept the plaintiff's factual allegations as true. *See, e.g., 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"); *First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 771 (2d Cir. 1994)* ("the well-pleaded material allegations of the complaint are taken as admitted"); *Anderson v. Clow (In re Stac Elecs. Sec. Litig.), 89 F.3d 1399, 1403 (9th Cir. 1996)* (all allegations of material facts are taken as true on a Rule 12(b)(6) motion).

[b] Construing Plaintiff's Allegations Liberally on Rule 12(b)(6) Motion

On a Rule 12(b)(6) motion, the court must draw all reasonable inferences in favor of the plaintiff. *See, e.g., Ibarra v. United States, 120 F.3d 472, 474 (4th Cir. 1997)* ("Regarding dismissal under Rule 12(b)(6), we accept the well-pled allegations of the complaint as true, and we construe the facts and reasonable inferences derived therefrom in the light most favorable to the plaintiff"); *In re DeLorean Motor Co., 991 F.2d 1236, 1240 (6th Cir. 1993)* (in deciding motion to dismiss, court must construe complaint in light most favorable to plaintiff, and the judge may not grant a motion to dismiss based on disbelief of factual allegations).

Courts construe a plaintiff's allegations liberally because the complaint is required only to give general notice of the plaintiff's claim, rather than detailed facts. *See, e.g., Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512-513, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)* (the complaint needs only to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests"); *Salahuddin v. Cuomo, 861 F.2d 40, 42 (2d Cir. 1988)* ("the principal function of pleadings under the Federal Rules is to give the adverse party fair notice of the claim asserted so as to enable him to answer and prepare for trial"); *United States v. Uvalde Consol. Independent School Dist., 625 F.2d 547, 549 (5th Cir. 1980)* (initial pleading, which is required only to give notice of claim, must be construed liberally so as to do substantial justice).

Exception:

Fed. R. Civ. P. 9(b) makes an express exception to the notice pleading concept when a plaintiff alleges fraud or mistake. *See Fed. R. Civ. P. 9(b)* ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake"); *see also Decker v. GlenFed, Inc. (In re Glenfed, Inc. Sec. Litig.), 60 F.3d 591, 593 (9th Cir. 1994)* ("In cases of corporate fraud ... , a plaintiff fulfills the particularity requirement of Rule 9(b) by pleading the misrepresentations with particularity and where possible the roles of the individual defendants in the misrepresentations"); *Cozzarelli v. Inspire Pharms, Inc., 549 F.3d 618, 620 (4th Cir. 2008)* (applying Rule 9(b), and finding that plaintiffs' complaint failed to raise the "strong inference" of wrongful intent required in securities fraud actions by the Private Securities Litigation Reform Act).

Notwithstanding the liberal construction given to pleadings, to survive a motion to dismiss, the pleading must set forth sufficient information for the court to determine whether some recognized legal theory exists on which relief could be afforded to the pleader. *See, e.g., Wilson v. Civil Town of Clayton, 839 F.2d 375, 378 (7th Cir. 1988)* (even under liberal standard, plaintiff's complaint failed to state constitutional claim); *see also United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991)* ("[j]udges are not like pigs, hunting for truffles buried in briefs").

[c] Refusing to Accept Conclusory Allegations as True on Rule 12(b)(6) Motion

For purposes of a motion to dismiss, the court does not need to accept as true conclusory allegations made by the plaintiff. *See, e.g., Ashcroft v. Iqbal, -- U.S. --, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 883-884 (2009)* (in deciding a motion to dismiss a complaint, a court need not accept as true assertions that are no more than recitals of the elements of a cause of action, supported by mere conclusory statements; only well-pleaded factual allegations are entitled to an assumption of veracity); *DM Research, Inc. v. College of Am. Pathologists, 170 F.3d 53, 55-56 (1st Cir. 1999)* (while the plaintiff's facts must be accepted as alleged, this does not automatically extend to bald assertions, subjective characterizations and legal conclusions); *Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1092 (2d Cir. 1995)* ("[c]onclusory allegations of the legal status of the defendants' acts need not be accepted as true for the purposes of ruling on a motion to dismiss"); *Murphy v. Sofamor Danek Group (In re Sofamor Danek Group), 123 F.3d 394, 400 (6th Cir. 1997)* (court does not need to accept as true legal conclusions or baseless factual inferences). Thus, conclusory allegations will not defeat a Rule 12(b)(6) motion to dismiss. *See, e.g., Northern Trust Co. v. Peters, 69 F.3d 123, 129 (7th Cir. 1995)* (conclusory statements of law, and their unwarranted inferences, are not sufficient to defeat motion to dismiss for failure to state claim); *Anderson v. Clow (In re Stac Elecs. Sec. Litig.), 89 F.3d 1399, 1403 (9th Cir. 1996)* (conclusory allegations of law and unwarranted inferences are insufficient to defeat motion to dismiss for failure to state claim).

[d] Courts Consider Only Pleadings and Matters of Judicial Notice on Rule 12(b)(6) Motion

In deciding whether or not to dismiss a case for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)*, the court may consider only the following matters:

1. **Facts alleged in the complaint.** *See Lovelace v. Software Spectrum, 78 F.3d 1015, 1017-1018 (5th*

Cir. 1996) (in deciding motion to dismiss, court may consider facts stated in complaint).

2. **Undisputed documents alleged or referenced in the complaint.** *See Fed. R. Civ. P. 10(c)* ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes"); *see also Cortec Industries, Inc. v. Sum Holding, L.P., 949 F.2d 42, 47 (2d Cir. 1991)* (if plaintiff's claims are predicated on document, defendant may attach document to Rule 12(b)(6) motion even if plaintiff's complaint does not explicitly refer to it).

3. **Public records.** *See, e.g., Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1278 (11th Cir. 1999)* (court, when considering motion to dismiss in securities fraud case, was permitted to take judicial notice of relevant public documents required to be filed with SEC for purpose of determining what statements the documents contained and not to prove truth of documents' contents).

The court may not, however, take into account additional facts asserted in an opposition to a motion to dismiss because the opposition does not constitute a pleading under *Fed. R. Civ. P. 7(a). See, e.g., Harrell v. United States, 13 F.3d 232, 236 (7th Cir. 1993)* ("a plaintiff cannot amend his complaint by a brief that he files in the district court or the court of appeals"); *Morgan Distrib. Co. v. Unidynamic Corp., 868 F.2d 992, 995 (8th Cir. 1989)* ("it is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss").

[5] Converting Rule 12(b)(6) Motion to Motion for Summary Judgment

If, on a Rule 12(b)(6) motion, the parties bring issues outside the pleadings before the court and the court does not exclude those issues, the court must treat the motion in the same manner as it must treat a motion for summary judgment under *Fed. R. Civ. P. 56. See Fed. R. Civ. P. 12(d).* The district court has discretion as to whether it wishes to consider issues outside the pleadings, thereby converting the motion to dismiss to a motion for summary judgment. *See, e.g., Lybrook v. Members of Farmington Mun. Sch. Bd. of Educ., 232 F.3d 1334, 1341-1342 (10th Cir. 2000)* (court has discretion as to whether to accept or reject attachments to pleadings, and did not abuse its discretion by failing to convert Rule 12(b)(6) motion to summary judgment motion).

Should the court elect to convert a Rule 12(b)(6) motion to dismiss to a motion for summary judgment, the court must notify all parties and give them a reasonable opportunity to present all legal arguments and evidence made pertinent by *Fed. R. Civ. P. 56. See In re Rockefeller Ctr. Props. Sec. Litig., 184 F.3d 280, 287-289 (3d Cir. 1999)* (when court converts motion, it must provide parties reasonable opportunity to present all material relevant to summary judgment).

[6] Dismissing Case for Failure to State Claim for Relief Pursuant to Rule 12(b)(6)

[a] Dismissing Case Under Rule 12(b)(6) When Claim Lacks Required Element

Dismissal under *Fed. R. Civ. P. 12(b)(6)* is proper if the complaint lacks an allegation regarding an element necessary to obtain relief. *See, e.g., Campbell v. City of San Antonio, 43 F.3d 973, 975 (5th Cir. 1995)* (federal civil rights claim dismissed for lack of element necessary to establish state officials mistaken identity of plaintiff); *Pyles v. United Air Lines, 79 F.3d 1046, 1049 (11th Cir. 1996)* (plaintiff's claim that showed that he was not party to subject agreement lacked necessary element).

[b] Dismissing Case Under Rule 12(b)(6) When Defendant Asserts Affirmative Defense

A dismissal pursuant to a Rule 12(b)(6) motion is appropriate when a successful affirmative defense or other bar to relief, such as the absolute immunity of a defendant, claim preclusion, or the statute of limitations, appears on the face of the complaint. *See, e.g., LaChapelle v. Berkshire Life Ins. Co., 142 F.3d 507, 509 (1st Cir. 1998)* ("Granting a motion to dismiss based on a limitations defense is entirely appropriate when the pleader's allegations leave no doubt that an asserted claim is time-barred"); *Day v. Moscow, 955 F.2d 807, 811 (2d Cir. 1992)* (defense of res judicata may

be upheld on *Fed. R. Civ. P. 12(b)(6)* motion without requiring answer).

[c] Dismissing Case *Sua Sponte* Under Rule 12(b)(6)

A court may dismiss a complaint *sua sponte* for failure to state a claim if the court gives the parties notice and an opportunity to amend or otherwise respond. *See, e.g., Chute v. Walker, 281 F.3d 314, 318-320 (1st Cir. 2002)* (*sua sponte* dismissals under *Fed. R. Civ. P. 12(b)(6)* are appropriate in limited circumstances, but *sua sponte* dismissal was erroneous when plaintiff was not afforded notice and opportunity to amend complaint or otherwise respond); *Abbas v. Dixon, 480 F.3d 636, 639-640 (2d Cir. 2007)* (district court erred by dismissing complaint *sua sponte* on statute of limitations without giving party opportunity to respond, as court could not decide with certainty from face of complaint that party had no meritorious tolling arguments).

[7] Allowing Plaintiff to Amend Complaint That Fails to State a Claim

Fed. R. Civ. P. 15(a) allows a party to amend its pleading once as a matter of course within 21 days after serving it. *Fed. R. Civ. P. 15(a)(1)(A)*. Because a *Fed. R. Civ. P. 12(b)(6)* motion is not considered a "responsive pleading," a plaintiff may amend the complaint once without leave, even during the pendency of a motion to dismiss, if the defendant has not yet served an answer. *See, e.g., Shane v. Fauver, 213 F.3d 113, 115 (3d Cir. 2000)* (in typical case in which defendant asserts defense of failure to state claim by motion, plaintiff may amend complaint once as matter of course without leave of court).

After amending once "as a matter of course," a party may amend its pleading only with the opposing party's written consent or with the court's leave. *Fed. R. Civ. P. 15(a)(2)*. Courts ordinarily will allow the plaintiff leave to amend the complaint. *See, e.g., Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)* (leave to amend shall be given freely when justice so requires); *Shane v. Fauver, 213 F.3d 113, 115 (3d Cir. 2000)* (after amending once or after answer has been filed, plaintiff may amend only with leave of court or written consent of opposing party, but leave must be freely given when justice so requires); *Bank v. Pitt, 928 F.2d 1108, 1112 (11th Cir. 1991)* (district court's discretion to dismiss a complaint without leave to amend is severely restricted by *Fed. R. Civ. P. 15(a)*, which directs that leave to amend shall be freely given).

However, a court may deny a plaintiff's request for leave to amend when the facts alleged in the complaint clearly show that the plaintiff cannot state a claim. *See Shane v. Fauver, 213 F.3d 113, 115 (3d Cir. 2000)* (among grounds that could justify denial of leave to amend are undue delay, bad faith, dilatory motive, prejudice, and futility).

[8] Rule 12(b)(6) Dismissal Is Final Judgment on Merits

A dismissal for failure to state a claim is considered a final judgment on the merits. *See, e.g., Federated Dep't Stores v. Moitie, 452 U.S. 394, 399 n.3, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981)* (dismissal for failure to state claim is "judgment on the merits"); *Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278, 284 n. 8 (5th Cir. 1993)* (because dismissals presumed to be with prejudice, court concluded that district court intended dismissal with prejudice, which is "normally an adjudication on the merits for purposes of res judicata"). Such a dismissal has a claim preclusive effect. *See, e.g., May v. Transworld Drilling Co., 786 F.2d 1261, 1263 (5th Cir. 1986)* ("dismissal for failure to state a claim is a judgment on the merits, with preclusive effect"); *Stewart v. United States Bancorp, 297 F.3d 953, 956-959 (9th Cir. 2002)* (dismissal of claims on basis of preemption is on merits and therefore triggers claim preclusion, barring any claims that were or could have been raised in prior action).

PRACTICE RESOURCES:

- *Moore's Federal Practice § 12.34.*

- *Federal Litigation Guide PP 3.90 -3.98*.
- *Moore's AnswerGuide: Federal Pretrial Civil Litigation § 4.32[6]*.
- *Bender's Federal Practice Forms* Form Nos. 12:90-12.131.
- *Fed. R. Civ. P. 12(b)(6)*.

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Chapter 3 DISMISSALS
PART B: MOVING TO DISMISS PURSUANT TO RULE 12(b)

1-3 Moore's AnswerGuide: Fed Civil Motion Practice § 3.09

§ 3.09 Moving to Dismiss for Failure to Join Indispensable Party Pursuant to Rule 12(b)(7)

[1] Complying With Requirement to Join Indispensable Parties Under Rule 19

Fed. R. Civ. P. 12(b)(7) provides that a party may move to dismiss an action on the ground that there is a "failure to join a party under Rule 19." *Fed. R. Civ. P. 12(b)(7)*.

Fed. R. Civ. P. 19 sets forth sets forth a two-step inquiry for determining whether an action must be dismissed for failure to join an indispensable party. The first prong of the test focuses on whether the party should be joined, if feasible.

A person who is subject to service of process and whose joinder will not deprive the court of subject matter jurisdiction must be joined as a party if, in that person's absence, the court cannot grant complete relief among the existing parties, or if a person claiming an interest relating to the subject matter of the action is so situated that disposing of the action in the person's absence may: (1) as a practical matter impair or impede the person's ability to protect the interest; or (2) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest. *See Fed. R. Civ. P. 19(a)*.

If a person who is required to be joined as a party cannot be joined, the court must determine whether in equity and good conscience the action should proceed among the existing parties or should be dismissed. *Fed. R. Civ. P. 19(b)*. In determining whether the action should proceed or be dismissed, *Fed. R. Civ. P. 19(b)* provides that the court should consider the following factors:

1. The extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

2. The extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures.

3. Whether a judgment rendered in the person's absence would be adequate; and

4. Whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

See Fed. R. Civ. P. 19(b).

[2] Dismissing Case Pursuant to Rule 12(b)(7) When Indispensable Person Cannot Be Joined

Dismissal of an action is proper in situations where a person determined to be indispensable cannot be joined as a party. *See, e.g., Rapoport v. Banco Mexicano Somex, S.A., 668 F.2d 667, 669 (2d Cir. 1982)* (dismissal under *Fed. R. Civ. P. 12(b)(7)* clearly not abuse of discretion).

[3] Complying With Timing Requirements for Asserting Defense of Failure to Join Required Party

Besides bringing a motion under *Fed. R. Civ. P. 12(b)(7)*, a party may raise the defense of failure to join a person required by *Fed. R. Civ. P. 19(b)* in any pleading allowed or ordered under *Fed. R. Civ. P. 7(a)*, by a Rule 12(c) motion for judgment on the pleadings, or at trial. *Fed. R. Civ. P. 12(h)(2)*. Courts look closely at the timing of the objection, however, and whether the movant is using the objection offensively. *See, e.g., Gil Enters. v. Delvy, 79 F.3d 241, 247 (2d Cir. 1996)* (refusing to find that court failed to join indispensable party, given late date defect raised and failure of movant to join that party); *Judwin Properties, Inc. v. United States Fire Ins. Co., 973 F.2d 432, 434 (5th Cir. 1992)* (plaintiff's own failure to join an indispensable party may not be used offensively).

[4] Waiving Indispensability Defense

A party may waive the indispensability defense in situation where the party had knowledge of the indispensable party and failed to timely object. *See, e.g., Gil Enters. v. Delvy, 79 F.3d 241, 247 (2d Cir. 1996)* (plaintiff who knew of party's existence, but failed to join party or to object until appeal, has waived procedural defect of party's absence).

[5] Moving Party Bears Burden of Proving Indispensability Defense

The moving party bears the burden of establishing that an absent person should be joined under *Fed. R. Civ. P. 19. See Citizen Band Potawatomi Indian Tribe v. Collier, 17 F.3d 1292, 1293 (10th Cir. 1994)* ("The proponent of a motion to dismiss under 12(b)(7) has the burden of producing evidence showing the nature of the interest possessed by an absent party and that the protection of that interest will be impaired by the absence")

The movant can meet its burden by providing affidavits of persons having knowledge of those interests, as well as other evidence outside the pleadings. *See Martin v. Local 147, International Brotherhood of Painters & Allied Trades, etc., 775 F. Supp. 235, 236-237 (N.D. Ill. 1991)* (facts to decide Rule 12(b)(7) motion properly taken from affidavit offered in support of motion).

[6] Dismissing Case for Failure to Join Indispensable Party Disfavored by Courts

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. *See Jaser v. New York Property Ins. Underwriting Asso., 815 F.2d 240, 242 (2d Cir. 1987)* ("very few cases should be terminated due to the absence of nondiverse parties unless there has been a reasoned determination that their nonjoinder makes just resolution of the action impossible").

If a case involves multiple claims, the court may not dismiss the entire case 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. *See Clarendon, Ltd. v. State Bank, 77 F.3d 631, 635 (2d Cir. 1996)* (absentee party allowed to be added only for purpose of answering third-party claims).

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. *Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 118, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968)* (indispensable party has absolute right to participate in lawsuit); *see also First Financial Marketing Services Group, Inc. v. Field Promotions, Inc., 286 F. Supp. 295, 299 (S.D.N.Y. 1968)* (upon determining probable indispensability of absent party, court gave plaintiff 60 days prior to dismissal to procure absentee's appearance).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 12.35.*
- *Federal Litigation Guide PP 3.120 -3.122.*
- *Bender's Federal Practice Forms* Form Nos. 12:130-12:131, 19:21-19:22.
- *Fed. R. Civ. P. 12(b)(7), 19.*

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Chapter 3 DISMISSALS
PART C: MOVING FOR JUDGMENT ON THE PLEADINGS PURSUANT TO RULE 12(c)

1-3 Moore's AnswerGuide: Fed Civil Motion Practice § 3.10

§ 3.10 Checklist for Moving for Judgment on the Pleadings Pursuant to Rule 12(c)

☐ Determine whether pleadings have closed.

☐ Determine that motion for judgment on the pleadings can be brought in a timely fashion so as not to delay trial. *See § 3.11[3] below*.

☐ Determine grounds for motion for judgment on the pleadings:

- ○ Lack of subject matter jurisdiction;
- ○ Failure to state a claim upon which relief may be granted;
- ○ Failure to join a party under *Fed. R. Civ. P. 19*;
- ○ Failure to state a legal defense to a claim.

☐ Prepare, file, and serve motion for judgment on the pleadings in compliance with rules governing motion practice. *See §§ 1.02 -1.13 above*.

☐ **Search by Topic:** Civil Procedure > Pretrial Judgments > Judgment on the Pleadings

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Chapter 3 DISMISSALS
PART C: MOVING FOR JUDGMENT ON THE PLEADINGS PURSUANT TO RULE 12(c)

1-3 Moore's AnswerGuide: Fed Civil Motion Practice § 3.11

§ 3.11 Moving for Judgment on the Pleadings Pursuant to Rule 12(c)

[1] Seeking Entry of Judgment on the Pleadings Pursuant to Rule 12(c)

Fed. R. Civ. P. 12(c) authorizes a party to move for judgment on the pleadings in order to dispose of cases in which material facts are not in dispute, and the court may render judgment on the merits by looking at pleadings and judicially noticed facts. *See Fed. R. Civ. P. 12(c)*; *see also Hebert Abstract Co. v. Touchstone Properties, 914 F.2d 74, 76 (5th Cir. 1990)* ("A motion brought pursuant to *Fed. R. Civ. P. 12(c)* is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts").

Any party can move for judgment on the pleadings. *See Ramsey v. Amfac, Inc., 960 F. Supp. 1424, 1426 (N.D. Cal. 1997)* ("A plaintiff as well as a defendant may bring a motion under 12(c)"). Moreover, the district court can grant judgment on the pleadings on its own initiative. *See, e.g., Flora v. Home Fed. Sav. & Loan Asso., 685 F.2d 209, 211 (7th Cir. 1989)* (affirming *sua sponte* dismissal because one party clearly entitled to judgment as matter of law and both parties had opportunity to be heard).

[2] Asserting Defenses and Objections in Rule 12(c) Motion for Judgment on Pleadings

A motion for judgment on the pleadings may be used to raise defenses and objections such as the following:

1. Lack of jurisdiction over the subject matter;

2. Failure to state a claim upon which relief may be granted;

3. Failure to join a party under *Fed. R. Civ. P. 19*; or

4. Failure to state a legal defense to a claim.

See Fed. R. Civ. P. 12(c), (h)(2)(B).

[3] Complying With Timing Requirements for Bringing Rule 12(c) Motion for Judgment on the Pleadings

A party may move for judgment on the pleadings after the pleadings are closed. *Fed. R. Civ. P. 12(c)*. The pleadings are closed after the last of the following pleadings in the case has been filed: (1) a complaint; (2) an answer to a complaint; (3) an answer to a counterclaim designated as a counterclaim; (4) an answer to a crossclaim; (5) a third-party complaint; (6) an answer to a third-party complaint; and (7) if the court orders one, a reply to an answer. *See Fed. R. Civ. P. 7(a)*; *see also Doe v. United States, 419 F.3d 1058, 1061-1062 (9th Cir. 2005)* (motion for judgment on the pleadings was procedurally premature where it was brought before any answer was filed).

A motion for judgment on the pleadings must be brought early enough not to delay trial. *Fed. R. Civ. P. 12(c)*; *see also Thomas v. Henderson, 297 F. Supp. 2d 1311, 1314-1315 (S.D. Ala. 2003)* (motion for judgment on pleadings was not untimely even though it was brought two years after suit was initiated and after discovery was almost complete).

[4] Adjudicating Rule 12(c) Motion for Judgment on the Pleadings

The standard governing a Rule 12(c) motion for judgment on the pleadings is the same as a motion to dismiss for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)*. *See GATX Leasing Corp. v. National Union Fire Ins. Co., 64 F.3d 1112, 1114 (7th Cir. 1995)* ("We review a motion pursuant to Rule 12(c) under the same standard as a motion to dismiss under *Fed. R. Civ. P. 12(b)*").

On a motion for judgment on the pleadings, the court must accept the non-movant's allegations as true, and draw all reasonable inferences in favor of the non-movant. *See, e.g., Feliciano v. Rhode Island, 160 F.3d 780, 788 (1st Cir. 1998)* (in reviewing a motion for judgment on the pleadings "the district court must accept all of the nonmoving party's well-pleaded factual averments as true and draw all reasonable inferences in her favor"); *Park Univ. Enters. v. Am. Cas. Co., 442 F.3d 1239, 1244 (10th Cir. 2006)* ("We review a district court's grant of a motion for judgment on the pleadings *de novo*, using the same standard that applies to a Rule 12(b)(6) motion ... . So doing, we accept all facts pleaded by the nonmoving party as true and grant all reasonable inferences from the pleadings in favor of the same"). The court is not obliged, however, to ignore allegations that undermine the non-movant's claim, nor is the court bound by allegations that are merely unsupported conclusions of law. *See, e.g., Northern Ind. Gun & Outdoor Shows v. City of S. Bend, 163 F.3d 449, 452 (7th Cir. 1998)* (court is not obligated to ignore any facts set forth in the complaint that undermine the plaintiff's claim or to assign any weight to unsupported conclusions of law).

The court will grant a motion for judgment on the pleadings when the movant is entitled to judgment as a matter of law. *See, e.g., Feliciano v. Rhode Island, 160 F.3d 780, 788 (1st Cir. 1998)* ("Judgment on the pleadings under Rule 12(c) may not be entered unless it appears beyond a doubt that the nonmoving party can prove no set of facts in support of her claim which would entitle her to relief"); *Burns Int'l Sec. Servs. v. International Union, 47 F.3d 14, 16 (2d Cir. 1994)* (judgment on pleadings appropriate if moving party entitled to judgment as matter of law).

[5] Relationship Between Rule 12(c) Motion and Summary Judgment Motion

If, on a motion for judgment on the pleadings, the parties present issues outside the pleadings and not excluded by the court, the motion should be treated as one for summary judgment and disposed of as provided in *Fed. R. Civ. P. 56*. *See Fed. R. Civ. P. 12(d)*; *see also Rubert-Torres ex rel. Cintron-Rupert v. Hospital San Pablo, Inc., 205 F.3d 472, 475-476 (1st Cir. 2000)* (court converted motion for judgment on pleadings to motion for summary judgment when it considered expert witness report, derived from discovery, that plaintiff had attached to her opposition to motion); *Baker v. Putnal, 75 F.3d 190, 197 (5th Cir. 1996)* (ruling based on facts outside pleadings to be reviewed as order granting summary judgment).

When the court converts a motion for judgment on the pleadings into a motion for summary judgment, the non-movant must be given a reasonable opportunity to present all material that is pertinent to the motion. *See Fed. R. Civ. P. 12(d)*; *see also Krijn v. Pogue Simone Real Estate Co., 896 F.2d 687, 689 (2d Cir. 1990)* ("The essential inquiry, when

determining if the district court correctly converted a motion to dismiss into a motion for summary judgment, is whether the non-movant 'should reasonably have recognized the possibility that the motion might be converted into one for summary judgment or was taken by surprise and deprived of a reasonable opportunity to meet facts outside the pleadings' ").

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 12.38*.
- *Bender's Federal Practice Forms* Form Nos. 12:140-12:144.
- *Federal Litigation Guide PP 3.160-3.163*.
- *Moore's AnswerGuide: Federal Pretrial Civil Litigation § 4.34*.
- *Fed. R. Civ. P. 12(c), (d)*.

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Chapter 3 DISMISSALS
PART D: MOVING TO DISMISS BASED ON LACK OF JUSTICIABILITY

1-3 Moore's AnswerGuide: Fed Civil Motion Practice § 3.12

§ 3.12 Checklist for Moving to Dismiss Based on Lack of Justiciability

☐ Determine whether plaintiff's claims are justiciable by considering the following:

○ Does plaintiff have standing to bring claims? Standing requires a concrete and particularized injury that is: (1) actual or imminent; (2) caused by, or fairly traceable to, an act that the litigant challenges in the instant litigation; and (3) redressable by the court. *See § 3.13 below*.

○ Are the claims ripe for adjudication? Consider whether: (1) the claims are fit for judicial resolution; and (2) the hardship to the parties of withholding judicial consideration. *See § 3.14 below*.

○ Are the claims moot? Claims can become moot when: (1) the case no longer presents a live controversy; (2) the parties no longer have a legally cognizable interest in the controversy; (3) the court can no longer grant the requested relief; (4) the controversy has been resolved in another forum; (5) a change in law; and (6) a voluntary dismissal. *See § 3.15 below*.

☐ Determine whether to bring motion based on lack of justiciability pursuant to *Fed. R. Civ. P. 12(b)(1)*, or, alternatively, whether to bring motion for judgment on the pleadings pursuant to *Fed. R. Civ. P. 12(c)* or motion for summary judgment pursuant to *Fed. R. Civ. P. 56*.

☐ File and serve motion in compliance with Federal Rules governing motion practice, as well as local district court rules and individual judge's rules and standing orders. *See §§ 1.09 -1.13 above*.

☐ **Search by Topic:** Civil Procedure > Justiciability

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Chapter 3 DISMISSALS
PART D: MOVING TO DISMISS BASED ON LACK OF JUSTICIABILITY

1-3 Moore's AnswerGuide: Fed Civil Motion Practice § 3.13

§ 3.13 Moving to Dismiss Case for Lack of Standing

[1] Complying With Standing Requirement

In order to have standing to sue in federal court, a plaintiff must be a proper party to seek an adjudication of the particular claims asserted in the complaint. *See Allen v. Wright, 468 U.S. 737, 752, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)* ("the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted").

To establish standing, a plaintiff must demonstrate that it has suffered a concrete and particularized injury. The injury must be an injury in fact--an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. There must be a causal connection between the injury and the conduct complained of--the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. It must be likely, as opposed to merely speculative, that the injury will be redressed in a favorable decision. *See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)* ; *see also Florida Audubon Soc'y v. Bentsen, 94 F.3d 658, 663-664 (D.C. Cir. 1996)* ; *Caldwell v. Caldwell, 545 F.3d 1126, 1131 (9th Cir. 2008)* (complaint that alleged only a generalized grievance was insufficient to satisfy the injury-in-fact requirement).

[2] Raising Issue of Lack of Standing

[a] Raising Standing Issue by Bringing Rule 12(b)(1) Motion or Rule 56 Motion for Summary Judgment

Standing is an element of subject matter jurisdiction. Thus, a defendant may challenge the plaintiff's standing by bringing a Rule 12(b)(1) motion to dismiss for lack of subject jurisdiction. *See Fed. R. Civ. P. 12(b)(1)*. A defendant also may challenge a plaintiff's standing by filing a Rule 56 motion for summary judgment. *See Fed. R. Civ. P. 56*; *see also see Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883-884, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990)* (standing raised on motion for summary judgment).

[b] Court Can Raise Standing Issue *Sua Sponte*

The court may raise the issue of standing *sua sponte* at the trial or appellate stage of proceedings. *See, e.g., In re*

President's Comm'n on Organized Crime etc., 783 F.2d 370, 373 (3d Cir. 1986) (appellate court decided standing issue "even though the court below passed over it without comment"); *Louisiana ACORN Fair Hous. v. LeBlanc, 211 F.3d 298, 304-306 (5th Cir. 2000)* (court addressed issue of standing *sua sponte* on appeal).

[3] Establishing Standing Is Plaintiff's Burden

The plaintiff has the burden of establishing standing. *See, e.g., Pederson v. Louisiana State Univ., 213 F.3d 858, 869 (5th Cir. 2000)* (stating plaintiff's burden to establish standing); *Los Angeles County Bar Ass'n v. Eu, 979 F.2d 697, 701 (9th Cir. 1992)* (plaintiff has burden of proof on standing). To meet this burden at the pleading stage, the plaintiff must clearly and specifically set forth facts sufficient to show that each claim for relief seeks redress for actual or imminent injury that is caused by an act challenged in the instant litigation. *See Baur v. Veneman, 352 F.3d 625, 642 n.15 (2d Cir. 2003)* ("a plaintiff must demonstrate standing for each claim and form of relief sought").

[4] Determining Whether Plaintiff Has Standing; Court's Inquiry

[a] Standing Determined as of Time Plaintiff Filed Suit

When conducting its inquiry, the court must determine whether the plaintiff had standing at the time that it filed the lawsuit. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), 528 U.S. 167, 180, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)* ("we have an obligation to assure ourselves that [plaintiff] had Article III standing at the outset of the litigation"); *Anjelino v. New York Times Co., 200 F.3d 73, 88 (3d Cir. 1999)* (standing is established at pleading stage); *Focus on the Family v. Pinellas Suncoast Transit Auth., 344 F.3d 1263, 1275 (11th Cir. 2003)* ("Article III standing must be determined as of the time at which the plaintiff's complaint is filed"). Thus, an injury that did not occur until after the suit was filed cannot serve as the basis for standing. *See, e.g., Utah Ass'n of Counties v. Bush, 455 F.3d 1094, 1101 (10th Cir. 2006)* (alleged injury that occurred after complaint was filed could not serve as basis for standing).

[b] Federal Law, Not State Law, Applies to Standing Inquiry

The district court must apply federal law, not state law, when determining whether a plaintiff has standing to bring suit in federal court. *See Rifkin v. Bear Stearns & Co., 248 F.3d 628, 631-633 (7th Cir. 2001)* (standing to bring a federal claim in federal court is exclusively a question of federal law and a state statute permitting taxpayer standing cannot override federal law).

[c] Conducting Evidentiary Hearing to Determine Standing

District courts may resolve the question of standing based on the pleadings alone. *See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)* (at pleading stage, general factual allegations of injury resulting from defendant's conduct may suffice to establish standing). If, however, the parties present contradictory evidence on the issue of standing, the court may decide to conduct an evidentiary hearing to resolve factual disputes relevant to the standing inquiry. *See, e.g., Munoz-Mendoza v. Pierce, 711 F.2d 421, 425 (1st Cir. 1983)* (court must resolve any genuinely disputed factual issue concerning standing either through pretrial evidentiary hearing or at trial itself); *Bischoff v. Osceola County, 222 F.3d 874, 881 (11th Cir. 2000)* (district court must hold evidentiary hearing, including live witness testimony, when court was presented with conflicting affidavits regarding standing issue).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 101.20 -101.35.*
- *Bender's Federal Practice Forms,* Form No. 12:12.

- *Moore's AnswerGuide: Federal Pretrial Civil Litigation §§ 1.49 -1.53*.

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Chapter 3 DISMISSALS
PART D: MOVING TO DISMISS BASED ON LACK OF JUSTICIABILITY

1-3 Moore's AnswerGuide: Fed Civil Motion Practice § 3.14

§ 3.14 Moving to Dismiss for Lack of Ripeness for Adjudication

[1] Understanding Ripeness Doctrine

A court's ripeness inquiry focuses on whether the claim is sufficiently mature, and the issues sufficiently defined and concrete, to permit the court to render a decision. *See Motor Vehicle Mfrs. Ass'n of the United States v. New York State Dep't. of Envtl. Conservation, 79 F.3d 1298, 1305 (2d Cir. 1996)* (a dispute is ripe for adjudication when there is a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract). By ensuring there is a real dispute between the parties, the ripeness doctrine prevents courts from becoming entangled in purely abstract or theoretical disagreements. *See Johnson v. Sikes, 730 F.2d 644, 648 (11th Cir. 1984)* (the basic rationale of the ripeness doctrine is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements).

The question of ripeness goes to whether the district court has subject matter jurisdiction over the action. *See, e.g., Southern Pacific Transp. Co. v. Los Angeles, 922 F.2d 498, 502 (9th Cir. 1990)* ("If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed"); *New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1498-1499 (10th Cir. 1995)* ("The question of whether a claim is ripe for review bears on a court's subject matter jurisdiction under the case or controversy clause of Article III of the United States Constitution").

[2] Determining Whether Case Is Ripe for Adjudication

Courts apply a two-part test to determine whether an issue is ripe for adjudication, evaluating:

1. The fitness of the issue for judicial resolution; and

2. The hardship to the parties of withholding judicial consideration.

See, e.g., Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 201-202, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983) (finding that challenge to legislation was ripe because it was predominantly legal and delay would work a substantial hardship to the parties); *Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 304, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979)* (finding that constitutional challenges to the Arizona Agricultural Employment Relations Act ripe because of their chilling effect upon speech); *Abbott Labs. v.*

Gardner, 387 U.S. 136, 153, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967) (holding that pharmaceutical manufacturers challenge to FDA legislation was ripe for adjudication because the legislation at issue produced "an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance ..."); *cf. Dealer Computer Servs., Inc. v. Dub Herring Ford, 547 F.3d 558, 561 (6th Cir. 2008)* (the factors considered in assessing ripeness are: (1) the likelihood that the harm alleged by the party will ever come to pass; (2) the hardship to the parties if judicial relief is denied at the current stage of the proceedings; and (3) whether the factual record is sufficiently developed to produce a fair adjudication on the merits).

[3] Raising Issue of Ripeness

[a] Asserting Ripeness Issue in Rule 12(b)(1) Motion

A defending party may argue that the plaintiff's case lacks ripeness for adjudication by bringing a motion to dismiss under *Fed. R. Civ. P. 12(b)(1). See New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1499 (10th Cir. 1995)* ("The question of ripeness, like other challenges to a court's subject matter jurisdiction, is treated as a motion under Rule 12(b)(1)").

[b] Raising Ripeness Issue *Sua Sponte*

District courts have the discretion to consider the question of ripeness on their own initiative. *See Metropolitan Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, 501 U.S. 252, 265 n.13, 111 S. Ct. 2298, 115 L. Ed. 2d 236 (1991)* (even if parties do not raise question of ripeness on appeal, it concerns federal court jurisdiction under Article III, so court must consider question on its own initiative).

[4] Establishing Ripeness Is Complainant's Burden

It is the complainant's burden to allege facts demonstrating that the action is ripe for adjudication. *See Renne v. Geary, 501 U.S. 312, 316, 111 S. Ct. 2331, 115 L. Ed. 2d 288 (1991)* ("It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers").

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 101.70 -101.81.*
- *Bender's Federal Practice Forms* Form No. 57:11.
- *Moore's AnswerGuide: Federal Pretrial Civil Litigation § 1.54.*

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Chapter 3 DISMISSALS
PART D: MOVING TO DISMISS BASED ON LACK OF JUSTICIABILITY

1-3 Moore's AnswerGuide: Fed Civil Motion Practice § 3.15

§ 3.15 Moving to Dismiss for Mootness

[1] Overview of Mootness Doctrine

The mootness doctrine provides not only that there must be an actual and justiciable controversy at the inception of the action, but also that a federal court must dismiss the action for want of jurisdiction if the controversy ceases to exist. *See Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-241, 57 S. Ct. 461, 81 L. Ed. 617 (1937)* (action will be dismissed if there is not a definite and concrete controversy between the parties); *Tucker v. Phyfer, 819 F.2d 1030, 1033 (11th Cir. 1987)* ("The mootness doctrine requires that the plaintiff's controversy remain live throughout the litigation; once the controversy ceases to exist, the court must dismiss the cause for want of jurisdiction"). The controversy must be definite and concrete seeking an immediate and definitive determination of the legal rights of the parties, as distinguished from an advisory opinion upon a hypothetical state of facts.

A case is also considered moot in situations where the district court can no longer grant effective relief. *See, e.g., Burlington N. R. Co. v. Crow Tribal Council, 940 F.2d 1239, 1244 (9th Cir. 1991)* (case becomes moot when court can no longer grant effective relief); *Northwest Environmental Defense Center v. Gordon, 849 F.2d 1241, 1244 (9th Cir. 1988)* (question of mootness hinges on present controversy and whether effective relief can be granted).

[2] Determining Whether Case Is Moot

[a] Case Is Moot When It No Longer Presents a Live Controversy

A district court will consider a case to be moot when it no longer presents a live controversy, such as in the following circumstances:

1. **Passage of time has made case stale and it is unlikely that precise conditions of case will ever recur.** *See, e.g., Jordan by & Through Jones v. Indiana High Sch. Athletic Ass'n, 16 F.3d 785, 787 (7th Cir. 1994)* (action by player challenged enforcement of high school athletic association's eligibility rules determined to be moot because plaintiff graduated during pendency of action); *Flynt v. Weinberger, 762 F.2d 134, 135 (D.C. Cir. 1985)* (challenge to ban on press coverage declared moot when Grenada invasion came to an end).

2. **Issues no longer extant due to intervening factual events.** *See, e.g., Aiona v. Judiciary of Hawaii, 17 F.3d 1244, 1248 (9th Cir. 1994)* (claims challenging constitutionality of Hawaii's license revocation statute were declared moot because revocation of licenses was rescinded in administrative hearings conducted while constitutional challenge was pending).

3. **Parties have entered into a settlement agreement resolving the controversy.** *See, e.g., In re Talbott Big Foot, Inc., 924 F.2d 85, 87-88 (5th Cir. 1991)* (claimant's appeal from district court ruling that vessel operator had limited liability for accident was mooted by settlement); *United States Fire Ins. Co. v. Caulkins Indiantown Citrus Co., 931 F.2d 744, 748 (11th Cir. 1991)* (pending action seeking declaration as to legal obligations of insured was dismissed as moot because settlement agreement constituted complete resolution of dispute).

[b] Case Is Moot When Parties No Longer Have Legally Cognizable Interest in Controversy

A district court will find a case to be moot when the parties no longer have a legally cognizable interest in the outcome of the controversy, such as in the following circumstances:

1. **Change in party's status.** *See, e.g., Arizonans for Official English v. Arizona, 520 U.S. 43, 68-71, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997)* (suit seeking to enjoin enforcement of amendment to state constitution making English official language of Arizona became moot when plaintiff, a state employee who spoke both English and Spanish at work, resigned); *Fox v. Board of Trustees of the State Univ., 42 F.3d 135, 140 (2d Cir. 1994)* (declaratory and injunctive claims mooted by graduation); *Green v. Branson, 108 F.3d 1296, 1300 (10th Cir. 1997)* (former prisoner's claim for declaratory relief was mooted by his release from incarceration; entry of declaratory judgment would have no effect on defendant prison officials behavior toward him).

2. **Plaintiff divested of his interest in disputed subject matter.** *See, e.g., Johnson-Kennedy Radio Corp. v. Chicago Bears Football Club, Inc., 97 F.2d 223, 225 (7th Cir. 1938)* (suit seeking injunction to prevent broadcasting of football game declared moot after airing of game on date in question); *Jersey Cent. Power & Light Co. v. New Jersey, 772 F.2d 35, 40 (3d Cir. 1985)* (plaintiff power company's interest in action to enjoin turnpike authority from interfering with shipment of nuclear waste ended when, during pendency of appeal, shipments terminated).

3. **Defendant no longer responsible for challenged activity or conduct.** *See, e.g., Blackburn v. Goodwin, 608 F.2d 919, 925 (2d Cir. 1979)* (case against FBI official deemed moot when official no longer employed in same position and could not comply with relief requested from court); *Commodity Futures Trading Com. v. Board of Trade, 701 F.2d 653, 656 (7th Cir. 1983)* (action seeking declaration that patent was void deemed moot because patent had been sold during pendency of action and defendant no longer held title).

Proceeding as a class action may save a case from being dismissed on mootness grounds. For example, a putative class action is not subject to dismissal on mootness grounds even if the named plaintiff's claims become moot after the action is filed. *See Franks v. Bowman Transp. Co., 424 U.S. 747, 752-756, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (1976)* (fact that named plaintiff no longer had personal stake in outcome of certified class action does not moot class action); *Sosna v. Iowa, 419 U.S. 393, 401-402, 95 S. Ct. 553, 42 L. Ed. 2d 532 (1975)* (constitutional justiciability requires that named plaintiff have case or controversy when suit filed and class is certified and live controversy throughout; controversy may be between named defendant and class member, even though named plaintiff's claim is moot); *see also § 8.06[1][a] below.*

[c] Case Is Moot When Court Can No Longer Grant Requested Relief

A district court may consider a case moot when it court can no longer grant the requested relief, such as in the following situations:

1. **Plaintiff already obtained requested relief.** *See, e.g., Arizona Electric Power Cooperative, Inc. v. Federal Energy Regulatory Com., 631 F.2d 802, 808 (D.C. Cir. 1980)* (plaintiff was made whole before litigation and would not identify any further relief to be given by court; therefore, case was dismissed as moot).

2. **Defendant ceased challenged activity.** *See, e.g., Enrico's, Inc. v. Rice, 730 F.2d 1250, 1253 (9th Cir. 1984)* (state decision not to enforce rule concerning wholesale liquor prices, in response to appellate court invalidation of rule, rendered moot federal action challenging rule); *Grano v. Barry, 733 F.2d 164, 167-168 (D.C. Cir. 1984)* (challenge to district court's injunction against issuance of permit to demolish historic tavern rendered moot by passage into law of public initiative that prohibited demolition).

[d] Case Is Moot When Controversy Resolved in Another Forum

A case may be rendered moot by virtue of a decision rendered in another forum, such as in the following circumstances:

1. **Administrative agency disposes of matter in controversy.** *See Aiona v. Judiciary of Hawaii, 17 F.3d 1244, 1248 (9th Cir. 1994)* (federal challenge to constitutionality of license revocation statute rendered moot when administrative agency rescinded license revocations of the plaintiffs).

2. **Court issues decision on matter in controversy.** *See, e.g., Powder River Basin Resource Council v. Babbitt, 54 F.3d 1477, 1484-1485 (10th Cir. 1995)* (plaintiff's federal suit to compel payment of counsel fees rendered moot when Wyoming Supreme Court ruled in parallel state litigation that plaintiffs would be awarded fees).

[e] Case Is Moot Due to Change in Law

A case may become moot as a result of a change in law, such as in the following circumstances:

1. **Amendment to law existing at time suit was initiated.** *See, e.g., Lewis v. Continental Bank Corp., 494 U.S. 472, 478, 110 S. Ct. 1249, 108 L. Ed. 2d 400 (1990)* (plaintiff's stake in outcome rendered moot by amendment of law).

2. **Challenged law is repealed or expires.** *See, e.g., Pine Tree Medical Assocs. v. Secretary of HHS, 127 F.3d 118, 120-121 (1st Cir. 1997)* (issue of whether regulations violated Public Health Service Act's notice and comment provisions became moot when Congress repealed notice and comment provisions); *Rosetti v. Shalala, 12 F.3d 1216, 1223-1225 (3d Cir. 1993)* (plaintiffs' challenge to validity of governmental rules for disability benefits for HIV patients was declared moot when challenged regulations were replaced by new regulations).

[f] Case Is Moot When Plaintiff Voluntarily Dismisses Case

Mootness may also occur as a side effect of a plaintiff's voluntary dismissal of an action. *See, e.g., A. B. Dick Co. v. Marr, 197 F.2d 498, 502 (2d Cir. 1952)* (voluntary dismissal moots case); *Or. Bureau of Labor and Indus. ex rel. Richardson v. U.S. West Communs., Inc., 288 F.3d 414, 416-417 (9th Cir. 2002)* (voluntary dismissal can moot case, rendering it nonjusticiable under Article III).

[3] Exceptions to Mootness Doctrine

[a] Case May Not Be Moot When Defendant's Conduct Is Capable of Being Repeated

Although a lawsuit may technically meet the standard for mootness, a court will not dismiss the case as moot if the defendant's conduct is capable of being repeated, yet evades judicial review. The exception applies only in exceptional circumstances, and when both of the following conditions exist:

1. If the challenged action is inherently too short in duration to be fully litigated before its cessation or expiration, and

2. If there is a reasonable expectation that the plaintiff will again be subjected to the same action unless court intervention occurs.

See, e.g., Weinstein v. Bradford, 423 U.S. 147, 149, 96 S. Ct. 347, 46 L. Ed. 2d 350 (1975) (the capable of repetition, yet evading review doctrine is limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again); *Desiderio v. NASD, 191 F.3d 198, 201-202 (2d Cir. 1999)* (SEC's approval of rule change abolishing mandatory arbitration of statutory employment discrimination claims did not moot prospective broker's suit because amendment was voluntary and did not apply to pending claims and defendant failed to show that there was no reasonable expectation that rule would be reinstated).

[b] Case May Not Be Moot When Defendant Voluntarily Ceases Challenged Activity to Avoid Judicial Resolution

As a general rule, a defendant's voluntary cessation of challenged conduct does not render the underlying controversy moot unless there is no reasonable possibility that the challenged conduct will resume. *See Adarand Constructors, Inc. v. Slater, 528 U.S. 216, 222, 120 S. Ct. 722, 145 L. Ed. 2d 650 (2000)* ("Voluntary cessation of challenged conduct moots a case, however, only if it is *absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur"); *see also Gluth v. Kangas, 951 F.2d 1504, 1507-1508 (9th Cir. 1991)* (defendant's voluntary cessation of old policy, which denied prisoners meaningful access to law library, for the sole purpose of avoiding adverse court ruling was insufficient basis for mooting claim, particularly because defendant offered no reasonable assurance that alleged violations would not recur).

Whether the voluntary cessation of activity by a defendant can provide a basis for dismissing an action on mootness grounds turns on two key questions:

1. Whether the defendant is free to return to its "old ways;" and

2. Whether the defendant is likely to resume the challenged conduct.

See, e.g., Milwaukee Police Ass'n v. Jones, 192 F.3d 742, 747 (7th Cir. 1999) ("Voluntary cessation of allegedly illegal conduct does not render a case moot unless the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated"); *FTC v. Affordable Media, LLC, 179 F.3d 1228, 1237 (9th Cir. 1999)* ("an action for an injunction does not become moot merely because the conduct complained of was terminated, *if there is a possibility of recurrence*, since otherwise the defendant's would be free to return to [their] old ways").

[c] Case May Not Be Moot When Defendant's Past Acts Have Present, Future, or Collateral Consequences That May Be Judicially Addressed

An exception to the mootness doctrine exists for actions that seek redress for past conduct that has present, future, or collateral consequences. *See, e.g., Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 122, 94 S. Ct. 1694, 40 L.*

Ed. 2d 1 (1974) (employer sought to enjoin state from granting welfare benefits to striking workers; although strike ended before injunction could be issued, issue was not moot because employer's subsequent relations with union would be affected by ongoing state policy).

[4] Party or Court Can Raise Mootness Issue at Any Time

Any party can raise the issue of mootness at any time in the litigation, or the district court may raise the mootness issue *sua sponte* because it is a jurisdictional question. *See, e.g., Glenbrook Capital L.P. v. Kuo, 525 F. Supp. 2d 1130, 1149 (N.D. Cal. 2007)* ("Mootness is a jurisdictional defect that can be raised at any time by the parties or the court *sua sponte*"); *McLaughlin v. Hoffman, 547 F.2d 918, 919 n.2 (5th Cir. 1977)* ("While neither party raises this issue, mootness is a jurisdictional question under Article III, which may be raised by the court").

[5] Moving Party Bears Burden of Proving Mootness

The moving party bears a heavy burden to establish that an action is moot. *See United States v. W.T. Grant Co., 345 U.S. 629, 633, 73 S. Ct. 894, 97 L. Ed. 1303 (1953)* (the burden to demonstrate mootness "is a heavy one"); *see also County of Los Angeles v. Davis, 440 U.S. 625, 631, 99 S. Ct. 1379, 59 L. Ed. 2d 642 (1979)* (finding that heavy burden of establishing mootness was satisfied).

PRACTICE RESOURCES:

- *Moore's Federal Practice §§ 101.90 -101.101.*
- *Bender's Federal Practice Forms* Form No. 41:13.
- *Moore's AnswerGuide: Federal Pretrial Civil Litigation §§ 1.55, 1.56.*

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Chapter 3 DISMISSALS
PART E: MOVING FOR VOLUNTARY DISMISSAL PURSUANT TO RULE 41(a)

1-3 Moore's AnswerGuide: Fed Civil Motion Practice § 3.16

§ 3.16 Checklist for Moving for Voluntary Dismissal Pursuant to Rule 41(a)

☐ Determine whether voluntary dismissal of action is warranted.

☐ Determine which parties to dismiss.

☐ Verify whether parties will stipulate to voluntary dismissal.

☐ If the parties will not stipulate to a voluntary dismissal, a plaintiff can file a notice of dismissal as a matter of right before the complaint is answered or a motion for summary judgment filed. The following types of actions may not be dismissed without prior court approval:

- ○ Class actions. *See Fed. R. Civ. P. 23(e).*
- ○ Derivative actions. *See Fed. R. Civ. P. 23.1.*
- ○ Actions relating to unincorporated associations. *See Fed. R. Civ. P. 23.2.*
- ○ Actions involving receivers. *See Fed. R. Civ. P. 66.*
- ○ Actions governed by some statutes.

☐ When dismissal is no longer available as a matter of right and the parties will not stipulate to dismissal, the plaintiff can file a motion for dismissal pursuant to *Fed. R. Civ. P. 41(a)(2). See § 3.17[7] below.*

○ File and serve motion in accordance with Federal Rules governing motion practice, as well as applicable local district court rules as well as individual judge's rules and standing orders.

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Moore's AnswerGuide: Federal Civil Motion Practice

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Chapter 3 DISMISSALS
PART E: MOVING FOR VOLUNTARY DISMISSAL PURSUANT TO RULE 41(a)

1-3 Moore's AnswerGuide: Fed Civil Motion Practice § 3.17

§ 3.17 Seeking Voluntary Dismissal Pursuant to Rule 41(a)

[1] Understanding Requirements for Seeking Voluntary Dismissal Without Court Order

Under *Fed. R. Civ. P. 41(a)*, a plaintiff may voluntarily dismiss the action without a court order by filing: (1) a notice of dismissal before the opposition party serves an answer or a motion for summary judgment; or (2) a stipulation of dismissal signed by all parties who have appeared in the action. *See Fed. R. Civ. P. 41(a)(1)*. Unless the notice or stipulation states otherwise, the dismissal will be without prejudice. *Fed. R. Civ. P. 41(a)(2)*. However, if the plaintiff previously dismissed any federal or state court action based on or including the same claim, a notice of dismissal will operate as an adjudication on the merits. *See Fed. R. Civ. P. 41(a)(2)*.

[2] Understanding Purposes of Voluntary Dismissal Pursuant to Rule 41(a)

Fed. R. Civ. P. 41(a) serves two purposes. First, it allows plaintiffs to either "start over" or "abandon" the litigation. *See, e.g., McCall-Bey v. Franzen, 777 F.2d 1178, 1184 (7th Cir. 1985)* ("the general purpose of the rule is to preserve the plaintiff's right to take a voluntary nonsuit and start over so long as the defendant is not hurt"); *Lapierre v. Executive Industries, Inc., 117 F.R.D. 328, 329 (D. Conn. 1987)* (Under *Fed. R. Civ. P. 41(a)*, "plaintiff is free to review his cause of action, determine its merit, and dismiss his claims rather than face an adverse judgment and subsequent award of costs"). Second, by regulating the timing, frequency and conditions of such dismissals, *Fed. R. Civ. P. 41* protects defendants from harassment and prejudice. *See generally Ikospentakis v. Thalassic S.S. Agency, 915 F.2d 176, 177 (5th Cir. 1990)* ("primary purpose in entrusting dismissal to the supervision of the court under [*Fed. R. Civ. P. 41(a)*] is to protect the non-movant from unfair treatment").

[3] Reasons Why Plaintiff May Seek Voluntary Dismissal Pursuant to Rule 41(a)

[a] Seeking Voluntary Dismissal Under Rule 41(a) to Halt Litigation

A plaintiff may seek a voluntary dismissal to halt litigation for various reasons, including the following:

1. **To obtain new evidence needed to state or support a claim.** *See, e.g., Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 217, 67 S. Ct. 752, 91 L. Ed. 849 (1947)* (plaintiff can take a voluntary dismissal to fill a gap in the evidence).

2. **To correct pleadings.** *See, e.g., Fitness Quest, Inc. v. Dynamic Classics, Ltd., 1990 U.S. Dist. LEXIS 3299, at *3 (S.D.N.Y. 1990)* (approving dismissal to correct mistake in original complaint).

3. **To facilitate coordination or consolidation with another action.** *See, e.g., Creighton v. Taylor, 1990 U.S. Dist. LEXIS 15597, at *2-*4 (D. Conn. 1990)* (voluntary dismissal granted where plaintiff acted with apparent intent to refile action in state court where another similar action was pending).

[b] Seeking Voluntary Dismissal Under Rule 41(a) to Obtain Alternative Forum

Although generally disfavored by the courts and viewed by many appellate courts as improper "forum-shopping," plaintiffs sometimes seek voluntary dismissal to obtain an alternative forum for the litigation, for a variety of strategic purposes, including the following:

1. Defeating federal diversity jurisdiction by joining non-diverse parties and refiling the action in state court. *See, e.g., O'Reilly v. R.W. Harmon & Sons, Inc., 124 F.R.D. 639, 639-640 (W.D. Mo. 1989)* (voluntary dismissal for the purpose of joining a non-diverse defendant).

2. Defeating federal subject matter jurisdiction by dismissing federal causes of action and refiling the action in state court. *See Ethridge v. Harbor House Restaurant, 861 F.2d 1389, 1393 (9th Cir. 1988)* (removal appropriate where state action could have been filed in federal court).

3. Preserving federal diversity jurisdiction by dismissing the action as against non-diverse parties. *See, e.g., Sealskin v. Harrison Baking Co., 1990 U.S. Dist. LEXIS 11956, at *2 (E.D. Pa. 1990)* (voluntary dismissal of non-diverse defendant used to preserve subject matter jurisdiction).

4. Avoiding unfavorable state law by refiling in a state or federal court in a different jurisdiction. *See, e.g., Manshack v. Southwestern Electric Power Co., 915 F.2d 172, 172-173 (5th Cir. 1990)* (dismissal to avoid state-law statutory defense).

5. Changing judges by refiling in state court with the hope that a different judge will be assigned to the case on removal. *See Jorgensen v. Prudential Ins. Co., 852 F. Supp. 255, 260 (D.N.J. 1994)* (noting impropriety of dismissal for purpose of obtaining a new judge).

6. Ensuring a trial before a particular federal judge by filing multiple actions and dismissing those which are not assigned to that judge. *See, e.g., Murray v. Sevier, 145 F.R.D. 563, 563-564 (D. Kan. 1993)* ("[t]his relatively young case already has a checkered history which began with a deliberate attempt to circumvent this court's random selection process and secure a trial before Chief Judge Kelly ... [w]hen counsel determined that [one of the six cases filed] had been assigned to Chief Judge Kelly, they dismissed all the other cases pursuant to *Fed. R. Civ. P. 41(a)(1)*").

7. Refiling in a jurisdiction with a longer statute of limitations. *See McCants v. Ford Motor Co., 781 F.2d 855, 859 (11th Cir. 1986)* ("[w]e have already held the loss of a valid statute of limitations defense not to constitute a bar to a dismissal without prejudice").

[c] Seeking Voluntary Dismissal Under Rule 41(a) for Tactical Reasons

Although such conduct is generally disfavored by the courts, and in extreme cases, may be viewed as misconduct, plaintiffs may try to voluntarily dismiss an action for tactical reasons, including the following:

1. Delaying or avoiding discovery. *See Greguski v. Long Island R.R., 163 F.R.D. 221, 223-224 (S.D.N.Y. 1995)* ("When lawyers are allowed to place and withdraw cases from dockets at their whims, serious litigants are penalized" in that "the serious litigant is left to gamble with the expense of preparation versus the probability of being reached for trial").

2. Adjourning, delaying, or avoiding a trial. *See, e.g., Chott v. Cal Gas Corp., 746 F. Supp. 1377, 1378 (E.D. Mo. 1990)* ("[p]laintiffs dismissed the [prior] action because the trial date was imminent and plaintiffs were as yet undecided whether additional defendants should be added").

3. Delaying or avoiding an anticipated adverse determination on the merits. *See, e.g., Williams v. Ford Motor Credit Co., 627 F.2d 158, 160 (8th Cir. 1980)* (district court abused discretion by granting dismissal at end of trial following motion for judgment notwithstanding the verdict); *see also Spencer v. Moore Business Forms, Inc., 87 F.R.D. 118, 122 (N.D. Ga. 1980)* (denying motion following granting of summary judgment as to one defendant and partial summary judgments as to other defendants).

4. Refiling complaint containing a jury demand. *See Paturzo v. Home Life Ins. Co., 503 F.2d 333, 335-336 (4th Cir. 1974)* (dismissal cannot be used to cure jury waiver).

5. Eliminating a defendant that is impeding settlement negotiations. *See Aggregates (Carolina), Inc. v. Kruse, 134 F.R.D. 23, 24 (D.P.R. 1991)* (court accepted voluntary dismissal of defendant who was holding up settlement negotiations).

6. Facilitating an immediate final judgment to expedite an appeal. *See Raceway Properties, Inc. v. Emprise Corp., 613 F.2d 656, 657 (6th Cir. 1980)* (dismissed to expedite review); *but see Chappelle v. Beacon Communs. Corp., 84 F.3d 652, 654 (2d Cir. 1996)* ("[w]e agree with those courts that have precluded an appeal from a dismissal of some of a plaintiff's claims when the balance of his claims have been dismissed without prejudice pursuant to a Rule 41(a) dismissal of the action").

[d] Seeking Voluntary Dismissal Under Rule 41(a) to End Litigation

A plaintiff also may dismiss an action pursuant to *Fed. R. Civ. P. 41(a)* without any intent of recommencing it. Common reasons for such voluntary dismissals include the following:

1. The action is meritless and would be futile to continue. *See Lapierre v. Executive Industries, Inc., 117 F.R.D. 328, 329 (D. Conn. 1987)* ("plaintiff is free to review his cause of action, determine its merit, and dismiss his claims rather than face an adverse judgment and subsequent award of costs").

2. Plaintiff realizes that the federal court lacks subject matter jurisdiction. *See Witlin v. Gallagher Basset Serv., 1993 U.S. Dist. LEXIS 5543, at *1-*2 (E.D. Pa. 1993)* (voluntary dismissal motivated by plaintiff's desire to refile action in state court).

3. Plaintiff is unable to continue the litigation for financial reasons or otherwise. *See, e.g., Fernandez v. Southside Hospital, 593 F. Supp. 840, 841 (E.D.N.Y. 1984)* (affidavit accompanying notice of dismissal stated, in part, that "the evidence and money needed to prove a claim ... would be too time consuming and expensive"); *Murdock v. Prudential Ins. Co. of Am., 154 F.R.D. 271, 272-273 (M.D. Fla. 1994)* ("[p]laintiffs stated that the lack of funds to go forward with trial was the underlying reason for the voluntary dismissal").

4. Defendant appears to be judgment-proof. *See Read Corp. v. Bibco Equipment Co., 145 F.R.D. 288, 290 (D.N.H. 1993)* (plaintiff sought a dismissal without prejudice to future litigation, in order to preserve

its right to defend its patent should defendant experience a miraculous economic recovery and resume its alleged infringing conduct).

5. Plaintiff has settled the case. *See Moore's Federal Practice (3d ed.) § 41.31.*

[4] Opposing Plaintiff's Attempt to Voluntarily Dismiss Case Under Rule 41(a)

A defendant may oppose a plaintiff's attempt to voluntarily dismiss a case under *Fed. R. Civ. P. 41(a)* in order to avoid being subjected to future lawsuits. *See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 397, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)* ("Rule 41(a)(1) was designed to curb abuses of [the] nonsuit rules ... Rule 41(a)(1) was intended to eliminate the annoying of a defendant by being summoned into court in successive actions and then, if no settlement is arrived at, requiring him to permit the action to be dismissed and another one commenced at leisure").

A defendant also may object to a plaintiff's attempt to voluntarily dismiss a case in order to seek a strategic advantage. *See, e.g., Thorp v. Scarne, 599 F.2d 1169, 1177 n.10 (2d Cir. 1979)* ("[o]ne need not be an expert in game theory to conclude that plaintiffs tend to dismiss actions that do not look promising while defendants generally want to obtain an adjudication on the merits in precisely the same cases").(

[5] Voluntary Dismissal Under Rule 41(a) Must Terminate Action as to One or More Defendants

[a] Plaintiff Must Dismiss All Claims Against at Least One Defendant

Courts have interpreted *Fed. R. Civ. P. 41(a)* to require the dismissal of all claims against one or more defendants. *See, e.g., Ethridge v. Harbor House Restaurant, 861 F.2d 1389, 1392 (9th Cir. 1988)* ("we agree with those courts that have held a plaintiff may not use [*Fed. R. Civ. P. 41(a)(1)(A)(i)*] to dismiss, unilaterally, a single claim from a multi-claim complaint"); *Gobbo Farms & Orchards v. Poole Chem. Co., 81 F.3d 122, 123 (10th Cir. 1996)* (dismissal must be of whole action and not merely claim within action).

[b] Amendment, Not Voluntary Dismissal, Is Appropriate Method for Terminating Fewer Than All Claims

Amendment of a complaint, rather than dismissal, is the appropriate method for eliminating particular claims from the action. *See, e.g., Ethridge v. Harbor House Restaurant, 861 F.2d 1389, 1392 (9th Cir. 1988)* (*Fed. R. Civ. P. 15(a)* is the appropriate mechanism "where a plaintiff desires to eliminate an issue, or one or more but less than all of several claims, but without dismissing as to any of the defendants"); *Vogel v. Am. Kiosk Mgmt., 371 F. Supp. 2d 122, 129 (D. Conn. 2005)* (a plaintiff wishing to eliminate some but not all claims or issues from the action should amend the complaint under *Fed. R. Civ. P. 15(a)*, rather than dismiss under *Fed. R. Civ. P. 41(a)*).

[c] Plaintiff May Voluntarily Dismiss Fewer Than All Defendants

A plaintiff may voluntarily dismiss an action as to less than all of the defendants, as long as all claims are dismissed as to each affected defendant. *See, e.g., Circuit General Foods Corp. v. Jay V. Zimmerman Co., 1990 U.S. Dist. LEXIS 10156, at *4 (S.D.N.Y. 1990)* ("a plaintiff may dismiss its claims against less than all defendants in a multi-defendant case").

[6] Complying With Procedural Requirements for Seeking Voluntary Dismissal Without Obtaining Court Approval

A plaintiff may unilaterally dismiss the action by filing a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment. *Fed. R. Civ. P. 41(a)(1)(A)(i).*

A plaintiff may also dismiss an action by filing a stipulation of dismissal, signed by all parties who have appeared. *Fed.*

R. Civ. P. 41(a)(1)(A)(ii).

Exceptions:

Court approval of a dismissal is required in the following types of actions:

1. Class actions. *See Fed. R. Civ. P. 23(e)*; *see also Janus Films, Inc. v. Miller, 801 F.2d 578, 582 (2d Cir. 1986)* ("[w]ith some stipulated dismissals, such as class actions, court approval is required, *Fed. R. Civ. P. 23(e)*, and the judge must determine whether the settlement is fair, adequate, and reasonable, the same standard applicable to a class action consent judgment").

2. Derivative actions. *See Fed. R. Civ. P. 23.1.*

3. Actions relating to unincorporated associations. *See Fed. R. Civ. P. 23.2.*

4. Actions involving receivers. *See Fed. R. Civ. P. 66.*

5. Actions governed by some other statutes. *See, e.g., 31 U.S.C. §§ 3729 et seq.* (False Claims Act); *8 U.S.C. § 1329* (Immigration and Nationality Act); *15 U.S.C. § 15c* (Clayton Act).

[7] Moving for Voluntarily Dismissal Requiring Court Approval Pursuant to Rule 41(a)(2)

[a] Understanding Motion for Dismissal Pursuant to Rule 41(a)(2)

Fed. R. Civ. P. 41(a)(2) authorizes a plaintiff to move for a voluntary dismissal by court order if such a dismissal is no longer available as of right under *Fed. R. Civ. P. 41(a)(1)(A)(i)* and the plaintiff cannot obtain the other parties' consent to a stipulated dismissal under *Fed. R. Civ. P. 41(a)(1)(A)(ii). See Fed. R. Civ. P. 41(a)(2).*

Fed. R. Civ. P. 41(a)(2) is designed to permit the plaintiff to dismiss the action while at the same time avoiding prejudice to the defendant. *See, e.g., Alamance Industries, Inc. v. Filene's, 291 F.2d 142, 146 (1st Cir. 1961)* (primary purpose of rule is "to prevent voluntary dismissals which unfairly affect the other side and to permit the imposition of curative conditions"); *Templeton v. Nedlloyd Lines, 901 F.2d 1273, 1274 (5th Cir. 1990)* (*Fed. R. Civ. P. 41* allows plaintiffs to freely dismiss their suits, subject to court approval, provided the dismissal does not prejudice any party); *McCall-Bey v. Franzen, 777 F.2d 1178, 1184 (7th Cir. 1985)* (purpose of *Fed. R. Civ. P. 41* is to preserve plaintiff's right to take a voluntary nonsuit and start over so long as the defendant is not hurt).

The plaintiff must seek a court order to effect a voluntary dismissal if an answer or motion for summary judgment has been served and the adverse party is unwilling to stipulate to a dismissal. *See Tibbetts v. Syntex Corp., 1991 U.S. Dist. LEXIS 13628, at *3 (N.D. Cal. 1991)* , *aff'd, 1993 U.S. App. LEXIS 17052 (9th Cir. 1993)* (*Fed. R. Civ. P. 41(a)(2)* requires plaintiff to obtain court approval in order to dismiss an action when a defendant has filed an answer or motion for summary judgment).

[b] Ruling on Motion for Voluntary Dismissal Pursuant to Rule 41(a)(2)

The district court has the discretion to determine whether to grant or deny a *Fed. R. Civ. P. 41(a)(2)* motion for voluntary dismissal. *See Sinclair v. Soniform, Inc., 935 F.2d 599, 603 (3d Cir. 1991)* . In exercising its discretion, the court generally must make three separate determinations:

1. Whether the dismissal should be allowed at all;

2. Whether the dismissal should be with or without prejudice; and

3. What terms and conditions, if any, are appropriate.

See Spencer v. Moore Business Forms, Inc., 87 F.R.D. 118, 119 (N.D. Cal. 1980) (listing three determinations).

Warning:

Courts disagree as to whether a district court judge may deny a *Fed. R. Civ. P. 41(a)(2)* motion with prejudice. *See, e.g., Shepard v. Egan, 767 F. Supp. 1158, 1165 (D. Mass. 1990)* (court lacks discretion to deny plaintiff's motion to dismiss claim with prejudice); *but see SEC v. Lorin, 869 F. Supp. 1117, 1119 (S.D.N.Y. 1994)* (court may grant dismissal); *SEC v. American Bd. of Trade, Inc., 750 F. Supp. 100, 105 (S.D.N.Y. 1990)* ("[b]ecause the dismissal will be with prejudice, there can be no adverse effect on defendants here").

[c] Complying With Procedural Requirements for Bringing Motion Under Rule 41(a)(2)

A plaintiff should request voluntary dismissal by filing a written motion because a court order is required. *See Webber v. Eli Lilly & Co., 117 F.R.D. 490, 491 (D. Me. 1987)* (court may dismiss case without prejudice upon plaintiff's motion). However, a plaintiff may make the motion orally if appropriate under the circumstances. *See Morris v. City of Hobart, 39 F.3d 1105, 1109 (10th Cir. 1994)* ("Rule 41(a)(2) does not require that the plaintiff's request for dismissal take any specific form; it requires only that the court approve such a request for dismissal"). The plaintiff must also notify the defendant of the motion for dismissal. *See Barber v. General Electric Co., 648 F.2d 1272, 1275 (10th Cir. 1981)* (district court properly vacated order granting voluntary dismissal when defendant did not receive notice of motion or an opportunity to be heard).

[d] Ruling on Rule 41(a)(2) Motion for Voluntary Dismissal

As a general rule, a district court will grant a Rule 41(a)(2) motion absent prejudice to the defendant. *See Waller v. Financial Corp. of America, 828 F.2d 579, 583 (9th Cir. 1987)* ("a district court should grant a motion for voluntary dismissal unless a defendant can show that it will suffer some plain legal prejudice as a result"). Moreover, the fact that an answer or motion for summary judgment has been filed, without more, is not a basis for denying a motion for voluntary dismissal without prejudice. *See Hamilton v. Firestone Tire & Rubber Co., 679 F.2d 143, 146 (9th Cir. 1982)* . Furthermore, a court should not deny a Rule 41(a)(2) motion merely because the plaintiff may obtain some tactical advantage by taking a voluntary dismissal. *See, e.g., Puerto Rico Maritime Shipping Authority v. Leith, 668 F.2d 46, 50 (1st Cir. 1981)* ("technical advantage" does not bar dismissal).

Although the case law does not precisely define what constitutes "legal prejudice" warranting denial of a motion to dismiss, courts often will consider the following factors when ruling on a Rule 41(a)(2) motion:

1. The extent to which the action has progressed, including the defendant's effort and expense in preparing for trial;

2. The plaintiff's diligence in prosecuting the action;

3. The duplicative expense of relitigation;

4. The adequacy of plaintiff's reasons for the need to dismiss;

5. Whether the motion is made after some critical juncture in the case; and

6. Vexatious conduct on plaintiff's part.

See, e.g., Doe v. Urohealth Sys., 216 F.3d 157, 160 (1st Cir. 2000) (courts typically consider defendant's effort and expense in preparing for trial, excessive delay by plaintiff in prosecuting action, insufficient explanation of need for dismissal, and fact that defendant filed summary judgment motion); *Grover by Grover v. Eli Lilly & Co., 33 F.3d 716, 718 (6th Cir. 1994)* (in determining whether defendant will suffer legal prejudice, court should consider defendant's trial preparation efforts and expenses, excessive delay and lack of diligence on plaintiff's part in prosecuting action, insufficient explanation for need to dismiss case, and whether defendant has filed motion for summary judgment).

However, the mere prospect of plaintiff filing a second lawsuit after obtaining a voluntary dismissal does not constitute legal prejudice warranting denial of the dismissal motion. *See Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 217, 67 S. Ct. 752, 91 L. Ed. 849 (1947)* ("mere prospect" of second lawsuit not enough).

The district court has the discretion to hold an evidentiary hearing when determining a Rule 41(a)(2) motion. *See, e.g., Puerto Rico Maritime Shipping Authority v. Leith, 668 F.2d 46, 51 (1st Cir. 1981)* (no abuse of discretion in denying hearing when court was familiar with relevant issues and defendant was given 20 days to respond to motion); *McLaughlin v. Cheshire, 676 F.2d 855, 857 (D.C. Cir. 1982)* ("[i]n the further proceedings required to end the dispute over appellants' request for dismissal without prejudice, the District Court may, in its discretion, rely entirely on written submissions from the parties or hold an evidentiary hearing to resolve issues of fact that cannot be resolved on the papers submitted").

[e] Imposing Terms of Dismissal Pursuant to Rule 41(a)(2)

Fed. R. Civ. P. 41(a)(2) provides that the district court may impose terms on an order granting a voluntary dismissal in order to protect the defendant from prejudice. *See Fed. R. Civ. P. 41(a)(2)*; *see Cross Westchester Dev. Corp. v. Chiulli, 887 F.2d 431, 432 (2d Cir. 1989)* ("[t]he purpose of authorizing terms and conditions on a voluntary dismissal is to protect the defendant from prejudice"). However, the court may not impose conditions on the non-moving party to protect the plaintiff from the consequences of the dismissal. *See Cross Westchester Dev. Corp. v. Chiulli, 887 F.2d 431, 432 (2d Cir. 1989)* (district court erred by conditioning dismissal on non-moving defendants waiving statute of limitations defense to federal claim once action was refiled in state court).

Courts typically impose terms upon Rule 41(a)(2) dismissal orders that require the plaintiff to reimburse the defendant for certain costs, including the following:

1. **Defendant's litigation costs.** Courts ordinarily award payment of defendant's costs of litigation as a condition of dismissal without prejudice under *Fed. R. Civ. P. 41(a)(2). See Degussa Admixtures, Inc. v. Burnett, 471 F. Supp. 2d 848, 852 (W.D. Mich. 2007)* (courts frequently award costs and attorney's fees when plaintiff dismisses suit without prejudice under *Fed. R. Civ. P. 41(a)(2)*).

2. **Costs for defendant's work that will not be useful in future litigation.** The court should award the defendant the costs incurred in preparing work product that will not be useful in subsequent litigation of the same claim. *See, e.g., Cauley v. Wilson, 754 F.2d 769, 772 (7th Cir. 1985)* (because defendant may have to defend again at a later time and incur duplicative legal expenses, the "fee award should reimburse defendant for expenses incurred in preparing work product that will not be useful in subsequent litigation of the same claim").

3. **Costs for defendant's work in opposing dismissal motion.** The defendant should be awarded the costs incurred in opposing the plaintiff's motion for a voluntary dismissal. *See Bath Iron Works Corp. v. Parmatic Filter Corp., 736 F. Supp. 1175, 1178 (D. Me. 1990)* (awarding defendant reasonable costs incurred in preparation of motion).

4. **Costs of removal.** The court may award the defendant the costs expended in removing the action. *See Bishop v. West American Ins. Co., 95 F.R.D. 494, 495 (N.D. Ga. 1982)* (plaintiff required to pay removal costs).

Warning:

The terms of the dismissal cannot award the defendant more relief than the defendant could have obtained through an adjudication of the lawsuit on the merits. *See Ferrato v. Castro, 888 F. Supp. 33, 34 (S.D.N.Y. 1995)* (refusing to impose condition that would protect defendant from all future copyright infringement claims by plaintiffs, licensees, or assignees, regardless of circumstances).

Besides awarding costs to the defendant, the court may impose other conditions on voluntary dismissal. *See, e.g., Ahler v. City of N.Y., 1993 U.S. Dist. LEXIS 12680, at *3 (S.D.N.Y. 1993)* (requiring plaintiff not to refile action); *Templeton v. Nedlloyd Lines, 901 F.2d 1273, 1275-1276 (5th Cir. 1990)* (conditioning dismissal on plaintiffs' stipulation that they would not oppose the use of existing discovery in the pending state court action); *Hunter v. Surgitek/Medical Engineering Corp., 1992 U.S. Dist. LEXIS 9696, at *11-*12 (N.D. Ind. 1992)* (conditioning dismissal on production of documents and evidence).

The Fifth Circuit has held that the same authority that empowers a court to award costs, attorney's fees, and contempt sanctions, also invests a district court with jurisdiction, after a notice of dismissal is filed, to enter an injunction requiring the plaintiff to obtain court permission before filing another action. *See Qureshi v. United States, 600 F.3d 523, 525-526 (5th Cir. 2010)* (court's authority to impose injunction against future filings flows from court's inherent power to protect its jurisdiction and to control its docket).

[f] Imposing Condition That Rule 41(a)(2) Dismissal Is With Prejudice

Generally, a voluntary dismissal is without prejudice unless otherwise specified in the court's order. *See, e.g., Bell v. City of Kellogg, 922 F.2d 1418, 1421 (9th Cir. 1991)* (when unspecified, *Fed. R. Civ. P. 41(a)(2)* deems such dismissal as made without prejudice); *but see GF Gaming Corp. v. City of Black Hawk, 405 F.3d 876, 888 (10th Cir. 2005)* (district court did not abuse its discretion in interpreting plaintiffs' voluntary dismissal as with prejudice based on procedural history of case and plaintiffs' apparent concession that dismissal was with prejudice).

In unusual circumstances, a district court may impose a condition on a voluntary dismissal requiring that the dismissal be with prejudice. *See, e.g., Schlegel v. Life Ins. Co. of N. Am., 269 F. Supp. 2d 612, 616 n.3 (E.D. Pa. 2003)* (although plaintiff requested dismissal without prejudice, court concluded that at such a late stage in the litigation, after completion of discovery and the filing of summary judgment motions, dismissal should be with prejudice); *Brooks v. State Bd. of Elections, 173 F.R.D. 547, 549-550 (S.D. Ga. 1997)* (dismissal with prejudice was appropriate condition in class action that had been litigated for almost nine years).

Typically, the court will not award fees to the defendant if the court grants a voluntary dismissal with prejudice, because the defendant is not confronted with the future risk of litigation. *See Cauley v. Wilson, 754 F.2d 769, 772 (7th Cir. 1985)* (fees are not awarded when plaintiff obtains dismissal with prejudice because the defendant cannot be made to defend again).

Warning:

The district court may also dismiss the action with prejudice if the plaintiff fails to comply with conditions imposed by the court on a voluntary dismissal. *See LeBlang Motors v. Subaru of Am., 148 F.3d 680, 687 (7th Cir. 1998)* (district court did not abuse its discretion in granting involuntary dismissal of plaintiff's second action as sanction for failure to comply with terms and conditions attached to voluntary dismissal of plaintiff's first action).

[g] Rejecting Terms Imposed by Court and Withdrawing Rule 41(a)(2) Motion

A plaintiff that finds the terms and conditions imposed by the court to be too onerous need not accept the dismissal, and may withdraw the Rule 41(a)(2) motion and proceed with the action. *See, e.g., Gravatt v. Columbia University, 845 F.2d 54, 56 (2d Cir. 1988)* ("an opportunity to withdraw a motion for dismissal without prejudice must be afforded a plaintiff before the dismissal is converted to one with prejudice"); *Jaramillo v. Burkhart, 59 F.3d 78, 79 (8th Cir. 1995)* ("[w]hen a plaintiff requests dismissal without prejudice and the district court intends to dismiss with prejudice, however, the district court must give the plaintiff notice of its intention and a chance to withdraw the request and proceed with litigation").

[h] Preserving Counterclaims Under Rule 41(a)(2)

Fed. R. Civ. P. 41(a)(2) provides that if a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. *Fed. R. Civ. P. 41(a)(2)*. Accordingly, a plaintiff may not dismiss an action when the dismissal would destroy federal jurisdiction and prevent the court from adjudicating the defendant's counterclaim. However, when there is an independent jurisdictional basis for the counterclaim, *Fed. R. Civ. P. 41* does not prohibit dismissal of the underlying complaint. *See Farmaceutisk Laboratorium Ferring A/S v. Reid Rowell, Inc., 142 F.R.D. 179, 180 (N.D. Ga. 1991)* ("Where there exists an independent jurisdictional basis for the counterclaim, Rule 41 does not bar dismissal of plaintiff's complaint").

[i] Effect of Voluntary Dismissal Under Rule 41(a)(2)

A voluntary dismissal without prejudice under *Fed. R. Civ. P. 41(a)(2)* renders the proceedings a nullity and leaves the parties as if the action had never been brought. *See In re Piper Aircraft Distribution System Antitrust Litigation, 551 F.2d 213, 219 (8th Cir. 1977)* . However, a dismissal with prejudice has the effect of a final adjudication on the merits in favor of the defendant. *See Wainwright Secur., Inc. v. Wall Street Transcript Corp., 80 F.R.D. 103, 105 (S.D.N.Y. 1978)* ("dismissal with prejudice has the effect of a final adjudication on the merits favorable to the defendant").

Strategic Point:

The statute of limitations is generally not tolled by the commencement of an action that is later voluntarily dismissed. *See, e.g., Basco v. American Gen. Ins. Co., 43 F.3d 964, 965 (5th Cir. 1994)* (voluntary dismissal did not toll statute of limitations).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 41.10 -41.40.*
- *Bender's Federal Practice Forms* Form Nos. 41:20-41:43.
- *Fed. R. Civ. P. 41(a).*

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Chapter 3 DISMISSALS
PART F: MOVING FOR INVOLUNTARY DISMISSAL PURSUANT TO RULE 41(b)

1-3 Moore's AnswerGuide: Fed Civil Motion Practice § 3.18

§ 3.18 Checklist for Moving for Involuntary Dismissal Pursuant to Rule 41(b)

☐ Under *Fed. R. Civ. P. 41(b)*, a defendant may move for an involuntary dismissal because of:

- ○ Plaintiff's failure to prosecute;
- ○ Plaintiff's failure to comply with the Federal Rules of Civil Procedure; or
- ○ Plaintiff's failure to comply with a court order.

☐ Determine whether to request dismissal of the entire action or a particular claim.

☐ Be sure to consult local rules and judge's standing orders, which often contain requirements that apply to a defendant's motion for an involuntary dismissal because of the plaintiff's failure to prosecute.

☐ **Search by Topic:** Civil Procedure > Dismissals > Involuntary Dismissals

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Chapter 3 DISMISSALS
PART F: MOVING FOR INVOLUNTARY DISMISSAL PURSUANT TO RULE 41(b)

1-3 Moore's AnswerGuide: Fed Civil Motion Practice § 3.19

§ 3.19 Moving for Involuntary Dismissal Pursuant to Rule 41(b)

[1] Asserting Grounds for Involuntary Dismissal

Fed. R. Civ. P. 41(b) permits a defendant to move to dismiss an action or any claim against it because of the plaintiff's failure to prosecute or failure to comply with a court order. *Fed. R. Civ. P. 41(b)*. In addition, local district court rules frequently provide that an action may be dismissed for failure to prosecute. *See, e.g.,* S.D. Ga. L.R. 41.1(c) (lack of "reasonable promptness" in taking action on case may result in dismissal); D.N.M. L.R. 41.1 (90 days with no action taken may result in dismissal).

The purpose of *Fed. R. Civ. P. 41(b)* is to prevent undue delays in litigation and to avoid congestion in the calendars of the courts. *See Link v. Wabash R. Co., 370 U.S. 626, 629-630, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962) . Fed. R. Civ. P. 41(b)* imposes a duty of due diligence on plaintiff in view of the policy favoring the prompt disposition of cases. *See Lyell Theatre Corp. v. Loews Corp., 682 F.2d 37, 43 (2d Cir. 1982)* (primary rationale underlying a dismissal under *Fed. R. Civ. P. 41(b)* is plaintiff's failure to process his case diligently).

[a] Ruling on Motion for Involuntary Dismissal; Factors Considered by Court

When deciding whether to dismiss a case for failure to prosecute under *Fed. R. Civ. P. 41(b)*, the district court should consider the totality of the circumstances and the record as a whole. *See Jackson v. City of New York, 22 F.3d 71, 74 (2d Cir. 1994)* (must look at entire record in determining whether dismissal is warranted). Although the following list is not exhaustive, courts have considered the following factors in determining whether to grant an involuntary dismissal for failure to prosecute:

1. **Duration and number of plaintiff's failures.** *See Morris v. Morgan Stanley & Co., 942 F.2d 648, 651-652 (9th Cir. 1991)* (trial court properly granted motion for involuntary dismissal where there was two years of unnecessary delay, including repeated failure to respond to defendants' correspondence, failure to appear at a scheduled meeting, and four substitutions of counsel).

2. **Stage of litigation, with dismissal more likely at later stage.** *See, e.g., Jackson v. City of New York, 22 F.3d 71, 76 (2d Cir. 1994)* (denying dismissal when action had been pending only 13 months and was still in pre-trial stages); *Goforth v. Owens, 766 F.2d 1533, 1535 (11th Cir. 1985)* (dismissal for failure to

attend pre-trial conference or to be ready to proceed with trial).

3. **Whether plaintiff had received notice that further delays would result in dismissal.** *See Johnson v. Kamminga, 34 F.3d 466, 468 (7th Cir. 1994)* ("although district courts are encouraged to warn litigants before dismissing a case for failure to prosecute, whether they in fact do so is clearly within their discretion").

4. **Whether defendant has been prejudiced by the delay.** *See Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986)* (unreasonable delay creates presumption of prejudice).

5. **Whether judge has struck proper balance between alleviating court calendar congestion and protecting party's right to due process and chance to be heard.** *See Peart v. City of New York, 992 F.2d 458, 460-463 (2d Cir. 1993)* (although plaintiff's counsel offered to begin trial in only 10 days, court noted that "to excuse [counsel's] delay here would be to ignore the fact that when delays are multiplied over and over for one reason or another in one case after another, as [they] surely [are] and would be once the bar realizes that deadlines mean nothing, the net result is the build-up of a paralyzing backlog of pending cases").

6. **Whether judge has adequately assessed efficacy of lesser sanctions.** *See World Thrust Films v. International Family Entertainment, 41 F.3d 1454, 1456 (11th Cir. 1995)* (district court must make finding regarding whether lesser sanctions would suffice).

7. **Conduct of plaintiff's counsel.** *See Knoll v. AT&T, 176 F.3d 359, 363-364 (6th Cir. 1999)* (although courts are reluctant to dismiss merely because of attorney's failures, dismissal was warranted when counsel neglected case, repeatedly ignored court orders without excuse, and attempted to force continuance by refusing to proceed on day of trial).

If the district court's order does not contain express findings as to the basis for the dismissal, and the court's reasoning is not clear from the record, the dismissal may be reversed or vacated on appeal and remanded. *See, e.g., Boudwin v. Graystone Ins. Co., Ltd., 756 F.2d 399, 401 (5th Cir. 1985)* (vacating dismissal order and remanding "[b]ecause the record does not reflect those factors which would warrant dismissal with prejudice and lacks the requisite findings"); *Moneymaker v. CoBen (In re Eisen), 31 F.3d 1447, 1451 (9th Cir. 1994)* (court should make explicit findings). However, specific findings on each of the essential factors are not required. *See Nita v. Connecticut Dep't of Envtl. Protection, 16 F.3d 482, 485 (2d Cir. 1994)* (no one factor is dispositive).

[b] Dismissing Case for Failure to Comply With Court Order

Pursuant to *Fed. R. Civ. P. 41(b)*, the district court can dismiss an action due to the plaintiff's failure to comply with a court order or rule. *See Fed. R. Civ. P. 41(b)*. The order need not be entered in an elaborate memorandum opinion in order to serve as the basis for dismissal under *Fed. R. Civ. P. 41(b)*. *See Yourish v. California Amplifier, 191 F.3d 983, 987 (9th Cir. 1999)* (plaintiff's noncompliance with judge's minute order was sufficient to justify involuntary dismissal). Disobedience of a court's local rules may also justify dismissal. *See World Thrust Films v. International Family Entertainment, 41 F.3d 1454, 1456 (11th Cir. 1995)* (district court has authority under *Fed. R. Civ. P. 41(b)* to dismiss actions for failure to comply with local rules).

Noncompliance is typically treated in the same manner as a failure to prosecute, and courts usually apply the same test in determining whether dismissal is warranted because of a failure to prosecute or disobedience of a court's order. *See Malone v. United States Postal Service, 833 F.2d 128, 130 (9th Cir. 1987)* (same test used for noncompliance and failure to prosecute). As a general rule, the plaintiff's disobedience of the court's order must be willful in order to warrant dismissal. *See Hutchins v. A.G. Edwards & Sons, 116 F.3d 1256, 1260 (8th Cir. 1997)* (because dismissal with

prejudice is an extreme sanction, it should be used only in cases of willful disobedience of a court order).

[2] Exercising Discretion When Deciding Whether to Impose Drastic Sanction of Voluntary Dismissal

The district court has discretion on whether to grant a motion for an involuntary dismissal under *Fed. R. Civ. P. 41(b)*. *See Colon v. Mack, 56 F.3d 5, 7 (2d Cir. 1995)* (involuntary dismissal for plaintiff's failure to prosecute is a matter committed to the discretion of the trial court by *Fed. R. Civ. P. 41(b)*). Thus, a court may dismiss an action *sua sponte* for a plaintiff's failure to prosecute or to comply with a court order. *See Link v. Wabash R. Co., 370 U.S. 626, 630-631, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962)* .

However, a dismissal pursuant to *Fed. R. Civ. P. 41(b)* is a drastic remedy that courts impose only under extreme circumstances. *See Givens v. A.H. Robins Co., 751 F.2d 261, 263 (8th Cir. 1984)* ("Dismissal with prejudice is an extreme sanction and should be used only in cases of willful disobedience of a court order or continued or persistent failure to prosecute a complaint"). Because dismissal under *Fed. R. Civ. P. 41(b)* is such a drastic remedy, courts should generally hold a hearing to determine the need for the dismissal. *See, e.g., Colon v. Mack, 56 F.3d 5, 7 (2d Cir. 1995)* (court acted too precipitously in rejecting as implausible, without a hearing, pro se prisoner's explanation for failure to appear on first day of trial).

[3] Bringing Motion for Involuntary Dismissals Pursuant to Rule 41(b)

Under *Fed. R. Civ. P. 41(b)*, "a defendant may move to dismiss the action or any claim against it." *Fed. R Civ. P. 41(b)*. Thus, the court need not dismiss the entire lawsuit but may eliminate individual causes of action. Similarly, the court may dismiss against fewer than all defendants. Although *Fed. R. Civ. P. 41(b)* anticipates a motion by a defendant, a plaintiff may also move for an involuntary dismissal of a counterclaim. *See Fed. R. Civ. P. 41(b)*.

[4] Involuntary Dismissal Generally Acts as Adjudication on Merits

A dismissal under *Fed. R. Civ. P. 41(b)* operates as an adjudication on the merits of an action and precludes a subsequent action on the claim under the doctrine of res judicata, unless a local rule or court specifies otherwise. *See, e.g., LeBlang Motors v. Subaru of Am., 148 F.3d 680, 687 (7th Cir. 1998)* (although defendant requested involuntary dismissal without prejudice, because district court's order did not state whether it was with or without prejudice, circuit court treated dismissal as adjudication on merits); *Luney v. SGS Auto. Servs., Inc., 432 F.3d 866, 867 (8th Cir. 2005)* (dismissal of plaintiff's first action for failure to prosecute, which failed to specify whether it was with or without prejudice, acted as adjudication on merits and barred second action on same claim).

Warning:

Local rules in some districts provide that a dismissal under *Fed. R. Civ. P. 41(b)* is without prejudice. *See, e.g.,* C.D. Cal. L.R. 41-2 ("Unless the Court provides otherwise, any dismissal pursuant to L.R. 41-1 shall be without prejudice"); E.D. Wash. L.R. 41.1(b) (dismissal for failure to prosecute action in timely manner is without prejudice).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 41.50 -41.53*.
- *Bender's Federal Practice Forms* Form Nos. 41:50-41:51.
- *Fed. R. Civ. P. 41(b)*.

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Chapter 3 DISMISSALS
PART G: MOVING TO DISQUALIFY JUDGE

1-3 Moore's AnswerGuide: Fed Civil Motion Practice § 3.20

§ 3.20 Checklist for Moving to Disqualify Judge

☐ Determine whether to file affidavit pursuant to *28 U.S.C. § 144* to disqualify district court judge because of bias or prejudice.

☐ Determine whether to file a motion to disqualify judge for grounds specified in *28 U.S.C. § 455*, which include the following:

- ○ Judge's personal bias or prejudice concerning a party;
- ○ Judge's personal knowledge of disputed evidentiary facts;
- ○ Judge's prior involvement with matter in controversy;
- ○ Judge's financial interest in subject matter of proceeding;
- ○ Judge's or relative's relationship to party in proceedings.

☐ If seeking disqualification by affidavit pursuant to Section 144, the affidavit must be signed by party and accompanied by certificate of counsel.

☐ Promptly file and serve motion to disqualify judge in accordance with the Federal Rules governing motion practice, as well as all applicable local rules and judge's standing orders. Sections 144 and 455 both require that disqualification be sought as soon as the party learns of the facts supporting disqualification.

☐ **Search by Topic:** Civil Procedure > Judicial Officers > Judges > Disqualifications & Recusals

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Chapter 3 DISMISSALS
PART G: MOVING TO DISQUALIFY JUDGE

1-3 Moore's AnswerGuide: Fed Civil Motion Practice § 3.21

§ 3.21 Moving to Disqualify or Recuse Judge

[1] Statutory Bases for Seeking Disqualification or Recusal of Judge

Two statutes govern the recusal of United States judges. Under *28 U.S.C. § 144*, whenever a party to any proceeding files a "timely and sufficient" affidavit that the presiding judge has a personal bias or prejudice against the party or in favor of an adverse party, the judge must be disqualified. *See 28 U.S.C. § 144*.

The circumstances under which a judge must disqualify himself are listed in *28 U.S.C. § 455*, which makes the bias and prejudice recusal requirements applicable to all justices, judges, and magistrates, and also places the burden to identify the existence of those grounds upon the judge, rather than requiring recusal only in response to a party affidavit. *See 28 U.S.C. § 455*.

[2] Asserting Grounds for Seeking Disqualification or Recusal of Judge

A federal judge is subject to disqualification if his or her impartiality might reasonably be questioned. *28 U.S.C. § 455(a)*. Thus, a judge may be disqualified for reasons such as the following:

1. **Personal bias.** A judge may be disqualified if he or she has a personal bias or prejudice either against or in favor of a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. *28 U.S.C. § 455(b)(1)*.

2. **Previous involvement with matter in controversy.** A judge is subject to disqualification where the judge in private practice served as a lawyer in the matter in controversy. *28 U.S.C. § 455(b)(2)*. Moreover, a judge is subject to disqualification if a lawyer with whom he or she previously practiced was involved in the matter. *28 U.S.C. § 455(b)(2)*.

3. **Adjudicating lower court proceeding.** Pursuant to *28 U.S.C. § 47*, a judge is disqualified from hearing or determining an appeal from a final decision of a case that he or she tried. *See 28 U.S.C. § 47* ("No judge shall hear or determine an appeal from the decision of a case or issue tried by him"); *see also Clemmons v. Wolfe, 377 F.3d 322, 325-329 (3d Cir. 2004)* (to allow judge who had presided over state-court trial to adjudicate defendant's subsequent habeas corpus petition would create appearance of

impropriety, which is basis for recusal under *28 U.S.C. § 455(a)*).

4. **Judge or associate as material witness.** A judge is disqualified from any proceeding where either the judge or a lawyer with whom he or she previously practiced has been a material witness in the proceeding. *See 28 U.S.C. § 455(b)(2)*.

5. **Judge as government official or advisor.** A judge is also subject to disqualification where the judge has served in governmental employment and in such capacity participated as counsel, advisor, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy. *See 28 U.S.C. § 455(b)(3)*. Generally, disqualification under *28 U.S.C. § 455(b)(3)* is only required where the judge personally served as counsel in the matter. *See, e.g., Kendrick v. Carlson, 995 F.2d 1440, 1444 (8th Cir. 1993)* (Assistant United States Attorney without any involvement in a case brought by other attorneys in his office is not required to disqualify himself from presiding over such a case under *28 U.S.C. § 455(b)(3)*).

6. **Financial or other interest.** A judge must be disqualified where the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding. *See 28 U.S.C. § 455(b)(4)*. Likewise, a judge is subject to disqualification if the judge is aware that the judge, or the judge's spouse or minor child, has any other interest that could substantially be affected by the outcome of the proceeding. *See 28 U.S.C. § 455(b)(4)*.

7. **Status of judge, spouse, or relative.** A judge should be disqualified if the judge, the judge's spouse, or a person within the third degree of relationship to the judge or the judge's spouse is a party, lawyer, material witness, or otherwise has an interest in the proceeding. *See 28 U.S.C. § 455(b)(5)*.

[3] Disqualifying Judge for Financial Interest in Proceeding

"Financial interest" means ownership of any legal or equitable interest, or a relationship as director, advisor, or other active participant in a party. *28 U.S.C. § 455(d)(4)*. Recusal is required no matter how small the judge's financial interest, whether or not the interest actually creates an interest of impartiality, or whether the outcome of the case could affect the interest. *See Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 859-860, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988)* (judge who was trustee of university should have disqualified self in action seeking declaration of ownership of corporation in which university had interest). Remote financial interest will not necessarily, however, warrant disqualification of the judge. *See In re New Mexico Natural Gas Antitrust Litigation, 620 F.2d 794, 796 (10th Cir. 1980)* (possibility that judge might benefit from lower utility bills as member of public insufficient).

For purposes of defining "financial interest," the term does include ownership in a mutual or common investment fund that holds securities, unless the judge participates in the management of the fund. An office in an educational, religious, charitable, fraternal, or civil organization is not a "financial interest" in securities held by the organization. The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or similar proprietary interest, is not a "financial interest" unless the outcome of the proceeding could substantially affect the value of the interest. Ownership of governing securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities. *28 U.S.C. § 455(d)(4)*

[4] Recusing Judge Based on Relationship With Person With Interest in Proceeding

In unusual circumstances, a judge's relationship with a person who has an interest in the proceeding will warrant recusal. *See, e.g., Caperton v. A.T. Massey Coal. Co., -- U.S. --, 129 S. Ct. 2252, 173 L. Ed. 2d 1208, 1222 (2009)* (due

process requires the recusal of a judge when a person with a personal stake in a particular case had a significant and disproportionate influence, while the case was pending, in the election of the judge to the court that would decide the case); *United States v. Jordan, 49 F.3d 152, 157-158 (5th Cir. 1995)* (recusal required where defendant was involved in extremely hostile relationship with person who had long, close, and multi-faceted friendship with judge); *United States v. Tucker, 78 F.3d 1313, 1322-1325 (8th Cir. 1996)* (judge's long term relationship with close friend of defendant mandated recusal); *but see Cheney v. United States Dist. Court, 541 U.S. 913, 913-929, 124 S. Ct. 1391, 158 L. Ed. 2d 225 (2004)* (Justice's friendship or appearance of friendship with Vice President does not require recusal in case in which Vice President is being sued in official capacity).

Also in unusual circumstances, a judge may be subject to recusal if his or her present or former law clerk has a relationship with a party. *See Barksdale v. Emerick, 853 F.2d 1359, 1361-1362 (6th Cir. 1988)* (law clerk's relation to defendant required judge to conduct hearing regarding recusal). However, a judge is not automatically subject to disqualification whenever a former law clerk represents a party to a proceeding. *See, e.g., Hamid v. Price Waterhouse, 51 F.3d 1411, 1416-1417 (9th Cir. 1995)* (recusal of judge not required even though one of the judge's clerks during early stage of case subsequently became associate of firm that represented party because clerk did not work on that case); *United States v. Occhipinti, 851 F. Supp. 523, 527 (S.D.N.Y. 1993)* (fact that U.S. attorney assigned to case had been an intern for judge was not grounds for recusal).

[5] Circumstances That Do Not Ordinarily Justify Disqualification

Generally, the following circumstances are not sufficient to justify disqualification of a judge:

1. **Rumor, speculation, beliefs, conclusions, innuendo, suspicion, opinion, and similar non-factual matters.** *See, e.g., In re United States, 666 F.2d 690, 695 (1st Cir. 1981)* (charge of partiality must be supported by a factual basis and "a judge considering whether to disqualify himself must ignore rumors, innuendos, and erroneous information"); *Glass v. Pfeffer, 849 F.2d 1261, 1267 (10th Cir. 1988)* (affidavit seeking recusal is insufficient if it merely states conclusions, rumors, beliefs and opinions).

2. **Judge's previous expression of an opinion on a point of law or interest in a certain area of law.** *See, e.g., Buell v. Mitchell, 274 F.3d 337, 347 (6th Cir. 2001)* (judge who, as legislator, sponsored or voted for legislation implementing or favoring death penalty is not presumed to be disqualified from reviewing capital cases as judge); *but see In re School Asbestos Litigation, 977 F.2d 764, 781-782 (3d Cir. 1992)* (judge's attendance at pro-plaintiff conference on key issue in nationwide products liability class action, which judge attended at plaintiff's expense out of settlement fund deposited with court, created appearance of impropriety).

3. **Judge's moral or religious beliefs.** *See Feminist Women's Health Ctr. v. Codispoti, 69 F.3d 399, 400-401 (9th Cir. 1995)* (denying plaintiff's motion for recusal in case against abortion protesters based on judge's membership in Catholic Church).

4. **Judge's dedication to upholding law, or determination to impose severe punishment within limits of the law on those found guilty of a particular offense.** *Cf. United States v. Antar, 53 F.3d 568, 576-577 (3d Cir. 1995)* (judge, by improperly telling parties that goal was to enforce repatriation order and final judgment issued during concurrent proceeding, displayed high degree of antagonism against defendant).

5. **Prior adverse rulings in same proceeding or other proceedings.** *See, e.g., Camacho v. Autoridad de Telefonos de Puerto Rico, 868 F.2d 482, 490-491 (1st Cir. 1989)* (judge who authorized wiretaps was not required to recuse himself from civil suit against participants in wiretap).

6. **Familiarity with person possessing an interest in the case.** *See Cheney v. United States Dist. Court, 541 U.S. 913, 914-929, 124 S. Ct. 1391, 158 L. Ed. 2d 225 (2004)* (where Supreme Court Justice attended duck-hunting trip with Vice President, who was defendant in his official capacity in a suit before the Court, the Justice determined that his recusal was not required or permitted).

7. **Representation of one of the parties by the judge's son or daughter in another case.** *See Microsoft Corp. v. United States, 530 U.S. 1301, 121 S. Ct. 25, 147 L. Ed. 2d 1048 (2000)* (no appearance of impropriety existed merely because Chief Justice's son represented, in another case, party that was also party to litigation pending in Supreme Court).

8. **Baseless personal attacks on judge by a party.** *See Standing Comm. on Discipline of the United States Dist. Court v. Yagman, 55 F.3d 1430, 1443 (9th Cir. 1995)* (party cannot force judge to recuse self by engaging in personal attacks on judge).

9. **Lawsuits or complaints brought against judge by a party.** *See, e.g., Rafferty v. NYNEX Corp., 60 F.3d 844, 848 n.4 (D.C. Cir. 1995)* (judge's knowledge that judicial misconduct complaints had been filed against him or a colleague are insufficient to require recusal and would permit party to "shop" for a judge); *In re Mann, 229 F.3d 657, 658-659 (7th Cir. 2000)* (recusal not required simply because party has filed judicial misconduct complaint against judge).

10. **Controversy between judge and party's attorney.** *See Baldwin Hardware Corp. v. Franksu Enter. Corp., 78 F.3d 550, 557 (Fed. Cir. 1996)* (bias must be directed against party, and bias exhibited against attorney will only merit recusal when it results in material and identifiable harm to party's case); *A.J. ex rel. L.B. v. Kierst, 56 F.3d 849, 862 (8th Cir. 1995)* (controversy between trial judge and attorneys did not require disqualification of judge in absence of proof of bias or judicial prejudice to parties).

11. **Reporters' personal opinions or characterizations of judge.** *See United States v. Greenough, 782 F.2d 1556, 1558-1559 (11th Cir. 1986)* (judge considering whether to disqualify himself must ignore rumors, innuendos, and erroneous information published as fact in the newspapers).

12. **Threats against other judges on the court.** *See Clemens v. United States Dist. Court, 428 F.3d 1175, 1178-1180 (9th Cir. 2005)* (party's threats against lives of three district court judges did not require the recusal of other judges of same court). However, threats against the assigned judge may serve as the basis for disqualification, unless the threats are motivated by a desire to disqualify the judge. *See United States v. Greenspan, 26 F.3d 1001, 1006-1007 (10th Cir. 1994)* (judge who learned from FBI of alleged conspiracy to assassinate judge and members of family by defendant whom judge was about to sentence should have recused self, as threat was apparently genuine and not intended merely as device to obtain recusal).

13. **Public criticism of judges and their decisions.** *See Standing Comm. on Discipline of the United States Dist. Court v. Yagman, 55 F.3d 1430, 1444-1445 (9th Cir. 1995)* (federal judges are granted life tenure to shield them from public criticism).

[6] Judge Has Continuing Duty to Recuse Self

It is the judge's responsibility to recuse himself or herself from a case, when recusal is warranted by the circumstances. *See, e.g., McCuin v. Texas Power & Light Co., 714 F.2d 1255, 1259-1260 (5th Cir. 1983)* (judge has duty to disqualify self as soon as judge becomes aware that grounds exist); *United States v. Conforte, 624 F.2d 869, 880 (9th Cir. 1980)* (disqualification statute imposes self-enforcing duty on judge). During the course of a proceeding, the judge has a

continuing duty to ask himself or herself what a reasonable person, knowing all the relevant facts, would think about his or her impartiality. *See, e.g., United States v. Greenspan, 26 F.3d 1001, 1005-1006 (10th Cir. 1994)* (judge is under continuing duty to query whether reasonable person, knowing all facts, would question judge's impartiality).

[7] Bringing Motion to Disqualify Judge Under 28 U.S.C. § 144

A party seeking to disqualify of a judge under Section 144 must file an affidavit stating that the judge before whom the matter is pending has a personal bias or prejudice either against the party or in favor of any adverse party. A party may file only one Section 144 affidavit in a case. *28 U.S.C. § 144*. This affidavit must state the facts and reasons for the party's belief that bias or prejudice exists, and must be sufficiently definite and particular to convince a reasonable person that bias exists. *See United States v. Townsend, 478 F.2d 1072, 1074 (3d Cir. 1973)* (affidavit must state facts supporting allegations of bias, including time, place, persons, and circumstances).

The moving party must file the affidavit immediately after obtaining knowledge of the facts warranting disqualification of the judge. *See, e.g., Gil Enters. v. Delvy, 79 F.3d 241, 247 (2d Cir. 1996)* (recusal motions are to be made at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim); *United States v. Sykes, 7 F.3d 1331, 1339 (7th Cir. 1993)* (affidavit not filed until two months after allegedly prejudicial statement was untimely).

Furthermore, the affidavit must be signed by the party, and not by the party's attorney. *See Pomeroy v. Merritt Plaza Nursing Home, Inc., 760 F.2d 654, 658-659 (5th Cir. 1985)* ("A court may not grant relief under § 144 if a party's counsel instead of the party executes an affidavit alleging personal bias or prejudice"). Finally, the affidavit must be accompanied by a certificate of counsel stating that it is made in good faith. *28 U.S.C. § 144*.

[8] Bringing Motion to Disqualify Judge Under 28 U.S.C. § 455

A party may seek disqualification of a judge under Section 455 by filing a motion setting forth facts showing that the judge is biased or prejudiced. *See 28 U.S.C. § 455*; *see also Lindsey ex rel. Lindsey v. City of Beaufort, 911 F. Supp. 962, 967 n.4 (D.S.C. 1995)* (motion must state facts and reasons sufficient to convince reasonable person that bias or prejudice exists).

The moving party must file the motion at the earliest possible moment after obtaining knowledge of the facts demonstrating the basis for disqualification. *See, e.g., United States v. Owens, 902 F.2d 1154, 1155-1156 (4th Cir. 1990)* (timeliness is essential element of recusal motion); *Travelers Ins. Co. v. Liljeberg Enters., 38 F.3d 1404, 1410 (5th Cir. 1994)* (party seeking disqualification must do so at earliest moment after learning of facts demonstrating basis for disqualification).

[9] Ruling on Motion for Recusal or Disqualification; Standards Applied by Court

In ruling on a Section 144 affidavit, the court must assume the truth of the facts stated in the affidavit. *See, e.g., Berger v. United States, 255 U.S. 22, 36, 41 S. Ct. 230, 65 L. Ed. 481 (1921)* (judge assumes truth of alleged facts); *In re Corrugated Container Antitrust Litigation, 614 F.2d 958, 967 (5th Cir. 1980)* (court must take as true facts stated in affidavit). Thus, the judge must determine whether the affidavit is legally sufficient to warrant recusal, but may not determine the truth or falsity of the matters stated in the affidavit. *See Berger v. United States, 255 U.S. 22, 36, 41 S. Ct. 230, 65 L. Ed. 481 (1921)* (judge determines only legal sufficiency of alleged facts assumed to be true; to permit judge to determine truth of facts would permit judge to exercise prejudice or bias).

By contrast, a court need not accept the factual allegations made in a Section 455 motion as true. *See United States v. Balistrieri, 779 F.2d 1191, 1203* (7th Cir. 1985 (Section 455 dispenses with the requirement that the judge must take all the factual averments of the affidavit as true). Instead, the court may weigh the evidence, and reject allegations as

untrue. *See, e.g., Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n, 872 F. Supp. 1346, 1349 (E.D. Pa. 1994)* (judge permitted to contradict allegations with facts drawn from his own personal knowledge).

A judge should not be disqualified from a case unless there are valid grounds for recusal or disqualification. *See, e.g., W. Clay Jackson Enterprises, Inc. v. Greyhound Leasing & Financial Corp., 467 F. Supp. 801, 803 (D.P.R. 1979)* (judge has duty not to recuse absent valid grounds); *Lopez v. Behles (In re American Ready Mix), 14 F.3d 1497, 1501 (10th Cir. 1994)* (judge should not be recused on unsupported, irrational, or highly speculative grounds). When there is a close call, however, the court should err on the side of caution and permit recusal. *See, e.g., Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1112 (5th Cir. 1980)* (close questions must be resolved in favor of disqualification); *Nichols v. Alley, 71 F.3d 347, 352 (10th Cir. 1995)* (if question is close, "the balance tips in favor of recusal").

[10] Complying With Procedural Requirements After Moving for Recusal or Disqualification

Recusal under *28 U.S.C. § 144* is mandatory after a party has filed a sufficient affidavit and a certificate of counsel. *See United States v. Sykes, 7 F.3d 1331, 1339 (7th Cir. 1993)* (recusal is mandatory once party submits timely and sufficient affidavit and counsel presents certificate of good faith).

When a party files a motion to disqualify a judge pursuant to *28 U.S.C. § 455*, however, most courts require that the judge whose partiality is question determine whether disqualification is warranted. *See, e.g., United States v. Balistrieri, 779 F.2d 1191, 1202-1203 (7th Cir. 1985)* ("Section 455 clearly contemplates that decisions with respect to disqualification should be made by the judge sitting in the case, and not by another judge"); *Bernard v. Coyne (In re Bernard), 31 F.3d 842, 843 (9th Cir. 1994)* (motion to disqualify judge must be decided by judge whose impartiality is questioned); *but see United States v. Craig, 853 F. Supp. 1413, 1415 (S.D. Fla. 1994)* (challenged judge may either opt to refer matter to another judge for decision or rule on it personally).

In appropriate cases, a judge may recuse himself or herself as to some issues and retain authority to decide other issues. *See, e.g., Ellis v. United States, 313 F.3d 636, 641-642 (1st Cir. 2002)* (in adjudicating petition to vacate sentence, district judge acted appropriately in deciding most issues but partially recusing himself from deciding claims of judicial bias and misconduct in underlying trial); *United States v. Kimberlin, 781 F.2d 1247, 1258-1259 (7th Cir. 1985)* (limited recusal upheld); *but see United States v. Feldman, 983 F.2d 144, 145 (9th Cir. 1992)* (when judge determines that recusal is appropriate, it is not within his or her discretion to recuse by subject matter or only as to certain issues).

After a judge has been recused from a case, the judge should take no further action in the proceeding, except to accomplish whatever tasks are necessary to transfer the case to a successor judge. *See, e.g., El Fenix de Puerto Rico v. The M/Y Johanny, 36 F.3d 136, 141 (1st Cir. 1994)* (trial judge who has recused self should take no other action in case except ministerial acts to transfer case to another judge; judge cannot recuse self and set aside previously rendered judgment); *Moody v. Simmons, 858 F.2d 137, 143 (3d Cir. 1988)* (recused judge should take no further action in case except any necessary ministerial acts to transfer case to another judge).

If a judge is subject to disqualification due to the financial interest of the judge, judge's spouse, or minor child (other than an interest that would be substantially affected by the outcome of the proceeding), and if those grounds are discovered after substantial judicial time has been devoted to the matter, disqualification is not required if the person with the financial interest divests the financial interest. *28 U.S.C. § 455(f).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 63.20 -63.63.*
- *Bender's Federal Practice Forms* Form Nos. 63:50, 63:60.

- *Moore's AnswerGuide: Federal Pretrial Civil Litigation §§ 1.104 -1.109.*
- *28 U.S.C. §§ 144, 455.*

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Chapter 4 TRANSFER, REMOVAL, AND REMAND

1-4 Moore's AnswerGuide: Fed Civil Motion Practice 4.syn

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Chapter 4 TRANSFER, REMOVAL, AND REMAND
PART A: PROCEDURAL CONTEXT

1-4 Moore's AnswerGuide: Fed Civil Motion Practice § 4.01

§ 4.01 Procedural Context--Transfer, Removal, and Remand

A variety of federal statutory mechanisms exist for moving a civil case from one court to another. Often, these doctrines are employed by defendants in an effort to eliminate the advantage a plaintiff gains by selecting the initial forum. While such choice of law or other considerations may sometimes be looked upon with disdain by the courts as "forum shopping," at other times, these doctrines serve to enhance the efficiency of litigation for the parties and the judicial system.

Two statutory devices and one common law doctrine address parties' concerns over venue. If venue in the federal court in which a case was filed is improper, *28 U.S.C. § 1406(a)* provides for either dismissal or transfer to another federal court in which venue is proper. If venue in the federal court in which an action was originally filed is proper but inconvenient, *28 U.S.C. § 1404(a)* allows a transfer for convenience to another federal court. If no convenient alternative federal court exists, the common law doctrine of forum non conveniens allows for dismissal of an action for which an alternative foreign forum has been identified.

The Multidistrict Litigation statute (*28 U.S.C. § 1407*) provides a means by which the Judicial Panel on Multidistrict Litigation can transfer multiple actions pending in different districts and involving one or more common questions of fact or law to a single federal court for coordinated or consolidated pretrial proceedings. Unlike the venue devices discussed above, the Multidistrict Litigation statute gives the panel discretion to transfer the underlying actions to any federal district, regardless of jurisdiction or venue objections. At the conclusion of pretrial proceedings, any actions that have not been disposed of will be transferred back to the courts in which they were originally brought, for trial.

Finally, the general removal statute (*28 U.S.C. § 1441*) allows a defendant to move a case filed in a state court to the federal court for the district in which the cause is pending, if the case could have been brought in federal court on the basis of diversity jurisdiction, federal question jurisdiction, or jurisdiction authorized by one of a variety of specific removal statutes. Although removal itself offers no choice as to the location of the forum to which a case is removed, once a case is properly in federal court, it becomes subject to some of the other methods of transfer discussed in this chapter.

These devices present different threshold considerations including not only venue, but also personal and subject matter jurisdiction in the transferor and potential transferee courts. Some of these procedures are available for only a limited

time after the initiation of a case or the occurrence of circumstances warranting their application, and may be considered waived if they are not raised within the proper period. The substantive standards for ordering a transfer or dismissal also vary by doctrine. Most turn at least in part on the interest of justice; however, the tests for satisfying this criterion differ. Other factors that may be considered include the convenience of parties and witnesses, the furtherance of judicial economy, and the extent to which a particular forum gave rise to the actions at issue.

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Chapter 4 TRANSFER, REMOVAL, AND REMAND
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1-4 Moore's AnswerGuide: Fed Civil Motion Practice § 4.02

§ 4.02 Checklist for Motion to Dismiss for Improper Venue

☐ Determine appropriate deadline for respose to complaint and determine whether initial response to complaint will be by answer or by Rule 12 motion. *See § 1.10 above*; *§ 4.03 below*.

☐ If initial response will be by answer, prepare answer in compliance with pleading, formatting, filing, and service requirements. *See § 4.05 below*.

☐ If initial response will be Rule 12(b) motion to dismiss, prepare motion in compliance with rules governing motion practice. *See §§ 1.02-1.07 above*; *§§ 4.05*, *4.06 below*.

☐ Determine underlying basis for challenging venue:

- ○ General venue statute. *See § 4.05 below*.
- ○ Other federal statutes containing venue provisions. *See § 4.05 below*.
- ○ Mandatory forum selection clause. *See § 4.05 below*.

☐ Consider potential outcomes of request for dismissal:

- ○ Case may be transferred when transfer is in the interest of justice. *See § 4.07 below*.
- ○ Court may order severance in aid of transfer. *See § 4.07 below*.

☐ Determine whether to seek alternative venue transfer based on convenience. *See §§ 4.07*, *4.08*

below.

☐ If making Rule 12(b)(3) motion, determine what facts outside allegations of complaint may need to be established. *See §§ 4.06*, *4.07 below*.

☐ Prepare, file and serve motion papers in accordance with applicable rules. See §§ *1.02-1.13 above*.

☐ Check local rules and judge's rules regarding oral arguments and set or request hearing, as appropriate. *See § 1.04 above*.

☐ Determine whether to seek review of denial of motion or order to transfer venue:

- ○ Order of dismissal appealable under *28 U.S.C. § 1291*. *See § 4.07 below*.
- ○ Denial of motion to dismiss not appealable. *See § 4.07 below*.
- ○ Transfer orders not appealable. *See § 4.07 below*.

☐ **Search by Topic:** Civil Procedure > Venue

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1-4 Moore's AnswerGuide: Fed Civil Motion Practice § 4.03

§ 4.03 Overview of Rules Governing Venue

The venue of an action is the district court in which the action may legally be filed. *See NLRB v. Line, 50 F.3d 311, 314 (5th Cir. 1995)* ("[v]enue is necessarily defined as the appropriate district court to file an action"). Thus, a venue motion challenges whether an action may be heard in the court in which it was brought. Federal venue statutes govern venue in federal courts, with the purpose of directing lawsuits to an appropriately convenient court, taking into consideration the parties and subject matter involved in an action. The general venue statute, *28 U.S.C. § 1391*, governs venue in federal court cases, with the exception that special venue statutes also apply in a number of areas. *See 28 U.S.C. § 1391(a), (b).*

Objections to improper or inconvenient venue may be brought under two statutory provisions. According to *28 U.S.C. § 1406(a)*, if a case is filed in an improper judicial district, the court "shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." *28 U.S.C. § 1406(a)*. Transfer of such an action, rather than dismissal, is the favored disposition. *See Scott v. Monsanto Co., 868 F.2d 786, 788-789 (5th Cir. 1989)* . Dismissal or transfer under *28 U.S.C. § 1406(a)* is available only when the court determines that the existing forum is an improper venue. By contrast, *28 U.S.C. § 1404(a)* provides for transfer to a more convenient forum when venue in the original forum is proper. *See 28 U.S.C. § 1404(a); §§ 4.09-4.13 below* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 110.01 -110.60.*
- *Federal Litigation Guide PP 3.80 -3.84.*
- *28 U.S.C. §§ 1391(a), (b), 1404(a), 1406(a).*

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1-4 Moore's AnswerGuide: Fed Civil Motion Practice § 4.04

§ 4.04 General Considerations in Preparation for Filing Rule 12(b)(3) Motion Objecting to Improper Venue

[1] Objection to Improper Venue May Be Made by Rule 12(b)(3) Motion or in Answer to Complaint

An objection to improper venue must be made in the *first* response to the complaint initiating an action or the objection will be waived. The venue objection may be made by filing a motion under *Fed. R. Civ. P. 12(b)(3)* to dismiss or transfer the action pursuant to *28 U.S.C. § 1406(a)* prior to filing a responsive pleading. Alternatively, if a Rule 12(b) motion is not filed, an objection of improper venue may be asserted as a defense in the answer or other first responsive pleading. If an objection to improper venue is not asserted by one of these means, it will be permanently waived. *See 28 U.S.C. § 1406(b)*; *King v. Russell, 963 F.2d 1301, 1305 (9th Cir. 1992)* (venue objection must be raised in first defensive maneuver).

Because the objections and defenses listed in *Fed. R. Civ. P. 12(b)* may be joined together in a single motion, if a Rule 12(b) motion fails to include an objection of improper venue that is then available to the movant, that objection is permanently waived and may not be raised by a later motion or in a responsive pleading. *See Fed. R. Civ. P. 12(g), (h)*. The general rules governing motions and pleadings also apply to motions to dismiss under *Fed. R. Civ. P. 12* and must be complied with in a motion to dismiss for improper venue under *Fed. R. Civ. P. 12(b)(3)*. *See Fed. R. Civ. P. 7(b)(1), (2), 10*; *see also* Chs. 1, 3 *above*.

In the absence of a preliminary Rule 12 motion, a defendant may raise an objection to improper venue as a defense in the answer to the complaint. If the defendant's first response to the complaint is an answer that does not include an available objection to venue, however, the objection will be waived, unless the defendant adds the objection in an amendment permitted as a matter of course. *See Fed. R. Civ. P. 12(h)(1)*; *Gilmore v. Shearson/American Express, Inc., 811 F.2d 108, 112 (2d Cir. 1987)* .

Warning:

A motion to dismiss based on forum non conveniens is not the same as a motion to dismiss for improper venue. The doctrine of forum non conveniens is based on the inconvenience of the chosen venue and a court has discretion to dismiss even if jurisdiction and venue are proper. *See American Dredging Co. v. Miller, 510 U.S. 443, 448-449, 114 S. Ct. 981, 127 L. Ed. 2d 285 (1994)* (factors relevant to forum non conveniens); *see also §§ 4.14 -4.18 below*.

[2] Waiver of Objection to Improper Venue

A party can waive the defense of improper venue in several ways, including by failing to raise it in a timely manner by Rule 12(b) motion or in the answer to the complaint, or by engaging in conduct whereby a defendant is deemed to have implicitly abandoned the objection to venue. *See Manley v. Engram, 755 F.2d 1463, 1468 (11th Cir. 1985)* (the right to object to improper venue may be waived in any of several ways: by express waiver, by conduct amounting to waiver as a matter of law, or by failure to interpose a timely and sufficient objection).

[a] Waiver of Objection by Failure to Comply With Rule 12 Requirements

A defendant must assert all available Rule 12 defenses or objections in either a motion to dismiss or in the first responsive pleading. *See Fed. R. Civ. P. 12(g)(2)*. Thus, if a defendant's first response to the complaint is a Rule 12 motion that does not include an objection to venue, the objection is waived and permanently lost. The only exception to this rule applies if the venue objection was not available at the time the motion was made.

Exception:

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. *See Manley v. Engram, 755 F.2d 1463, 1471 n.18 (11th Cir. 1985)* (no waiver if factual claim on which plaintiff based venue, in this case plaintiff's residence, is later discovered to be inaccurate); *Holzsager v. Valley Hospital, 646 F.2d 792, 796 (2d Cir. 1981)* (court held that party cannot be deemed to have waived objections or defenses that were not known to be available at the time they could first have been made).

Warning:

Even if a defendant includes an objection to improper venue in its initial Rule 12(b) motion, the court may determine that the objection to improper venue has been waived if it is raised in a conclusory fashion without specifying the grounds for the objection. *See Albany Ins. Co. v. Almacenadora Somex, S.A., 5 F.3d 907, 909-910 (5th Cir. 1993)* (defendant waived defense of improper waiver by "simply stating that venue was improper" in its first Rule 12(b) motion to dismiss, and waiting until a second motion to argue that a forum selection clause specifying another forum made venue improper).

[b] Other Means of Waiving Objection to Improper Venue

An objection to venue also can be waived implicitly by conduct such as the following:

1. **Engaging in activity that implicitly submits to the court's jurisdiction before moving to dismiss for improper venue.** *See Manchester Knitted Fashions, Inc. v. Amalgamated Cotton Garment & Allied Industries Fund, 967 F.2d 688, 691 (1st Cir. 1992)* (fund waived its challenges to venue and submitted to jurisdiction of district court by failing to raise motion or defense in conjunction with preliminary hearing or before entering into a stipulation);

2. **Failing to respond to the complaint within the applicable time limits and allowing a default to be entered, even if the default is later set aside.** *See Hoffman v. Blaski, 363 U.S. 335, 343, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 (1960)* (defendant "properly served with process by a court with subject matter jurisdiction waives venue by failing seasonably to assert it, or even simply by making default"); *Cottman Transmission Sys., Inc. v. Martino Distrib., Inc., 36 F.3d 291, 296 (3d Cir. 1994)* (defendant waived objection to improper venue by defaulting); or

3. **Removing the action from state court, so that venue is governed by the removal statute, *28***

***U.S.C. § 1441(a)*, rather than by *28 U.S.C. § 1391*.** *See Lambert v. Kysar, 983 F.2d 1110, 1113 n.2 (1st Cir. 1993)* ("removal of the action to a proper forum under *28 U.S.C. § 1441(a)* frequently has been considered a waiver or cure of any defect in the original venue of the removed action under *28 U.S.C. § 1391*"); *see also § 4.28 below*.

Warning:

Even if an objection to improper venue is properly asserted in a Rule 12(b)(3) motion or responsive pleading, the objection nevertheless may be waived by other conduct that the court interprets as an implicit submission to the court's jurisdiction. *See Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 168, 60 S. Ct. 153, 84 L. Ed. 167 (1939)* (objection to venue also may be waived "by submission [in a cause] through conduct"); *Manchester Knitted Fashions, Inc. v. Amalgamated Cotton Garment & Allied Industries Fund, 967 F.2d 688, 691 (1st Cir. 1992)* .

Removal also can serve to waive an objection to improper venue based on a forum selection clause. Whether removal waives the objection depends upon the type of clause at issue. When the forum selection clause specifies the state or federal courts of another state, the case is removable, and therefore the act of removal waives or cures any objection to federal venue under the general venue statutes, because when an action is properly removable, it must be removed to the district court embracing the state court in which the action was commenced. *See Lambert v. Kysar, 983 F.2d 1110, 1113 n.2 (1st Cir. 1993)* ("a valid forum selection clause operates to render venue improper, *not only* under Section 1391, *but also* under Section 1441(a)") (emphasis in original); *Huntingdon Eng'g & Envtl., Inc. v. Platinum Software Corp., 882 F. Supp. 54, 56-57 (W.D.N.Y. 1995)* (denying motion to dismiss for improper venue under *28 U.S.C. § 1406(a)* based on forum selection clause specifying federal court in another state, because venue in removed action was controlled by removal statute, *28 U.S.C. § 1441(a)*).

[c] When Section 1406(a) Objection Waived, Motion for Transfer for Convenience Under Section 1404(a) Still Available

A motion to transfer venue for the convenience of the parties or witnesses under *28 U.S.C. § 1404(a)* may be made at any time. Thus, even when a defendant has waived the right to move for dismissal based on improper venue under *28 U.S.C. § 1406(a)*, it still may seek a convenience transfer of the action under *28 U.S.C. § 1404*. *See § 4.13[2] below*. The convenience transfer statute, however, applies only to actions filed in a district in which there is proper subject matter jurisdiction, personal jurisdiction, and venue. Thus, any defect that would justify a dismissal on jurisdiction or venue grounds also will preclude a transfer under *28 U.S.C. § 1404(a)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 12.32, 111.36*.
- *Federal Litigation Guide PP 3.81[2], 3.81[3], 3.82*.
- *Bender's Federal Practice Forms* Form Nos. 12:60-12.69.
- *28 U.S.C. § 1406*.
- *Fed. R. Civ. P. 12(g), (h)* (defenses and objections).

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Chapter 4 TRANSFER, REMOVAL, AND REMAND
PART B: MOTION TO DISMISS FOR IMPROPER VENUE PURSUANT TO RULE 12(b)(3)

1-4 Moore's AnswerGuide: Fed Civil Motion Practice § 4.05

§ 4.05 Prerequisites to Rule 12(b)(3) Motion to Dismiss for Improper Venue

[1] Determining Underlying Statutory or Contractual Basis for Challenging Venue

A motion challenging venue may be based on any of three grounds:

1 The general venue statute, *28 U.S.C. § 1391*;

2 A separate venue provision contained in a statute under which the action was brought; and

3 A mandatory forum selection clause in a contract out of which the action arises. *See M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12-13, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972)* .

Circuit Split:

Courts are split over whether a motion to dismiss based on a forum selection clause should be brought as a venue challenge under *Fed. R. Civ. P. 12(b)(3)* (the majority view), or for failure to state a claim under *Fed. R. Civ. P. 12(b)(6). See, e.g., Rainforest Cafe, Inc. v. EklecCo, L.L.C., 340 F.3d 544, 546 (8th Cir. 2003)* (recognizing controversy as to whether *Fed. R. Civ. P. 12(b)(3)* or *Fed. R. Civ. P. 12(b)(6)* motion is proper vehicle to dismiss based on forum selection clause); *Continental Ins. Co. v. M/V Orsula, 354 F.3d 603, 606-607 (7th Cir. 2003)* (Rule 12(b)(3) motion); *Silva v. Encyclopedia Britannica, Inc., 239 F.3d 385, 387-388 (1st Cir. 2001)* (Rule 12(b)(6) motion). For discussion of the requirements for 12(b)(3) motions, see *§ 3.05 above*. For discussion of the requirements for 12(b)(6) motions, see *§ 3.08 above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 111.01 -111.04*.
- *Federal Litigation Guide P 3.80*.

[2] Standing to Object to Improper Venue

[a] All Defendants May Object to Improper Venue With Respect to Themselves or Other Indispensable That Are Party Defendants

Any defendant may object to improper venue under *28 U.S.C. § 1406*. If venue is found improper as to the objecting defendant but not as to other defendants, the court should sever the claims against the objecting defendant and either dismiss them or transfer them to an appropriate district. *See Camp v. Gress, 250 U.S. 308, 316, 39 S. Ct. 478, 63 L. Ed. 997 (1919)* (nonresident defendant exempt from suit in federal court in a district where neither he nor plaintiff resided, but other defendants, who resided in that district, were not exempt).

Standing to raise the defense of improper venue is personal to the objecting defendant, and does not extend to an objection that venue is improper as to another defendant unless the second defendant is an indispensable party. *See Fed. R. Civ. P. 21*; *Anrig v. Ringsby United, 603 F.2d 1319, 1324 (9th Cir. 1978)* (district court erred in dismissing entire action without determining whether those defendants as to whom venue was improper were indispensable parties). If venue is determined to be improper for an indispensable party, the entire action should be dismissed or transferred. *See King v. Russell, 963 F.2d 1301, 1305 (9th Cir. 1992)* (district court properly dismissed action against all defendants when some defendants as to whom venue was improper were indispensable parties).

Strategic Point:

In a case in which venue is improper with respect to a defendant that is not an indispensable party and is proper with respect to other defendants, if all claims are factually related, the interests of efficiency and judicial economy may mandate transfer of the entire action, under both Sections 1406(a) and 1404(a), to a district in which venue will be proper as to all defendants and all claims can be tried together in a single lawsuit. *See Cottman Transmission Sys., Inc. v. Martino Distrib., Inc., 36 F.3d 291, 296 (3d Cir. 1994)* (transferring entire case against both defendants because defendant as to whom venue was proper was "directly connected to the main issue").

[b] Plaintiffs May Object to Improper Venue Under Certain Circumstances

Although a plaintiff generally waives an objection to venue in the court in which a case is filed, a plaintiff that has, in good faith, mistakenly brought an action in a forum without proper venue may move to transfer the action when the mistake comes to light. *See, e.g., Manley v. Engram, 755 F.2d 1463, 1467-1471 (11th Cir. 1985)* ("we hold that where a diligent plaintiff files suit in good faith in the district of the individual defendant's apparent residence, but later discovers that defendant subjectively considers another state his permanent residence, the plaintiff will not be deemed to have automatically waived his right to object to venue in the original forum or to seek a transfer under § 1406(a)").

[3] Court May Raise Objection to Improper Venue on Its Own Motion

Unless a defendant already has waived an objection to improper venue, a district court may raise the issue of improper venue on its own motion, and may dismiss or transfer the action on that ground after giving the parties adequate notice and an opportunity to be heard on the issue. *See Algodonera De Las Cabezas, S.A. v. American Suisse Capital, Inc., 432 F.3d 1343, 1345 (11th Cir. 2005)* (district court erred by dismissing case sua sponte before receiving any submissions or arguments from parties on propriety of venue); *Costlow v. Weeks, 790 F.2d 1486, 1488 (9th Cir. 1986)* (in the absence of a waiver, the district court had the authority to raise the issue of defective venue on its own motion).

Circuit Split:

Some courts, however, have ruled that the district court may not dismiss for improper venue sua sponte. *See Janis v. Ashcroft, 348 F.3d 491, 492-493 (6th Cir. 2003)* (district court noted distinction between *Fed. R. Civ. P. 12(h)(3)*, which expressly authorizes sua sponte dismissal for lack of subject matter jurisdiction, and *Fed. R. Civ. P. 12(h)(1)*, which does not provide similar authority with respect to

improper venue).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 111.35*.
- *Federal Litigation Guide P 3.81[1]*.

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1-4 Moore's AnswerGuide: Fed Civil Motion Practice § 4.06

§ 4.06 Additional Content of Motion to Dismiss for Improper Venue

[1] Evidence Outside the Pleadings May Be Considered

An objection of improper venue under *Fed. R. Civ. P. 12(b)(3)* may require proof of facts beyond those alleged in the complaint. If the facts upon which such a motion is based do not appear in the record, the court may hear the matter on affidavits, oral testimony, or deposition, and may defer ruling to give the plaintiff an opportunity to obtain discovery relevant to the motion. *See Fed. R. Civ. P. 43(e).*

[2] Burden of Proof Depends on Type of Evidence

A court deciding a motion opposing venue has discretion over whether or not to hold an evidentiary hearing. If no evidentiary hearing is held, the plaintiff need make only a prima facie showing of venue. *See Gulf Ins. Co. v. Glasbrenner, 417 F.3d 353, 355 (2d Cir. 2005)* (if court chooses to rely on pleadings and affidavits, only prima facie showing of venue is required); *Mitrano v. Hawes, 377 F.3d 402, 405 (4th Cir. 2004)* (to survive motion to dismiss when no evidentiary hearing is held, plaintiff need make only prima facie showing of venue).

Alternatively, if the court decides to hold an evidentiary hearing, the court may make findings of fact and permit discovery to aid its factual determination on the motion. When venue is determined as a fact issue, some courts hold that the party challenging venue bears the burden of proof, but other courts have held that the plaintiff bears the burden of proving venue in such circumstances. *See Myers v. American Dental Ass'n, 695 F.2d 716, 724 (3d Cir. 1982)* (venue is affirmative, dilatory defense, so that defendant has burden of proof); *but see Gulf Ins. Co. v. Glasbrenner, 417 F.3d 353, 355 (2d Cir. 2005)* (if district court holds evidentiary hearing, plaintiff must demonstrate venue by preponderance of evidence); *Granader v. Peachtree Lane Assocs,, Ltd. (In re Peachtree Lane Assocs., Ltd.), 150 F.3d 788, 794 (7th Cir. 1998)* (party challenging venue bears burden of establishing by preponderance of evidence that district chosen by plaintiff was improper venue).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 111.33[2].*

- *Federal Litigation Guide PP 3.81[1], 3.83.*

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1-4 Moore's AnswerGuide: Fed Civil Motion Practice § 4.07

§ 4.07 Court's Determination of Rule 12(b)(3) Motion Objecting to Improper Venue

[1] If Venue is Improper, Court Must Decide Whether to Dismiss or Transfer Action Under § 1406(a)

If the court determines that venue is improper in the district in which the plaintiff filed the action, the court must take one of the following actions:

1. Dismiss the action without prejudice, or

2. Transfer the action to a proper district or division if the court finds that transfer is in the interest of justice.

See 28 U.S.C. § 1406(a); *Minnette v. Time Warner, 997 F.2d 1023, 1026 (2d Cir. 1993)* .

Warning:

On a finding of improper venue under *28 U.S.C. § 1406(a)*, a court may transfer an action even if the defendant moved only to dismiss the action for lack of proper venue. *See Concession Consultants, Inc. v. Mirisch, 355 F.2d 369, 371-372 n.3 (2d Cir. 1966)* ("where the motion asks only that the suit be dismissed, the court may properly, sua sponte, order it transferred").

Strategic Point:

A motion to dismiss under *Fed. R. Civ. P. 12(b)* may be combined with a motion in the alternative to transfer venue. *See 28 U.S.C. §§ 1404(a), 1406(a)*; *see also Fort Knox Music, Inc. v. Baptiste, 257 F.3d 108, 112 (2d Cir. 2001)* (district court has power to transfer venue even if it lacks personal jurisdiction over defendants).

[a] Considerations Regarding Transfer

A court considering a motion to dismiss for improper venue under *28 U.S.C. § 1406(a)* is required by the statute to consider whether transfer is in the interest of justice before dismissing the action. When venue is improper in the court in which a case was brought, the court may transfer the action to another court with proper venue if the following conditions are met:

1. The proposed transferee court is one in which the action "could have been brought"; and

2. Transfer is "in the interest of justice."

28 U.S.C. § 1406(a); *see Costlow v. Weeks, 790 F.2d 1486, 1488 (9th Cir. 1986)* (transfer required only when it is in the interest of justice).

A court may consider the consequences of transfer when deciding a venue motion. *See Phillips v. Seiter, 173 F.3d 609, 610 (7th Cir. 1999)* (court is authorized to consider consequences of transfer before deciding whether to transfer, including taking a peek at the merits, because possible merit of case bears significantly on whether court should transfer or dismiss it). If the court finds that transfer is not in the interests of justice, it may dismiss the action without prejudice. *See King v. Russell, 963 F.2d 1301, 1304 (9th Cir. 1992)* (court found it would not be in interests of justice to transfer case because, among other reasons, plaintiff expressed no interest in transfer and because the action smacked of harassment and bad faith on plaintiff's part). Likewise, if transfer would clearly be futile, the court may dismiss the action rather than waste judicial resources. *See Daniel v. American Bd. of Emergency Med., 428 F.3d 408, 435-436 (2d Cir. 2005)* (transfer was not in interests of justice when transfer would be futile because plaintiffs lacked standing to pursue claims).

Strategic Point:

Following a transfer for improper venue under *28 U.S.C. § 1406(a)*, the transferee court will apply the law that would have applied had the action been properly commenced in the transferee court, including the choice of law rules of the state in which the transferee court sits. *See*, *e.g.*, *Adam v. J.B. Hunt Transp., Inc., 130 F.3d 219, 230 (6th Cir. 1997)* ; *Schaeffer v. Village of Ossining, 58 F.3d 48, 49 (2d Cir. 1995)* .

[b] Considerations Regarding Dismissal

To dismiss an action pursuant to a Rule 12(b)(3) motion brought under *28 U.S.C. § 1406(a)*, the court must find both of the following:

1. That venue is improper; and

2. That transfer is not in the interest of justice.

See 28 U.S.C. § 1406(a).

A dismissal under *28 U.S.C. § 1406(a)* must be without prejudice, and will not bar a subsequent action in the proper forum on the same claim, because the determination of improper venue does not go to the merits of the case. *See In re Hall, Bayoutree Associates, Ltd., 939 F.2d 802, 804 (9th Cir. 1991)* ; *see also Fed. R. Civ. P. 41(b)* (dismissal for improper venue is excluded from category of dismissals that operate as adjudication on the merits). Nevertheless, although numerous courts have reasoned that transfer is the preferred remedy under *28 U.S.C. § 1406(a)*, courts sometimes dismiss rather than transfer actions in which venue is found improper, even when the statute of limitations has since run and will therefore bar a new action filed in the proper district. *See Hapaniewski v. City of Chicago*

Heights, 883 F.2d 576, 580 (7th Cir. 1989) .

[2] Considerations Regarding Transfer in Lieu of Dismissal of Action in Which Venue Is Improper

[a] Jurisdictional Requirements for Transferor Court

A transferor court usually must have subject matter jurisdiction over a case in order to transfer the action under *28 U.S.C. § 1406(a)*, and a court that lacks subject matter jurisdiction must dismiss the action. *See Klett v. Pim, 965 F.2d 587, 591 (8th Cir. 1992)* . If, however, the court lacks subject matter jurisdiction over the action because a federal statute vests exclusive jurisdiction in a specified court, transfer to that court may be available under *28 U.S.C. § 1631*.

Personal jurisdiction is not required for transfer, so that a court that lacks personal jurisdiction over the defendants may transfer the action to a proper forum under *28 U.S.C. § 1406(a). See Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466, 82 S. Ct. 913, 8 L. Ed. 2d 39 (1962)* (language of *28 U.S.C. § 1406(a)* is broad enough to authorize transfer of cases, whether court in which it was filed had personal jurisdiction over defendants, no matter how wrong plaintiff may have been in filing action as to venue).

[b] Transferee Court Must Be Court in Which Action Originally Could Have Been Brought

According to *28 U.S.C. § 1406(a)*, the transferee court must be a court in which the action could have been properly brought at the time that the action was originally filed, unless it is an action against multiple defendants and the claims involving those for whom the requirements were not met at the time of the original filing have either been settled or dismissed. *See 28 U.S.C. § 1406(a)*; *Hoffman v. Blaski, 363 U.S. 335, 342-343, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 (1960)* (party seeking transfer has burden to establish that transferee court would have had subject-matter jurisdiction, defendants would have been subject to personal jurisdiction, and venue would have been proper at time action was originally filed). Thus, venue and personal jurisdiction must have been proper in the transferee court at the time the action was originally filed, and not as a result of subsequent actions taken by the defendant as part of the transfer motion. *See Minnette v. Time Warner, 997 F.2d 1023, 1026 (2d Cir. 1993)* (district court properly denied motion to transfer action to district in which venue would not have been proper).

The party objecting to improper venue has the burden of proving that the proposed transferee court is one in which the case originally could have been brought, and the action will not be transferred unless the movant provides a sufficient factual basis from which such a determination may be made. *See Volkswagen de Mexico, S.A. v. Germanischer Lloyd, 768 F. Supp. 1023, 1029 (S.D.N.Y. 1991)* ("party seeking transfer bears the burden of establishing personal jurisdiction over the defendants in the transferee forum").

Strategic Point:

If one or more defendants for whom venue would be improper in the transferee court are only indirectly connected to the action, the court may sever the action as to those defendants and transfer the remainder of the action unless it would cause the same issues to be litigated in two places. *See Wyndham Associates v. Bintliff, 398 F.2d 614, 618 (2d Cir. 1968)* (district court may properly sever claims against one or more defendants for purpose of permitting transfer of action against other defendants, at least when defendants as to whom venue would not be proper in the transferee district are alleged to be only indirectly connected to manipulations that form main subject matter of action); *Sunbelt Corp. v. Noble, Denton & Associates, Inc., 5 F.3d 28, 33-34 (3d Cir. 1993)* (court should not sever claims to be transferred if defendant over whom jurisdiction is retained is so involved in controversy to be transferred that partial transfer would require same issues to be litigated in two places).

[3] Appeals of Dispositions of Objections to Improper Venue Under § 1406(a)

An order dismissing an action for improper venue under *28 U.S.C. § 1406(a)* is appealable under *28 U.S.C. § 1291*, which permits appeals from final decisions of the district courts. *See United States v. Berkowitz, 328 F2d 358 (3d Cir. 1964)* . By contrast, a transfer order or denial of transfer under *28 U.S.C. § 1406(a)* is generally not immediately appealable because it will not end the litigation and is therefore not a final decision for the purpose of appellate jurisdiction. *See 28 U.S.C. § 1291* (providing for appeals only from "final decisions of the district courts of the United States"); *Songbyrd, Inc. v. Estate of Grossman, 206 F.3d 172, 176 (2d Cir. 2000)* ("transfer order is an interlocutory order that is not immediately reviewable by appeal").

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 12.32, 111.32 -111.34, 111.60 -111.65.*
- *Federal Litigation Guide P 3.84.*
- *28 U.S.C. § 1406* (cure or waiver of defects).
- *28 U.S.C. § 1631* (transfer to cure want of jurisdiction).

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1-4 Moore's AnswerGuide: Fed Civil Motion Practice § 4.08

§ 4.08 Distinguishing Between § 1406(a) and § 1404(a)

[1] Primary Distinction Is Whether Venue in Original Court Is Proper

Whether *28 U.S.C. § 1404(a)* or *28 U.S.C. § 1406(a)* should be used to consider the potential transfer of a particular case ordinarily depends upon whether venue in the court in which the action was originally brought is proper. If venue in the original court is proper, the convenience transfer provision of *28 U.S.C. § 1404(a)* applies, whereas if venue is improper, the improper venue provision of *28 U.S.C. § 1406(a)* applies. *See Jumara v. State Farm Ins. Co., 55 F.3d 873, 878 (3d Cir. 1995)* ("Section 1404(a) provides for transfer of a case where both the original and the requested venue are proper. Section 1406(a), on the other hand, applies where the original venue is improper and provides for either transfer or dismissal of the case."); *see also Van Dusen v. Barrack, 376 U.S. 612, 634, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964)* ("Section 1406(a) provides for transfer from forums in which venue is wrongly or improperly laid, whereas, in contrast, Section 1404(a) operates on the premise that the plaintiff has properly exercise his venue privilege").

The inquiry as to which statute properly applies is easy if venue is not proper in the district. In that situation, *28 U.S.C. § 1406(a)* is the relevant transfer statute. Even if a case is filed in a district that satisfies the applicable venue statute, however, the venue still may not be proper if an independent procedural requirement, such as personal jurisdiction over the defendant, is not met in the original court and would prevent the action from proceeding in that forum. Because courts employ different standards to determine whether venue is proper, determining which transfer statute applies is frequently difficult. *See McFarlane v. Esquire Magazine, 74 F.3d 1296, 1301 (D.C. Cir. 1996)* ; *Ellis v. Great Southwestern Corp., 646 F.2d 1099, 1106 (5th Cir. 1981)* ("[d]espite their apparent simplicity and exclusivity, [*28 U.S.C. § 1404(a)* and *28 U.S.C. § 1406(a)*] have been the subject of 'a nearly hopeless muddle of conflicting reasoning and precedent' ").

[2] Additional Procedural and Substantive Distinctions

Many of the procedures and standards governing the court's decision on transfer, and the consequences following from that decision, differ depending on whether *28 U.S.C. § 1404(a)* (convenience transfer) or *28 U.S.C. § 1406(a)* (improper venue transfer) is employed. Significant distinctions include the following:

1. Differences in whether the court may dismiss the action if it denies transfer;

2. Differences in the substantive law that the transferee court will apply if the case is transferred; and

3. Differences in means of waiving the right to move for transfer.

The most crucial of these distinctions between *28 U.S.C. § 1404* and *28 U.S.C. § 1406* is that the law of the original forum applies after a § 1404 transfer, whereas the law of the transferee forum applies after a § 1406 transfer. *See Tel-Phonic Services, Inc. v. TBS Int'l., Inc., 975 F.2d 1134, 1141 (5th Cir. 1992)* ; *Ferens v. John Deere Co., 494 U.S. 516, 523, 110 S. Ct. 1274, 108 L. Ed. 2d 443 (1990)* . Thus, a § 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 court.

Strategic Point:

Because important consequences flow from the use of the transfer or dismissal statutes, it is important for a party to determine which of the two statutes the court is most likely to invoke. Before making a dismissal or transfer motion, the moving party must evaluate whether the motion is likely to succeed, and whether the consequences are desirable. In close cases, questions of convenience and propriety of venue may involve many of the same facts, meaning that the issues can be considered simultaneously. *See Fed. R. Civ. P. 12(b)(3)*; *28 U.S.C. § 1404(a)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 111.02*.
- *Federal Litigation Guide P 3.81*.

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1-4 Moore's AnswerGuide: Fed Civil Motion Practice § 4.09

§ 4.09 Checklist for Motion to Transfer Venue for Convenience

☐ Establish essential factors supporting request for transfer based on convenience. *See § 4.10 below*.

☐ Establish standing to make transfer request. *See § 4.12 below*.

☐ Establish discretionary factors supporting convenience transfer. *See § 4.11 below*.

☐ Determine whether transferor and transferee courts are likely to have proper jurisdiction and venue. *See §§ 4.11, 4.13 below*.

☐ Make timely transfer request. *See § 4.13 below*.

☐ Prepare motion in compliance with rules governing motion practice. *See §§ 1.02-1.07 above*; *§ 4.10 below*.

☐ Check local rules and judge's rules regarding oral arguments and set or request hearing, as appropriate. *See § 1.04 above*.

☐ Consider likely outcome of motion:

- ○ Burden of proof on movant to clearly show justification for transfer. *See § 4.11 below*.
- ○ Convenience of witnesses is most important factor. *See § 4.12 below*.

- ○ Plaintiff's choice of forum given considerable weight. *See § 4.12 below*.
- ○ Other factors may be considered. *See § 4.13 below*.
- ○ Contractual forum selection provision may be given effect. *See § 4.12 below*.

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1-4 Moore's AnswerGuide: Fed Civil Motion Practice § 4.10

§ 4.10 Establishing Elements Required for Convenience Transfer

When a plaintiff brings an action in a district court with proper venue, a court is empowered under *28 U.S.C. § 1404(a)* to transfer the action to another federal forum if two requirements are met:

1. 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; and

2. The proposed transferee district must be one in which the action might have been brought originally.

See 28 U.S.C. § 1404(a), (b); *see also Van Dusen v. Barrack, 376 U.S. 612, 634, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964)* (*28 U.S.C. § 1404(a)* allows change of venue for convenience of parties and witnesses and in interest of justice).

In addition to determining that the transferee court is one in which the action might have been brought, the court must determine that transfer of the action will accomplish the following:

1. Enhance the convenience of the parties;

2. Enhance the convenience of the witnesses; and

3. Be in the interest of justice.

See 28 U.S.C. § 1404(a).

Strategic Point:

A defendant's motion to transfer venue should establish, by declaration or affidavit, that the proposed transferee forum is more convenient based upon the relevant factors and the specific facts of the case. *See Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1515 (10th Cir. 1991)* (party moving to transfer case pursuant to *28 U.S.C. § 1404(a)* bears burden of establishing that existing forum is inconvenient); *see also Anglo American Insurance Group, P.L.C. v. CalFed Inc., 916 F. Supp. 1324,*

1327 (S.D.N.Y. 1996) (movant carries the burden of establishing that proposed forum is more convenient).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 111.10*.
- *Bender's Federal Practice Forms* Form Nos. 12:64, 12:65.
- *28 U.S.C. § 1404* (change of venue).

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1-4 Moore's AnswerGuide: Fed Civil Motion Practice § 4.11

§ 4.11 Transferee Court Must Have Proper Venue, Subject Matter, and Personal Jurisdiction

The transferor court may not transfer an action under *28 U.S.C. § 1404(a)* unless it first determines that, at the time the action was originally filed, the following requirements were satisfied:

1. **The transferee court would have had proper venue under applicable venue statutes.** *See Hoffman v. Blaski, 363 U.S. 335, 343-344, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 (1960)* ;

2. **The transferee court would have had subject matter jurisdiction.** *See Hoffman v. Blaski, 363 U.S. 335, 343-344, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 (1960)* ;

3. **The transferee court could have exercised personal jurisdiction over the defendants, independently of the defendant's consent to jurisdiction as part of the transfer motion.** *See Hoffman v. Blaski, 363 U.S. 335, 342-343, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 (1960)* ; *see also Commercial Lighting Products, Inc. v. United States Dist. Ct., 537 F.2d 1078 (9th Cir. 1976)* (in diversity action, defendant's consent to transfer is irrelevant; power of district court under *28 U.S.C. § 1404(a)* to transfer action to another district depends not on wish or waiver of defendant but, rather, on whether transferee district was one in which action might have been brought by plaintiff).

The party seeking the transfer has the burden of proving that the action could have been brought originally in the transferee district. *See Hoffman v. Blaski, 363 U.S. 335, 343-344, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 (1960)* (party seeking transfer has burden to establish that transferee court would have had subject-matter jurisdiction, defendants would have been subject to personal jurisdiction, and venue would have been proper at time the action was originally filed).

Most courts deny transfer if a basis for personal jurisdiction, independent of the defendant's consent, is lacking in the transferee court. *See, e.g., Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1515 (10th Cir. 1991)* ("Section 1404(a) does not allow a court to transfer a suit to a district which lacks personal jurisdiction over the defendants, even if they consent to suit there").

Exception:

A court presiding over an action filed in retaliation for an action pending in another district may transfer the action to the first district even if the transferee court would not have had personal jurisdiction over the defendant, so long as the plaintiff could have raised the subject matter of its action as a counterclaim in the pending action in the transferee district and the parties are the same. *See A. J. Industries, Inc. v. United States Dist. Ct. for Cent. Dist. of Cal., 503 F.2d 384, 386-389 (9th Cir. 1974)* (transfer to district with pending action allowed if plaintiff could have asserted counterclaim).

Exception:

The transferor court may in some circumstances sever claims against defendants as to whom venue would not have been proper in the transferee district and transfer only those defendants as to whom venue would have been proper. *See Carver v. Knox County, Tenn., 887 F.2d 1287, 1293 (6th Cir. 1989)* (severing claims against certain defendants and transferring them to another district).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 111.12, 111.14.*

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1-4 Moore's AnswerGuide: Fed Civil Motion Practice § 4.12

§ 4.12 Establishing Discretionary Factors That Support Convenience Transfer

Once the threshold requirements relating to the proposed transferee forum are met, the decision as to whether transfer is warranted under *28 U.S.C. § 1404(a)* lies within the broad discretion of the district court. *See Filmline (Cross-Country) Productions, Inc. v. United Artists Corp., 865 F.2d 513, 520 (2d Cir. 1989)* (transfer decision within discretion of district court). In deciding whether the proposed alternative forum would better serve the convenience and interest of justice requirements, the transferor court will make an individualized determination on the basis of a number of case-specific factors. *See White v. ABCO Eng'g Corp., 199 F.3d 140, 143-144 (3d Cir. 1999)* (transfer requires case-specific determination based on public and private interest factors).

Courts frequently consider the following factors:

1. **Convenience of witnesses, generally considered the most important factor, based primarily on witnesses' places of residence.** *See Gundle Lining Constr. Corp. v. Fireman's Fund Ins. Co., 844 F. Supp. 1163, 1166 (S.D. Tex. 1994)* (relative convenience of witnesses is "the most important factor"); *Hernandez v. Graebel Van Lines, 761 F. Supp. 983, 990 (E.D.N.Y. 1991)* (convenience of witnesses is "probably the single-most important factor in the analysis");

2. **Plaintiff's original choice of forum, generally given significant weight.** *See Robinson v. Giarmarco & Bill, P.C., 74 F.3d 253, 260 (11th Cir. 1996)* (when considering whether to transfer a case for the convenience of parties and witnesses, plaintiff's choice of forum should not be disturbed unless it is clearly outweighed by other considerations). The plaintiff's choice is given less deference, however, when it has little connection to the action. *See In re Genentech, Inc., 566 F.3d 1338, 1348 (Fed. Cir. 2009)* (transfer of venue warranted where the plaintiff's chosen forum had no connection to any of the witnesses or evidence); *In re Volkswagen of Am., Inc., 545 F.3d 304, 319 (5th Cir. 2008)* (where a suit had no connection with the venue selected by the plaintiffs, the district court clearly abused its discretion in refusing to transfer the suit under *28 U.S.C. § 1404*); *Saleh v. Titan Corp., 361 F. Supp. 2d 1152, 1156-1157 (S.D. Cal. 2005)* (numerous courts have given less deference to the plaintiff's choice of forum when action has little connection with chosen forum);

3. **Where events at issue in the lawsuit took place.** *See Decker Coal Co. v. Commonwealth Edison*

Co., 805 F.2d 834, 841 (9th Cir. 1986) (court sitting in district where the injury occurred and where the evidence is located ordinarily will be most efficient forum);

4. **Convenience of parties, presumed to turn primarily on proximity to a party's residence.** *See United States Fid. & Guar. Co. v. Republic Drug Co., 800 F. Supp. 1076, 1080 (E.D.N.Y. 1992)* ;

5. **Comparative availability of compulsory process to compel the attendance of unwilling witnesses.** *See DiRienzo v. Philip Services Corp., 232 F.3d 49, 66 (2d Cir. 2000)* , *vacated in part by, DiRienzo v. Philip Services Corp., 294 F.3d 21 (2d Cir. 2002)* (one factor considered in deciding upon venue transfer based on convenience is availability of compulsory process to compel the attendance of unwilling witnesses);

6. **Location of documents and other relevant physical evidence.** *See Excelsior Designs, Inc. v. Sheres, 291 F. Supp. 2d 181, 186 (E.D.N.Y. 2003)* (courts look at the location of evidence in a *28 U.S.C. § 1404(a)* motion when documents are particularly bulky or difficult to transport, or proof that is it somehow a greater imposition for moving party to bring its evidence to the plaintiff's chosen forum than vice versa);

7. **Where action can be tried more inexpensively and expeditiously**. *See Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1515 (10th Cir. 1991)* (transfer may still be favored even if witnesses are willing to travel);

8. **Relative court congestion in the forums.** *See Parsons v. Chesapeake & O. R. Co., 375 U.S. 71, 73, 84 S. Ct. 185, 186, 11 L. Ed. 2d 137 (1963)* (condition of transferor court's docket is legitimate consideration in transfer analysis);

9. **Public interest in local adjudication of local controversies.** *See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 511, 67 S. Ct. 839, 91 L. Ed. 1055 (1947)* ; *In re Eastern Dist. Repetitive Stress Injury Litig, 850 F. Supp. 188, 195 (E.D.N.Y. 1994)* ("the public interest supports adjudication of the controversy in that locale, rather than in a remote location where it will be learned of only by report");

10. **Relative familiarity of the courts with applicable state or other law.** *See Scottish Air Int'l, Inc. v. British Caledonian Group, PLC, 81 F.3d 1224, 1232 (2d Cir. 1996)* (one factor relevant to transferring venue is the appropriateness of holding the trial in a forum that is at home with applicable law, rather than having a court untangle problems in conflict of laws, and in law foreign to itself);

11. **Extent to which transfer would be in the interest of justice.** *See Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 30, 108 S. Ct. 2239, 101 L. Ed. 2d 22 (1988)* (interest of justice factor encompasses the "public interest factors of systemic integrity and fairness"); *Coffey v. Van Dorn Iron Works, 796 F.2d 217, 220-221 (7th Cir. 1989)* ("interest of justice" is "a separate component" in the transfer analysis, relating to efficient administration of the court system, and "may be determinative in a particular case");

12. **Which forum will better serve judicial economy.** *See Ferens v. John Deere Co., 494 U.S. 516, 531, 110 S. Ct. 1274, 108 L. Ed. 2d 443 (1990)* , *quoting Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 26, 80 S. Ct. 1470, 4 L. Ed. 2d 1540 (1960)* ("To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that Section 1404(a) was designed to prevent"); *Brown v. Connecticut General Life Ins. Co., 934 F.2d 1193, 1196 (11th Cir. 1991)* (transfer appropriate when it would allow consolidation of action with related action pending in transferee court); and

13. **Existence of forum selection clause, given different weight by different courts.** *See M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12-13, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972)* (forum selection clause should be enforced unless party opposing enforcement can clearly show that enforcement "would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching"); *but see Jones v. GNC Franchising, Inc., 211 F.3d 495, 498-499 (9th Cir. 2000)* (district court properly denied motion to transfer based on forum selection clause when balance of factors favored retention of case); *Red Bull Assocs. v. Best Western Int'l, Inc., 862 F.2d 963, 967 (2d Cir. 1988)* (forum selection clause is only one factor in analysis).

No individual factor is determinative. The court has discretion to weigh each factor to reach a fair result, although plaintiff's choice of forum may be accorded significant weight. *See Lou v. Belzberg, 834 F.2d 730, 739 (9th Cir. 1987)* (although great weight is generally accorded plaintiff's choice of forum, when an individual brings derivative suit or represents a class, named plaintiff's choice of forum is given less weight). The convenience of nonparty witnesses is also an important factor. *See In re Commonwealth Oil Refining Co., 596 F.2d 1239, 1247 (5th Cir. 1979)* (one factor in determining whether venue transfer is convenient is proximity of witnesses); *see Saleh v. Titan Corp., 361 F. Supp. 2d 1152, 1165 (S.D. Cal. 2005)* (convenience of witnesses factor weighed heavily in favor of transfer).

Strategic Point:

These factors are quite similar to those that courts consider on a motion to dismiss under the common law doctrine of forum non conveniens. *See §§ 4.12 -4.18 below*; *Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 67 S. Ct. 839, 91 L. Ed. 1055 (1947)* .

Warning:

If a forum selection clause requires that any dispute between the parties arising out of the contract be brought in a specific state or foreign court exclusively, and the action is brought in (or removed to) another forum, *28 U.S.C. § 1404(a)* will be inapplicable because there is no federal forum to which transfer can be made so as to enforce the clause. Thus, a better vehicle to give effect to the clause would be a motion to dismiss or transfer for improper venue under *28 U.S.C. § 1406(a)*. *See 28 U.S.C. § 1406(a)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 111.13*.
- *Bender's Federal Practice Forms* Form Nos. 12:64, 12:65.
- *28 U.S.C. § 1404* (change of venue).

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Chapter 4 TRANSFER, REMOVAL, AND REMAND
PART C: MOTION TO TRANSFER VENUE FOR CONVENIENCE UNDER 28 U.S.C. § 1404

1-4 Moore's AnswerGuide: Fed Civil Motion Practice § 4.13

§ 4.13 Establishing Other Elements Relevant to Convenience Transfer

[1] Other Authority to Move for Convenience Transfer

A plaintiff also may move for a convenience transfer, but may be required to show that circumstances have changed since the action was originally filed, or that the transfer is in the interest of justice. *See Ferens v. John Deere Co., 494 U.S. 516, 524, 110 S. Ct. 1274, 108 L. Ed. 2d 443 (1990)* ; *Anglo American Ins. Group, P.L.C. v. CalFed, Inc., 916 F. Supp. 1324, 1329 (S.D.N.Y. 1996)* (plaintiff moving for transfer must show change of circumstances or that transfer in interest of justice); *but see American Home Assur. Co. v. Glovegold, Ltd., 153 F.R.D. 695, 700 (M.D. Fla. 1994)* (plaintiff need not show changed circumstances to obtain convenience transfer).

Warning:

A court may, on its own motion, transfer an action under *28 U.S.C. § 1404(a)* based on convenience and the interest of justice after giving the parties notice and an opportunity to be heard. *See Ferens v. John Deere Co., 494 U.S. 516, 530, 110 S. Ct. 1274, 108 L. Ed. 2d 443 (1990)* .

Warning:

The parties may not stipulate to a transfer under *28 U.S.C. § 1404(a)* to a different district, even when the transferee district is one in which the action might have been brought. *See White v. ABCO Engineering Corp., 199 F.3d 140, 143-144 (3d Cir. 1999)* ("transfer by stipulation is inappropriate" under convenience transfer statute).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 111.16.*

[2] Moving for Transfer in a Timely Manner

A defendant should move for a transfer no later than the answer. If the defendant becomes aware of circumstances supporting a convenience transfer after answering, he or she should move with reasonable promptness after factors

supporting transfer become evident. *See Vaz Borralho v. Keydril Co., 696 F.2d 379, 383 (5th Cir. 1983)* (defendants raised venue convenience issues in their answers and in a motion to dismiss the complaint).

There is no deadline for bringing a motion for a convenience transfer, and a motion for convenience transfer will not be denied solely because it is filed after the pretrial phase is well under way. However, delay is a factor in determining the propriety of transfer that can sometimes result in denial of the motion, and which should be explained. *See Moore v. Telfon Communications Corp., 589 F.2d 959, 968 (9th Cir. 1978)* (court properly considered six year delay in seeking transfer); *Mohamed v. Mazda Motor Corp., 90 F. Supp. 2d 757, 759 (E.D. Tex. 2000)* ("reasonable promptness" is lacking if party resisting transfer shows that motion is dilatory tactic or that party would be prejudiced solely because of delay in bringing motion).

Strategic Point:

The waiver of objections to improper venue does not preclude a defendant from moving for a convenience transfer. *See Hoffman v. Blaski, 363 U.S. 335, 342-343, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 (1960)* .

[3] Establishing Proper Venue

A convenience transfer under *28 U.S.C. § 1404(a)* is available in any civil action, including actions arising under federal statutes with special venue provisions and actions that have been removed from state court. *See In re Fireman's Fund Ins. Cos., 588 F.2d 93, 95 (5th Cir. 1979)* ("Because of the unambiguous phrase 'any civil action,' it has been held that this section [*28 U.S.C. § 1404(a)*] applies not only to the general federal venue provisions, e.g., *28 U.S.C. § 1391*, but also to special venue statutes within Title 28 and elsewhere in the Federal Code"); *see also Hatch v. Reliance Ins. Co., 758 F.2d 409, 413-414 (9th Cir. 1985)* ("[w]hen the case was removed to the United States District Court in Texas it became a federal case, and section 1404(a) applied" to permit transfer).

[4] Establishing that Subject Matter and Personal Jurisdiction Requirements Are Satisfied

To transfer an action under the convenience transfer statute, the transferor court ordinarily must have subject matter jurisdiction over the action. *See Van Dusen v. Barrack, 376 U.S. 612, 634, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964)* (use of venue transfer statute is appropriate when venue is proper in the original forum and that forum has subject matter jurisdiction). A court may grant such a transfer even if it lacks personal jurisdiction over the defendant. *See Corke v. Sameiet M. S. Song of Norway, 572 F.2d 77, 80 (2d Cir. 1978)* (*28 U.S.C. § 1406(a)* allows transfer of case regardless of whether transferor court has personal jurisdiction over defendants).

If the court lacks subject matter jurisdiction because a federal statute vests exclusive jurisdiction over a particular category of action or appeal in another federal court, transfer to that court may be available under another federal transfer statute. *See 28 U.S.C. § 1631.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 111.12, 111.14, 111.16, 111.17.*

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Chapter 4 TRANSFER, REMOVAL, AND REMAND
PART D: MOTION TO DISMISS FOR FORUM NON CONVENIENS

1-4 Moore's AnswerGuide: Fed Civil Motion Practice § 4.14

§ 4.14 Checklist for Motion to Dismiss for Forum Non Conveniens

☐ Determine whether motion is appropriate.

- ○ Adequate alternative forum in another country. *See § 4.16 below*.
- ○ Proper jurisdiction and venue. *See § 4.15 below*.

☐ Prepare and file motion in compliance with rules governing motion practice. *See §§ 1.02-1.07, 1.09-1.11 above*; *§ 4.15 below*.

☐ Check local rules and judge's rules regarding oral arguments and set or request hearing, as appropriate. *See § 1.04 above*.

☐ Ascertain factors supporting forum non conveniens dismissal such as:

- ○ Establish exceptional circumstances. *See § 4.15 below*.
- ○ Establish grounds to dismiss. *See § 4.15 below*.
- ○ Establish adequacy of alternative forum. *See § 4.16 below*.
- ○ Determine convenience of parties. *See § 4.17 below*.
- ○ Consider special venue provisions and forum selection clause, if applicable. *See § 4.18 below*.

☐ **Search by Topic:** Civil Procedure > Venue > Federal Venue Transfers

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Chapter 4 TRANSFER, REMOVAL, AND REMAND
PART D: MOTION TO DISMISS FOR FORUM NON CONVENIENS

1-4 Moore's AnswerGuide: Fed Civil Motion Practice § 4.15

§ 4.15 Establishing Requirements for Forum Non Conveniens Dismissal

[1] Establishing Exceptional Circumstances

Forum non conveniens is a common law doctrine permitting dismissal of an action that is properly before the court if both of the following requirements are met:

1. An adequate alternative forum exists in another country; and

2. The balance of the relevant private and public interest factors favors dismissal.

See Dole Food Co. v. Watts, 303 F.3d 1104, 1118-1120 (9th Cir. 2002) (party moving to dismiss based on forum non conveniens bears burden of showing (1) there is an adequate alternative forum, and (2) balance of private and public interest factors favors dismissal). Unless an adequate alternative forum exists, the court lacks discretion to dismiss the action pursuant to forum non conveniens. *See PT United Can Co. v. Crown Cork & Seal Co., 138 F.3d 65, 73 (2d Cir. 1998)* .

Forum non conveniens does not require that a plaintiff choose the optimal forum for a claim, but is instead an exceptional doctrine to be employed sparingly. *See Ravelo Monegro v. Rosa, 211 F.3d 509, 514 (9th Cir. 2000)* . The doctrine of dismissal on forum non conveniens grounds has been largely superseded by the statutory convenience transfer available under *28 U.S.C. § 1404(a)*, and is no longer used except when there is no federal forum to which the action can be transferred, and the more convenient forum is in a foreign country. *See American Dredging Co. v. Miller, 510 U.S. 443, 445 n.2, 114 S. Ct. 981, 127 L. Ed. 2d 285 (1994)* ("forum non conveniens has continuing application only in cases where the alternative forum is abroad"); *Cowan v. Ford Motor Co., 713 F.2d 100, 103 (5th Cir. 1983)* (*28 U.S.C. § 1404(a)* "superseded the common law doctrine of forum non conveniens insofar as transfer to another federal district court is possible").

Timing:

A motion for dismissal on the grounds of forum non conveniens should be made within a reasonable time after the defendant becomes aware of the facts that form the basis for the motion. *See Lony v. E.I. Du Pont de Nemours & Co., 935 F.2d 604, 614 (3d Cir. 1991)* (if discovery has proceeded substantially, presumption against dismissal on grounds of forum non conveniens greatly increases). Even if the

defendant has moved in a timely fashion, however, considerations of judicial economy weigh in favor of retaining the action if extensive discovery on the merits has taken place or if the court has expended significant resources on the case. *See Lony v. E.I. Du Pont de Nemours & Co., 935 F.2d 604, 607 (3d Cir. 1991)* ("whenever discovery has proceeded substantially so that the parties already invested much of the time and resources they will expend before trial, the presumption against dismissal ... greatly increases").

Strategic Point:

Because a motion to dismiss for forum non conveniens is not based on the merits of an action, a court has discretion to consider a defendant's forum non conveniens motion before resolving any other threshold objection such as subject-matter jurisdiction or personal jurisdiction. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 127 S. Ct. 1184, 167 L. Ed. 2d 15, 22 (2007)* ("We hold that a district court has discretion to respond at once to a defendant's forum non conveniens plea, and need not take up first any other threshold objection. In particular, a court need not resolve whether it has authority to adjudicate the cause (subject-matter jurisdiction) or personal jurisdiction over the defendant if it determines that, in any event, a foreign tribunal is plainly the more suitable arbiter of the merits of the case.").

Strategic Point:

Removal of an action from state court does not preclude subsequently moving to dismiss on forum non conveniens grounds. *See Baumgart v. Fairchild Aircraft Corp., 981 F.2d 824, 835 (5th Cir. 1993)* (removal does not bar subsequent forum non conveniens motion). If the court grants the later forum non conveniens motion, it may properly dismiss the action rather than remanding it to state court. *See De Aguilar v. Boeing Co., 11 F.3d 55, 58 (5th Cir. 1993)* ("the power to invoke forum non conveniens presupposes the existence of federal jurisdiction and thus does not require remand to an equally inconvenient forum").

[2] Establishing Grounds for Dismissal

The party moving to dismiss based on forum non conveniens bears the burden of establishing:

1. The existence of an adequate alternative forum; and

2. That the balance of the relevant private and public interest factors favors dismissal.

See American Dredging Co. v. Miller, 510 U.S. 443, 447-448, 114 S. Ct. 981, 127 L. Ed. 2d 285 (1994) ; *Alpha Therapeutic Corp. v. Nippon Hoso Kyokai, 199 F.3d 1078, 1090 (9th Cir. 1999)* (moving party has burden of showing that there is adequate alternative forum, and that choice of law and balance of private and public interest factors favor dismissal).

The doctrine of forum non conveniens is applied flexibly, with the court weighing multiple factors relating to fairness and convenience based on the particular facts of the case. *See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 249, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)* ("each case turns on its facts"); *Wilson v. Humphreys (Cayman), Ltd., 916 F.2d 1239, 1246 (7th Cir. 1990)* ("no rigid test" exists in forum non conveniens analysis). As a result, outcomes of the application of the doctrine are neither uniform nor predictable. *See American Dredging Co. v. Miller, 510 U.S. 443, 455, 114 S. Ct. 981, 127 L. Ed. 2d 285 (1994)* (uniformity and predictability of outcome almost impossible).

The threshold inquiry is whether an adequate forum is available, in the absence of which the court must deny the motion and retain the action. *See Veba-Chemie A.G. v. M/V Getafix, 711 F.2d 1243, 1248 (5th Cir. 1983)* (relevant only whether alternative forum is available at time of dismissal, not whether it was available when suit was brought); *Bhatnagar by Bhatnagar v. Surrendra Overseas Ltd., 52 F.3d 1220, 1225 (3d Cir. 1995)* ("a district court cannot dismiss on forum non conveniens grounds if that decision would render a plaintiff unable to pursue his or her action elsewhere").

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 111.70 -111.74, 111.90.*
- *Bender's Federal Practice Forms* Form Nos. 12:62, 12:63.

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Chapter 4 TRANSFER, REMOVAL, AND REMAND
PART D: MOTION TO DISMISS FOR FORUM NON CONVENIENS

1-4 Moore's AnswerGuide: Fed Civil Motion Practice § 4.16

§ 4.16 Determining Adequacy of Alternative Forum

A forum is generally considered adequate if it provides a potential avenue for redress. *See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)* . Even if particular causes of action or certain desirable remedies are not available in a foreign forum, that forum usually will be adequate so long as: (1) it permits litigation of the subject matter and provides adequate procedural safeguards, and (2) the remedy available in the alternative forum is not so inadequate as to constitute no remedy at all. *See Ceramic Corp. of America v. Inka Maritime Corp., 1 F.3d 947, 949 (9th Cir. 1993)* .

A foreign forum may be found to be adequate even if the following conditions are found:

1. **Alternative forum has less favorable substantive law.** *See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)* ; *see also Gonzalez v. Chrysler Corp., 301 F.3d 377, 380-383 (5th Cir. 2002)* (in rare circumstances, when remedy offered by other forum is clearly unsatisfactory, other forum may not be adequate alternative, and initial requirement may not be satisfied; thus, dismissal would not be appropriate);

2. **Alternative forum has less favorable procedural law.** *See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.18, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)* (alternative forum had stricter standards for treatment of claim for relief and less generous standard for award of attorney's fees); *see also Lockman Foundation v. Evangelical Alliance Mission, 930 F.2d 764, 768 (9th Cir. 1991)* (alternative forum lacked jury trial and had different discovery procedures); or

3. **Range of remedies or potential recoveries available in alternative forum less extensive than federal forum.** *See Creative Technology v. Aztech Systems PTE, 61 F.3d 696, 703 (9th Cir. 1995)* (alternative forum may not provide all of remedies and benefits that might be available in American court, but remedies provided are not so clearly inadequate or unsatisfactory that there is no remedy at all).

A foreign forum may be found to be inadequate in the presence of one of the following conditions:

1. **Litigation cannot proceed.** *See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)* ; *see also Mercier v. Sheraton Int'l Inc., 981 F.2d 1345, 1350 (1st Cir. 1992)* (alternative forum is inadequate if it does not permit litigation of the subject matter of the dispute); *Bank of Credit & Commerce Int'l (Overseas) Ltd. v. State Bank of Pakistan, 273 F.3d 241, 247 (2d Cir. 2001)* ("adequate forum does not exist if a statute of limitations bars the bringing of the case in that forum");

2. **Defendant not amenable to service of process in alternative forum, though defendant can cure this by submitting to personal jurisdiction.** *See Leetsch v. Freedman, 260 F.3d 1100, 1103-1104 (9th Cir. 2001)* (alternate forum's adequacy is generally satisfied if defendant is amenable to service of process in that forum; however, amenability to service of process is not the only determinant); *see also Dole Food Co. v. Watts, 303 F.3d 1104, 1118-1119 (9th Cir. 2002)* (regarding motion to dismiss based on forum non conveniens, alternative forum ordinarily exists when defendants are amenable to service of process in the foreign forum);

3. **No remedy is available to plaintiff.** *See El-Fadl v. Central Bank of Jordan, 75 F.3d 668, 678 (D.C. Cir. 1996)* (if the foreign forum would deny litigant access to its judicial system on claims in litigant's complaint, dismissal on forum non conveniens grounds is inappropriate); *see also Ceramic Corp. of America v. Inka Mar. Corp., 1 F.3d 947, 949-950 (9th Cir. 1993)* (even when defendant amenable to process in alternative forum, there may be rare circumstances in which remedy provided by alternative forum so clearly inadequate or unsatisfactory that it is no remedy at all, and dismissal would not be appropriate when alternative forum does not permit litigation of subject matter of dispute);

4. **Plaintiff has well founded fear of retaliation or persecution if action is pursued in alternative forum.** *See Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1134, 1143 (C.D. Cal. 2005)* (alternative forum inadequate if claimants cannot pursue their case without fearing retaliation); *Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1197 (S.D.N.Y. 1996)* (denying dismissal when Ghanian plaintiff, who had political asylum status, had well founded fear of persecution if he brought action alleging torture by Ghanian officials in Ghanian courts);

5. **Egregious litigation delays exist in alternative forum's judicial system, such as to render putative remedy effectively meaningless.** *See Bhatnagar by Bhatnagar v. Surrendra Overseas Ltd., 52 F.3d 1220, 1227-1229 (3d Cir. 1995)* (denial of motions to dismiss on grounds of forum non conveniens was proper when extreme delay in alternative forum rendered that forum inadequate for purposes of defendant's motion); or

6. **Plaintiff unable to join required third party in alternative forum.** *See In re Air Crash Disaster near New Orleans, 821 F.2d 1147, 1168 (5th Cir. 1987) , vacated and remanded on other grounds sub nom. Pan Am. World Airways, Inc. v. Lopez, 490 U.S. 1032, 109 S. Ct. 1928, 104 L. Ed. 2d 400 (1989)* (defendant might establish prejudice in choice of forum by showing key evidence or witnesses were unavailable during trial or that it did not receive fair trial due to forum's animosity or prejudice toward it).

Strategic Point:

Adequacy of the alternative forum can be established most effectively through expert affidavits or declarations. *See Mercier v. Sheraton Int'l, Inc., 981 F.2d 1345, 1351-1352 (1st Cir. 1992) .*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 111.74, 111.92.*

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Chapter 4 TRANSFER, REMOVAL, AND REMAND
PART D: MOTION TO DISMISS FOR FORUM NON CONVENIENS

1-4 Moore's AnswerGuide: Fed Civil Motion Practice § 4.17

§ 4.17 Establishing Convenience of Parties

Once the adequacy of an alternative foreign forum has been established, the court must weigh the private and public interests to determine whether the convenience of the parties and the ends of justice would best be served by dismissing the action. *See Lueck v. Sundstrand Corp., 236 F.3d 1137, 1145-1147 (9th Cir. 2001)* .

[1] Determining Private Interests

The private interest factors that the court may take into account in weighing the convenience of the parties include the following:

1. **Relative ease of access to sources of evidence.** *See Creative Technology v. Aztech Systems PTE, 61 F.3d 696, 703 (9th Cir. 1995)* ;

2. **Relative availability of compulsory process to compel attendance of significant unwilling witnesses at trial, considered most important factor.** *See Howe v. Goldcorp Invest, Ltd., 946 F.2d 944, 951 (1st Cir. 1991)* (fact that "only Canadian courts, and not courts within the United States, have the legal power to compel testimony of twelve Canadian potential witnesses who are not under the control of either party" weighed heavily in favor of dismissal);

3. **Defendant's inability to implead required third party, if impleader available in alternative forum.** *See Allstate Life Ins. Co. v. Linter Group, Ltd., 994 F.2d 996, 1002 (2d Cir. 1993)* (inability to implead other parties is factor favoring dismissal on ground of forum non conveniens); *Baumgart v. Fairchild Aircraft Corp., 981 F.2d 824, 828 (5th Cir. 1993)* (dismissal appropriate when, among other things, defendant would be able to implead third party in foreign forum, but not in district court);

4. **Relative costs of obtaining presence of willing witnesses.** *See Blanco v. Banco Industrial De Venezuela, S.A., 997 F.2d 974, 982 (2d Cir. 1993)* (most witnesses whose testimony would be required were located outside the U.S.; no process available to compel their appearance in New York, which would have entailed considerable expense);

5. **Relative costs of obtaining or translating evidence.** *See Aguinda v. Texaco, Inc., 303 F.3d 470, 479 (2d Cir. 2002)* (factor favored Ecuadorian forum when it would be onerous for U.S. court to manage translation difficulties arising various dialects); *Mars Inc. v. Kabushiki-Kaisha Nippon Conlux, 24 F.3d 1368, 1375 (Fed. Cir. 1994)* (complication of "having to agree on the proper translation of [Japanese] laws, documents and other communications" supported dismissal);

6. **Financial hardship to plaintiff of bringing action in alternative forum.** *See Murray v. British Broadcasting Corp., 81 F.3d 287, 292-293 (2d Cir. 1996)* (balancing plaintiff's financial burdens as one of several relevant factors serves need to retain flexibility in application of forum non conveniens doctrine);

7. **Relative difficulty of enforcing judgment, depending upon location of defendant's assets.** *See Baumgart v. Fairchild Aircraft Corp., 981 F.2d 824, 836 (5th Cir. 1993)* (potential difficulties regarding enforcement of judgment are among factors weighed in forum non conveniens analysis); and

8. **Relative possibility of viewing premises.** *See Blanco v. Banco Industrial De Venezuela, S.A., 997 F.2d 974. 983 (2d Cir. 1993)* (view of premises to determine progress of construction "essential" and thus supported dismissal).

Strategic Point:

The private interest factors are generally considered more important than the public interest factors; however, most courts consider both sets of interests. *See Leon v. Millon Air, Inc., 251 F.3d 1305, 1310 (11th Cir. 2001)* (although private factors generally considered more important than public interest factors, "the better rule is to consider both factors in all case"); *Baumgart v. Fairchild Aircraft Corp., 981 F.2d 824 (5th Cir. 1993)* .

[2] Determining Public Interests

The public interest factors that the court may take into account in considering whether to dismiss an action on forum non conveniens grounds include the following:

1. **Congestion of district court contemplating dismissal.** *See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)* ;

2. **Local interest in resolving local controversy in local forum and burden of imposing jury duty on citizens of forum unrelated to action.** *See Creative Technology v. Aztech Systems PTE, 61 F.3d 696, 704 (9th Cir. 1995)* ; *Baumgart v. Fairchild Aircraft Corp., 981 F.2d 824, 828 (5th Cir. 1993)* ; and

3. **Likelihood that district court will have to apply foreign law.** *See Scottish Air Int'l, Inc. v. British Caledonian Group, PLC, 81 F.3d 1224, 1234-1235 (2d Cir. 1996)* (when deciding forum non conveniens motion, court may properly rely on difficulties attending resolution of questions of foreign law).

Strategic Point:

Unlike a motion for convenience transfer under *28 U.S.C. § 1404(a)* (*see §§ 4.10 -4.13 above*), the existence of related litigation in the alternative forum is not a relevant factor in the forum non conveniens analysis. *See Guidi v. Inter-Continental Hotels Corp., 224 F.3d 142, 148 (2d Cir. 2000)* (existence of related litigation not listed as relevant factor in forum non conveniens test set forth by Supreme Court).

Circuit Split:

The degree of inconvenience that must be shown to justify a dismissal varies. *See Ravelo Monegro v. Rosa, 211 F.3d 509, 513-514 (9th Cir. 2000)* (court should dismiss only when facts establish such oppression and vexation of defendant as to be out of proportion to plaintiff's convenience); *Great Prize, S.A. v. Mariner Shipping Pty., Ltd., 967 F.2d 157, 160 (5th Cir. 1992)* ("[c]onvenience is the cornerstone of the [forum non conveniens] inquiry").

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 111.74.*

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Chapter 4 TRANSFER, REMOVAL, AND REMAND
PART D: MOTION TO DISMISS FOR FORUM NON CONVENIENS

1-4 Moore's AnswerGuide: Fed Civil Motion Practice § 4.18

§ 4.18 Other Factors Affecting Likelihood of Forum Non Conveniens Dismissal

[1] Deference to Plaintiff's Choice of Forum

The plaintiff's choice of forum is accorded significant deference when the plaintiff is an American citizen or resident. *See Overseas National Airways, Inc. v. Cargolux Airlines Int'l, S.A., 712 F.2d 11, 13-14 (2d Cir. 1983)* (citizens or residents deserve somewhat more deference than foreign plaintiffs, but dismissal should not be automatically barred when plaintiff has filed suit in his or her home forum); *see also Zelinski v. Columbia 300, Inc., 335 F.3d 633, 643 (7th Cir. 2003)* (to successfully move for a forum non conveniens dismissal, defendant must overcome presumption in favor of plaintiff's choice of forum).

A court will ordinarily accord less deference to the forum choice of a foreign plaintiff when determining whether to dismiss an action based on forum non conveniens grounds. *See Abad v. Bayer Corp., 563 F.3d 663, 667 (7th Cir. 2009)* (presumption in favor of a plaintiff's choice of a U.S. forum has little weight in a forum non conveniens analysis when the plaintiff is a foreign citizen); *Ravelo Monegro v. Rosa, 211 F.3d 509, 513-514 (9th Cir. 2000)* (in case brought in U.S. by foreign plaintiff, foreign plaintiff's choice deserves less deference); *Lony v. E. I. Du Pont de Nemours & Co., 886 F.2d 628, 633 (3d Cir. 1989)* (ordinarily, great deference is accorded a plaintiff's choice of forum, but amount of deference due is less when plaintiff is foreign). This rule is based on an assumption that a United States forum is not the most convenient forum for a foreign plaintiff. *See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255-256, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)* (presumption in favor of plaintiff's choice of forum applies with less force when plaintiff or real parties in interest are foreign, "[b]ecause the central purpose of any forum is to ensure that the trial is convenient").

In either case, however, the defendant must overcome the presumption in favor of the foreign plaintiff's choice of forum by showing that the balance of convenience favors trial in the foreign forum. *See Slight by and Through Slight v. E.I. Du Pont, 979 F. Supp. 433 (S.D. W. Va. 1997)* (despite reduced weight accorded foreign plaintiffs' choice of forum, defendant failed to show other factors weighed in favor of forum non conveniens dismissal when each side would suffer restricted access to discovery in other forum, and none of other factors pointed strongly in either direction).

Warning:

A federal treaty may preclude the doctrine of forum non conveniens and may require greater deference to a foreign plaintiff's choice of forum. *See Blanco v. Banco Industrial De Venezuela, S.A., 997 F.2d 974,*

981 (2d Cir. 1993) .

[2] Special Venue Provisions May Preclude Forum Non Conveniens Dismissal

The doctrine of forum non conveniens does not apply to actions arising under certain federal statutes that have special venue provisions indicating that Congress implicitly spoke to, and rejected, the application of forum non conveniens doctrine to a suit under the statute. *See Creative Technologies, Ltd. v. Aztech Systems PTE, Ltd., 61 F.3d 696, 700 (9th Cir. 1995)* (forum non conveniens doctrine is inapplicable to certain federal statutes such as Jones Act or the Federal Employer's Liability Act which contain special provisions mandating venue).

[3] Mandatory Forum Selection Clause Normally Precludes Forum Non Conveniens Dismissal

When an action is brought in a United States district court contrary to a mandatory forum selection clause designating a foreign forum, the normal forum non conveniens analysis generally does not apply. Instead, the forum selection clause controls, absent a strong showing that it should not be enforced. *See M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972)* (forum-selection clauses are prima facie valid and should be enforced unless enforcement is shown by resisting party to be unreasonable under circumstances). *But see Blanco v. Banco Industrial De Venezuela, S.A., 997 F.2d 974, 979-980 (2d Cir. 1993)* (because forum selection clause was permissive, regular forum non conveniens analysis applied).

[4] Federal Forum Non Conveniens Law Applies

A federal court in a diversity action must apply the federal law of forum non conveniens, rather than state forum non conveniens law of the district in which the court is sitting, in resolving a motion to dismiss when the alternative forum is a foreign tribunal. *See Ravelo Monegro v. Rosa, 211 F.3d 509, 511-512 (9th Cir. 2000)* (federal law governs forum non conveniens motion in federal court); *Rivendell Forest Prods. v. Canadian Pac. Ltd., 2 F.3d 990, 992 (10th Cir. 1993)* (majority of circuits addressing which law applies in federal forum non conveniens motions "have concluded that federal, not state, law governs").

[5] Appealing Dispositions of Motions for Forum Non Conveniens Dismissal

An order granting a motion to dismiss on forum non conveniens grounds is appealable as a final judgment. *See Lony v. E.I. Du Pont de Nemours & Co., 935 F.2d 604, 607 (3d Cir. 1991)* ; *Picco v. Global Marine Drilling Co., 900 F.2d 846, 849 n.4 (5th Cir. 1990)* . The denial of a forum non conveniens motion is an interlocutory order that is not immediately appealable. *See 28 U.S.C. § 1291*; *Van Cauwenberghe v. Biard, 486 U.S. 517, 527-528, 108 S. Ct. 1945, 100 L. Ed. 2d 517 (1988)* (denial of forum non conveniens motion not immediately appealable).

Because the district court has considerable flexibility in deciding a forum non conveniens motion, in certain cases the court may be able to decide that dismissal is appropriate without extensive inquiry into the merits of the underlying dispute. *Van Cauwenberghe v. Biard, 486 U.S. 517, 529, 108 S. Ct. 1945, 100 L. Ed. 2d 517 (1988)* . In such a case, immediate review might save both the court and the parties substantial time and expense, and the district court therefore may certify the order for interlocutory review under *28 U.S.C. § 1292(b)*. The court of appeals, in its discretion, may then accept the order for immediate appeal. Both the district court and the court of appeals must agree that the case is a proper candidate for immediate review before the normal rule requiring a final judgment will be overridden. *See In re Ford Motor Co., 344 F.3d 648, 653-655 (7th Cir. 2002)* (mandamus was not available remedy to compel district court to certify issue for immediate appeal under *28 U.S.C. § 1292(b)*).

Mandamus review of the denial of a motion to dismiss on forum non conveniens grounds is only available under unusual circumstances. *See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 505-506, 67 S. Ct. 839, 91 L. Ed. 1055 (1947)* ; *In re Ford Motor Co., 344 F.3d 648, 651-653 (7th Cir. 2002)* (mandamus relief not granted when district court did not abuse its authority, regardless of whether its decision on forum non conveniens would have been upheld on appeal from

final decision).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 111.75, 111.76, 111.78*

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Chapter 4 TRANSFER, REMOVAL, AND REMAND
PART E: MOTION FOR MULTIDISTRICT LITIGATION TREATMENT

1-4 Moore's AnswerGuide: Fed Civil Motion Practice § 4.19

§ 4.19 Checklist for Motion for Multidistrict Litigation Treatment

☐ Ascertain whether multidistrict litigation statute applies:

- ○ Determine whether actions involve one or more common questions of fact. *See § 4.21[1] below*.
- ○ Determine whether transfer would be convenient for the parties and witnesses. *See § 4.21[2] below*.
- ○ Determine whether transfer would promote the just and efficient conduct of the actions. *See § 4.21[3] below*.

☐ Consider likely outcome of motion:

- ○ Consider factors relevant to choice of transferee court. *See § 4.22[2] below*.
- ○ Consider separability of claims. *See § 4.23 below*.

☐ Prepare and file motion in compliance with Multidistrict Litigation Rules, particularly with respect to:

- ○ Form of papers and proof of service. *See § 4.24[1] below*.
- ○ Proper motion practice. *See § 4.24[1] below*.

- ○ Filing corporate disclosure statement. *See § 4.24[3] below*.
- ○ Applying for extensions of time, if necessary. *See § 4.24[3] below*.
- ○ Terminating actions. *See § 4.25 below*.
- ○ Remands. *See § 4.25 below*.

☐ Follow appropriate Multidistrict Litigation Rules governing hearings on motion. *See § 4.24[4] below*.

☐ **Search by Topic:** Civil Procedure > Venue > Multidistrict Litigation

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1-4 Moore's AnswerGuide: Fed Civil Motion Practice § 4.20

§ 4.20 Overview of Multidistrict Litigation Procedure

The Judicial Panel on Multidistrict Litigation may transfer multiple civil actions involving one or more common questions of fact to any federal district court for coordinated or consolidated pretrial proceedings under the Multidistrict Litigation statute, *28 U.S.C. § 1407*. Transfer is permitted by the statute if the panel finds that transfer will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of the actions. Once an action is transferred, all pretrial proceedings take place in the transferee court, until the case is sent back for trial. At the conclusion of pretrial proceedings in the transferee court, each transferred action must be remanded to the court in which it was originally filed for trial. *See 28 U.S.C. § 1407(a)*.

Exception:

The multidistrict litigation statute contains special rules for certain antitrust actions and exempts certain other antitrust actions from multidistrict consolidation and transfer. *See 28 U.S.C. § 1407(g)*.

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1-4 Moore's AnswerGuide: Fed Civil Motion Practice § 4.21

§ 4.21 Satisfying Requirements of Multidistrict Litigation Statute

The transfer of multiple civil actions pending in different districts is authorized by the multidistrict litigation statute if all of the following requirements are met:

1. **Proceedings must involve one or more common questions of fact.** *See In re Aircraft Acci. at Barrow, 474 F. Supp. 996, 999 (J.P.M.L. 1979)* (stressing existence of common questions of fact);

2. **Transfer must provide for convenience of the parties and witnesses.** *See In re Vernitron Securities Litig., 462 F. Supp. 391, 393-394 (J.P.M.L. 1978)* (transfer was necessary to prevent duplication of discovery and conflicting pretrial rulings, and to conserve efforts of parties, witnesses, and judiciary); and

3. **Transfer must promote just and efficient conduct of actions.** *See In re Food Lion, Inc., 73 F.3d 528, 532 (4th Cir. 1996)* .

See 28 U.S.C. § 1407; *In re Cessna Aircraft Distributorship Antitrust Litig., 460 F. Supp. 159, 161-162 (J.P.M.L. 1978)* (while court recognized existence of common questions of fact between class members' action and two other actions, mere showing that such questions existed was not sufficient, in and of itself, to warrant transfer); *In re Women's Clothing Antitrust Litigation, 455 F. Supp. 1388, 1390-1391 (J.P.M.L. 1978)* (while common questions of fact predominated litigation, transfer would not serve convenience of parties or witnesses and would not promote just and efficient conduct of litigation).

The party moving for transfer has the burden of showing that the statutory requirements for transfer are met.

Timing:

The panel is likely to refuse to transfer cases if the actions are nearing trial in the transferor forum or if discovery is already well along, because consolidation under these circumstances would not further the purposes of *28 U.S.C. § 1407. See In re Asbestos Prods. Liab. Litig., 771 F. Supp. 415, 418 (J.P.M.L. 1991)* (transfer would not further purposes of statute because many actions were well advanced, with some actions pending for up to four years, and trial dates or discovery cutoff dates set in several actions);

In re "Lite Beer" Trademark Litig., 437 F. Supp. 754, 755 (J.P.M.L. 1977) (transfer of actions near trial or well along in discovery will not further purpose of multidistrict litigation statute).

[1] Establishing Common Questions of Fact

In deciding whether there are sufficient common questions of fact to justify transfer, the panel is likely to consider the following factors:

1. The complexity of the common questions;

2. The number of common questions; and

3. The number of cases involved.

See 28 U.S.C. § 1407(h); *see also In re Microsoft Corp. Windows Operating Sys. Antitrust Litig., 2000 U.S. Dist. LEXIS 5559, at *6-*7 (J.P.M.L. 2000)* (common questions sufficient to permit § 1407 transfer despite presence of additional or differing legal theories because all underlying actions arise from common factual core); *In re Asbestos School Prods. Liab. Litig., 606 F. Supp. 713, 714 (J.P.M.L. 1985)* (panel generally will not order transfer if there are few common questions that are not complex and that do not predominate).

Warning:

When few actions are pending, there is a strong burden of showing that the common questions are complex enough to warrant transfer. *See In re Ortho Pharmaceutical "Lippes Loop" Prods. Liab. Litig., 447 F. Supp. 1073, 1074 (J.P.M.L. 1979)* (five actions); *In re Magic Marker Sec. Litig., 470 F. Supp. 862, 865 (J.P.M.L. 1979)* (two actions).

Exception:

Although the multidistrict litigation statute refers to common questions of fact, the Panel has also found transfer warranted on the basis of important or dispositive questions of law, as long as they accompany common questions of fact. *See In re Mut. Fund Sales Antitrust Litig., 361 F. Supp. 638, 640 (J.P.M.L. 1973)* (transfer justified on basis of important or dispositive questions of law).

If common questions of fact are found, the existence of different legal theories will not bar the transfer of actions or the later transfer of tag-along actions. *See In re General Motors Class E Buyout Sec. Litig., 696 F. Supp. 1546, 1546-1547 (J.P.M.L. 1988)* (existence of different legal theories will not bar transfer). Similarly, even if cases from different states must be decided under different state laws, a common factual basis may still justify pretrial consolidation when the cases arise from a common factual core. *See In re FedEx Ground Package Sys., 381 F. Supp. 2d 1380, 1381-1382 (J.P.M.L. 2005)* (consolidation was proper so that transferee court could structure discovery on common issues and other pretrial proceedings jointly).

[2] Establishing Convenience of Parties and Witnesses

When weighing the convenience of the parties and witnesses, the panel will consider the overall convenience of all parties and witnesses rather than taking into account the individual convenience of each party and each witness. *See In re Library Editions of Children's Books, 297 F. Supp. 385, 386 (J.P.M.L. 1968)* ("Panel must weigh the interests of all the plaintiffs and all the defendants, and must consider multiple litigation as a whole in the light of the purposes of the law"). Note, however, that the panel has authority to consolidate and transfer cases even over the objections of all of the parties. *See In re Air Crash Disaster at Florida Everglades, 549 F.2d 1006, 1013 (5th Cir. 1977)* (panel may transfer cases even if all parties object).

[3] Establishing Justice and Efficiency

The most important requirement for transfer under the multidistrict litigation statute is whether consolidation will promote the just and efficient conduct of the actions. *See 28 U.S.C. § 1407(a)*. The primary consideration is saving judicial resources, which can be achieved by conducting the pretrial proceedings in the related cases in a single forum and avoiding repeated rulings on the same issue and the possibility of conflicting rulings issued by several judges. *See Mangieri v. Cigna Corp. (In re Humana Inc. Managed Care Litig.), 2000 U.S. Dist. LEXIS 15927 (J.P.M.L. 2000)* (single forum avoids duplication of discovery and repeated, conflicting rulings on same issues); *see also Royster v. Food Lion (In re Food Lion), 73 F.3d 528, 532 (4th Cir. 1996)* .

Strategic Point:

The panel often suggests techniques drawn from the Manual for Complex Litigation (4th ed. 2004), for use by transferee court to minimize the inconvenience and expense of transfer for individual parties. *See In re Sugar Indus. Antitrust Litig. (East Coast), 471 F. Supp. 1089, 1094 (J.P.M.L. 1979)* (suggesting conduct of pretrial conferences and discovery so as to minimize inconvenience). Thus, the transferee court is likely to consult the Manual for Complex Litigation for suggestions. *See In re Ivan F. Boesky Sec. Litig., 948 F.2d 1358, 1364-1365 (2d Cir. 1991)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 112.01, 112.04.*
- *Federal Litigation Guide PP 28.06[3], 43.04[1].*
- *28 U.S.C. § 1407* (multidistrict litigation).
- Multidistrict Rules 3.2, 3.3, 4.1, 6.1, 6.2.

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1-4 Moore's AnswerGuide: Fed Civil Motion Practice § 4.22

§ 4.22 Establishing Additional Elements Relating to Transfer Decision

[1] Satisfying Additional Prerequisites for Transferring Actions

A transfer proceeding may be initiated by a motion filed with the panel or by the panel itself. *See 28 U.S.C. § 1407(c)*. After notice to the affected parties, a hearing is held to determine whether a transfer should be ordered. *See 28 U.S.C. § 1407(c)*. A case may be transferred only if the transferor court has subject-matter jurisdiction over the action. *See Glasstech, Inc. v. AB Kyro OY, 769 F.2d 1574, 1576-1577 (Fed. Cir. 1985)* .

The panel may transfer to any district and is not restricted by venue and personal jurisdiction considerations when determining to which district court the cases ought to be transferred. *See 28 U.S.C. § 1407*; *Pinney v. Nokia, Inc., 402 F.3d 430, 451-452 (4th Cir. 2005)* (*28 U.S.C. § 1407* is itself venue statute that allows panel to override plaintiff's choice of forum when requirements of statute are met); *In re New York City Mun. Sec. Litig., 572 F.2d 49, 51 (2d Cir. 1978)* ("§ 1407, unlike §§ 1404 and 1406, authorizes transfer of an action to 'any district' and not simply to a district where the action could have been brought"). Transfer may be to a district in which none of the actions was originally pending. *See In re Cement & Concrete Antitrust Litig., 437 F. Supp. 750, 753 (J.P.M.L. 1977)* , *aff'd*, *In re Cement & Concrete Antitrust Litig., 817 F.2d 1435 (9th Cir. 1987)* ("In appropriate circumstances we would order a group of actions to a district in which none of the actions is pending").

[2] Considering Factors Relevant to Determining Transferee District

Frequently, the most significant question raised by a motion for consolidation under the multidistrict litigation statute is not whether to consolidate the actions, but to which district they should be transferred. *See In re Air Fare Litig., 322 F. Supp. 1013, 1015 (J.P.M.L. 1971)* ("[a]s is so often the case, the real issue among the parties is not whether these actions should be transferred under Section 1407 but rather to which district they should be transferred"). When determining the appropriate transferee forum, the panel will take into account both the convenience of the parties and witnesses and the just and efficient conduct of the actions, and is likely to consider the following factors:

1. **Locations of parties, determined by their principal places of business.** *See In re "Factor VIII or IX Concentrate Blood Products" Liability Litigation, 853 F. Supp. 454, 455 (J.P.M.L. 1993)* (transfer can be made to district where defendants have a common location);

2. **Locations of relevant documents and witnesses.** *See In re Air Crash Disaster Near Coolidge, Ariz. on May 6, 1971, 362 F. Supp. 572, 573 (J.P.M.L. 1973)* (transfer to location of crash, where many relevant documents and anticipated witnesses were located);

3. **Centrality of location for convenience of parties and witnesses.** *See In re Wheat Farmers Antitrust Class Action Litig., 366 F. Supp. 1087, 1088 (J.P.M.L. 1973)* (most appropriate transferee court was district that was most convenient to parties and witnesses);

4. **District in which broadest-based and earliest actions were filed.** *See In re Regents of the Univ. of Cal., 964 F.2d 1128, 1136 (Fed. Cir. 1992)* (forum chosen because broadest-based actions, as well as earliest filed, were there);

5. **District in which most cases are pending.** *See In re Republic National-Realty Equities Securities Litig., 382 F. Supp. 1403, 1407 (J.P.M.L. 1974)* (transfer may be made to district that has most cases pending);

6. **Location of pending bankruptcy action of significant defendant.** *See In re American Continental Corp./Lincoln Savings & Loan Securities Litigation, 130 F.R.D. 475, 476 (J.P.M.L. 1990)* (forum appropriate in part because a significant defendant had bankruptcy pending there);

7. **Whether status of potential transferee forum's docket is conducive to efficiency, unless panel decides to appoint judge from another district.** *See In re Peruvian Road Litig., 380 F. Supp. 796, 798 (J.P.M.L. 1974)* (transfer would enable defendants to jointly present their jurisdictional challenge to plaintiff's claims to a forum with a lighter docket); *see also In re San Juan, Puerto Rico Air Crash Disaster, 316 F. Supp. 981, 982 n.3 (J.P.M.L. 1970)* (panel may appoint judge from another district to handle cases in transferee district);

8. **Which judge or judges are most familiar with issues involved.** *See In re Data Gen. Corp. Antitrust Litig., 470 F. Supp. 855, 859 (J.P.M.L. 1979)* (familiarity of district court judge with legal and factual issues was factor in transferring actions to that district); *In re Plywood Antitrust Litig., 376 F. Supp. 1405, 1407 (J.P.M.L. 1974)* (transfer was to forum with judge most familiar with issues in the case); and

9. **Appropriate forum for ultimate trial of actions.** *See In re Yarn Processing Patent Validity Litig., 341 F. Supp. 376, 382 (J.P.M.L. 1972)* (transfer to district better suited to both pretrial and ultimate trial of the principal issues); *see also Winbourne v. Eastern Air Lines, Inc., 632 F.2d 219, 220 (2d Cir. 1980)* (after completion of pretrial discovery, transferee court, pursuant to *28 U.S.C. § 1404(a)*, transferred to itself all actions for trial).

If these factors are relatively equally balanced between multiple districts, the panel may transfer the cases to the district preferred by the majority of litigants. *See In re Cutter Labs., Inc. "Braunwald-Cutter" Aortic Heart Valve Prods. Liab. Litig., 465 F. Supp. 1295, 1297-1298 (J.P.M.L. 1979)* (panel often transfers cases to district preferred by majority of litigants if all other factors seem equal).

Exception:

Slightly different considerations may be implicated in certain specialized actions, such as mass tort litigation, bankruptcy actions, or airplane crashes, such as the primary location in which the key physical evidence is located. *See In re Air Crash Disaster at Detroit Metropolitan Airport, 674 F. Supp. 27, 28 (J.P.M.L. 1987)* (actions transferred to location of airplane crash).

Strategic Point:

If any convenience transfers already have been ordered under *28 U.S.C. § 1404(a)* in the cases to be consolidated, the panel will take those decisions into account. *See In re Warehouse Constr., Contract Litig., 387 F. Supp. 734, 735-736 (J.P.M.L. 1975)* (panel will take into account decisions rendered in connection with change-of-venue motions); *but see In re American Financial Corp. Litig., 434 F. Supp. 1232, 1234 (J.P.M.L. 1977)* (denial of convenience transfer does not preclude motion to coordinate or consolidate pretrial proceedings).

The panel is required to assign the transferred cases to a particular judge or judges in the transferee district. *See 28 U.S.C. § 1407(b)*. This decision is generally based on familiarity with the particular facts and legal issues raised by the cases or experience with complex multidistrict litigation. *See In re Vioxx Prods. Liab. Litig., 360 F. Supp. 2d 1352, 1353 (J.P.M.L. 2005)* (transfer to judge experienced in complex litigation); *In re IBM, 302 F. Supp. 796, 800 (J.P.M.L. 1969)* (choosing judge familiar with facts and legal issues serves purpose of efficiency).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 112.04[1], 112.04[2].*
- *Bender's Federal Practice Forms* Form No. 12:68.
- *28 U.S.C. § 1407* (multidistrict litigation).

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Chapter 4 TRANSFER, REMOVAL, AND REMAND
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1-4 Moore's AnswerGuide: Fed Civil Motion Practice § 4.23

§ 4.23 Determining Impact of Transfer Order in Multidistrict Litigation

[1] Separation of Claims

Most proceedings are consolidated and transferred in their entirety; however, the panel has the authority to separate any claim, crossclaim, counterclaim or third-party claim from the rest of the action and remand the separated claim to the original court. *See 28 U.S.C. § 1407(a)*; *In re 1980 Decennial Census Adjustment Litig., 506 F. Supp. 648, 650-651 (J.P.M.L. 1981)* (panel has power to couple its order of transfer with simultaneous separation and remand of any claims in the action). The panel does not have authority to separate issues. *See In re A.H. Robins Co., 610 F. Supp. 1099, 1101 (J.P.M.L. 1985)* (panel lacks power to separate issues in civil actions, assigning one or more to transferee court and one or more to transferor courts).

[2] Transferring Jurisdiction

While a motion to transfer is pending, the district court in which the action is pending retains its jurisdiction to decide pretrial motions, and has discretion either to stay the action or to reach the merits of the pretrial motion. *See* Multidistrict Rule 2.1(d); *Kohl v. American Home Prods. Corp., 78 F. Supp. 2d 885, 887-888 (W.D. Ark. 1999)* .

After transfer, the transferor court is divested of jurisdiction to decide pending matters. *See In re Plumbing Fixture Cases, 298 F. Supp. 484, 495 (J.P.M.L. 1968)* (after order changing venue, jurisdiction of transferor court ceases). A transfer becomes effective when the Panel's transfer order is filed with the clerk of the transferee court. *See 28 U.S.C. § 1407(c)*; Multidistrict Rule 2.1(d). Thereafter, the jurisdiction of the transferor court ceases, and the transferee court assumes complete pretrial jurisdiction. *See In re Plumbing Fixture Cases, 298 F. Supp. 484, 495-496 (J.P.M.L. 1968)* (jurisdiction of transferor court ceases on transfer); *see also Glosser v. Posner (In re Ivan F. Boesky Sec. Litig.), 170 B.R. 61, 62 (S.D.N.Y. 1994)* (transferee court has exclusive jurisdiction over all matters, even those before bankruptcy court).

The transferee judge may modify, expand, or vacate prior orders issued by the transferor courts and has authority to decide all pretrial motions. *See In re Donald J. Trump Casino Sec. Litig., 7 F.3d 357, 364-368 (3d Cir. 1993)* . All discovery in progress and all orders of the transferor court remain in effect after transfer unless and until they are modified by the transferee judge. *See In re Plumbing Fixture Cases, 298 F. Supp. 484, 496 (J.P.M.L. 1968)* (orders of transferor court remain in effect until modified).

[3] Transferring Tag-Along Actions in Multidistrict Litigation

A "tag-along action" is a subsequent civil action filed in a district court that involves common questions of fact with actions that already have been transferred under the multidistrict litigation statute. Multidistrict Rule 1.1(h); *see also* Multidistrict Rules 7.1, 7.2. A tag-along action may also be transferred and consolidated with the previously transferred actions if the requirements for transfer under the multidistrict litigation statute are met. Because the panel has already made a determination that the transferred actions involve common questions of fact, it is likely that the panel will transfer the tag-along action. *See In re General Motors Class E Stock Buyout Securities Litig., 696 F. Supp. 1546, 1546-1547 (J.P.M.L. 1988)* (if pending litigation involves common questions of fact with other actions in same litigation previously transferred to another district, and transfer will serve convenience of parties and witnesses and promote just and efficient conduct of litigation, transfer should be ordered).

[4] Determining Law to Be Applied in Transferee Court

In multidistrict litigation that has been transferred to a central forum for coordinated or consolidated pretrial proceedings, the transferee court must apply the substantive state law of the transferor district, including its choice of law rules. *See In re Nucorp Energy Sec. Litig., 772 F.2d 1486, 1492 (9th Cir. 1985)* ; *In re Silicone Gel Breast Implants Prods. Liab. Litig., 887 F. Supp. 1463, 1465 (N.D. Ala. 1995)* . In general, when a transferred claim arises under federal law, the transferee court will apply the law of the transferee forum. *See In re Korean Air Lines Disaster, 829 F.2d 1171, 1176 (D.C. Cir. 1987)* , *aff'd on other grounds sub nom., Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 109 S. Ct. 1676, 104 L. Ed. 2d 113 (1989)* .

[5] Seeking Review of Transfer Orders

An order denying transfer is not appealable; however, a transfer order issued by the panel is reviewable by extraordinary writ issued by the court of appeals. *See 28 U.S.C. § 1407(e)*; *28 U.S.C. § 1651(a)*; *In re New York City Mun. Sec. Litig., 572 F.2d 49, 51 (2d Cir. 1978)* (court denied writ because there was no carved out exception prohibiting transfer of pretrial proceedings when defendant was bank). A petition for writ of mandamus to review an order of the panel should be filed in the court of appeals having jurisdiction over the district in which the hearing on transfer was to be held. *See 28 U.S.C. § 1407(e)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 112.02*, *112.03*, *112.07*.
- *Federal Litigation Guide P 43.04[2]*.
- *28 U.S.C. § 1407* (multidistrict litigation).
- *28 U.S.C. § 1651* (writs).
- Multidistrict Rules 1.1, 2.1, 7.1, 7.2.

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1-4 Moore's AnswerGuide: Fed Civil Motion Practice § 4.24

§ 4.24 Practicing Before Judicial Panel on Multidistrict Litigation

The panel has prescribed its own rules of procedure that detail the mechanics of a pretrial transfer under the Multidistrict Litigation statute. *See 28 U.S.C. § 1407(f)*; Multidistrict Rules 1.1-11.1.

Every member in good standing of the bar of any district court may practice law before the panel. Further, any attorney of record in any action transferred to another district may continue to represent his or her client in any district court to which the action is transferred. *See* Multidistrict Rule 2.1(c).

[1] Filing Papers, Appearance Notice, and Corporate Disclosures

[a] Filing Papers Electronically

All attorneys filing pleadings with the Panel must use the Panel's automated system, referred to in the Multidistrict Rules as "Electronic Case Filing" (EFC). Multidistrict Rule 1.1(d).

Counsel also must serve the Clerk of the Panel with a courtesy paper copy of the following pleadings within one business day of their filing: (1) a motion to transfer and its supporting brief; (2) a response to a show cause order; (3) a motion to vacate a conditional transfer order or a conditional remand order and its supporting brief; (4) any response or reply related to those pleadings; and (5) a corporate disclosure statement. No courtesy copies of any other pleadings are required. The courtesy copy must include all exhibits, be clearly marked "Courtesy Copy-Do Not File," contain the pleading number (if known), and be mailed or delivered to Clerk of the Panel, United States Judicial Panel on Multidistrict Litigation, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Room G-255, North Lobby, Washington, D.C. 20002-8004. *See* Multidistrict Rule 3.2(d).

Multidistrict Rule 3.2(a) prescribes the content and form of electronic pleadings.

[b] Pro Se Individuals May Not File Electronically

Unless the Panel orders otherwise, pro se individuals may not use electronic filing. *See* Multidistrict Rule 3.3(a). Instead, they must file a paper original and one copy of all pleadings with the Clerk of the Panel by mail or delivery. *See* Multidistrict Rule 3.3(c).

Multidistrict Rule 3.3(b) prescribes the content and form of paper pleadings.

[c] Proof of Service

All pleadings must contain a proof of service on all other parties in all involved actions. The proof of service must indicate the name and manner of service. If a party is not represented by counsel, the proof of service must indicate the name of the party and the party's last known address. Multidistrict Rule 4.1(a). The proof of service pertaining to motions for a transfer or remand must certify that counsel has transmitted a copy of the motion or filing to the clerk or each district where an affected action is pending. Multidistrict Rule 4.1(b).

[d] Notice of Appearance and Corporate Disclosure Statement

Within 14 days of the filing of a motion to transfer, each party or designated attorney must file a written notice of appearance, stating the name and address of the attorney designated to receive service of all papers relating to the practice before the panel. Only one attorney may be designated by each party. *See* Multidistrict Rule 4.1(c).

Within 14 days of the filing of a motion to transfer or other motion or order, any nongovernmental corporate party in a matter before the panel must file a corporate disclosure statement. *See* Multidistrict Rule 5.1. The statement must be updated to reflect any changes in the information on the statement within 14 days of the filing of any subsequent motion to transfer or remand, order to show cause, or motion to vacate a conditional transfer order or a conditional remand order. *See* Multidistrict Rule 5.1(c).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 112.03*.
- *28 U.S.C. § 1407* (multidistrict litigation).
- *Fed. R. Civ. P. 5* (serving and filing pleadings).
- *Fed. R. Civ. P. 6* (time).
- Multidistrict Rules 3.2, 3.3, 4.1, 5.1.

[2] Requesting Action by Written Motion

All requests for action by the panel must be made in writing and accompanied by:

1. A supporting brief concisely stating the background of the litigation and factual and legal contentions of the movant; and

2. A schedule providing basic information about each action involved.

See Multidistrict Rule 6.1(b).

Once a motion is filed with the panel, all other parties have 21 days to respond. If a party does not respond to the motion, that party is deemed to have acquiesced to the action requested in the motion. *See* Multidistrict Rule 6.1(c). Within 7 days after the end of the 21-day response period, the moving party may file a single brief in reply to any opposition. *See* Multidistrict Rule 6.1(d).

[3] Responding to Orders to Show Cause Within 21 Days

When the panel initiates transfer proceedings, the Clerk will serve a show cause order on all parties involved directing them to show cause why the action or actions should not be transferred for coordinated or consolidated pretrial proceedings. *See* Multidistrict Rule 8.1(a). Any party may file a response to the show cause order within 20 days of filing unless the order provides otherwise. Failure to respond is treated as a party's acquiescence to the action contemplated in the order. *See* Multidistrict Rule 8.1(c).

Timing:

An application to extend the time to file a pleading or perform an act required by the Multidistrict Rules must state specifically the revised date sought and must be filed before the deadline for filing the pleading or performing the act. Absent exceptional circumstances, the Panel will not grant any extensions of time to file a notice of opposition to either a conditional transfer order or a conditional remand order. Multidistrict Rule 6.3(b).

[4] Scheduling and Holding Hearings in Multidistrict Litigation

Whenever the transfer or remand of actions is under consideration, the panel will specify the time, place and subject matter for a hearing and notify counsel for all parties involved. *See 28 U.S.C. § 1407(c)*; Multidistrict Rule 11.1(a). No transfer or remand determination will be made by the panel without a hearing if any party timely opposes the transfer or remand unless the panel determines that either:

1. The dispositive issues have been authoritatively decided; or

2. The facts and legal arguments are adequately presented in the briefs and the record, and the decisional process would not be significantly aided by oral argument.

See Multidistrict Rule 11.1(c). Unless the panel orders to the contrary, all other matters, such as a motion for reconsideration, will be considered and determined on the basis of the papers filed. *See* Multidistrict Rule 11.1(c).

Except for leave by the panel on a showing of good cause, only parties that have filed a motion or written response to a motion will be allowed to appear and present oral argument. *See* Multidistrict Rule 11.1(d)(i). All counsel supporting transfer or remand and all counsel opposing transfer or remand must confer separately before the hearing to organize their arguments and select representatives to present all views without duplication. *See* Multidistrict Rule 11.1(e). Unless otherwise ordered by the panel, a maximum of 20 minutes is allotted for oral argument in each matter. The time will be equally divided between the varying viewpoints. *See* Multidistrict Rule 11.1(f).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 112.03*.
- *28 U.S.C. § 1407* (multidistrict litigation).
- Multidistrict Rules 6.1, 8.1, 11.1.

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1-4 Moore's AnswerGuide: Fed Civil Motion Practice § 4.25

§ 4.25 Terminating or Remanding Action in Multidistrict Litigation

The transferee judge has the authority to decide all pretrial motions, including motions that may be dispositive of an action. *See In re "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 751-752 (E.D.N.Y. 1984) , aff'd in part, rev'd in part on other grounds, 818 F.2d 145 (2d Cir. 1987)* (transferee court assumes complete jurisdiction and has authority to decide all pretrial motions such as summary judgment or approval of settlement). Actions terminated in the transferee court are not remanded to the transferor court. In this situation, the clerk of the transferee court notifies the panel of the termination and retains the original files and records unless otherwise directed. *See* Multidistrict Rule 10.1(a).

The transferee court may not try a case transferred to it for coordinated or consolidated pretrial proceedings. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 40-41, 118 S. Ct. 956, 140 L. Ed. 2d 62 (1998)* (transferee court may not hear trial of case that has been transferred to it for coordinated or consolidated pretrial proceedings by panel). As a result, the panel must remand to the transferor courts all actions that have not been terminated in the transferee court at or before the time when pretrial proceedings are concluded. *See 28 U.S.C. § 1407(a).*

The panel will consider remand of each transferred action or any separable claim, crossclaim, counterclaim, or third-party claim at or before the conclusion of coordinated or consolidated pretrial proceedings on the motion of any party, at the suggestion of the transferee court, or on the panel's own initiative. *See* Multidistrict Rule 10.1(b). The panel will remand an action before the completion of pretrial proceedings only on a showing of good cause. *See In re South Central States Bakery Products Antitrust Litig., 462 F. Supp. 388, 390 (J.P.M.L. 1978) .*

After remand, the transferor judge regains complete control of the action from the point of remand forward, but is not permitted to modify orders issued by the transferee judge. *See Royster v. Food Lion (In re Food Lion), 73 F.3d 528, 532-533 (4th Cir. 1996)* ; *see also 28 U.S.C. § 1407.*

When the panel has been advised by the transferee district judge or otherwise that the pretrial proceedings are concluded or that remand is otherwise appropriate, the panel will issue a conditional remand order. The Clerk of the Panel will serve this order on each party to the litigation, but will not send the order to the clerk of the transferee district court for seven days after entry. Multidistrict Rule 10.2(a). Any party opposing the conditional remand order must file notice of opposition with the Clerk of the Panel within the seven-day period. In that event, the Clerk of the Panel will not transmit

the remand order to the district court, but will instead notify the parties of the briefing schedule. Multidistrict Rule 10.2(b). The party opposing remand has 14 days after the filing of its notice of opposition within which to file a motion to vacate the conditional remand order. Failure to file and serve a motion and brief will be treated as a withdrawal of the opposition, and the Clerk of the Panel may then transmit the remand order to the clerk of the transferee district court. Multidistrict Rule 10.2(e).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 112.03[6].*
- *28 U.S.C. § 1407* (multidistrict litigation).
- Multidistrict Rules 10.1, 10.2 (termination and remand).

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Chapter 4 TRANSFER, REMOVAL, AND REMAND
PART F: FILING NOTICE OF REMOVAL TO FEDERAL COURT

1-4 Moore's AnswerGuide: Fed Civil Motion Practice § 4.26

§ 4.26 Checklist for Filing Notice of Removal to Federal Court

☐ Determine whether removal is possible by considering the following:

- ○ Case originally filed in state court. *See § 4.27 below*.
- ○ Federal question jurisdiction. *See § 4.28[1] below*.
- ○ Diversity jurisdiction. *See § 4.28[1] below*.
- ○ Applicability of valid forum selection clause. *See § 4.29[3] below*.
- ○ Applicability of special removal statutes. *See § 4.28[1] below*.
- ○ Time allowed for filing removal notice. *See § 4.28[4] below*.
- ○ Will all defendants join the removal notice? *See § 4.28[2] below*.
- ○ Have defendants already submitted to state court jurisdiction? *See § 4.29 below*.

☐ Draft notice of removal, including short and plain statement of grounds for removal:

- ○ In a federal question case, allege that case arises under federal law and identify statutory basis for claim. *See § 4.28 below*.
- ○ In a diversity case, allege requirements for diversity jurisdiction. *See § 4.28 below*.

- ○ If special removal statute case, identify removal statute and allege jurisdictional facts supporting removal under statute. *See § 4.28 below*.

☐ Join all defendants in notice of removal. *See § 4.28[2] below*.

☐ Comply with timing requirements for filing notice of removal under *28 U.S.C. § 1446(b)*, by filing notice within *30 days* after the earlier of:

- ○ 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); or

- ○ The date on which the *first* defendant receives a copy of a pleading, motion, or order from which it first may be ascertained that the case has become removable. *See § 4.28[4] below*.

☐ In a diversity case, file notice no more than one year after complaint was filed, unless the case is qualified class action in which case one-year limit does not apply. *See § 4.28[4] below*.

☐ File notice of removal in appropriate federal court, with a copy of all process, pleadings, and orders served on removing defendant in the action. *See § 4.28[3] below*.

☐ Provide prompt written notice of filing to adverse parties. *See § 4.28[3] below*.

☐ File prompt notice of removal with state court clerk. *See § 4.28[3] below*.

☐ After removal, if answer was not filed in state court, answer or present other defenses in compliance with time requirements of *Fed. R. Civ. P. 81(c)(2)*.

☐ **Search by Topic:** Civil Procedure > Removal

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§ 4.27 Overview of Removal Requirements

Federal law permits defendants to remove an action originally filed in state court to the federal district court for the district and division in which the state action is pending, if the case originally could have been brought in federal court. Removal most often is based on the general removal statute, *28 U.S.C. § 1441*, which sets forth the following restrictions on removal:

1. Only a civil action brought in a state court may be removed;

2. The district courts of the United States must have original jurisdiction over the action;

3. Only a defendant may remove; and

4. The action must be removed to the federal district court for the district and division within which the state court action is pending.

See 28 U.S.C. § 1441(a).

Exception:
Special removal statutes also provide for removal under certain circumstances. *See 28 U.S.C. §§ 1441-1445*; *see also § 4.28[1][c] below*.

The notice of removal must contain a short and plain statement of the grounds for removal, indicating that the requirements for federal jurisdiction are met based on federal question jurisdiction, diversity jurisdiction, and/or jurisdiction based on special removal statutes. *See 28 U.S.C. § 1446(a)*; *Fed. R. Civ. P. 8(a)*.

Warning:
Counsel must ensure that all statutory requirements are fully met, no matter which type of removal is chosen. *See 28 U.S.C. §§ 1441-1447*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 107.01 -107.44*.
- *Federal Litigation Guide PP 1.60 -1.69*.
- *28 U.S.C. § 1441* (actions removable generally).

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§ 4.28 Preparing and Filing Notice of Removal

[1] Asserting Grounds for Removal

The notice of removal must contain a short and plain statement of the grounds for removal. *See 28 U.S.C. § 1446(a)*; *Fed. R. Civ. P. 8(a)*. The removing defendant must plainly indicate that the requirements for federal jurisdiction are satisfied on the basis of one or more of the following:

1. Federal question jurisdiction (*see 28 U.S.C. § 1331*);

2. Diversity jurisdiction (*see 28 U.S.C. § 1332*); or

3. Jurisdiction based on special removal statutes.

[a] Federal Question Cases

In a case removed based on federal question jurisdiction, the removal notice must allege that the case arises under federal law and identify the statutory basis for the claim. *See 28 U.S.C. § 1441(b)*. A federal question action is removable without regard to the parties' citizenship or residence, or the amount in controversy. *See 28 U.S.C. §§ 1331*, *1441(b)*. When 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 determine all issues in the case, or may exercise its discretion to remand all matters in which state law predominates. *See 28 U.S.C. § 1441(c)*.

Federal question jurisdiction exists when a federal question is presented on the face of the plaintiff's well-pleaded complaint. *See Aetna Health Inc. v. Davila, 542 U.S. 200, 207, 124 S. Ct. 2488, 159 L. Ed. 2d 312 (2004)* (state law suit for wrongful denial of benefits under ERISA-regulated plan properly removed). Any action in which an issue of federal law forms an ingredient of the original cause is a case arising under federal law, even if other questions of law are involved. *See Grable & Sons Metal Prods. v. Darue Eng'g & Mfg., 545 U.S. 308, 312, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005)* (federal cause of action is not necessary condition for exercising jurisdiction over state-law claims that implicate significant federal issues).

Exception:

If a court finds that a plaintiff has "artfully pleaded" claims by omitting to plead necessary federal questions, removal is proper even if no federal question appears on the face of the complaint. *See Rivet v. Regions Bank, 522 U.S. 470, 475, 118 S. Ct. 921, 139 L. Ed. 2d 912 (1998)* (defense of claim preclusion by prior federal judgment does not provide basis for removal based on federal question).

A case is generally not removable based on a federal defense, including the defense of preemption, even if that defense is anticipated in the complaint, and it is the only issue. *Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 6, 123 S. Ct. 2058, 156 L. Ed. 2d 1 (2003)* (defense relying on preclusive effect of prior federal judgment or preemptive effect of federal statute will not provide a basis for removal). *But see Caterpillar, Inc. v. Williams, 482 U.S. 386, 393, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987)* (any claim purportedly based on completely pre-empted state law is considered, from its inception, a federal claim arising under federal law). Nor is a case removable solely on the basis of a federal question counterclaim or cross-complaint. *Caterpillar, Inc. v. Williams, 482 U.S. 386, 399, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987)* (defendant cannot inject federal question into action asserting state-law claim to create action arising under federal law).

Exception:

If a federal statute wholly displaces a state-law cause of action through complete preemption, the state claim can be removed. This is so because when the federal statute completely preempts the state-law cause of action, a claim that comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law. *See Aetna Health Inc. v. Davila, 542 U.S. 200, 207-208, 124 S. Ct. 2488, 159 L. Ed. 2d 312 (2004)* (ERISA's savings clause must be interpreted in light of Congress's intent to create exclusive federal remedy).

[b] Diversity Cases

In order to remove a case based on diversity jurisdiction, the removal notice must allege:

1. Complete diversity between the parties;

2. None of the parties in interest properly joined and served as defendant is a citizen of the state in which the action is pending; and

3. Facts showing that the requisite amount in controversy is met.

See 28 U.S.C. § 1441(b).

It is important to keep in mind that removal based on general diversity jurisdiction is permissible only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which the action is filed. *See 28 U.S.C. § 1441(b).*

Exception:

In certain narrowly-defined cases, minimal diversity is sufficient to establish diversity jurisdiction. For example, under the Multiparty, Multiforum Trial Jurisdiction Act of 2002, district courts have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single accident, when at least 75 natural persons have died in the accident at a discrete location and certain other statutory requirements are present. Minimal diversity exists under the Act if any party is a citizen of a state and any adverse party is (1) a citizen of another state, (2) a citizen or subject of a foreign state, or a (3) foreign state. *See 28 U.S.C. § 1369* (Multiparty, Multiforum Trial Jurisdiction Act of 2002); *see also Moore's Federal Practice (3d ed.) § 102.22.*

Exception:

Complete diversity is not required in class actions or mass actions governed by the Class Action Fairness Act of 2005, which provides for diversity jurisdiction over certain class actions in which the matter in controversy exceeds the sum or value of $5 million, and diversity of citizenship exists between any member of a class of plaintiffs and any defendant. *See 28 U.S.C. §§ 1332(d)(2), 1453(b)*; *see also § 4.28[1][c] below*.

To satisfy the complete diversity requirement, a defendant should consider the following:

1. **Citizenship of all *named* defendants is relevant for diversity jurisdiction.** *See 28 U.S.C. § 1441(a)*;

2. **Citizenship of nominal, sham, or fraudulently joined defendants is irrelevant for removal under diversity jurisdiction.** *See Pullman Co. v. Jenkins, 305 U.S. 534, 537-540, 59 S. Ct. 347, 83 L. Ed. 334 (1939)* (fraudulently joined defendants do not preclude removal); *see also Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1066-1067 (9th Cir. 2001)* (joinder of non-diverse defendant deemed fraudulent and ignored for determining diversity, if plaintiff fails to state cause of action against resident defendant);

3. **Defendant seeking removal based on diversity jurisdiction has burden of establishing diversity.** *Pullman Co. v. Jenkins, 305 U.S. 534, 540, 59 S. Ct. 347, 83 L. Ed. 334 (1939)* ; *see Hertz Corp. v. Friend, ___ U.S. ___, 130 S. Ct. 1181, 175 L. Ed. 2d 1029, 1041-1044 (2010)* (burden of persuasion for establishing diversity is on party seeking removal, and "nerve center" test controls determination of corporation's principle place of business for purposes of diversity; "nerve center" is place where corporation's officers direct, control, and coordinate corporate activities);

4. **Case is removable on diversity grounds if initial pleading alleges facts indicating diversity, based on citizenship of named defendants.** *See 28 U.S.C. § 1446(b)*.

Strategic Point:

A change in citizenship following removal does not divest the federal district court of jurisdiction. The joinder of a defendant who is a resident of the forum state after removal also does not divest the federal district court of jurisdiction if complete diversity remains. *Spencer v. United States Dist. Court, 393 F.3d 867, 870 (9th Cir. 2004)* (joinder of local, but completely diverse, defendant after action has been removed to federal court does not require remand).

To support diversity jurisdiction, the amount in controversy must exceed $75,000, exclusive of interest and costs. *See 28 U.S.C. § 1332(a)*. The amount in controversy is determined based on the complaint at the time that the notice of removal is filed. *See Pullman Co. v. Jenkins 305 U.S. 534, 537, 59 S. Ct. 347, 83 L. Ed. 334 (1939)* . A defendant seeking removal based on diversity jurisdiction bears the burden of proving the amount in controversy by a preponderance of the evidence. *See Sanchez v. Monumental Life Ins. Co., 102 F.3d 398, 403-404 (9th Cir. 1996)* (defendant must prove amount in controversy by preponderance of evidence when plaintiff's complaint does not specify particular amount of damages).

If the jurisdictional amount is not alleged in the complaint or is not facially apparent, a federal court will look to the removal notice and may require post-removal evidence relevant to the amount in controversy at the time of removal to determine whether the case is removable. *See Kroske v. United States Bank Corp., 432 F.3d 976, 980 (9th Cir. 2005)* (district court properly considered plaintiff's interrogatory responses and emotional distress damage awards in similar cases in determining amount in controversy).

Strategic Point:

If the other elements of jurisdiction are present, such as complete diversity, and at least one named plaintiff satisfies the amount in controversy requirement, the entire case may be removable. Supplemental jurisdiction can be exercised over the claims of other plaintiffs in the case, even if those claims are for less than the jurisdictional amount. *See Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 549, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005)* .

[c] Special Statute Cases

In a case removed on the basis of a special removal statute, the removal notice must allege the special removal statute and the requisite jurisdictional facts supporting removal under that statute. Defendants in any of the following types of cases should check the relevant statutes to determine the possibility of removal and the related requirements:

1. Actions brought against federal agencies and officers (*see 28 U.S.C. § 1442(a)*);

2. Actions brought against members of the armed forces (*see 28 U.S.C. § 1442(a)*);

3. Civil rights actions (*see 28 U.S.C. § 1443*);

4. Civil actions against foreign states (*see 28 U.S.C. § 1441(d)*);

5. Foreclosure actions against the United States (*see 28 U.S.C. §§ 1444, 2410*);

6. Cases in which the Resolution Trust Corporation is a party (*see 12 U.S.C. § 1441a(l)(3)*);

7. Actions involving the Federal Deposit Insurance Corporation (*see 12 U.S.C. § 1819(b)(2)*);

8. Claims related to bankruptcy cases (*see 28 U.S.C. §§ 1334(b), 1452*);

9. Actions under the Fair Labor Standards Act (*see Breuer v. Jim's Concrete of Brevard, Inc., 538 U.S. 691, 694-700, 123 S. Ct. 1882, 155 L. Ed. 2d 923 (2003))* ; and

10. Covered class actions falling under the preclusion provision of the Securities Litigation Uniform Standards Act (*see 15 U.S.C. §§ 77p(c), 78bb(f)(2)*).

Exception:

Some types of actions are statutorily nonremovable, such as actions against railroads, or against their receivers or trustees, that arise under the Federal Employer's Liability Act (*see 28 U.S.C. § 1445(a)*), certain civil actions against common carriers (*see 28 U.S.C. § 1445(b)*, workers' compensation actions brought under state law (*see 28 U.S.C. § 1445(c)*), and actions based on claims arising under the Securities Act of 1933 (*see 15 U.S.C. § 77v(a)*). *See Moore's Federal Practice (3d Ed.) § 107.17*.

The Class Action Fairness Act of 2005, applicable to any civil action commenced on or after February 18, 2005, facilitates removal of class actions by making the following changes:

1. The Act makes it easier to establish jurisdiction based on diversity of citizenship, by providing that class actions may be removed without regard to whether any defendant is a citizen of the state in which the action is brought. See *28 U.S.C. § 1453(b)*.

2. The Act eliminates the absolute one-year limitation on removal, so that a defendant may remove a case at any time, as long as the notice of removal is filed within 30 days after receipt of a pleading or other paper from which the defendant first may ascertain that the action is or has become removable. *See 28 U.S.C. § 1453(b), (d)(2).*

3. Class actions governed by the Act may be removed by any single defendant, without the consent of the other defendants. *See 28 U.S.C. § 1453(b).*

4. A "mass action" involving proposed joint trial of claims for monetary relief of 100 or more persons, involving common questions of law or fact, is removable in the same manner as a class action. *See 28 U.S.C. § 1332(d)(11)(A), (B)(i).*

Exception:

The Class Action Fairness Act specifically excludes certain types of class actions, including securities actions, actions concerning fiduciary duties and related obligations with respect to securities, and actions concerning intra-corporate and business organization litigation. *See 28 U.S.C. § 1453(d).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 23.63A* (removal in class action context).
- *Moore's Federal Practice (3d ed.) §§ 103.40, 107.11, 107.14*, 107.15, 107.30.
- *Federal Litigation Guide PP 1.61, 1.65[1].*
- *Bender's Federal Practice Forms* Form Nos. 81:190-81:193, 81:208, 81:260.
- *28 U.S.C. § 1331* (federal question jurisdiction).
- *28 U.S.C. § 1332* (jurisdiction based on diversity of citizenship).
- *28 U.S.C. § 1453* (Class Action Fairness Act of 2005).
- *Fed. R. Civ. P. 8(a)* (claims for relief).

[2] Joining Appropriate Parties in Removal Notice

In general, only defendants may remove a civil action to a federal district court. *See 28 U.S.C. §§ 1441(a), 1446(a).* Third-party defendants may remove if the third-party claim states a separate and independent claim for relief that would entitle the third-party defendant to removal. *Carl Heck Engineers, Inc. v. Lafourche Parish Police Jury, 622 F.2d 133, 135-136 (5th Cir. 1980)* (uniform construction and application of removal statute should not depend on state procedures governing third-party practice). An action may also be removed by an intervening defendant if the original action would have been removable, the time for removing the action has not expired, and the original defendants join in the notice of removal.

Exception:

Under very rare circumstances, plaintiffs are permitted by the general removal statute to remove an action that they filed in state court. See *Moore's Federal Practice (3d ed.) § 107.11[2].*

All defendants served in an action must join, but need not actually sign, the notice of removal. *See Roe v. O'Donohue, 38 F.3d 298, 301 (7th Cir. 1994) , abrogated on other grounds by Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 353, 119 S. Ct. 1322, 143 L. Ed. 2d 448 (1999)* (to "join" a motion is to support it in writing). The failure of one or more defendants to join the removal notice constitutes a procedural defect that precludes removal. *See 28 U.S.C. § 1446(b)*; *Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381, 393, 118 S. Ct. 2047, 141 L. Ed. 2d 364 (1998)* (removal requires consent of all the defendants); *see also Moore's Federal Practice (3d Ed.) § 107.11[1]*; *Federal Litigation Guide P 1.63*.

There are several exceptions to the requirement that all defendants join the removal notice:

1. A defendant not served with state court process need not join in the removal notice. *See Salveson v. Western States Bankcard Ass'n, 731 F.2d 1423, 1429 (9th Cir. 1984)* ;

2. Improperly served defendants need not join in the removal notice. *See Salveson v. Western States Bankcard Ass'n, 731 F.2d 1423, 1429 (9th Cir. 1984)* ;

3. Nominal or formal parties, being neither necessary nor indispensable, are not required to join in the removal notice. *See Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 461, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (1980)* ;

4. If removal is based on a specific statutory authorization, only statutorily authorized defendants must join in the removal notice. *See Akin v. Ashland Chem. Co., 156 F.3d 1030, 1034-1035 (10th Cir. 1998)* (federal officer removal is exception to general removal requiring all defendants to join in removal); *Ely Valley Mines, Inc. v. Hartford Acci. & Indem. Co., 644 F.2d 1310, 1314-1315 (9th Cir. 1981)* ; and

5. A defendant in a multistate class action that meets the modified diversity requirements of Class Action Fairness Act of 2005 may remove the action without the consent of all defendants. *See 28 U.S.C. § 1453(b)*.

In all cases, the removal notice must expressly explain any absence or nonjoinder of codefendants. *See P. P. Farmers' Elevator Co. v. Farmers Elevator Mut. Ins. Co., 395 F.2d 546, 548 (7th Cir. 1968)* (better practice dictates that removal petition indicate why there are nonjoining defendants).

Warning:

A mere statement by the initial removing defendant that the other defendants consent to, or do not oppose, removal does not satisfy this requirement. *See Roe v. O'Donohue, 38 F.3d 298, 301 (7th Cir. 1994) , abrogated on other grounds by Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 353, 119 S. Ct. 1322, 143 L. Ed. 2d 448 (1999)* ; *but see Harper v. AutoAlliance Int'l, Inc., 392 F.3d 195, 201-202 (6th Cir. 2004)* (neither signature nor written statement of other defendants needed, and unequivocal consent by counsel on non-signing defendant's behalf in notice of removal sufficient).

[3] Filing Removal Notice in Appropriate Court and Proper Manner

A removal notice must be filed in accordance with the following procedures:

1. 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. *See 28 U.S.C. § 1446(a)*; *Fed. R. Civ. P. 8(a)*;

2. The notice of removal must be filed along with a copy of all process, pleadings, and orders served on

the removing defendant in the action. *See 28 U.S.C. § 1446(a)*; and

3. Promptly after filing a notice of removal, a defendant must give separate written notice of the filing to all adverse parties and file a copy of each notice with the clerk of the state court where the case was filed. *See 28 U.S.C. § 1446(d).*

The notice of removal must be signed pursuant to *Fed. R. Civ. P. 11. See 28 U.S.C. § 1446(a)*; *Fed. R. Civ. P. 11.*

[4] Timely Filing of Notice of Removal

The removing party must file the notice of removal within 30 days after the earlier of the following:

1. The date on which the party 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; or

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

See 28 U.S.C. § 1446(b).

Circuit Split:

Most courts hold that the 30-day removal period *begins to run when the first defendant is served*, provided that the case is removable at that time. *See Getty Oil Corp., Div. of Texaco, Inc. v. Insurance Co. of North America, 841 F.2d 1254, 1262-1263 (5th Cir. 1988)* (failure of first-served defendant to timely file removal notice bars all subsequently served defendants from removal unless plaintiff intentionally delayed naming some defendants in bad-faith attempt to prevent removal). There is a growing trend, however, of permitting later-served defendants 30 days from the date of service of the complaint to file a removal notice with the unanimous consent of their codefendants, even though the first-served co-defendants did not file a removal notice within 30 days. *See Marano Enters. of Kan. v. Z-Teca Rests., L.P., 254 F.3d 753, 755-757 (8th Cir. 2001)* (later-served defendants have thirty days from the date of service to file a notice of removal even though the first-served co-defendants did not file a timely notice of removal); *Brierly v. Alusuisse Flexible Packaging, Inc., 184 F.3d 527, 532-533 (6th Cir. 1999)* (last-served defendant has full 30 days after service to remove).

Strategic Point:

A case is removable when "examination of the four corners of the applicable pleadings" reveals a basis for removal. There is no duty to make further inquiry and the defendant's subjective knowledge is irrelevant. *See Harris v. Bankers Life & Cas. Co., 425 F.3d 689, 694 (9th Cir. 2005)* (no duty to investigate potential reasons for removal); *Whitaker v. American Telecasting, Inc., 261 F.3d 196, 205-206 (2d Cir. 2001)* (reasonable basis for removal requires defendants to apply reasonable amount of intelligence, but does not require defendants to look beyond initial pleading).

When a case is not removable based on the plaintiff's initial pleading, it may become removable at a later date if the plaintiff voluntarily acts to create federal jurisdiction by:

1. Dismissing any nondiverse defendants. *See 28 U.S.C. § 1446*; *People by Lungren v. Keating, 986 F.2d 346, 348-349 (9th Cir. 1993)* ;

2. Changing citizenship, thereby creating diversity. *See De Bry v. Transamerica Corp., 601 F.2d 480, 486-488 (10th Cir. 1979)* ; or

3. Amending the complaint to include a claim based on federal law. *See Leffall v. Dallas Indep. Sch. Dist., 28 F.3d 521, 525-526 (5th Cir. 1994)* .

If subsequent events reveal the existence of diversity jurisdiction after the complaint has been served, a defendant must remove within 30 days of the date on which the defendant receives a copy of an amended pleading, motion, order, or other paper from which it may be ascertained that the case is removable. *See 28 U.S.C. § 1446(b)*; *Akin v. Ashland Chem. Co., 156 F.3d 1030, 1035-1036, 1035 n.2 (10th Cir. 1998)* (time for removal began to run after defendant received answer to interrogatory because answer evidenced that challenged conduct occurred wholly within federal enclave); *see also Addo v. Globe Life & Accident Ins. Co., 230 F.3d 759, 761 (5th Cir. 2000)* (post-complaint letter from insurance beneficiary's attorney to insurer offering to settle case for amount greater than federal jurisdictional minimum is "other paper").

Warning:

In an action based on diversity jurisdiction, removal under *28 U.S.C. § 1446(b)* must take place within one year of the commencement of the action. *See In re Uniroyal Goodrich Tire Co., 104 F.3d 322, 324 (11th Cir. 1997)* (case may not be removed under diversity jurisdiction more than one year after commencement of the action). This one-year limit does not apply if the case is a multistate class action subject to the modified diversity requirements of the Class Action Fairness Act of 2005. *See 28 U.S.C. § 1453(b)*; *see also § 4.28[c] above*.

Successive notices of removal are permitted; however, counsel should carefully weigh whether new circumstances warrant a successive removal motion. *See Midlock v. Apple Vacations West, Inc., 406 F.3d 453, 457-458 (7th Cir. 2005)* (defense counsel subject to monetary sanctions and barred from seeking successive removals when second removal attempt was frivolous); *Benson v. SI Handling Sys., Inc., 188 F.3d 780, 782-783 (7th Cir. 1999)* (second removal attempt proper when plaintiff admitted that amount in controversy was satisfied).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 107.11, 107.15, 107.30.*
- *Federal Litigation Guide PP 1.63, 1.65[3], 1.66.*
- *28 U.S.C. § 1446(a)* (notice of removal).
- *28 U.S.C. § 1446(b)* (time for filing notice of removal).

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Chapter 4 TRANSFER, REMOVAL, AND REMAND
PART F: FILING NOTICE OF REMOVAL TO FEDERAL COURT

1-4 Moore's AnswerGuide: Fed Civil Motion Practice § 4.29

§ 4.29 Waiving Right of Removal

[1] Waiving Right to Remove by Failure to File Timely Notice

Failure to file a timely removal notice may result in waiver. The general time limit is 30 days after defendant's receipt of the initial pleading or other paper indicating that the case is removable. *See 28 U.S.C. § 1446(b).*

[2] Waiving Right to Remove by Submitting to State Court Jurisdiction

A defendant may waive the right to remove an action by taking actions in the state court, after it appears that the case is removable, that clearly and unequivocally manifest submission to state court jurisdiction and the abandonment of the right to a federal forum. *See Schmitt v. Insurance Co. of North America, 845 F.2d 1546, 1548 (9th Cir. 1988)* (removal waived by filing permissive cross-complaint).

[3] Waiving Right to Remove Through Forum Selection Clause

A mandatory forum selection clause that clearly and unequivocally designates an exclusive forum to resolve disputes may serve as a waiver of the right to remove. *See Waters v. Browning Ferris Indus., 252 F.3d 796, 797-798 (5th Cir. 2001)* (waiver valid when contract provision makes it unequivocally clear that other party has right to choose forum); *Northern Cal. Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co., 69 F.3d 1034, 1036-1038 (9th Cir. 1995)* (to be mandatory, a clause must clearly designate an exclusive forum). Because removal must generally be joined by all defendants, a valid and enforceable forum selection clause may bar defendants who are not parties to the agreement from removing the action.

The party seeking enforcement of a forum selection clause bears the burden of proof. *See Ferrari, Alvarez, Olsen & Ottoboni v. Home Ins. Co., 940 F.2d 550, 553-554 (9th Cir. 1991)* (party asserting waiver bears the burden of proof).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 107.18.*

- *Federal Litigation Guide P 1.62*.
- *28 U.S.C. § 1446(b)* (notice of removal of civil action or proceeding).

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Chapter 4 TRANSFER, REMOVAL, AND REMAND
PART F: FILING NOTICE OF REMOVAL TO FEDERAL COURT

1-4 Moore's AnswerGuide: Fed Civil Motion Practice § 4.30

§ 4.30 Effects of Filing Notice of Removal

Removal is effective once the copy of the removal notice served on adverse parties is filed with the state court in which the action is pending. Once the case is removed, the state court may not proceed unless and until the case is remanded. *See 28 U.S.C. § 1446(d)*; *Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1375 n.4 (5th Cir. 1980)* (proceedings in state case subsequent to removal are void). The state court is divested of jurisdiction. *See 28 U.S.C. § 1446(d)*. All prior state court orders, injunctions, or other proceedings occurring before removal remain in effect after removal unless modified or supplanted by the federal court. *See Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers, 415 U.S. 423, 437, 94 S. Ct. 1113, 39 L. Ed. 2d 435 (1974)* (*Fed. R. Civ. P. 65* governs duration of temporary restraining order issued by state court before removal). Similarly, all bonds, undertakings, or security given by a party before removal remain valid and effectual following removal. *See 28 U.S.C. § 1450*.

Removal of a case to the wrong district court is a procedural defect that does not deprive the district court of subject matter jurisdiction. *See Peterson v. BMI Refractories, 124 F.3d 1386, 1388-1394 (11th Cir. 1997)* (failure to comply with the geographic requirements does not deprive a district court of subject matter jurisdiction in a removed case). If a case is removed to the wrong district or division, the court may dismiss the case or transfer it to the proper district. *See 28 U.S.C. §§ 1404(a), 1406(a)*; *see also Kreimerman v. Casa Veerkamp, S.A. de C.V., 22 F.3d 634, 644-645 (5th Cir. 1994)* (court should transfer to proper division rather than dismiss).

Strategic Point:

Venue rules applicable to actions originally filed in federal courts do not apply to removed actions. Thus venue need not have been originally proper in the district to which a case is properly removed. *See 28 U.S.C. § 1391*; *Polizzi v. Cowles Magazines, Inc., 345 U.S. 663, 665, 73 S. Ct. 900, 97 L. Ed. 1331 (1953)* (removed action not subject to dismissal on ground that venue would be improper if originally brought in federal court).

The Federal Rules of Civil Procedure govern all procedural issues after removal, including service of process on unserved or improperly served defendants. *See 28 U.S.C. § 1448*; *Fed. R. Civ. P. 81(c)*. In a case that was removed on the basis of diversity jurisdiction, the law of the state in which the action was originally filed governs substantive issues

(including choice of law provisions). *See Erie R.R. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)* .

If a removable claim presents a federal question and is part of a case that includes related state law claims, the entire case may be removed based on the court's supplemental jurisdiction. *See 28 U.S.C. §§ 1367*, *1441(c)*. If a separate and independent federal question claim or cause of action is joined with claims or causes of action that are otherwise not removable, the entire case may be removed. The district court has discretion to determine all issues or to remand the issues in which state law predominates. *See 28 U.S.C. § 1441(c)*; *American Fire & Casualty Co. v. Finn, 341 U.S. 6, 12-14, 71 S. Ct. 534, 95 L. Ed. 702 (1951)* (to be separate and independent, asserted claims must have arisen from different sets of acts that are not transactionally related).

By the express terms of the general removal statute, *28 U.S.C. § 1441*, a federal district court may adjudicate any claim in an action removed under the statute, even if the state court where the action was filed lacked subject matter jurisdiction over the claim. *See 28 U.S.C. § 1441(f)*. When *28 U.S.C. § 1441* is *not* the basis for removal, however, federal courts require state court subject matter jurisdiction under the derivative jurisdiction doctrine. The derivative jurisdiction doctrine arises from the theory that a federal court's jurisdiction over a removed case derives from the jurisdiction of the state court from which the case originated. The doctrine still applies, for example, in cases removed by federal officers or agencies under *28 U.S.C. § 1442*. *See, e.g., Palmer v. City Nat'l Bank, 498 F.3d 236, 245-248 (4th Cir. 2007)* (derivative jurisdiction continues to apply to cases removed under *28 U.S.C. § 1442*); *Barnaby v. Quintos, 410 F. Supp. 2d 142, 143-146 (S.D.N.Y. 2005)* (elimination of derivative jurisdiction doctrine with respect to cases removed under *28 U.S.C. § 1441* does not apply to federal officer removal under *28 U.S.C. § 1442*).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 107.12-107.15*, *107.30*, *107.31*.
- *Bender's Federal Practice Forms* Form Nos. 81:190-81:208.
- *28 U.S.C. § 1367* (supplemental jurisdiction).
- *28 U.S.C. § 1446* (procedure for removal).
- *28 U.S.C. § 1448* (process after removal).
- *28 U.S.C. § 1450* (validity of provisional relief granted before removal).
- *Fed. R. Civ. P. 8(a)* (claims for relief), *81(c)* (removed actions).

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Chapter 4 TRANSFER, REMOVAL, AND REMAND
PART G: AMENDING NOTICE OF REMOVAL

1-4 Moore's AnswerGuide: Fed Civil Motion Practice § 4.31

§ 4.31 Checklist for Amending Notice of Removal

☐ Consider statutory time limits for amendment of removal notice:

- ○ If within original 30-day notice period, may amend without restriction. *See § 4.32[1] below*.
- ○ After original 30-day notice period, may amend to correct defective allegations of jurisdiction. *See § 4.32[2] below*.

☐ File and serve amended removal notice in compliance with *28 U.S.C. § 1446* or *28 U.S.C. § 1653*.

☐ **Search by Topic:** Civil Procedure > Removal

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Chapter 4 TRANSFER, REMOVAL, AND REMAND
PART G: AMENDING NOTICE OF REMOVAL

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§ 4.32 Amending Notice of Removal

A notice of removal may be freely amended:

1. Within the original 30-day period in which the notice of removal must be filed. *See 28 U.S.C. § 1446(b)*; or

2. After the 30-day period if the amendment corrects defective allegations of jurisdiction, but not to set out an additional basis for removal jurisdiction. *See 28 U.S.C. § 1653*.

[1] Amending Notice of Removal Within Original Notice Period

A notice of removal may be freely amended without restriction within the 30-day period in which the notice must be filed. The amendment may assert new bases for jurisdiction or new jurisdictional facts in an attempt to remedy fundamental defects in the original notice. *See 28 U.S.C. § 1446(b)*; *USX Corp. v. Adriatic Ins. Co., 345 F.3d 190, 199-206 (3d Cir. 2003)* , *cert. denied*, *541 U.S. 903, 124 S. Ct. 1602, 158 L. Ed. 2d 244 (2004)* (removal notice may be amended within 30 days); *Northern Illinois Gas Co. v. Airco Industrial Gases, Div. of Airco, Inc., 676 F.2d 270, 273 (7th Cir. 1982)* (removal petition may be amended freely within 30-day period).

[2] Amending Notice of Removal After Original Notice Period

After the expiration of the original notice period, the provisions of *28 U.S.C. § 1653*, which permit amendment of defective allegations of jurisdiction, govern the amendment of removal petitions and allow amendments only to correct or cure a defective jurisdictional allegation. *See USX Corp. v. Adriatic Ins. Co., 345 F.3d 190, 199-206 (3d Cir. 2003)* (noting prohibition against adding completely new grounds for removal after time for removal had expired, but allowing amendment that merely clarified allegations made in original notice); *D. J. McDuffie, Inc. v. Old Reliable Fire Ins. Co., 608 F.2d 145, 147 (5th Cir. 1979)* (after 30-day period, amendment of removal notice is governed by *28 U.S.C. § 1653*, which provides that "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts").

Although amendments after expiration of the original notice period may not assert a new basis for jurisdiction or attempt to remedy a fundamental defect in a previously asserted jurisdictional ground, they may clarify previously

asserted grounds. *See Matrix Z, LLC v. Landplan Design, Inc., 493 F. Supp. 2d 1242 (S.D. Fla. 2007)* (permitting amendment after 30-day period to provide specific information regarding parties' locations, where original removal notice had made only a conclusory assertion of diversity jurisdiction).

In addition to merely technical amendments, amendments that clarify a ground for removal previously alleged in the original notice of removal may be permitted. *See USX Corp. v. Adriatic Ins. Co., 345 F.3d 190, 206 (3d Cir. 2003)* (revision of jurisdictional allegation to assert new basis for jurisdiction, after summary judgment proceedings, was permissible clarification in light of Supreme Court's intervening resolution of related jurisdictional question to require revised allegation). Thus, a removal notice may be amended under *28 U.S.C. § 1653* to correct defective jurisdictional allegations or generally to correct an omitted jurisdictional fact. *See Schild v. Tymco, Inc., 842 F. Supp. 225, 226 n.2 (M.D. La. 1994)* ("a defective allegation (as opposed to a missing allegation) may be cured by amendment, even following the thirty day period for removal"). For example, if the state court record reveals a jurisdictional fact (even though imperfectly stated) that is essential to removal and has been omitted from the "four corners of the removal petition," the notice may be amended to correct the defect. *See Northern Illinois Gas Co. v. Airco Industrial Gases, Div. of Airco, Inc., 676 F.2d 270, 273-274 (7th Cir. 1982)* (allowing amendment after 30-day period because, "[w]here the state court record reveals a jurisdictional fact, albeit imperfectly stated, which is essential to removal and which has been omitted from the four corners of the removal petition, an amendment of the petition is permissible to correct the defect").

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 107.11[1][c].*

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Chapter 4 TRANSFER, REMOVAL, AND REMAND
PART H: MOTION FOR ORDER REMANDING REMOVED ACTION TO STATE COURT

1-4 Moore's AnswerGuide: Fed Civil Motion Practice § 4.33

§ 4.33 Checklist for Motion for Order Remanding Removed Action to State Court

☐ Determine whether there is a basis for remand:

- ○ Lack of subject matter jurisdiction. *See § 4.34[1] below*.
- ○ Procedural defect in removal. *See § 4.34[1] below*.
- ○ Abstention. *See § 4.34[2] below*.
- ○ Forum selection clause. *See § 4.34[2] below*.

☐ If grounds for remand exist, determine when motion must be filed:

- ○ Motion based on jurisdictional defect may be made at any time. *See § 4.35[2] below*.
- ○ Motion based on procedural defect must be made within 30 days of filing of removal notice. *See § 4.35[2] below*.

☐ Prepare motion for order remanding removed action to state court:

- ○ Clearly state basis for motion. *See § 4.34 below*.
- ○ Include request for costs and attorney's fees incurred as result of removal. *See § 4.34[2] below*.

- ☐ Timely file and serve motion.

- ☐ **Search by Topic:** Civil Procedure > Postremoval Remands

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Chapter 4 TRANSFER, REMOVAL, AND REMAND
PART H: MOTION FOR ORDER REMANDING REMOVED ACTION TO STATE COURT

1-4 Moore's AnswerGuide: Fed Civil Motion Practice § 4.34

§ 4.34 Ascertaining Grounds for Motion to Remand

[1] Asserting Statutory Grounds for Remand

The primary statutory grounds for remand are:

1. Lack of subject matter jurisdiction, including both diversity jurisdiction and federal question jurisdiction; and

2. Procedurally defective removal.

See 28 U.S.C. § 1447(c).

A plaintiff seeking remand to the state forum that he or she previously selected may attempt to join nondiverse defendants to destroy diversity jurisdiction. The district court may either deny joinder or permit joinder and remand. *See 28 U.S.C. § 1447(c),(e); Cobb v. Delta Exports, Inc., 186 F.3d 675, 676-677 (5th Cir. 1999)* (when plaintiff seeks to join additional non-diverse defendants after case is properly removed, court has discretion under Section 1447(e) to refuse to permit joinder, or to permit joinder but then must remand case to state court).

Exception:
A district court may permit joinder and retain jurisdiction, however, if the case could have originally been filed in federal court under an independent basis for federal jurisdiction. *See Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1068-1069 (9th Cir. 2001)* (plaintiff waived any defect in court's removal jurisdiction by failing to seek remand after joinder of nondiverse defendants).

Once a plaintiff files a motion for remand, the defendant must prove that the basis for removal was proper. *See Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992)* (defendant bears burden of proving all grounds necessary to support removal).

Strategic Point:

If the plaintiff voluntarily reduces the amount in controversy below the jurisdictional minimum after removal, the district court retains jurisdiction. *See St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 290-292, 58 S. Ct. 586, 82 L. Ed. 845 (1938)* (post-removal reduction does not divest federal court of jurisdiction).

[2] Asserting Nonstatutory Grounds for Remand

Nonstatutory grounds for remand include:

1. Abstention. *See Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 714-715, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996)* ; and

2. Enforcement of a forum selection clause. *See Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273, 279-280 (9th Cir. 1984)* .

Warning:

A minority of courts may decline to remand a case of uncertain federal jurisdiction based on the futility exception, such as when the state court would dismiss the claims with prejudice. *See Deutsch v. Turner Corp., 324 F.3d 692, 718-719, n.22 (9th Cir. 2003)* ; *Asarco, Inc. v. Glenara, Ltd., 912 F.2d 784, 787 (5th Cir. 1990)* (recognizing futility exception); *but see University of S. Alabama v. American Tobacco Co., 168 F.3d 405, 410 (11th Cir. 1999)* (remand under *28 U.S.C. § 1447(c)* is mandatory regardless of proceeding's futility in state court).

Strategic Point:

Class actions removed on the basis of minimal diversity under the Class Action Fairness Act of 2005 are subject to either mandatory or discretionary remand under a number of specified circumstances. *See 28 U.S.C. § 1332(d)*; *Moore's Federal Practice (3d ed.) §§ 23.63[2][a], 107.41[1][e][i][B].*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 107.41[1][e][iii][E].*
- *Federal Litigation Guide P 1.69[1].*
- *28 U.S.C. § 1447(c)* (procedure for remand).

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Chapter 4 TRANSFER, REMOVAL, AND REMAND
PART H: MOTION FOR ORDER REMANDING REMOVED ACTION TO STATE COURT

1-4 Moore's AnswerGuide: Fed Civil Motion Practice § 4.35

§ 4.35 Initiating and Pursuing Remand Procedures

[1] Determining Who May Move for Remand

A removed action may be remanded on motion by any of the parties. *See 28 U.S.C. § 1447(c)*. Remand is ordinarily sought by plaintiffs.

Warning:

A removing defendant who subsequently moves for remand may be subject to sanctions for improper removal. *See Napoleon Hardwoods, Inc. v. Professionally Designed Benefits, Inc., 984 F.2d 821, 822 (7th Cir. 1993)* .

Strategic Point:

A removed action may be remanded sua sponte by the court if it finds that it lacks subject matter jurisdiction. *See 28 U.S.C. § 1447(c)* ("[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded"). A minority of courts also hold that a district court may remand sua sponte based on a *procedural defect*. *See Averdick v. Republic Fin. Servs., 803 F. Supp. 37, 41-42 (E.D. Ky. 1992)* (district court may remand sua sponte at any time); *but see Kelton Arms Condo. Owners Ass'n v. Homestead Ins. Co., 346 F.3d 1190, 1192-1193 (9th Cir. 2003)* (federal district court lacks authority to sua sponte remand for nonjurisdictional defects in procedure).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 107.41[1].*
- *Federal Litigation Guide P 1.69[2].*

- *28 U.S.C. § 1447(c)* (procedure for remand).

[2] Meeting Timing Requirements for Motion to Remand

A motion for remand based on a lack of subject matter jurisdiction may be made at any time by either the court or any of the parties. *See 28 U.S.C. § 1447(c)*. Whenever it appears before final judgment that the federal court lacks subject matter jurisdiction over a case, the case must be remanded. *See 28 U.S.C. § 1447(c)*.

A motion for remand based on procedural defects must be made within 30 days of the filing of the removal notice or the defect is deemed waived. *See 28 U.S.C. § 1447(c)*. The 30-day period runs from the day that the removal notice was filed, not from the date that the plaintiff was served with the notice. *See 28 U.S.C. § 1447(c)*; *Pavone v. Mississippi Riverboat Amusement Corp., 52 F.3d 560, 566 (5th Cir. 1995)* (30-day period runs from the day that the removal notice was filed and is not extended if served by mail).

Strategic Point:

If a motion to remand based on procedural defects is filed after the 30-day period and the defendant does not raise the issue of untimeliness, the defect of untimeliness is waived and remand is permissible. *See Roe v. O'Donohue, 38 F.3d 298, 301-302 (7th Cir. 1994)* (questioning whether defendant causing untimely remand motion should be estopped from raising objection).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 107.41[1].*
- *Federal Litigation Guide P 1.69[3].*
- *Bender's Federal Practice Forms* Form Nos. 81:260- 81:280.
- *28 U.S.C. § 1447* (procedure after removal).

Strategic Point:

Counsel who has succeeded in remanding a case to state court may move for attorney's fees, costs, and actual expenses caused by the removal. *See 28 U.S.C. § 1447(c)*. Absent unusual circumstances, attorney's fees may be awarded only when the removing party lacked an objectively reasonable basis for seeking removal. *See Martin v. Franklin Capital Corp., 546 U.S. 132, 140-141, 126 S. Ct. 704, 163 L. Ed. 2d 547 (2005)* (attorney's fees denied due to objectively reasonable basis for seeking removal); *Warthman v. Genoa Twp. Bd. of Trs., 549 F.3d 1055, 1061 (6th Cir. 2008)* (a plaintiff is entitled to an award of attorney's fees and costs when there was no objectively reasonable basis for removal unless unusual circumstances warrant a departure from the general rule).

[3] Determining Effects of Post-Removal Changes in Case

When state law claims are removed based on supplemental jurisdiction in conjunction with a federal question claim and the federal claim is resolved or dismissed, the district court has discretion to hear or remand the remaining state law claims. *See 28 U.S.C. § 1367(c)(3)*. If the federal question is eliminated relatively soon after removal, it is ordinarily preferable to remand the case rather than dismiss the case. *See Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 357,*

108 S. Ct. 614, 98 L. Ed. 2d 720 (1988) (district court can consider manipulative tactics in weighing remand).

The district court retains jurisdiction over surviving third-party claims if the following claims are settled:

1. The federal claim on which jurisdiction is based. *See Dery v. Wyer, 265 F.2d 804, 808 (2d Cir. 1959)* ; or

2. The main claim on which diversity jurisdiction depends. *See Hill v. Rolleri, 615 F.2d 886, 888-889 (9th Cir. 1980)* (plaintiffs settled case after removal; federal court retains jurisdiction over third-party claims).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 107.41.*
- *28 U.S.C. § 1367(c)(3)* (discretion to hear or remand remaining state law claims).

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Chapter 4 TRANSFER, REMOVAL, AND REMAND
PART H: MOTION FOR ORDER REMANDING REMOVED ACTION TO STATE COURT

1-4 Moore's AnswerGuide: Fed Civil Motion Practice § 4.36

§ 4.36 Determining Post-Remand Status of Action

[1] Remand Returns Jurisdiction to State Court

Once a certified copy of a remand order is mailed to the state court, the district court is divested of jurisdiction and the state court resumes jurisdiction to proceed with the case. *See 28 U.S.C. § 1447(c)*; *Arnold v. Garlock, Inc., 278 F.3d 426, 437 (5th Cir. 2001)* (order remanding case for lack of subject matter jurisdiction is not self-executing; certified copy of order must be mailed to clerk of state court). When a remand order is based on nonstatutory grounds, the district court may reconsider the order until the state court receives a certified copy of the remand order. *See Shapiro v. Logistec USA Inc., 412 F.3d 307, 313 (2d Cir. 2005)* (district court had jurisdiction to reconsider remand based on defendant's residence in state in which diversity action was brought).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 107.42, 107.43.*
- *28 U.S.C. § 1447(c)* (remand procedure).

[2] Seeking Appellate Review of Remand Decision

The denial of a motion to remand is not a final order and is ordinarily not subject to immediate appellate review. *See O'Halloran v. University of Washington, 856 F.2d 1375, 1378-1379 (9th Cir. 1988)* (appellate review is generally deferred until a final judgment or other appealable order is entered).

Remand orders based on a lack of subject matter jurisdiction or a defect in removal procedure are not reviewable on appeal or otherwise, even if the remand is erroneous. *See 28 U.S.C. § 1447(d)*; *Powerex Corp. v. Reliant Energy Servs., 551 U.S. 224, 234, 127 S. Ct. 2411, 168 L. Ed. 2d 112 (2007)* (when the district court relied upon a ground that is colorably characterized as subject matter jurisdiction, appellate review is barred by *28 U.S.C. § 1447(d)*); *Thermtron Prods. v. Hermansdorfer, 423 U.S. 336, 343, 96 S. Ct. 584, 46 L. Ed. 2d 542 (1976)* (if a trial judge purports to remand a case on the ground that it was removed "improvidently and without jurisdiction," the order is not subject to challenge in the court of appeals).

The bar against appellate review of remands based on procedural defects applies to cases removed under any of the various removal statutes. *See Things Remembered v. Petrarca, 516 U.S. 124, 128, 116 S. Ct. 494, 133 L. Ed. 2d 461 (1995)* (remand orders based on procedural defects not subject to review).

Exception:

28 U.S.C. § 1447 excepts cases removed pursuant to *28 U.S.C. § 1443* (removal of specified civil rights cases) from its restrictions on appellate review of remands. Remand orders in such cases are reviewable "by appeal or otherwise." *28 U.S.C. § 1447(d)*.

Exception:

A court of appeals may accept a timely appeal from a district court order denying or granting remand of a class action pursuant to the modified diversity requirements of the Class Action Fairness Act of 2005. *See 28 U.S.C. § 1453(c)(1)*.

A remand based on a substantive ruling apart from a jurisdictional issue is subject to review if the substantive decision is contained in a separate order--such a separate order is reviewable. If, however, the substantive ruling is part of a single order that remands for subject-matter jurisdiction, review of the ruling is barred. *See Powerex Corp. v. Reliant Energy Servs., 551 U.S. 224, 235-236, 127 S. Ct. 2411, 168 L. Ed. 2d 112 (2007)* (if district court's remand order relies on ground that is colorably characterized as subject-matter jurisdiction, appellate review is barred by *28 U.S.C. § 1447(d)*).

A remand based on declining to exercise supplemental jurisdiction over state-law claims under *28 U.S.C. § 1367(c)* is not a remand for lack of subject-matter jurisdiction and therefore is not barred from appellate review by *28 U.S.C. § 1447(c), (d)*. The district court's decision whether to exercise its statutory supplemental jurisdiction over the state-law claims (*see 28 U.S.C. § 1367(a), (c)*) after dismissing every claim over which it has original jurisdiction is purely discretionary. *Carlsbad Tech. v. HIF Bio, -- U.S. --, 129 S. Ct. 1862, 173 L. Ed. 2d 843, 849-850 (2009)* (court's determination may be reviewed for abuse of discretion, but may not be raised as jurisdictional defect).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 107.43A, 107.44*.
- *28 U.S.C. § 1447* (procedure after removal).
- *28 U.S.C. § 1453(c)* (review of remand orders in actions subject to Class Action Fairness Act).

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Chapter 5 PROVISIONAL REMEDIES

1-5 Moore's AnswerGuide: Fed Civil Motion Practice 5.syn

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[5] Depositing Money or Property With Court Clerk

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Chapter 5 PROVISIONAL REMEDIES
PART A: PROCEDURAL CONTEXT

1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.01

§ 5.01 Procedural Context--Seeking Provisional Remedies

Provisional remedies provide important safeguards in litigation. Urgent circumstances may prompt a party to seek temporary relief from the court in order to protect itself against loss, irreparable injury, or dissipation of property.

For example, parties may request provisional injunctive relief in the form of a preliminary injunction or temporary restraining order, in order to prevent likely future harm, preserve the status quo, and expedite the litigation. In addition to the benefit of the primary relief sought, provisional injunctive relief can be a powerful weapon. Combined with a request for expedited discovery, a motion for provisional injunctive relief will heighten the urgency with which the parties and the court treat the lawsuit. The motion may take the adverse party by surprise and cause the court to yield a more complete picture of relevant circumstances. It may also, for better or worse, give the parties an early indication of the court's view of the case, *see §§ 5.02 -5.04 below*.

Several types of provisional remedies are available to parties concerned that defendants in the action may dispose of property necessary to satisfy a judgment. Parties may request the appointment of a receiver to preserve property during litigation. Although traditionally used in a property conflict setting, receivership is an equitable remedy with wide potential application. *See §§ 5.32 -5.39 below*. In addition, they may proceed against a surety under *Fed. R. Civ. P. 65.1*, request the deposit of money or other things under *Fed. R. Civ. P. 67*, or request a prejudgment seizure of property under *Fed. R. Civ. P. 64*. *See §§ 5.27*, *5.43*, *5.52 below*.

Provisional remedies do not just serve defensive purposes. They can be employed offensively as tactical tools to create a sense of urgency, which could get opposing parties to take the case seriously, expedite discovery, and provide a glimpse of the court's opinions about the case at an early phase of the litigation. The downside is that the process of seeking provisional remedies is costly, the remedies themselves are often difficult to enforce, and unsuccessful motions may potentially impede settlement or otherwise damage the future course of the litigation. Therefore, counsel should avoid acting on impulse or succumbing to pressure from legitimately anxious clients and be sure to conduct a thorough risk-benefit analysis before seeking provisional remedies.

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Chapter 5 PROVISIONAL REMEDIES
PART B: MOTION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.02

§ 5.02 Deciding Whether or Not to Seek Preliminary Injunctive Relief

A party considering whether or not to seek preliminary injunctive relief, either through a preliminary injunction or temporary restraining order (TRO), is making an important tactical decision that can result in a significant payoff or carry serious consequences for the future of the litigation. Therefore, before filing a motion, it is critical to weigh the benefits of the relief sought (preventing harm) and the potential benefits (e.g., expediting litigation) against the potential drawbacks of seeking injunctive relief, such as increased litigation costs, and the possibility of negatively impacting the lawsuit if the motion is unsuccessful. *See § 5.03 below*.

It is also important to realistically evaluate whether a factual basis exists that warrants preliminary injunctive relief and whether there is sufficient evidence to establish all of the requirements for preliminary injunctive relief. *See §§ 5.04[1], 5.11[1] below*.

Strategic Point:

Preliminary injunctive relief may be sought only in connection with a pending action. If the motion for a preliminary injunction or TRO 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.

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Chapter 5 PROVISIONAL REMEDIES
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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.03

§ 5.03 Assessing Tactical Benefits of Preliminary Injunctive Relief

[1] Determining Potential Tactical Benefits of Preliminary Injunctive Relief

In addition to any benefit provided by the court order being sought, a party may gain tactical benefits from seeking preliminary injunctive relief. The degree to which a party can take advantage of such potential tactical benefits depends upon the party's position in the litigation, extent of preparation, evidentiary basis for the party's claims, and economics. Benefits often include:

1. Preventing irreversible harm.

2. Accelerating the litigation, expediting discovery, and possibly, even the trial.

3. Providing an early reading on the court's view of the case.

4. Increasing costs for the opposing party could possibly increase pressure for early settlement or ADR.

5. Engaging the court with the case to ensure respondent's compliance with the injunctive relief.

Strategic Point:

It is important to distinguish tactical benefits from the benefit of any relief sought in the motion, such as preservation of property needed to satisfy a judgment while litigation is pending. The benefit of preventing harm may far outweigh any tactical benefits or disadvantages

[2] Considering Potential Drawbacks to Seeking Injunctive Relief

The potential downsides of seeking injunctive relief include:

1. Injunctive litigation is generally costly and time-consuming.

2. Denial of injunction may be interpreted by opposing parties as vindication of their position and may impede settlement.

3. Injunctive remedies are often difficult to enforce.

4. Premature disclosure of issues or positions before the case is fully investigated and analyzed may prejudice the outcome of the litigation.

5. Posting required security can be an expensive up-front cost.

Warning:

Because requests for preliminary relief can impose a significant burden on the court, parties should not bring these motions absent a genuine belief that their claims are meritorious. Parties should not seek injunctive relief merely for tactical advantage. Avoid requests for emergency relief on Friday afternoon, if possible.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 64.01 -67.03*.
- *Federal Litigation Guide PP 8.01 -8.13*.

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Chapter 5 PROVISIONAL REMEDIES
PART B: MOTION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.04

§ 5.04 Assessing Need for Preliminary Injunctive Relief and Type of Injunctive Relief Required

[1] Assessing Need to Preserve Status Quo Between Parties Pending Trial

A preliminary injunction is an equitable remedy. *See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 318-320, 119 S. Ct. 1961, 144 L. Ed. 2d 319 (1999)* (ability to obtain preliminary injunction depends on traditional principals of equity jurisdiction). Courts will issue equitable injunctive relief when needed to preserve the status quo between parties pending final determination on merits. *See Louis Vuitton Malletier v. Dooney & Bourke, Inc., 454 F.3d 108, 114 (2d Cir. 2006)* (preliminary injunction generally seeks only to maintain status quo pending trial on merits). Injunctive relief targets future conduct. It is unrelated to reparations for past misconduct, which may be obtained by a private litigant in an action for damages. *See United States v. Oregon State Medical Soc., 343 U. S. 326, 333, 72 S. Ct. 690, 96 L. Ed. 978 (1952)* (sole function of action for injunction is to forestall future violations).

[2] Preliminary Injunctions and Temporary Restraining Orders (TROs)

A preliminary injunction is granted after a hearing, typically held on short notice, and remains in force until final determination of the merits of the action, unless modified. Preliminary injunctions may not be issued without notice to the adverse party

By comparison, a TRO is an extraordinary remedy that differs from a preliminary injunction in terms of duration, procedural requirements, and appealability. A TRO is issued for a fixed time, not to exceed 10 days, although the court may extend the TRO for an additional 10 days. It may be granted after a summary hearing with notice or may be granted *ex parte*.

[3] Deciding Between Mandatory or Prohibitory Injunctive Relief

A party may seek either mandatory or prohibitory injunctive relief, depending on which will provide the most suitable interlocutory relief. A prohibitory injunction orders a party to refrain from doing an act, while a mandatory injunction orders a party to do an act. *See Louis Vuitton Malletier v. Dooney & Bourke, Inc., 454 F.3d 108, 114 (2d Cir. 2006)* (preliminary injunction is usually prohibitory, i.e., one that forbids or restrains an act, and seeks generally only to maintain the status quo pending a trial on the merits); *see also Moore v. Consol. Edison Co. of N.Y., Inc., 409 F.3d 506, 510 (2d Cir. 2005)* (when defendant with notice in injunction proceeding completes acts sought to be enjoined,

court may by mandatory injunction restore status quo.

Warning:

Mandatory injunctions are not favored. If a party seeks mandatory preliminary relief that goes beyond maintaining the status quo pending litigation, the court may be extremely cautious about issuing a preliminary injunction. *See § 5.06 [1] below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 65.20*, *65.21*, *65.31 -65.34*.
- *Federal Litigation Guide PP 7.01*, *7.03*, *7.05*.

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Chapter 5 PROVISIONAL REMEDIES
PART B: MOTION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.05

§ 5.05 Checklist: Preliminary Injunction

☐ Determine whether preliminary injunction is necessary. *See § 5.04 above*.

☐ Determine whether moving party can satisfy standards for preliminary injunctive relief. *See § 5.06 below*.

☐ Commence action if it is not already pending.

☐ Draft notice of motion, motion, and other papers necessary under local procedure. *See § 5.06[3] below*.

☐ Draft supporting affidavits and supporting memorandum of law. *See § 5.06[3] below*.

☐ Consider requesting expedited discovery to heighten urgency with which parties and court treat matter and to elicit complete and accurate version of facts. *See § 5.06[3] below*.

☐ Consult local rules and individual judge's rules with respect to submitting proposed orders and submit proposed order, if required. *See §§ 5.06[3], 5.10 below*.

☐ Notice hearing on motion for preliminary injunction. *See § 5.06[2] below*.

☐ Prepare to provide required security. *See § 5.09 below*.

☐ **Search by Topic:** Civil Procedure > Remedies > Injunctions

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 65.03*, *65.05 -65.07*, *65.20*, *65.21*, *65.23*.
- *Bender's Federal Practice Forms* Form Nos. 65:100-65:115.
- *Federal Litigation Guide PP 7.01*, *7.03*, *7.05*, *7.10 -7.35*.

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Chapter 5 PROVISIONAL REMEDIES
PART B: MOTION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.06

§ 5.06 Seeking Preliminary Injunction

[1] Satisfying Balancing Test for Preliminary Injunction

Under the traditional balancing test for obtaining a preliminary injunction, a party seeking relief must demonstrate:

1. Irreparable injury if the relief is denied;

2. Probability of success on the merits;

3. Balance of potential harm favors the moving party; and

4. Public interest favors the injunction.

See Winter v. Natural Res. Def. Council, 555 U.S. 7, 129 S. Ct. 356, 374, 172 L. Ed. 2d 249 (2008) (a plaintiff seeking a preliminary injunction must establish (1) that he or she is likely to succeed on the merits; (2) that he or she is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his or her favor; and (4) that an injunction is in the public interest); *see also Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000)* (en banc) (per curiam) (outlining traditional test for preliminary injunction); *Mississippi Power & Light v. United Gas Pipe Line Co., 760 F.2d 618, 621 (5th Cir. 1985)* (affirming grant of preliminary injunction when all four criteria were met). The precise formulation by which an application for a preliminary injunction is assessed varies from circuit to circuit (*see below*). However, courts generally take into account the movant's likelihood of success on the merits and the threat of irreparable harm caused by the non-movant's conduct.

Circuit Split:

Circuits vary as to how to weigh factors. Some circuits (e.g., the First and Fifth) use the traditional four-prong formulation. *See Planned Parenthood League v. Bellotti, 641 F.2d 1006, 1009 (1st Cir. 1981)* (applying four-prong test); *Mississippi Power & Light v. United Gas Pipe Line Col, 760 F.2d 618, 621* (5th Cir. 1985 (affirming grant of preliminary injunction when all four criteria were met).

Other circuits (e.g., the Second, Eighth and Ninth) use some variants of a two-prong alternative statement of the equitable standards. Generally, if the balance of hardships tips sharply in the moving

party's favor, that party need show only that serious questions are raised on the merits of the case. *See Rodde v. Bonta, 357 F.3d 988, 994 n.8 (9th Cir. 2004)* (under alternative two-prong test, if balance of hardships tips sharply in plaintiff's favor, plaintiff need only show that serious questions are raised on merits, rather than strong likelihood of success); *Sonesta International Hotels Corp., v. Wellington Assocs., 483 F.2d 247, 250 (2d Cir. 1973)* (transforming four-prong preliminary injunction test into two-prong test).

Warning:

In the various circuits' formulations of the tests for granting a preliminary injunction, nuances continue to develop over time. Moreover, some opinions express disapproval of formulations followed in other circuits. When preparing a motion for a preliminary injunction and supporting materials, it is crucial for counsel to frame the client's position based on the standard prevailing in the court in which the case is pending.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 65.03, 65.05 -65.07.*
- *Bender's Federal Practice Forms* Form Nos. 65:100-65:115.
- *Federal Litigation Guide PP 7.10 -7.35.*

[2] Seeking Preliminary Injunctive Relief; Procedural Requirements

Notice and a hearing are required. *Fed. R. Civ. P. 65* does not specify a required form of notice, but the party giving notice, whether by service of complaint and summons, motion, order to show cause, or otherwise, should ensure that the responding party be given a fair opportunity to oppose the application and to prepare for such an opportunity. *See Fed. R. Civ. P. 65(a)(1)*; *Rosen v. Siegel, 106 F.3d 28, 31-32 (2d Cir. 1997)* (compliance with notice requirement mandatory; purpose of requirement is to provide opposing party fair opportunity to oppose motion for preliminary injunction).

Warning:

Local district court rules and individual judges' rules may include specific requirements for notice, as well as the content of moving papers and orders. Therefore, it is critical to consult local rules and individual judges' rules prior to seeking preliminary injunctive relief.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 65.21.*
- *Bender's Federal Practice Forms* Form Nos. 65:120-65.149.
- *Fed. R. Civ. P. 5(a)* (order to show cause or notice of motion must be served on other parties).
- *Fed. R. Civ. P. 65(a)* (notice required for preliminary injunctions).

[3] Preparing Documents Supporting Motion for Preliminary Injunction

Motions for preliminary injunction should be filed with affidavits that support the need for injunctive relief. In addition, motions for preliminary injunction should be filed with documents supporting the need for injunctive relief. Such documents may include:

1. Discovery documents;

2. Documentary exhibits attached to declarations;

3. Charts summarizing exhibits;

4. Deposition testimony; and

5. Transcripts of prior hearings.

A party should also include a memorandum of law and a draft order if required by local rule. *See § 5.10 below*. The motion, evidentiary support, and memorandum of law should address each factor that is required to obtain injunctive relief. *See § 5.06[1] above*.

If parties waive the hearing or submit the matter on papers, the court may decide the motion based on the submitted affidavits. However, if there is a disputed factual issue, the court must hold a hearing before deciding whether or not to issue an injunction. *See Williams v. Curtiss-Wright Corp., 681 F.2d 161, 163 (3d Cir. 1982)* (preliminary injunction may issue on basis of affidavits and other written evidence, without a hearing, if evidence submitted by both sides resolves all relevant factual issues); *Kern v. Clark, 331 F.3d 9, 12 (2d Cir. 2003)* (when disputed issues of fact exist, motions for preliminary injunction require hearing and should not be decided on the basis of affidavits).

While the court may consider evidence that would not be admissible at trial, *see Flynt Distributing Co. v. Harvey, 734 F.2d 1389, 1394 (9th Cir. 1984)* (in preliminary injunction proceedings, court may consider otherwise inadmissible evidence when to do so will prevent irreparable harm), affidavits and other evidence should clearly address the specific facts that would provide the basis for granting the injunction. *See Atari Games Corp. v. Nintendo of America, Inc., 897 F.2d 1572, 1575 (Fed. Cir. 1990)* (courts should be wary of issuing an injunction based solely upon allegations and conclusory affidavits).

Strategic Point:

Consider requesting expedited discovery in order to elicit a more complete and accurate version of the facts early in the litigation and to heighten the urgency with which the parties and court are likely to treat the lawsuit.

Warning:

Local rules and individual judges' rules may include detailed requirements for the content of moving papers and orders.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 65.23*.
- *Bender's Federal Practice Forms* Form Nos. 65:140-65:149.

- *Fed. R. Civ. P. 5(a)* (order to show cause or notice of motion must be served on other parties).
- *Fed. R. Civ. P. 7(b)* (motions and other papers).
- *Fed. R. Civ. P. 65(a)* (notice required for preliminary injunctions).

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Chapter 5 PROVISIONAL REMEDIES
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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.07

§ 5.07 Checklist: Temporary Restraining Order

☐ Determine whether TRO is necessary. *See § 5.08 below*.

☐ Determine whether a factual basis exists and can be shown which meets the requirements for a TRO. *See § 5.08 below*.

☐ Consult local rules and individual judge's rules concerning applications for TRO, including timing, notice, form of papers to be submitted and form of order

☐ Provide notice, if possible, of application for TRO. *See § 5.08[2] below*.

☐ Prepare supporting papers. *See § 5.08 below*.

☐ Draft proposed order if required. *See § 5.10 below*.

☐ Prepare attorney's certification if TRO is sought ex parte. *See § 5.08[3] below*.

☐ Establish that requirements are met of granting TRO ex parte. *See § 5.08[3] below*.

☐ Prepare to provide required security. *See § 5.09 below*.

☐ Contact court to schedule a time to present the TRO request.

☐ In copyright action, consider seeking impoundment of all copies or recordings allegedly made or

used in violation of copyright owner's exclusive rights, and all articles that could reproduce those copies or recordings. *See § 5.11 below*.

☐ **Search by Topic:** Civil Procedure > Remedies > Injunctions > Temporary Restraining Orders

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.08

§ 5.08 Seeking Temporary Restraining Order (TRO); Satisfying Requirements

[1] Showing of Irreparable Harm Required to Obtain Temporary Restraining Order (TRO)

A TRO is a short-term device to restrain a party's actions and preserve the status quo until the court holds a hearing to determine whether or not to issue a preliminary injunction. A TRO may not exceed 14 days' duration unless a 14-day extension is granted by the court, An extraordinary remedy, a party can only obtain a TRO if can successfully convince the court that the court must act immediately in order to prevent irreparable harm. *See Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers, 415 U.S. 423, 438-439, 94 S. Ct. 1113, 39 L. Ed. 2d 435 (1974)* (TROs are used only to preserve status quo and prevent irreparable harm as long as necessary before hearing can be held, but no longer). *See Fed. R. Civ. P. 65(b).*

A party seeking a TRO must meet the same requirements necessary to obtain a preliminary injunction: irreparable injury, probability of success on the merits, balance of potential harm between the parties, and public interest. *See § 5.06 above*. The principle distinction is the time factor, with the risk of irreparable injury being more urgent in cases warranting TRO before a hearing can be held on a preliminary injunction. Thus, the party moving for a TRO must show that irreparable harm is imminent so that the court should act to maintain the status quo until it can decide on the preliminary injunction. A movant bringing such a motion *ex parte* must prove that the alleged injury is so imminent that it requires court action before notice can be given to the adverse party. *See § 5.08[3] below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 65.30 -65.31, 65.36.*
- *Bender's Federal Practice Forms* Form Nos. 65.10-65.30.
- *Federal Litigation Guide PP 7.40 -7.42.*
- *Fed. R. Civ. P. 65(b)* (TROs).

[2] Seeking Temporary Restraining Order (TRO); Notification

Requirement

A party seeking a TRO must attempt to notify the opposing party in any manner that is feasible, given the urgency of the circumstances. Generally, a party will seek a TRO simultaneously with a motion for a preliminary injunction, and many or all of the same attachments usually support both requests. In rare instances, a court will grant an ex parte restraining order, but the court will do so only if the applicant makes an exceptionally strong showing of the need for immediate relief and the inability to give the opposing party prior notice. *See Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 180, 89 S. Ct. 347, 21 L. Ed. 2d 325 (1968)* (court should not issue TRO *ex parte* unless movant shows impossibility of notifying opposing parties); *see also Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers, 415 U.S. 423, 433, 94 S. Ct. 1113, 39 L. Ed. 2d 435 (1974)* (informal notice and hastily arranged hearing on TRO preferable to no notice or hearing at all).

Warning:

Local rules and individual judges' rules may include specific requirements for the content of moving papers and orders on a motion seeking a TRO.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 65.30 -65.32.*
- *Bender's Federal Practice Forms* Form Nos. 65.10-65:30.
- *Federal Litigation Guide PP 7.43, 7.44 .*
- *Fed. R. Civ. P. 65(b)* (TROs).

[3] Seeking Temporary Restraining Order (TRO) *Ex Parte*; Special Requirements

To obtain a TRO without written or oral notice to the adverse party or that party's attorney, the requesting party must submit:

1. Specific facts by affidavit or verified complaint showing that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or its counsel can be heard in opposition; and

2. The applicant's counsel's written certification to the court concerning the efforts, if any, that they made to give notice as well as the reasons supporting their claim that notice should not be required under the circumstances.

See Fed. R. Civ. P. 65(b)(1).

Warning:

Except in those cases in which a court is convinced that notice will itself result in irreparable harm, the chances of obtaining a TRO are much lower if the judge is not confident that the applicant has been diligent in providing adequate notice of the request. *See Granny Goose Foods, Inc. v. Brotherhood of Teamsters, 415 U.S. 423, 433, 94 S. Ct. 1113, 39 L. Ed. 2d 435 (1974) .*

In addition, an *ex parte* application for a TRO must also:

1. State the date and hour it was issued.

2. Describe the injury and state why it was irreparable.

3. State why the order was issued without notice.

4. Be promptly filed in the clerk's office and entered in the record.

See Fed. R. Civ. P. 65(b)(2).

Timing:

Note the requirement for prompt filing in the clerk's office and that the order expires at the time designated by the court, not to exceed 14 days after entry of the TRO, unless before that time the court, for good cause, extends it for another 14-day period or the adverse party consents to a longer extension. Also, the reasons for seeking an extension must be entered in the record. *Fed. R. Civ. P. 65(b)(2).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 65.33, 65.34, 65.37 -65.39.*
- *Bender's Federal Practice Forms* Form No. 65.12.
- *Federal Litigation Guide PP 7.45, 7.46 .*
- *Fed. R. Civ. P. 7(b)* (motions and other papers).
- *Fed. R. Civ. P. 11(b)* (attorney certification).
- *Fed. R. Civ. P. 65(b)(1)* (issuing TROs without notice).
- *Fed. R. Civ. P. 65(b)(2)* (contents and expiration of TROs).

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.09

§ 5.09 Providing Security for Preliminary Injunction or TRO

An applicant seeking a preliminary injunction or TRO must provide a bond as security to safeguard the party to be enjoined from damage or loss if the injunction or TRO is wrongly issued. *See Fed. R. Civ. P. 65(c)*. The amount is subject to the court's discretion; it can be nominal or even as low as nothing. *See Atlanta v. Metropolitan Atlanta Rapid Transit Authority, 636 F.2d 1084, 1094 (5th Cir. 1981)* (to obtain restraining order, applicant must provide security in amount within court's discretion; amount can be zero); *see also Barahona-Gomez v. Reno, 167 F.3d 1228, 1234 (9th Cir. 1999)* , *reaff'd on rehearing, 236 F.3d 1115 (9th Cir. 2001)* (requirement for "nominal bond of $1,000" in immigration case was within district court's discretion).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 65.50 -65.53*.
- *Bender's Federal Practice Forms* Form Nos. 65:220-65:233.
- *Federal Litigation Guide PP 7.47, 7.73*.
- *Fed. R. Civ. P. 65(c)* (security).

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.10

§ 5.10 Drafting Proposed Injunction Order or Temporary Restraining Order; Specificity Requirement

When drafting a proposed preliminary injunction order or temporary restraining order, a party must:

1. State the reasons that the order is being issued;

2. State the terms of the order specifically; and

3. Describe in reasonable detail the act or acts to be restrained by the issuance of the order.

See Fed. R. Civ. P. 65(d)(1). The specificity requirement prevents uncertainty and confusion on the part of those faced with injunctive orders in order to avoid a possible contempt citation on a decree too vague to be understood. Moreover, the requirement facilitates informed and effective appellate review, thereby increasing the likelihood of successful enforcement.

Circuit Split: Although most Circuits (e.g., the Seventh Circuit) do not allow incorporation by reference of terms from other documents, such as the complaint, into preliminary injunctions and TROs, others (e.g., the Ninth Circuit) have allowed it in rare circumstances under which the enjoined party has received adequate notice of the specific acts prohibited. *See, e.g., Dupuy v. Samuels, 465 F.3d 757, 758-760 (7th Cir. 2006)* . (*Fed. R. Civ. P. 65(d)*, which requires that injunction describe acts prohibited or required in reasonable detail and not by reference to the complaint or other document, should be interpreted literally, so that incorporation by reference is never appropriate); *but see Reno Air Racing Ass'n v. McCord, 452 F.3d 1126, 1134-1134 (9th Cir. 2006)* (while TRO usually should not incorporate another document by reference, there are rare exceptions to the rule).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 65.50.*
- *Bender's Federal Practice Forms* Form Nos. 65:50, 65:61.

- *Federal Litigation Guide P 7.71.*
- *Fed. R. Civ. P. 65(d)(1)* (required contents and scope of injunctions or TRO).

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.11

§ 5.11 Seeking Impoundment in Copyright Proceedings Under Rule 65(b)

Fed. R. Civ. P. 65 applies to impoundments in a copyright infringement action. *See Fed. R. Civ. P. 65(f)*. The applicant may seek to have the court impound all copies or recordings claimed to have been made or used in violation of the copyright owner's exclusive rights, and all articles by means of which the copies or recordings may be reproduced. *See 17 U.S.C. § 503(a)*. Impoundment can be sought *ex parte* on a strong showing of reasons why notice is likely to defeat effective relief. *See Fed. R. Civ. P. 65(f)*, Committee Note of 2001.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 65.90*.
- *Nimmer on Copyright,* Chapter 35.
- *17 U.S.C. § 503* (remedies for copyright infringement).
- *Fed. R. Civ. P. 65(f)* (copyright infringement).

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Chapter 5 PROVISIONAL REMEDIES
PART C: OPPOSING PRELIMINARY INJUNCTIVE RELIEF

1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.12

§ 5.12 Stating Grounds for Opposition to Injunctive Relief

[1] Proving that Requirements for Injunctive Relief Have Not Been Met

Because there are several strict requirements that a party must satisfy in order to obtain injunctive relief, often the strongest argument made by the party opposing such a motion is that the movant has not established one or more of the requirements for injunctive relief. Because the court's determination of whether or not injunctive relief is warranted is usually heavily fact based, providing as much evidentiary support as possible in support of the points of law raised in the motion lends even more weight and credibility to the arguments raised. Although this list is not exhaustive, courts have denied motions for injunctive relief when the opposing party has convincingly argued that:

1. **Injury to moving party will not be irreparable if relief denied at this time.** *See Acierno v. New Castle County, 40 F.3d 645, 653-654 (3d Cir. 1994)* (denial of building permit did not constitute irreparable harm when potential harm was merely speculative in nature).

2. **Moving party has low probability of success on the merits.** *See British Printing & Communication Corp. plc v. Harcourt Brace Jovanovich, Inc., 664 F. Supp. 1519, 1531-1532 (S.D.N.Y. 1987)* (preliminary injunctive relief denied against corporation targeted for acquisition when movant corporation failed to demonstrate likelihood of ultimate success on merits).

3. **Balance of harm to responding party greater than risk of harm to moving party.** *See American Motorcyclist Ass'n v. Watt, 714 F.2d 962, 966-967 (9th Cir. 1983)* (preliminary injunction preventing implementation by government of environmental plan properly denied when balance of hardships favored government allegation of permanent harm to fragile desert resources).

4. **Moving party has adequate remedy at law.** *See Northern California Power Agency v. Grace Geothermal Corp., 469 U.S. 1306, 1306, 105 S. Ct. 459, 83 L. Ed. 2d 388 (1984)* (party seeking injunction must show that it does not have adequate remedy at law); *Van Arsdel v. Texas A&M University, 628 F.2d 344, 346 (5th Cir. 1980)* (preliminary injunction properly denied when plaintiff, in action against university, could be otherwise compensated by receipt of back pay and reinstatement of teaching position).

[2] Opposing Injunctive Relief on Equitable or Jurisdictional Grounds

In addition to the standard legal argument that the court should deny the motion because the moving party has failed to meet its burden of proving that it has satisfied all of the requirements necessitating injunctive relief, the opposing party may also argue that the motion should not be granted on equitable or jurisdictional grounds, including the following:

1. **Public interest would not be served or might be harmed by injunction.** *See Tilton v. Capital Cities/ABC, 827 F. Supp. 672, 674 (N.D. Okla. 1993)* (public policy favored denial of preliminary injunction relief seeking to enjoin rebroadcast of allegedly defamatory television program).

2. **Anti-injunction statute applies to the case.** *See Brother Records, Inc. v. Jardine, 432 F.3d 939, 942-943 (9th Cir. 2005)* (district court's authority to issue injunction is limited by Anti-Injunction Act).

3. **Laches bars injunctive relief.** *See Kansas v. Colorado, 514 U.S. 673, 687, 115 S. Ct. 1733, 131 L. Ed. 2d 759 (1995)* (doctrine of laches can bar equitable relief).

4. **Unclean hands doctrine bars injunctive relief when issuance of injunction would encourage misconduct or illegal activity.** *See GoTo.com, Inc. v. Walt Disney Co., 202 F.3d 1199, 1209-1210 (9th Cir. 2000)* (doctrines of laches can bar preliminary injunction in trademark infringement case).

5. **Court lacks jurisdiction to issue injunction.** *See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, 527 U.S. 308, 119 S. Ct. 1961, 144 L. Ed. 2d 319 (1999)* (district court has no authority to issue preliminary injunction preventing debtors from disposing of their assets pending adjudication of creditors' contract claim for money damages because it is not a remedy historically available from court of equity).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 65.06 -65.07, 65.22, 65.36.*
- *28 U.S.C. § 2283* (Anti-Injunction Act).

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.13

§ 5.13 Raising Objections to Order to Show Cause; Timing

If the court has issued an order to show cause, the responding party should review the order immediately to ascertain the time period allotted for filing opposition papers. If injunctive relief is requested by motion, it would be prudent for the opposing party to review local district court rules as well as the judge's order itself in order to determine the appropriate time limit for filing opposition papers. Affidavits opposing a motion generally must be filed no later than seven days before a hearing on the motion, unless the court permits otherwise. *See Fed. R. Civ. P. 6(c)(2).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d Ed.) §§ 65.06 -65.07, 65.22, 65.36.*
- *Fed. R. Civ. P. 6(d)* (timing).

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Chapter 5 PROVISIONAL REMEDIES
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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.14

§ 5.14 Stating Grounds for Dissolving or Modifying Preliminary Injunctive Relief

Because injunctive relief is based on presumably temporary circumstances, the issuing court may modify the injunctive relief to reflect changing events and should consider whether the original purpose of the injunctive relief would be facilitated by modification or dissolution. *See Consumer Advisory Bd. v. Glover, 989 F.2d 65, 67 (1st Cir. 1993)* (court has power to terminate or modify injunctive relief to further original purpose of injunctive order); *Patterson v. Newspaper & Mail Deliverers' Union, 13 F.3d 33, 38-39 (2d Cir. 1993)* (injunctive relief may be modified or vacated when original objectives of injunction have been satisfied).

A party may move for modification or dissolution of an order for preliminary relief on the grounds that:

1. **Order is vague, overbroad or ambiguous.** *See Hughey v. JMS Development Corp., 78 F.3d 1523, 1531 (11th Cir. 1996)* (injunction must set forth reasons for issuance, be specific in terms, and describe in reasonable detail, and not by reference to complaint or other document, act or acts to be restrained); *E. & J. Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280, 1297-1298 (9th Cir. 1992)* (court found some terms of permanent injunction overbroad and modified it accordingly).

2. **Circumstances of case have changed, eliminating need for preliminary injunctive relief.** *See New York State Ass'n for Retarded Children v. Carey, 706 F.2d 956, 967-970 (2d Cir. 1983)* (injunctive relief was dissolved in class action when circumstances underlying original injunction changed).

3. **Movant abused order by seeking unnecessary extension.** *See Hudson v. Barr, 3 F.3d 970, 975-976 (6th Cir. 1993)* (delay in holding hearing to determine merits of motion for preliminary injunction warranted dissolution of temporary restraining order).

4. **Underlying law supporting the original injunction was amended or repealed.** *See United States v. Snepp, 897 F.2d 138, 141 (4th Cir. 1990)* (injunction may be modified "where warranted by a change of law").

Warning:

Voluntary cessation of the conduct enjoined does not moot a case. *See FTC v. Affordable Media, LLC, 179 F.3d 1228, 1238 (9th Cir. 1999)* (citing *United States v. W. T. Grant Co., 345 U.S. 629, 632, 73 S. Ct. 894, 97 L. Ed. 1303 (1953)* (finding injunction moot based on defendant voluntarily ceasing enjoined conduct would leave defendant "free to return to his old ways").

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 65.40, 65.60.*
- *Fed. R. Civ. P. 65(d)* (required contents and scope of injunction or TRO).

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.15

§ 5.15 Motion to Dissolve or Modify Temporary Restraining Order (TRO)

[1] Seeking Dissolution or Modification of Temporary Restraining Order (TRO)

A party may bring a motion to modify or dissolve a preliminary injunction at any time before the court enters final judgment. *See Canal Authority of Florida v. Callaway, 489 F.2d 567, 578-579 (5th Cir. 1974)* (court has continuing jurisdiction over preliminary injunction and is authorized to make equitable changes in light of subsequent changes in facts, law, or for good cause shown).

Before moving to dissolve or modify a temporary restraining order issued against it, a party must first give two days' notice to the party that obtained the TRO, unless the TRO proscribes an alternative notification period. *See Fed. R. Civ. P. 65(b)(4).*

[2] Seeking Preliminary Injunction at Hearing on Dissolving or Modifying Temporary Restraining Order (TRO)

If the parties are in a position to present legal arguments and evidence for and against the issuance of a preliminary injunction at the time of the hearing on the motion to dissolve the TRO, the court may proceed in the same manner as if it were a hearing on an application for a preliminary injunction. *See Brotherhood of R. Carmen, Local No. 429 v. Chicago & N. W. R. Co., 354 F.2d 786, 797 (8th Cir. 1965)* (party that obtains TRO must proceed with application for preliminary injunction and, if they do not, court will dissolve TRO).

Timing:

A motion to vacate or dissolve an injunction based on changed circumstances is not subject to 28-day time limit set forth in *Fed. R. Civ. P. 59(e). See Credit Suisse First Boston Corp. v. Grunwald, 400 F.3d 1119, 1124 (9th Cir. 2005)* (motion to vacate or dissolve injunction based on changed circumstances is not subject to *Fed. R. Civ. P. 59(e)* time limit).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 65.40*.
- *Bender's Federal Practice Forms* Form Nos. 65.80-65:91, 65.210.
- *Fed. R. Civ. P. 7(b)* (motions and other papers).
- *Fed. R. Civ. P. 65(b)(4)* (motion to dissolve TRO).

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.16

§ 5.16 Seeking Recovery on Bond for Wrongful Restraint or Enjoinment

A party that has been wrongfully restrained or enjoined by a TRO may seek recovery on the bond posted under *Fed. R. Civ. P. 65(c). Fed. R. Civ. P. 65.1* (proceedings against surety). *See §§ 5.42-5.50 below* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 65.53.*
- *Bender's Federal Practice Forms* Form Nos. 65:230, 65:231.
- *Fed. R. Civ. P. 65(c)*(security).
- *Fed. R. Civ. P. 65.1* (proceedings against a surety).
- *Slidell, Inc. v. Millennium Inorganic Chems., Inc., 460 F.3d 1047, 1059 (8th Cir. 2006)* (party that incurred costs and damages due to wrongful enjoinment may recover on injunction bond).

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Chapter 5 PROVISIONAL REMEDIES
PART E. ENFORCING PRELIMINARY INJUNCTIVE RELIEF

1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.17

§ 5.17 Checklist for Enforcing Preliminary Injunctive Relief

- ☐ Determine persons against whom injunctive relief can be enforced. *See § 5.18 below*.
- ☐ File motion for contempt of court against noncompliant party. *See §§ 5.19, 7.21-7.26 below*.
- ☐ **Search by Topic:** Civil Procedure > Remedies > Injunctions

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.18

§ 5.18 Determining Persons Against Whom Injunctive Relief Can Be Enforced

Parties to the action, their officers, agents, employees, attorneys, and all persons acting in concert with the parties who receive actual notice may be bound by an injunction or TRO. *Independent Federation of Flight Attendants v. Cooper, 134 F.3d 917, 920 (8th Cir. 1998)* (a nonparty with actual notice may be held in contempt when nonparty aids or abets named party in concerted violation of court order).

Moreover, persons in privity with the parties may also be bound. *See Regal Knitwear Co. v. NLRB, 324 U.S. 9, 13-14, 65 S. Ct. 478, 89 L. Ed. 661 (1945)* (injunction not only binds defendants but also binds those identified with defendants in interest, in "privity" with them, or subject to their control).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 65.80.*
- *Bender's Federal Practice Forms* Form Nos. 65:270-65:281.
- *Fed. R. Civ. P. 7(b)* (motions and other papers).
- *Fed. R. Civ. P. 65(d)(2)* (persons bound by injunction or TRO).

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.19

§ 5.19 Moving for Contempt of Court

A party may move for contempt of court against a person who does not comply with a preliminary injunction or TRO, if the movant can show by clear and convincing evidence that the order is clear and unambiguous and the alleged contemnor is able to comply, but has not tried to do so. *See King v. Allied Vision, 65 F.3d 1051, 1058 (2d Cir. 1995)* (party may be held in civil contempt for failure to comply with court order if the order is clear and unambiguous, proof of noncompliance is clear and convincing, and contemnor has not diligently attempted to comply in a reasonable manner). For further discussion of contempt, *see* §§ *7.21-7.26 below*.

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. *See United States v. United Mine Workers, 330 U.S. 258, 294-295, 67 S. Ct. 677, 91 L. Ed. 884 (1947)* (violations of an order are punishable as criminal contempt even though the order is set aside on appeal or though the basic action has become moot); *see also* § *7.23 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 65.81.*
- *Bender's Federal Practice Forms* Form Nos. 65:270-65:281.
- *Federal Litigation Guide PP 7.80, 7.81.*
- *Reynolds v. Roberts, 207 F.3d 1288, 1298 (11th Cir. 2000)* (summarizing civil contempt procedure for failure to comply with preliminary injunction).

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Chapter 5 PROVISIONAL REMEDIES
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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.20

§ 5.20 Checklist for Appealing Preliminary Injunctive Relief

- ☐ Determine whether order can be appealed. *See § 5.21 below*.
- ☐ Appeal extended ex parte TRO or preliminary injunction. *See § 5.23 below*.
- ☐ Seek stay or other relief from injunction pending appellate review. *See § 5.24 below*.
- ☐ Appeal amount of security bond. *See § 5.25 below*.
- ☐ **Search by Topic:** Civil Procedure > Remedies > Injunctions

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.21

§ 5.21 Determining Whether Order Can Be Appealed

Except as otherwise provided in *28 U.S.C. § 1292(a)(1)* and *(d)* and except when direct review may be had in the Supreme Court, the courts of appeal have jurisdiction over appeals from interlocutory orders of the district courts granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. *See 28 U.S.C. § 1292(a)(1).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 203.01, 203.10*
- *Federal Litigation Guide P 48.31.*
- *28 U.S.C. § 1292(a)(1)* (courts of appeal generally have jurisdiction to hear appeals of district courts' interlocutory orders).

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.22

§ 5.22 Appealing Preliminary Injunction

Generally the appeals court reviews a decision on a motion for preliminary injunction solely to determine whether the district court abused its discretion. *See Grand River Enterprise Six Nations, Ltd. v. Pryor, 481 F.3d 60, 60 (2d Cir. 2007)* (district court has wide discretion in determining whether to grant preliminary injunction and court of appeals review is limited to abuse of discretion).

The reviewing court determines only whether the district court used the appropriate legal standards governing the issuance of a preliminary injunction, and whether it correctly apprehended the law with respect to the underlying issues. It does not substitute its own decision for the district court's. *See Joelner v. Village of Wash. Park, 378 F.3d 613, 619-620 (7th Cir. 2004)* (appellate court examines legal conclusions de novo, findings of fact for clear error, and balancing of factors required for an injunction for abuse of discretion); *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc., 204 F.3d 867, 874 (9th Cir. 2000)* (district court's grant of preliminary injunction will be reversed only if district court abused its discretion by basing its decision on erroneous legal standard or on clearly erroneous factual findings).

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.23

§ 5.23 Appealing Extended TRO

A TRO is generally not appealable. However, if a court extends an ex parte TRO more than 28 days from its entry date without the enjoined party's consent, the TRO becomes a preliminary injunction and is appealable. *See Sampson v. Murray, 415 U.S. 61, 86-88, 94 S. Ct. 937, 39 L. Ed. 2d 166 (1974)* (TRO continued beyond time permissible under *Fed. R. Civ. P. 65* must be treated as a preliminary injunctions and should not be shielded from appellate review.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 203.10.*
- *28 U.S.C. § 1292(a)(1)* (courts of appeal generally have jurisdiction to hear appeals of district courts' interlocutory orders).

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.24

§ 5.24 Seeking Stay or Other Relief from Injunction Pending Appellate Review

Unless otherwise ordered by the court an interlocutory or final judgment in an action for an injunction is not stayed during the period after its entry or during the pendency of an appeal. The district court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal on such terms as to bond or otherwise as it considers proper for security of the adverse party's rights.

The court of appeals may also suspend, modify, restore, or grant an injunction pending appeal. *See Tribal Village of Akutan v. Hodel, 859 F.2d 662, 663 (9th Cir. 1988)* (court of appeals has power to suspend, modify, restore, or grant injunction during pendency of appeal).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 62.01-62.03.*
- *Federal Litigation Guide P 48.60.*
- *Fed. R. Civ. P. 62(c)* (allows modification, suspension, grant, or restoration of injunction pending appeal).

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.25

§ 5.25 Appealing Amount of Security Bond

The standard for review of a district court's decision on security bond is abuse of discretion. *See Atlanta v. Metropolitan Atlanta Rapid Transit Authority, 636 F.2d 1084, 1094 (5th Cir. 1981)* (amount of security required when preliminary injunction issues is a matter within the discretion of the trial court and the court may elect to require no security at all).

PRACTICE RESOURCES:

- *Fed. R. Civ. P. 65(c)* (security bond is set in the amount court considers proper).

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Chapter 5 PROVISIONAL REMEDIES
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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.26

§ 5.26 Checklist for Seizing Property Before Judgment or Opposing Prejudgment Seizure

☐ Determine whether state or federal law governs prejudgment seizure. *See §§ 5.27, 5.28 below.*

- ○ Seizure remedies are generally allowed according to state law.
- ○ Seizure remedies in cases affected by federal statutes are governed by federal law.

☐ For plaintiffs seeking prejudgment seizure, depending on the facts of the case, consider whether the following remedies are available: *See § 5.27 below.*

- ○ Attachment.
- ○ Garnishment.
- ○ Replevin.
- ○ Sequestration.
- ○ Other corresponding or equivalent remedies.

☐ Plaintiffs should ensure that statutory procedural requirements for prejudgment seizure are satisfied before investing time and money in preparing motion. *See § 5.28 below.*

- ○ Consider seeking preliminary injunctive relief if requirements for prejudgment seizure cannot be met. *See § 5.29 below.*

☐ For defendants opposing prejudgment seizure before court has entered order, prepare motion opposing prejudgment seizure; if order has already been entered, prepare motion to quash or modify prejudgment seizure order. *See § 5.30 below*.

- ○ If possible, include argument, supported by evidence, that adverse party has not satisfied statutory requirements for prejudgment seizure. *See §§ 5.28-5.30 below*.
- ○ Particularly if plaintiff is seeking prejudgment *ex parte*, argue that plaintiff did not, but should have, provided proper notice.
- ○ If applicable, claim that that property to be seized is exempt pursuant to state law. *See § 5.30 below*.
- ○ Include argument and evidence showing that plaintiff is not likely to prevail on the merits, and is therefore, unlikely to obtain a judgment. *See § 5.30 below*.
- ○ Request damages for improper seizure, if applicable.

☐ Draft and file opposition motion and/or claim of exemption, notice to plaintiff, and supporting documents in accordance with state law. *See § 5.30 below*.

☐ Defendants may also consider appeal prejudgment seizure as collateral order. *See § 5.31 below*.

☐ **Search by Topic:** Civil Procedure > Provisional Remedies

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.27

§ 5.27 Availability of Prejudgment Seizure Remedies Governed by State Law

Prejudgment seizure remedies available under *Fed. R. Civ. P. 64* include: arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies. *See Fed R. Civ. P. 64(b).*

With limited exceptions noted below, these prejudgment seizure remedies are generally available under the law of the state where the federal court is located, and state law also determines the rights to these remedies.

Exception:

Although the right to state prejudgment seizure remedies under *Fed. R. Civ. P. 64(a)* is generally governed by state law, federal statues govern seizure remedies in certain cases. Usually this involves property owned by the United States, attached by the United States, or seized by the United States under its revenue laws. Moreover, the property of nationally chartered banks, the Federal Reserve Bank, and the FDIC are not subject to state law provisional remedies. Examples of such statutes include:

- *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 immune from provisional seizures of property).
- *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).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 64.01, 64.13.*
- *Federal Litigation Guide PP 8.03, 8.05.*
- *Fed. R. Civ. P. 64(b)* (types of prejudgment seizure remedies available).

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.28

§ 5.28 Satisfying Procedural Requirements for Prejudgment Seizure

For a prejudgment seizure remedy to be available, the plaintiff must have already initiated the lawsuit by filing a complaint. *See Fed. R. Civ. P. 64(a)*. Prejudgment seizure remedies are available in actions removed from state to federal court, and any remedies granted while the action was in state court continue in effect after the case is removed.

Although the right to a prejudgment remedy and the type of remedy available (e.g., attachment, garnishment, etc.) is determined by state law, the procedure for obtaining the remedy is governed by the Federal Rules of Civil Procedure. *See United States v. St. Paul Mercury Ins. Co., 361 F.2d 838, 839 (5th Cir. 1966)* (when federal district court issued writ of garnishment permitted by state law, writ should have been served by U. S. Marshal as provided by Federal Rules, not by county sheriff as provided by state rules).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 64.10 -64.14, 69.03.*
- *Bender's Federal Practice Forms* Form Nos. 64:1-64:261.
- *Federal Litigation Guide PP 8.01, 8.02, 8.10.*
- *28 U.S.C. § 1450* (order of attachment or sequestration issued in state court prior to removal continues in effect after removal).
- *Fed R. Civ. P. 64(a)* (prejudgment seizure remedies available at commencement of and throughout action).

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.29

§ 5.29 Considering Preliminary Injunction if Prejudgment Seizure Not Available

Plaintiffs that cannot meet the statutory procedural requirements for prejudgment seizure may consider seeking a preliminary injunction in order to achieve a similar result. *See FTC v. H. N. Singer, Inc., 668 F.2d 1107, 1112 (9th Cir. 1982)* (district court has power to issue preliminary injunction to preserve status quo when state law does not allow attachment to issue); *see also §§ 5.02 -5.03* and *5.06 above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 64.13, 65.20.*

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.30

§ 5.30 Opposing, Modifying, or Quashing Prejudgment Seizure Order

A defendant opposing prejudgment seizure of its property before the court has entered an order should prepare a motion opposing the seizure on any or all of the following grounds, if applicable:

1. Plaintiff has failed to meet the procedural statutory requirements for prejudgment seizure. *See § 5.28 above*.

2. Claim that the property subject to seizure is exempt. The availability of exemptions as well as the processes for claiming them are subject to state law. *See KLC, Inc. v. Trayner, 426 F.3d 172, 175-176 (2d Cir. 2005)* (applying state law to determine a homestead exemption).

3. Argue and include supporting evidence showing that plaintiff is not likely to prevail on the merits and is therefore unlikely to obtain a judgment.

4. Particularly if plaintiff is seeking prejudgment seizure ex parte, argue that plaintiff could have, but did not, provide proper notice.

5. Draft and file opposition motion and/or claim of exemption, notice to plaintiff, and supporting documents, in accordance with state law.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 64.13, 69.03[3].*
- *Bender's Federal Practice Forms* Form Nos. 64:1-64:261.
- *Federal Litigation Guide P 8.11.*

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.31

§ 5.31 Appealing Prejudgment Seizure as Collateral Order

Generally, a party may not appeal an order granting prejudgment seizure, unless it qualifies as a collateral order. *See Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949)* (decisions determining claims of right separable from, and collateral to, rights asserted in action can be appealed before whole case is adjudicated). A party may, under certain circumstances, appeal an under denying prejudgment seizure. *See Britton v. Howard Sav. Bank, 727 F.2d 315, 320-322 (3d Cir. 1984)* (denial of writ of attachment appealable as collateral order because destruction of security before final judgment would render subsequent appeal meaningless).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 64.19.*
- *Federal Litigation Guide P 8.13.*

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Chapter 5 PROVISIONAL REMEDIES
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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.32

§ 5.32 Checklist for Appointing Receiver

☐ Before deciding to seek receivership, weigh the following initial considerations carefully:

○ Because receivership is a remedy of last resort, first determine whether a factual basis exists that justifies the appointment of receiver. *See § 5.34 below*.

○ Determine whether appointment of receiver is within court's equity jurisdiction in present case. *See § 5.35 below*.

○ Determine whether court has jurisdiction with reference to location of the property to be placed in receivership. *See § 5.35 below*.

○ Consider and prepare to respond to adverse party's arguments. *See § 5.40 below*.

○ Consider negative consequences of having receiver appointed. *See § 5.36 below*.

☐ For parties seeking appointment of a receiver by noticed motion:

○ *Fed. R. Civ. P. 66* does not authorize hearings on applications for receivership. Determine whether hearing is required by local district court rule or individual judge's rule, and if so, whether or not a particular date is specified. *See § 5.37 below*.

○ Prepare supporting affidavits and memorandum of law, if required. *See § 5.37 below*.

○ Draft order to show cause or notice of motion, and ask judge to sign order to show

cause. *See §§ 5.37, 5.38 below*.

○ Serve order to show cause or notice of motion, along with supporting papers, on adverse party. *See § 5.37 below*. If required by local rule, notify adverse party's creditors. *See § 5.38 below*.

○ Draft order appointing receiver and request judge's signature. *See § 5.37 below*.

○ Post receiver's bond, if necessary. *See § 5.37 below*.

○ Deliver signed order to receiver. Be sure to provide appropriate information and instructions for effective and proper control and management of receivership property.

☐ For parties seeking *ex parte* appointment of temporary receiver:

○ Obtain affidavits and other documentary evidence of good cause to support ex parte request for appointment of temporary receiver. *See § 5.39 below*.

○ If hearing required by local district court or individual judge's rule, prepare appropriate form of notice of hearing on whether receivership should be continued. *See § 5.39 below*.

○ Draft order appointing temporary receiver and request judge's signature. *See § 5.39 below*.

○ Deliver order of appointment to temporary receiver. Be sure to provide appropriate information and instructions for effective and proper control and management of receivership property. *See § 5.39 below*.

○ If required by local rule, give notice of appointment to adverse party. *See § 5.39[3] below*.

☐ **Search by Topic:** Civil Procedure > Remedies > Receiverships > Receivers > Appointments

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§ 5.33 Exercising Equitable Remedy of Receivership

Fed. R. Civ. P. 66 applies to receivers appointed pursuant to the court's general equitable powers. *See Fed. R. Civ. P. 66*, advisory committee note of 1946. It does not apply to receivers (trustees) in bankruptcy cases who are governed by the Bankruptcy Act. *See 11 U.S.C. §§ 321-323. Fed. R. Civ. P. 66* does not describe the powers of a receiver or define the circumstances permitting appointment of a receiver; it assumes that a receiver has already been or will be appointed by the federal court.

Because receivership is an equitable remedy, a party may request it in a variety of situations where ownership or management of property is a factor in the lawsuit. For example, the U.S. Security and Exchange Commission has used the federal court's equity powers in actions against public companies. *See SEC v. Koenig, 469 F.2d 198, 200 (2d Cir. 1972)* (appointment of receiver appropriate to supervise public disclosures, investigate and make a public report on transactions, and prepare for and hold meeting of shareholders).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 66.03, 66.04.*
- *Fed. R. Civ. P. 66.*

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§ 5.34 Seeking Appointment of Receiver

[1] Appointing Receiver Is Remedy of Last Resort

Although receivership is a remedy of last resort, under extreme circumstances, particularly when a plaintiff has shown good cause for concern that a defendant is attempting to wrongfully dispose of property that could satisfy a judgment, a party may find it necessary to seek neutral handling of property during litigation. Generally, courts will only appoint a receiver under the most compelling of circumstances. *See Consolidated Rail Corp. v. Fore R. R. Co., 861 F.2d 322, 326-327 (1st Cir. 1988)* (appointment of receiver is extraordinary remedy and will not be applied unless clear showing made that emergency exists).

While this extraordinary equitable remedy is appropriate in cases involving various factual circumstances, receivership is most often sought:

1. By a secured creditor with an interest in real property pending the foreclosure of a mortgage;

2. By minority shareholders seeking to protect corporate assets from dominant shareholders, officers, and directors;

3. By the holder of a deed of trust seeking conservation and management of property; or

4. By judgment creditors seeking to preserve the assets of the litigation.

Strategic Point:

Although receivership is traditionally used to protect property that may be at risk during litigation, creative litigants have persuaded federal courts to employ their equitable powers to appoint receivers to protect public rights. *See, e.g., O'Leary v. Moyer's Landfill, Inc., 677 F. Supp. 807, 815-816 (E.D. Pa. 1988)* (receiver appointed to manage landfill); *United States v. City of Detroit, 476 F. Supp. 512, 520 (E.D. Mich. 1979)* (receiver appointed over municipal water and sewage treatment plant).

[2] Determining Whether to Appoint Receiver; Factors Considered by Court

Courts have recognized many factors to be relevant when determining whether to appoint a receiver. *See Consolidated Rail Corp. v. Fore R. R. Co., 861 F.2d 322, 326-327 (1st Cir. 1988)* (listing factors considered in determining whether to appoint receiver). Although this list is not exhaustive, these factors include:

1. **Fraudulent conduct by adverse party.** *See Burnrite Coal Briquette Co. v. Riggs, 274 U.S. 208, 212, 47 S. Ct. 578, 71 L. Ed. 1002 (1927)* (fraudulent conduct by adverse party justifies receivership).

2. **Imminent danger that property will be lost or harmed.** *See Gordon v. Washington, 295 U.S. 30, 37-39, 55 S. Ct. 584, 79 L. Ed. 1282 (1935)* (imminent danger of property being lost or squandered justifies receivership).

3. **Adequacy of available legal remedies.** *See Leighton v. One William Street Fund, Inc., 343 F.2d 565, 568 (2d Cir. 1965)* (inadequacy of available legal remedies justifies receivership).

4. **Risk of harm from failure to appoint receiver outweighs injury to adverse party if application were granted.** *See Mintzer v. Arthur L. Wright & Co., 263 F.2d 823, 825 (3d Cir. 1959)* (allowing receivership if probability of harm to applicant if no receiver appointed would be greater than injury to adverse party if application granted).

5. **Applicant's probability of success on the merits and possibility of irreparable injury to applicant's interests in property.** *See Bookout v. First National Mortgage & Discount Co., 514 F.2d 757, 758 (5th Cir. 1975)* (receivership justified based on applicant's probable success on merits and possibility of irreparable injury to applicant's interests in property).

6. **Impossibility or impracticability of bringing action to final judgment.** *See View Crest Garden Apartments, Inc. v. United States, 281 F.2d 844, 849 (9th Cir. 1960)* (impossibility of prompt disclosure is a factor appropriately considered in appointing receiver).

7. **Whether receivership will serve interests of applicant and others seeking protection.** *See Commodity Futures Trading Com. v. Comvest Trading Corp., 481 F. Supp. 438, 441 (D. Mass. 1979)* (degree of probability that interests of those seeking protection would in fact be served by receivership is key factor in determining whether receivership appropriate).

Warning:

A party seeking the appointment of a receiver for a solvent business entity may require particularly careful factual support. Dissatisfaction with existing management and the fact that the business is losing money are not sufficient to warrant receivership. *See Macon Lumber Co. v. Bishop & Collins, 229 F.2d 305, 307 (6th Cir. 1956)* (appointment of receiver for solvent business is a measure which court consider only when danger of loss to stockholders is imminent and no adequate remedy at law exists).

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§ 5.35 Satisfying Jurisdictional Requirements for Receivership

Because an application for appointment of a receiver is not a pleading, but a motion for an order in a pending action, the application need not show the basis of the court's subject matter jurisdiction, which presumably has already been shown in the complaint.

The court has power to appoint a receiver if the complaint in the pending action seeks equitable relief. *See Kelleam v. Maryland Casualty Co., 312 U.S. 377, 381, 61 S. Ct. 595, 85 L. Ed. 899 (1941)* . However, receivership is only a means to reach a legitimate end through a court of equity's exercise of power; it is not an end in itself. *See Gordon v. Washington, 295 U.S. 30, 37, 55 S. Ct. 584, 79 L. Ed. 1282 (1935)* (federal court of equity will not appoint a receiver when appointment is not ancillary to another form of final equitable relief).

Common examples of equitable relief that could implicate appointment of a receiver include:

1. Injunctive relief;

2. Declaratory relief;

3. Rescission of a contract and restitution of, for example, real property conveyed, personal property transferred, or money paid;

4. Specific performance of a contract to convey real property or transfer personal property;

5. Dissolution of a partnership; and

6. Foreclosure of a lien on real or personal property.

Whenever a court has jurisdiction over a pending action *in rem*, it has possession of the subject property and may appoint a receiver for the property when appropriate, whether or not the court has personal jurisdiction of the owner or another person entitled to possession of the property. *See Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 195-196, 55 S. Ct. 386, 79 L. Ed. 850 (1935)* (recognition of general principle that court having jurisdiction *in rem* has

power to appoint receiver for subject property). If the court has personal jurisdiction over the legal owner or another person entitled to possession of the property, the court may also appoint a receiver for the property. *See United States v. Arizona Fuels Corp. 739 F.2d 455, 460-461 (9th Cir. 1984)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 66.02 -66.04.*
- *Federal Litigation Guide PP 8.20, 8.22, 8.24.*
- *Fed. R. Civ. P. 66.*

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Chapter 5 PROVISIONAL REMEDIES
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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.36

§ 5.36 Considering Potential Negative Consequences of Receivership

Before seeking appointment of a receiver, a party should consider the potential negative consequences. Under a receivership, the parties cede to the court a substantial amount of control over the enterprise that is at stake in the case as well as the course of the litigation, because a case in which a receiver has been appointed cannot be dismissed except by court order. *See Fed. R. Civ. P. 41(a)(1), 66.*

Furthermore, there could be some financial risks for the applicant, who may be required to pay a premium for a bond covering potential liability to the adverse party. *See § 5.37 below*. The applicant may also have to pay some expenses and a portion of the receiver's fee in the event that the court determines that the receivership was improper, as well as costs of receivership to the adverse party that would not have arisen but for appointment. *See CFTC v. Frankwell Bullion Ltd., 99 F.3d 299, 306 (9th Cir. 1966)* .

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.37

§ 5.37 Notifying Parties and Posting Bond Before Receiver Appointed

An applicant seeking appointment of a receiver must draft an order to show cause or notice of motion, specifying a hearing date and obtain the judge's signature, if order to show cause is the method employed. The applicant must notify other parties to the action by serving the order or notice of motion, along with supporting papers. In addition, the court has the discretion to order the applicant to post a bond, and also has the authority to determine the terms and conditions of the bond.

Warning:

Fed. R. Civ. P. 66 does not require a formal hearing before a receiver is appointed. *See Citronelle-Mobile Gathering, Inc. v. Watkins, 934 F. 2d 1180, 1188-1189 (11th Cir. 1991)* (no evidentiary hearing required prior to appointment of receiver when case had been fully adjudicated on merits and court was trying to execute judgment). However, local rules in some districts provide that a hearing notice must be served upon certain creditors of the adverse party, who is required to provide a list of creditors to the court to help ensure that the notification requirement is met.

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.38

§ 5.38 Delivering Order of Appointment to Receiver

After a receiver is appointed, the party that obtained the receivership must deliver the signed order to the receiver. The order should not only specify what the receiver is to do with the property but should also designate the powers that the receiver may properly exercise.

Practically speaking, appointment orders customarily provide that:

1. The receiver is authorized to take and have complete and exclusive control, possession, and custody of the property in receivership;

2. All persons, on being presented with a certified copy of the order, are directed to deliver to the receiver any and all of the property in receivership that is in their possession or under their control; and

3. All persons having actual knowledge or due notice of the order are enjoined from disturbing the possession of the receiver in any way, prosecuting any actions that affect the property in receivership, or transferring or otherwise disposing of, or concealing, the interest of the party (who is subjected to the receivership) in the property.

In some cases, appointment orders may include special provisions, such as the following:

1. The receiver must file an oath to faithfully execute the duties of a receiver as set forth in the order;

2. The receiver has power to exercise voting rights (or other particular ownership rights) tied to property, such as shares of stock, in receivership; and

3. The receiver will have no personal liability for any acts or omissions in connection with the performance of duties as receiver.

Strategic Point:

In the absence of a governing local rule, a party may use not only reported cases but also local rules from the court where the action is pending as guidelines for particular provisions in the appointment order.

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.39

§ 5.39 Seeking *Ex Parte* Appointment of Temporary Receiver

[1] Showing Good Cause for *Ex Parte* Appointment of Temporary Receiver

An applicant seeking *ex parte* appointment of a temporary receiver must show good cause that that the court must take immediate action to appoint a receiver before notice could be given to the adverse party and a hearing could be scheduled. Generally, courts follow the same standard for obtaining a temporary restraining order (TRO) on an *ex parte* application. *See § 5.09 above*. Thus, the court may appoint a temporary receiver *ex parte* if it the applicant shows, either by affidavit or by verified complaint, that immediate and irreparable injury, loss, or damage will result to the applicant if the court does not appoint a receiver immediately. *See Arkansas Louisiana Gas Co. v. Kroeger, 303 F.2d 129, 132 (5th Cir. 1962)* (when notice is impracticable because defendant has absconded or cannot be found or when notice would defeat purpose of receivership, court has discretion to make *ex parte* appointment).

Strategic Point:

When considering making an *ex parte* application for receivership, be aware that courts generally view certain factors as deficiencies, which may include: (1) cursory efforts at service; (2) "emergency" situation was foreseeable; (3) insufficient documentation supporting application; and (4) weighty obligations imposed on innocent parties. *See Federal Home Loan Mortgage Corp. v. Spark Tarrytown, Inc., 813 F. Supp. 234, 236-237 (S.D.N.Y. 1993)* (listing deficiencies in an *ex parte* application for receivership that require careful scrutiny).

[2] Holding Prompt Hearing on Temporary Receivership

As is the practice when issuing a temporary restraining order (TRO), the court appointing a temporary receiver on an *ex parte* application must hold a reasonably prompt hearing on whether the receivership should be continued during the pendency of the litigation. *See Gibralter Savings v. Ryan, 772 F. Supp. 1290, 1295 (D.C. Cir. 1991)* (ruling on constitutionality of statute that provided for hearing after receiver was appointed).

[3] Notifying Parties of Hearing on Extension of Appointment of Receiver

After a temporary receiver is appointed on an *ex parte* application, if the party that obtained the receivership intends to request that the appointment to be extended for the duration of the case, the applicant must serve either an order to show cause or notice of motion upon all parties and affected creditors.

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.40

§ 5.40 Opposing Appointment of Receiver

[1] Attacking Factual Basis for Seeking Receivership

A party challenging the appointment of a receiver must employ a fact-based argument to persuade the court that the appointment would do more harm than good. A party opposing receivership should present factual evidence supporting as many of the following arguments as possible:

1. No risk that property in question will be lost or squandered;

2. Party challenging receivership did not engage in fraudulent conduct;

3. Available legal remedies are adequate;

4. If receiver appointed, injury to party challenging receivership greater than harm to applicant if no receiver were appointed;

5. Applicant unlikely to succeed on merits and applicant's interests in property in question is remote;

6. Appointment of receiver will not enhance prospect of bringing action promptly to final judgment; and

7. Receivership will not serve interests of those seeking protection.

See Meyer Jewelry Co. v. Meyer Holdings, 906 F. Supp. 428, 434 (E.D. Mich. 1995) (refusing to appoint receiver when imminent threat to applicant's investment not established, adequate legal remedy existed, and harm to applicant if no receiver were appointed outweighed by injury to opposing party if application were granted).

[2] Suggesting Less Drastic Alternatives to Receivership

A party challenging the appointment of a receiver may also suggest alternatives that could achiever a similar result, such as furnishing a bond, consenting to some form of injunctive relief, depositing funds in an escrow account, or submitting a letter of credit to the clerk of the court to establish a payment fund.

If it appears likely that the court will appoint a receiver, the opposing party may suggest a less drastic alternative to traditional receivership, such as a limited receivership or a custodian in lieu of a receiver. Moreover, the opposing party may also challenge the eligibility, qualifications, or credentials of the applicant's nominee for appointment.

[3] Attacking Federal Government's Statutory Right to Seek Receivership

If the federal government is suing to collect a debt and has invoked its statutory right to seek appointment of a receiver, a party opposing the appointment may raise the government's failure to meet the statutory requirements to obtain receivership in addition to mounting an attack on the facts.

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§ 5.41 Appealing from Ruling on Appointment of Receiver

If a receiver is appointed, the party opposing receivership may consider making an interlocutory appeal. *See 28 U.S.C. § 1292(a)(1)*; *Santibanez v. Wier McMahon & Co., 105 F.3d 234, 238 (5th Cir. 1997)* (courts of appeal have jurisdiction of appeals from interlocutory orders appointing receivers or denying orders to wind up receiverships).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 66.03[2], 66.04, 66.07.*
- *Federal Litigation Guide PP 8.21[2], 8.22, 8.23, 8.25[3], 8.26.*
- *Bender's Federal Practice Forms* Form Nos. 66:1, 66:2, 66:10-66:12.
- *28 U.S.C. 1292(a)(1)* (courts of appeal generally have jurisdiction to hear appeals of district courts' interlocutory orders).
- *Fed. R. Civ. P. 5(a)* (order to show cause or notice of motion must be served on other parties).
- *Fed R. Civ. P. 7(b)* (motions and other papers).
- *Fed. R. Civ. P. 66* (practice in administering estate by receiver must accord with historical practice in federal courts or with local rule).

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.42

§ 5.42 Checklist for Enforcing Surety's Liability on Bond

☐ Review requirements set forth in *Fed. R. Civ. P. 65.1. See § 5.48 below.*

☐ Determine whether filing enforcement motion under *Fed. R. Civ. P. 65.1* motion is available.

○ Has surety entered into a bond, stipulation, or undertaking required or permitted by the Federal Rules? *See §§ 5.43* and *5.48[3] below.*

○ Was security given in a bankruptcy proceeding? If so, a Rule 65.1 motion is not available. *See § 5.43 below.*

○ Has the action in which the bond was posted been dismissed? If so, it may be necessary to bring an independent action. *See § 5.47 below.*

☐ Determine whether Rule 65.1 procedure is available against principal, as well as surety. *See § 5.44 below.*

☐ Determine whether conditions for payment under the bond have been satisfied. *See § 5.45 below.*

☐ Calculate damages recoverable under the bond. *See § 5.46 below.*

☐ Review terms of bond or other undertaking to ascertain any preconditions to filing motion, such as demand on surety. *See § 5.45 below.*

☐ Be sure to review local district court rules and individual judge's rules prior to preparing, filing,

and serving motion.

☐ Ensure that timing of motion is proper. *See § 5.48[1] below*.

☐ Consider whether bringing independent action in state or federal court would be more advantageous. *See § 5.47 below*.

- ○ Would attorney's fees be recoverable?
- ○ Would jury trial be available?
- ○ Would another jurisdiction provide a more convenient forum or other tactical advantages?

☐ Confer with opposing counsel in an attempt to resolve issues, which may not just save costs and expenses of filing motion, but may also be required by local rule. *See § 5.48[2] below*.

☐ Provide opposing counsel with documentation to substantiate claims for costs, interest, and damages.

☐ Review terms of bond or other undertaking to ascertain any preconditions to filing motion, such as demand on surety.

☐ Be sure to provide adequate notice to surety. *See § 5.48[3] below*.

☐ Draft, file, and serve motion in accordance with Federal Rules and local rules. *See § 1.02-1.13 above*; *§ 5.48 below*.

☐ **Search by Topic:** Civil Procedure > Remedies > Bonds > Sureties

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.43

§ 5.43 Understanding Enforcement Remedy Available Under Rule 65.1

Fed. R. Civ. P. 65.1 authorizes parties to seek to enforce the liability of a surety whenever the Federal Rules of Civil Procedure require or permit a party to give security and the security is given is in the form of a bond, stipulation, or other undertaking, including the following:

1. As a condition for a stay of proceedings to enforce judgment. [*Fed. R. Civ. P. 62(c), (d), (h)*]. *See Moore's Federal Practice (3d ed.) § 62.03.*

2. Incidental to attachment or other provisional remedies for which state law requiring security applies. [*Fed. R. Civ. P. 64*]. *See §§ 5.26 -5.31 above.*

3. As condition to TRO or preliminary injunction [*Fed. R. Civ. P. 65(b)*]. *See § 5.09 above.*

4. As security for costs required by local rule promulgated by the district court.

5. In a derivative action, as required by state law for shareholder to maintain action.

6. As security required by Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions.

Warning:

A Rule 65.1 motion is not available against a surety under bankruptcy proceeding bonds or undertakings, which are under the jurisdiction of the Bankruptcy Court and therefore governed by Bankruptcy rules. A proceeding against the surety in a bankruptcy proceeding may possibly be brought as an adversary proceeding under *Fed. R. Bankr. P. 9025.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 65.1.02 -65.1.04.*

- *Federal Litigation Guide P 7.75.*

- *Fed. R. Civ. P. 65.1.*

- *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 314, 119 S. Ct. 1961, 144 L. Ed. 2d 319 (1999)* (liability of surety who posts bond for preliminary injunction may be enforced on motion without necessity of independent action).

- *Bass v. First Pacific Networks, Inc. 219 F.3d 1052, 1054 (9th Cir. 2000)* (surety's liability on supersedeas bond may be enforced under either Rule 65.1 summary procedure or through independent action initiated in state or federal court).

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.44

§ 5.44 Filing Rule 65.1 Motion as Creditor Against Principal

A creditor may bring a *Rule 65.1* motion against a principal as well as a surety. *See Squaxin Island Tribe v. Washington, 781 F.2d 715, 723-724 (9th Cir. 1986)* (Rule 65.1 motion can be filed against principal as well as surety on bond). A surety may not bring a Rule 65.1 motion against the principal however. *See Aerotrade, Inc. v. Republic of Haiti, 399 F. Supp. 618 (S.D.N.Y. 1975)* .

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.45

§ 5.45 Satisfying Conditions for Executing on Bond

Before a party can bring a Rule 65.1 motion, the conditions for payment on the bond must have been satisfied and the surety's liability must have been accrued. Therefore, a party seeking enforcement of the bond will not generally be able to file a motion until after the underlying action has been resolved in the moving party's favor.

For example, a party may execute on a bond after a court has determined that the party had been unlawfully enjoined or restrained pursuant to *Fed. R. Civ. P. 65(c). See Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 910 F.2d 1049, 1054 (2d Cir. 1990)* (party has been wrongfully enjoined if it is ultimately found that the enjoined party had at all times the right to do the enjoined act).

Exception:

In rare circumstances, a party may be able to proceed against the bond despite the fact that the merits of the underlying action have been resolved against it or have not yet been resolved. *See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 317, 119 S. Ct. 1961, 144 L. Ed. 2d 319 (1999)* (petitioners' failure to appeal permanent injunction does not forfeit their claim that preliminary injunction was wrongful).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 65.1.03.*
- *Federal Litigation Guide P 7.75.*
- *Fed. R. Civ. P. 65(c).*

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.46

§ 5.46 Calculating Damages Recoverable Upon Execution of Bond or Undertaking

[1] Determining Damages Recoverable Upon Execution of Injunction Bond

Federal law governs the question of what is recoverable under an injunction bond issued under *Fed. R. Civ. P. 65(c). See Fireman's Fund Insurance Co. v. S. E. K. Constr. Co., 436 F.2d 1345, 1351-1352 (10th Cir. 1971)* . The moving party must prove that it was wrongfully enjoined and that it suffered damages that were proximately caused by an erroneously issued injunction. *See Milan Express, Inc. v. Averitt Express, Inc., 254 F.3d 966, 981 (11th Cir. 2001)* . There is a rebuttable presumption that a wrongfully enjoined or restrained party is entitled to have the bond executed. *See Nintendo of Am. v. Lewis Galoob Toys, 16 F.3d 1032, 1036 (9th Cir. 1994)* .

Although generally, the wrongfully enjoined party may recover from the surety provable damages up to the amount of the bond, the court may reduce or even deny damages if it is shown that the party has failed to mitigate damages. *See Coyne-Delany Co. v. Capital Development Board, 717 F.2d 385, 392 (7th Cir. 1983)* (failure to mitigate provides grounds for denying damages on injunction bond).

Warning:

Attorney's fees are not recoverable on an injunction bond unless the bond so provides. *See Matek v. Murat, 862 F.2d 720, 734 (9th Cir. 1988) , abrogated on other grounds by Holden v. Hagopian, 978 F.2d 1115 (9th Cir. 1992) ; Fireman's Fund Insurance Co. v. S. E. K. Constr. Co., 436 F.2d 1345, 1351-1352 (10th Cir. 1971)* .

[2] Determining Damages Recoverable Upon Execution of Attachment Undertaking

State law governs seizure of property for the purpose of securing satisfaction of a judgment, unless a federal statute applies, which would then determine the circumstances under which attachment is available. *See Fed. R. Civ. P. 64. See also Paul H. Aschkar & Co. v. Curtis, 327 F.2d 306, 310 (9th Cir. 1963)* (forum law governs matters such as type of claim warranting attachment, bond requirements, and circumstances under which property may be released from attachment).

Generally, the attaching party's liability for wrongful attachment includes all damages proximately caused by the

attachment. *See United States Fid. & Guar. Co. v. J. United Electrical Contr. Corp., 62 F. Supp. 2d 915, 925 (E.D.N.Y. 1999)* (under state law, party seeking attachment order must give undertaking in amount fixed by court to compensate defendant for all costs and damages sustained by attachment should defendant prevail). This includes all costs and expenses up to the amount of the undertaking, including attorney's fees, reasonably spent to defeat the attachment. *See Fidelity & Deposit Co., v. L. Bucki & Son Lumber Co., 189 U.S. 135, 136, 23 S. Ct. 582, 47 L. Ed. 744 (1903)* (attorney's fees incurred in securing dissolution of an attachment are recoverable in an action upon attachment bonds if state law allows).

[3] Determining Damages Recoverable Upon Execution of Supersedeas Bond

An appellant may obtain a stay of judgment pending appeal by posting a supersedeas bond, which guarantees damages awarded in the district court when an appeal is taken from that judgment. The recovery on a supersedeas bond includes the amount of the judgment, with interest and costs, but does not include attorney's fees. *See Bass v. First Pac. Networks, Inc., 219 F.3d 1052, 1055 (9th Cir. 2000)* (recovery on a supersedeas bond does not include attorney fees).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 65.1.02.*
- *Federal Litigation Guide P 7.75.*
- *Fed. R. Civ. P. 62(d).*
- *Fed. R. Civ. P. 64.*

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.47

§ 5.47 Considering Independent Action as Alternative to Rule 65.1 Motion

Rather than filing a motion in accordance with *Fed. R. Civ. P. 65.1*, a party may bring an independent action against a surety in state or federal court *See Bass v. First Pac. Networks, Inc., 219 F.3d 1052, 1055 (9th Cir. 2000)* (surety's liability may be enforced under either Rule 65.1 procedure or through independent action). Depending on the circumstances of the case, possible advantages to filing and independent action could be the selection of a more convenient or otherwise favorable forum, the availability of a jury trial, and the recovery of attorney fees.

Moreover, a party may choose to bring an independent action if the suit under which the bond was posted has been dismissed. *See American Bible Soc. v. Blount, 446 F.2d 588, 595 (3d Cir. 1971)* (noting that independent action against surety could be brought after action in which bond posted was dismissed).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 65.1.03.*
- *Fed. R. Civ. P. 65.1.*

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.48

§ 5.48 Filing Rule 65.1 Motion Against a Surety

[1] Complying With Timing Requirements

Before filing a motion pursuant to *Fed. R. Civ. P. 65.1*, the surety's liability on the bond has to have already been established, based upon a determination of the principal's liability in the underlying action. *See American Bible Soc. v. Blount, 446 F.2d 588, 594-595 (3d Cir. 1971)* (no liability can arise on an injunction bond unless there is a final judgment in favor of the party enjoined).

Although *Fed. R. Civ. P. 65.1* includes no express time limit for filing a motion, excessive delay may bar relief. *See Stoody Co. v. Mikels, 40 F. Supp. 53, 53-54 (S.D. Cal. 1941)* (motion to determine damages from wrongful injunction unreasonably late when filed two-and-a-half years after final decree dissolving injunction). Furthermore, the party must file the motion before the bond is exonerated. *See Buddy Systems, Inc., v. Exer-Genie, Inc., 545 F.2d 1164, 1167-1168 (9th Cir. 1976)* (surety has no liability on bond after it is exonerated).

[2] Attempting Resolution of Issue With Opposing Counsel

A party should not file a *Rule 65.1* motion unless its attempts to resolve the issue with opposing counsel have failed, and therefore, payment cannot be accomplished by agreement. Not only could a conference with opposing counsel potentially save time and expenses associated with filing the motion, but local district court rules or individual judge's rules may require it.

[3] Providing Adequate Notice to Surety and Adverse Party

Any surety who provides security through a bond, stipulation, or other undertaking under the Federal Rules of Civil Procedure irrevocably appoints the court clerk as the surety's agent for service of any papers affecting the surety's liability on the bond or undertaking. Therefore, a party seeking to enforce the liability of the surety must serve a copy of the motion upon the court clerk. The clerk must then mail copies to the sureties if their addresses are known. *See Fed. R. Civ. P. 65.1*. Furthermore, the moving party must provide the adverse party with advance notice of a Rule 65.1 motion, in accordance with federal and local rules. *See § 1.04[2] above*.

Warning:

Local rules may require an effort to give actual notice to the surety, notwithstanding the appointment of the clerk as agent for service of process. Judgment against the surety may not stand if actual notice has not been given to the surety. *See Beatrice Foods Co. v. New England Printing & Lithographing Co., 930 F.2d 1572, 1576-1577 (Fed. Cir. 1990)* (*Fed. R. Civ. P. 65.1* requires notice to surety when motion to execute surety's bond is filed with the court).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 65.1.03*, 65.01.04.
- *Bender's Federal Practice Forms* Form Nos. 65.1:1, 65.1:2.
- *Fed. R. Civ. P. 5(a)* (notice of motion must be served on other parties).
- *Fed. R. Civ. P. 7(b)* (motions and other papers).
- *Fed. R. Civ. P. 65.1*.

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.49

§ 5.49 Opposing Rule 65.1 Motion to Enforce Surety's Liability

[1] Arguing Grounds for Opposing Rule 65.1 Motion

A party opposing a Rule 65.1 motion may make one or more of the following arguments to impede execution of the bond:

1. **Moving party was not wrongfully enjoined.** *See Milan Express, Inc. v. Averitt Express, Inc., 254 F.3d 966, 981 (11th Cir. 2001)* (to recover against an injunction bond, party must prove wrongful enjoinment).

2. **Injunction stays Rule 65.1 procedures.** *See Celotex Corp. v. Edwards, 514 U.S. 300, 311-312, 115 S. Ct. 1493, 131 L. Ed. 2d 403 (1995)* (Rule 65.1 procedures to enforce surety's liability may be stayed by injunction).

3. **Exoneration of bond precludes Rule 65.1 motion.** *See Buddy Systems, Inc. v. Exer-Genie, Inc., 545 F.2d 1164, 1167-1168 (9th Cir. 1976)* (district cannot consider Rule 65.1 motion after bond has been exonerated).

4. **Excessive delay in filing motion bars relief.** *See Stoody Co. v. Mikels, 40 F. Supp. 53, 53-54 (S.D. Cal. 1941)* (excess delay may bar claim for damages based on wrongly issued injunction).

[2] Challenging Damages Sought by Party Bringing Rule 65.1 Motion

A party opposing a Rule 65.1 motion may successfully reduce, or possibly eliminate entirely, the damages awarded by the court by making one or more of the following arguments and providing adequate factual evidence to the court:

1. **Moving party's damages not proximately caused by wrongful enjoinment or attachment.** *See Matek v. Murat, 862 F.2d 720, 733-734 (9th Cir. 1988) , abrogated on other grounds by Holden v. Hagopian, 978 F.2d 1115 (9th Cir. 1992)* (improperly enjoined party may not demand damages on bond simply because injunction was improperly granted, but must also demonstrate injury resulted from injunction).

2. **Moving party is claiming damages in excess of bond or seeking attorney's fees not permitted by bond.** *See Fireman's Fund Insurance Co. v. S. E. K. Constr. Co., 436 F.2d 1345, 1351-1352 (10th Cir. 1971)* (attorney fees not recoverable on an injunction bond).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 65.1.02, 65.1.03.*
- *Federal Litigation Guide P 7.75.*

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Chapter 5 PROVISIONAL REMEDIES
PART I: MOTION TO ENFORCE SURETY'S LIABILITY ON BOND PURSUANT TO RULE 65.1

1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.50

§ 5.50 Appealing Liability Determination

If the district court decides against execution of the bond, the party seeking execution of the bond may file an appeal. Moreover, a surety may appeal from the district court's final determination of its liability on the bond. The court of appeals reviews de novo a district court's decision to execute a bond. *See Slidell, Inc. v. Millennium Inorganic Chems., Inc., 460 F.3d 1047, 1059 (8th Cir. 2006)* (court of appeals employs de novo standard when reviewing district court's decision to execute injunction bond). However, the appeals court employs the clearly erroneous standard when reviewing a district court's computation of damages recoverable on the bond. *See Nintendo of Am. v. Lewis Galoob Toys, 16 F.3d 1032, 1036 (9th Cir. 1994)* (court of appeals can review de novo district court's decision to execute bond and can review computation of damages under clearly erroneous standard).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 65.1.04.*

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Chapter 5 PROVISIONAL REMEDIES
PART J: MOTION FOR LEAVE TO MAKE DEPOSIT WITH COURT PURSUANT TO RULE 67

1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.51

§ 5.51 Checklist for Motion Seeking Leave to Make Deposit With Court

☐ Determine whether the threshold conditions of *Fed. R. Civ. P. 67* are met.

- ○ Judgment for money or property capable of being deposited is part of relief sought in pending action. *See § 5.56 below*.
- ○ Money or property is suitable for delivery to court. *See § 5.52 below*.

☐ Determine whether voluntary deposit is necessary or appropriate.

- ○ As statutory condition of proceeding with interpleader action. *See § 5.54[1] below*.
- ○ As voluntary or court-ordered condition of proceeding with *Rule 22* interpleader. *See § 5.54[2] below*.
- ○ As tender of payment that will stop accrual of interest. *See § 5.54[3] below*.

☐ Determine whether to deposit *all* or *part* of disputed money or property. *See § 5.55 below*.

☐ Consider alternatives to making deposit under *Fed. R. Civ. P. 67*, such as the following:

- ○ Letter of credit.
- ○ Escrow account.

○ Joint signature account in names of counsel.

☐ Draft motion, supporting memorandum of law, affidavits, and proposed order in accordance with federal rules, including local district court and individual judge's rules. *See* §§ *1.02-1.08 above*. Be sure to include express claim to the property. *See § 5.56 below*.

☐ Be sure to provide adverse party with adequate notice of motion. *See* §§ *1.04[2], above*; *5.56[2] below*.

☐ Obtain clerk's pre-approval of order if required by local rule. *See § 5.54[4] below*.

☐ Serve signed order on court clerk. *See § 5.54[4] below*.

☐ Deposit money or property with court clerk and ensure compliance with statutory or other investment requirements. *See § 5.56[5] below*.

☐ **Search by Topic:** Civil Procedure > Remedies > Deposits With Court

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.52

§ 5.52 Seeking Leave to Make Deposit With Court; Strategic Considerations

In an action in which any part of the relief sought is a judgment for a sum of money, the disposition of a sum of money, or the disposition of "any other thing capable of delivery," *Fed. R. Civ. P. 67* authorizes a party to deposit with the court all or any part of that sum or thing. Thus, the Rule relieves the depositor of responsibility for the sum or thing while the parties litigate their rights with respect to it. Parties tend to file motions pursuant to *Fed. R. Civ. P. 67* most often within the context of interpleader actions, admiralty *in rem* actions, or where the deposit is in effect an offer of judgment or an effort to stop interest accrual.

The decision of whether or not to allow a deposit in a particular case is within the district court's discretion, and is subject to review only under an abuse of discretion standard. *See Cajun Electric Power Coop., Inc. v. Riley Stoker Corp., 901 F.2d 441, 445 (5th Cir. 1990)* (district court's decision denying leave to make deposit is subject to review under an abuse of discretion standard).

Before investing the time and expense required to prepare, file, and serve a motion pursuant to *Fed. R. Civ. P. 67*, a party should carefully weigh its alternatives, such as making private arrangements to hold the funds or property in escrow. Moreover, local district court or individual judge's rules may encourage parties to seek alternatives to a Rule 67 motion.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 67.02.*
- *Fed. R. Civ. P. 67.*

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.53

§ 5.53 Complying With Requirements of Rule 67

A Rule 67 motion is not appropriate if money or other property capable of being deposited with the court is not part of the relief specifically sought in the pending action. For example, *Fed. R. Civ. P. 67* does not permit deposit of funds with the court when the plaintiff is not seeking a money judgment. *See Eurolines Shipping Co., S.A. v. Metal Transport Corp., 491 F. Supp. 590, 592 (S.D.N.Y. 1980)* (*Fed. R. Civ. P. 67* does not permit deposit of funds with court when plaintiff has petitioned for confirmation of arbitration award).

Although parties typically deposit money, *Fed. R. Civ. P. 67* explicitly authorizes the deposit of any "thing capable of delivery." However, the court may refuse to allow parties to deposit other types of property when the court does not have the facilities to hold them or determines that the property would be best protected if it were held elsewhere. *See John v. Sotheby's, 141 F.R.D. 29, 34 (S.D.N.Y. 1992)* (court refused to allow deposit of oil painting with clerk because painting would be better preserved if it remained with auction house). The court may also refuse to permit a deposit if it would impose an unnecessary burden on the clerk. *See Design Benefit Plans v. Enright, 940 F. Supp. 200, 207 (N.D. Ill. 1996)* (deposit not allowed in dispute over unpaid commissions where it would involve substantial sums in excess of $4 million and entail a series of ongoing deposits).

Warning:

Rule 67 deposit cannot be used to alter the contractual relationship or legal duties of the parties. *See Prudential Ins. Co. v. BMC Industries, Inc., 630 F. Supp. 1298, 1299-1300 (S.D.N.Y. 1986)* (*Fed. R. Civ. P. 67* cannot be used to effect a legal transfer of property between the litigants).

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.54

§ 5.54 Determining Necessity or Appropriateness of Rule 67 Deposit

[1] Deposit Is Condition of Interpleader Under Federal Interpleader Act

In order to maintain a federal statutory interpleader action, a party must deposit disputed funds or property with the court or post a bond; failure to deposit the entire amount in controversy is a jurisdictional defect. *See 28 U.S.C. § 1335(a)(2)*; *see also Edner v. Massachusetts Mut. Life Ins. Co., 138 F.2d 327, 329 (3d Cir. 1943)* (interpleader statute provides that sum paid by complainant in interpleader into registry of court shall be deposited there to abide judgment of court).

[2] Deposit Under Rule 22 Interpleader

In a *Rule 22* interpleader action, the stakeholder is not required to deposit the disputed money or property with the court. *See Gelfgren v. Republic Nat'l Life Ins. Co., 680 F.2d 79, 82 (9th Cir. 1962)* (unlike interpleader actions under federal statute, and interpleader action under Rule 22 does not require disputed money or property to be deposited with court). However, *Fed. R. Civ. P. 67* does authorize the court to order the party in possession of property to deposit it with the court. *See Central Bank v. United States, 838 F. Supp. 564, 566 (M.D. Fla. 1993)* (although interpleader action was initiated under *Fed. R. Civ. P. 22*, court ordered deposit of disputed funds into court).

[3] Deposit to Stop Accrual of Interest

If the court orders a party to make a deposit pursuant to *Fed. R. Civ. P. 67*, that deposit will stop interest from accruing pending a final resolution of the rights of the parties with respect to the funds. *See Cajun Electric Power Coop., Inc. v. Riley Stoker Corp. 901 F.2d 441, 445 (5th Cir. 1990)* (party's deposit with court pursuant to *Fed. R. Civ. P. 67* satisfied tender of payment requirements).

Warning:

It is the act of making the deposit, not the filing of a motion that stops the accrual of interest. *See United States ex rel. Garrett v. Midwest Constr. Co., 619 F.2d 349, 353-354 (5th Cir. 1980)* (money must be made available unconditionally to stop accrual of interest and merely filing motion to deposit, without actual deposit, has no effect on interest accrual while defendant continued to have use and control of

funds).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 22.03, 67.02, 67.03.*
- *Fed. R. Civ. P. 67.*
- *28 U.S.C. § 1335(a)(2)* (requiring money or property to be deposited with court in federal interpleader action).

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.55

§ 5.55 Determining Whether to Deposit All or Part of Money or Property

Although *Fed. R. Civ. P. 67* permits the deposit of "all or part of the money or thing" in dispute, the court has the discretion to require the party in possession of the property to deposit the full amount.

Exception:

In a statutory interpleader action, the entire sum in dispute must be deposited. *See 28 U.S.C. § 1335(a)(2).*

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.56

§ 5.56 Seeking Leave to Deposit Money or Property Pursuant to Rule 67

[1] Filing Motion or Stipulation With Court Pursuant to Rule 67

Fed. R. Civ. P. 67 requires a party to make a motion or stipulation seeking leave to make a deposit, unless the deposit is allowed by right. *See Fed. R. Civ. P. 67(a)*. Before preparing and filing the motion, it is important to consult local district court rules and individual judge's rules to ensure compliance with any requirements to provide the court with supporting affidavits, memoranda of law, or proposed orders. *See § 1.06[3] above*.

Warning:

The party depositing the money or other property should assert any claim to the property in the motion. While a later assertion of a claim to the fund may be allowed by the court unless there is a clear and unambiguous waiver or abandonment, the best practice is to clearly assert any claims in the motion. *See Veillon v. Exploration Services, Inc., 876 F.2d 1197, 1201 (5th Cir. 1989)* (even if insurer did not abandon claim to fund at time of deposit, position taken at pretrial hearing was unequivocal relinquishment).

[2] Notifying Adverse Party of Rule 67 Motion

The moving party filing a motion pursuant to *Fed. R. Civ. P. 67* must provide adequate notice to the adverse party, in accordance with the federal rules, including any particular notice requirements set forth in local district court or individual judge's rules. *See § 1.04[2] above*.

[3] Filing Proposed Order With Rule 67 Motion or Stipulation

Because *Fed. R. Civ. P. 67* requires that the court issue an order granting leave to deposit a specific sum of disputed money or property with the court, the party filing the motion or stipulation should include a proposed order that describes in detail the property to be deposited. Not only will this reduce likelihood of confusion and enable effective management of the property by the court, but it may be required by local district court rules or individual judge's rules.

In addition, the order should include any directions for special placement of the deposit, as permitted or required by

local rule. For example, some courts will deposit funds into certain types of accounts, such as a passbook savings account, unless the party requests and specifies otherwise in the order. *See e.g.,* N.D. Ill. L.R. 67.1.

Warning:

Be sure to check local rules carefully to determine whether specific terms or provisions must be included in the order. Several district courts require pre-approval by the clerk of any order for deposit of funds. *See, e.g.,* E.D. Cal Gen. L.R. 67-150(b); D. Conn. L.R. 67(b); E.D.N.Y. & S.D.N.Y. L.R. 67(b).

[4] Serving Signed Order on Court Clerk and Other Parties

The party making the deposit must serve the order permitting deposit on the clerk of the court, as well as all other parties. *Fed. R. Civ. P. 67*. This assures that the clerk knows what is being deposited and how to treat the property or handle the funds. *See Fed. R. Civ. P. 67*, Committee Note of 1983. Local rules may require personal delivery of the order to the clerk, personal delivery of orders directing specific treatment of the deposited funds, or service on designated clerks. *See, e.g.,* M.D. Fla. L.R. 4.16(a).

[5] Depositing Money or Property With Court Clerk

When making a deposit pursuant to *Fed. R. Civ. P. 67*, a party must deposit funds with the Treasurer of the United States or a designated depository, in the name of and to the credit of the court. Furthermore, the party must deposit the funds in an interest-bearing account or invest them in an interest-bearing instrument approved by the court. *See 28 U.S.C. § 2041*; *Fed. R. Civ. P. 67(b)*.

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§ 5.57 Appealing Adverse Ruling on Rule 67 Motion

A party may appeal a court order denying leave to make a deposit under *Fed. R. Civ. P. 6*. When reviewing the district court's decision, the appellate court must employ the abuse of discretion standard. *See Cajun Electric Power Coop., Inc. v. Riley Stoker Corp. 901 F.2d 441, 445 (5th Cir. 1990)* (district court's decision denying leave to make a deposit is subject to review under abuse of discretion standard).

By contrast, a party may not appeal a court order granting a Rule 67 motion. *See Perpetual Am. Bank, F.S.B. v. Terrestrial Sys., 811 F.2d 504, 506 (9th Cir. 1987)* (provisional orders entered by district court to preserve or protect assets of party pending final resolution of action do not generally qualify for interlocutory appeal under collateral order exception to final judgment rule); *Standard Ins. Co. v. Saklad, 1995 U.S. App. LEXIS 24098, at *4 (9th Cir. 1995)* (unpublished opinion).

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1-5 Moore's AnswerGuide: Fed Civil Motion Practice § 5.58

§ 5.58 Withdrawing Money or Property Deposited with Court

Funds deposited pursuant to *Fed. R. Civ. P. 67* may be withdrawn only by order of the court. *See 28 U.S.C. § 2042*, *Fed. R. Civ. P. 67*. Generally, this will not be permitted until the dispute over the funds or other property has been decided.

Once a court orders withdrawal, the money must remain deposited for five years. After five years, the court will ensure that the money is deposited in the Treasury in the name and to the credit of the United States, although claimants may establish their right to the funds after five years. *See United States v. 8.0 Acres of Land, 197 F.3d 24, 30-31 (1st Cir. 1999)* (deposit of funds unclaimed for five years in Treasury does not work an escheat because funds are merely transferred and any claims to the funds are not extinguished).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 67.03*.
- *Bender's Federal Practice Forms* Form Nos. 67:1-67:3, 67:20, 67:30.
- *Fed. R. Civ. P. 5(a)* (notice of motion must be served on other parties).
- *Fed. R. Civ. P. 7(b)* (motions and other papers).
- *Fed. R. Civ. P. 67(a)* (depositing property into court).
- *Fed. R. Civ. P. 67(b)* (investing and withdrawing funds).

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Chapter 6 DISCOVERY

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[6] Providing Party to Be Sanctioned Under Rule 37(f) With Opportunity to Be Heard

§ 6.19 Moving for Sanctions for Spoliation of Evidence

[1] Determining Whether Spoliation or Failure to Preserve Evidence Has Occurred

[2] Elements of Spoliation

[3] Imposing Sanctions for Spoliation of Evidence; Alternative Sources of Authority

[4] Sanctions Generally Unavailable for Loss of Electronically Stored Information Through Routine Operation of System

[5] Imposing Dismissal, Default, or Other Sanctions for Spoliation of Evidence

[a] Dismissal or Default Imposed Upon Party Found Guilty of Spoliation of Evidence

[b] Other Sanctions Imposed Upon Party Found Guilty of Spoliation of Evidence

[6] Circumstances in Which Sanctions Not Awarded for Spoliation of Evidence

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Chapter 6 DISCOVERY
PART A: PROCEDURAL CONTEXT

1-6 Moore's AnswerGuide: Fed Civil Motion Practice § 6.01

§ 6.01 Procedural Context--Discovery

The Federal Rules provide for various methods of discovery, including interrogatories, requests for documents, requests for admission, and depositions, to give parties the opportunity to establish or contest the facts alleged in the pleadings. Well-planned discovery helps the parties and the court to ascertain the facts that are actually in dispute, thereby facilitating motion practice, and allowing for presentation of a more coherent and comprehensible case at trial. Furthermore, discovery often enables counsel to obtain facts that may convince the opposing party that ADR or settlement of the action is preferable to the uncertainty and expense of trial.

If good faith efforts to meet and confer with opposing parties to obtain sufficient responses to their discovery requests are unavailing, specific discovery rules authorize parties to file motions to compel adequate responses to discovery probes. A party may file a motion to compel discovery not only when its opponent refuses to provide any responses, or responds only by providing objections, but also when the opponent's responses are incomplete or evasive.

Trial courts are vested with broad discretion to sanction parties that fail to provide requested discovery or fail to comply with prior discovery orders, not only to punish misconduct in individual cases but also to create a deterrent effect upon litigants in general. In order to promote the administration of justice, United States district courts judges are authorized by the Federal Rules to impose a wide variety of sanctions to ensure that parties comply with discovery obligations as well as court orders. Even the most extreme sanctions, such as dismissal of an action or entry of a default judgment, are available to penalize parties for severe misconduct.

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Chapter 6 DISCOVERY
PART B: MOVING TO SEEK OR OPPOSE DISCOVERY

1-6 Moore's AnswerGuide: Fed Civil Motion Practice § 6.02

§ 6.02 Checklist for Motions Seeking or Opposing Discovery

☐ Determine the purpose of the discovery motion.

- ○ Extend discovery cutoff. *See § 6.03 below*.
- ○ Obtain protective order. *See § 6.04 below*.
- ○ Obtain mental or physical examination of person. *See § 6.05 below*.
- ○ Propound interrogatories in excess of number permitted by rule. *See § 6.06 below*.
- ○ Determine sufficiency of responses to request for admission. *See § 6.07 below*.
- ○ Amend or withdraw response to request for admission. *See § 6.08 below*.
- ○ Quash or modify a subpoena. *See § 6.09 below*.
- ○ Perpetuate testimony. *See § 6.10 below*.
- ○ Compel mandatory disclosure or discovery. *See § 6.11 below*.

☐ Determine which court has jurisdiction.

- ○ Typically, the court where the case is pending will have jurisdiction.

- Note that only "the issuing court" may grant a motion to quash or modify a subpoena. *See § 6.09[1][c] below*.

- A motion for a protective order may be filed in either the court in which the action is pending or in matters related to depositions in the district where the deposition is to be taken. *See § 6.04[3][e] below*.

☐ Engage in good faith effort at resolution of issues. This is not only a cost-effective strategy, but it is often a prerequisite to filing a discovery motion.

- Meeting and conferring with opposing parties is expressly required by the Federal Rules before filing certain discovery motions, such as motions for a protective order, motions to request a physical or mental evaluation, and motions to compel. *See §§ 6.04[3][c], 6.05[5], 6.11[7] below*.

- Check the local U.S. district court rules and, if known, the specific judge's rules and standing orders to determine whether there is a meet and confer requirement. *See § 6.06[3] below*.

☐ Determine the time limit, if any, for bringing the discovery motion.

- Check the Federal Rule that pertains to the discovery motion being brought. Most Federal Rules governing discovery do not provide specific time limits for bringing motions, but they do require that motions be brought in a "timely" fashion, a phrase that has been subject to interpretation by the courts. *See, e.g., §§ 6.04[3][d], 6.09[3] below*.

- Check local U.S. district court rules, or a particular judge's rules or orders, which often mandate time limits for bringing discovery motions. *See § 6.11[5][a] below*.

☐ When necessary, seek appropriate sanctions.

- Reasonable expenses available for bringing motion to obtain protective order. *See § 6.04[5] below*.

- Sanctions for failure to admit. *See § 6.07[2] below*.

- Sanctions for failure to provide mandatory disclosure or discovery. *See § 6.11[3] below*.

☐ File and serve the discovery motion.

- Be sure to comply with general filing and service requirements for motions under

the Federal Rules. *See* §§ *1.09-1.13 above*.

○ Local U.S. district court rules or the judge's rules, standing orders, or orders pertaining to an individual case may impose filing and service requirements for certain motions. *See §§ 6.07[3]*, *6.08[3]*, *6.11[5] [a] below*.

☐ **Search by Topic:** Civil Procedure > Discovery

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Chapter 6 DISCOVERY
PART B: MOVING TO SEEK OR OPPOSE DISCOVERY

1-6 Moore's AnswerGuide: Fed Civil Motion Practice § 6.03

§ 6.03 Moving to Extend Discovery Cutoff

[1] Modifying Scheduling Order

A trial court may modify or amend a scheduling order setting a deadline to complete discovery only when "good cause" is shown and the court grants leave to modify. *Fed. R. Civ. P. 16(b).*

[2] Meeting Good Cause Standard

Courts have considerable discretion in determining whether good cause exists to extend a discovery cutoff. The factor upon which courts are most likely to focus in making this determination is whether or not counsel for the party seeking the extension have met their discovery obligations with due diligence. *See Sigros v. Walt Disney World, Co., 190 F. Supp. 2d 165, 169 (D. Mass. 2002)* (plaintiffs established good cause for modifying scheduling order to extend discovery period after serving newly named defendant because motion was timely filed and identified issues that would likely need further discovery, the need for extension did not arise from plaintiffs' lack of diligence, and discovery responses from newly named corporate defendant would likely require further discovery responses from original defendant).

Any motion that seeks to change the date for the close of discovery must address why the grounds for the extension now being put forward could not have been anticipated by the moving party.

[3] Supporting Motion to Extend Discovery Cutoff With Documentary Evidence

A motion to extend a discovery cutoff should be accompanied by a notice of motion, a memorandum of points and authorities, and an affidavit, if appropriate.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 16.14.*
- *Bender's Federal Practice Forms* Form No. 6:23.

- *Fed. R. Civ. P. 16(b).*

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Chapter 6 DISCOVERY
PART B: MOVING TO SEEK OR OPPOSE DISCOVERY

1-6 Moore's AnswerGuide: Fed Civil Motion Practice § 6.04

§ 6.04 Moving for Protective Order

[1] Overview of Protective Orders

Under *Fed. R. Civ. P. 26(c)*, a party or any person from whom discovery is sought may move for a protective order in the court where the action is pending. On matters relating to a deposition, a protective order may be sought either where the action is pending or in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

1. Forbidding the disclosure or discovery. *See Fed. R. Civ. P. 26(c)(1)(A)*.

2. Specifying terms, including time and place, for the disclosure or discovery. *See Fed. R. Civ. P. 26(c)(1)(B)*.

3. Prescribing a discovery method other than the one selected by the party seeking discovery. *See Fed. R. Civ. P. 26(c)(1)(C)*.

4. Forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters. *See Fed. R. Civ. P. 26(c)(1)(D)*.

5. Designating the persons who may be present while the discovery is conducted. *See Fed. R. Civ. P. 26(c)(1)(E)*.

6. Requiring that a deposition be sealed and opened only on court order. *See Fed. R. Civ. P. 26(c)(1)(F)*.

7. Requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way. *See Fed. R. Civ. P. 26(c)(1)(G)*.

8. Requiring that the parties simultaneously file specified documents or information in sealed envelopes,

to be opened as the court directs. *See Fed. R. Civ. P. 26(c)(1)(H).*

[2] Availability of Protective Orders

[a] Protective Order Applicable to All Types of Discovery

Fed. R. Civ. P. 26(c) applies to all types of discovery, including depositions, as well as written discovery such as interrogatories, requests for production of documents, and requests for admissions. *See Brittain v. Stroh Brewery Co., 136 F.R.D. 408, 413 (M.D.N.C. 1991)* (production of documents).

[b] Protective Order Generally Unavailable to Assert Rights of Third Parties

Generally, a party may not obtain a protective order in order to assert rights of third parties. *See, e.g., Bush Dev. Corp. v. Harbour Place Assocs., 632 F. Supp. 1359, 1364 (E.D. Va. 1986)* (defendants have no standing to object on grounds of confidentiality to third party's production of documents in response to subpoena).

[c] Protective Order May Bind Both Party and Nonparty Witnesses

A protective order may bind both parties and nonparties. *See, e.g., Quinter v. Volkswagen of Am., 676 F.2d 969, 972 (3d Cir. 1982)* (protective order held applicable to expert witness); *Truswal Systems Corp. v. Hydro-Air Engineering, Inc., 813 F.2d 1207, 1210 (Fed. Cir. 1987)* (in remanding order quashing portion of subpoena against nonparty, court noted that standards of *Fed. R. Civ. P. 26(c)* apply to both parties and nonparties equally).

Furthermore, a nonparty may be held in contempt for violating a protective order if the nonparty has actual knowledge of it. *See Quinter v. Volkswagen of Am., 676 F.2d 969, 972 (3d Cir. 1982)* (finding plaintiff's expert witness to be plaintiff's agent and subject to protective order that specifically named only plaintiff and plaintiff's counsel). Similarly, a protective order may be enforceable against third parties, including the government. *See In re Grand Jury Subpoena Duces Tecum etc., 945 F.2d 1221, 1224 (2d Cir. 1991)* (grand jury subpoena obtained by government for production of information obtained in bankruptcy proceeding was unenforceable because information sought was subject to protective order that it would remain confidential and be used only in bankruptcy proceeding).

[3] Obtaining Protective Order

[a] Seeking Protective Order

A party or other person from whom discovery is sought may seek a protective order by filing a motion in the district court. *Fed. R. Civ. P. 26(c)(1)*; *see also United States v. Operation Rescue, 112 F. Supp. 2d 696, 705 (S.D. Ohio 1999)* (because *Fed. R. Civ. P. 26(c)* permits either "a party or the person from whom discovery is sought" to seek protective order, party has standing to seek protective order on behalf of nonparty).

[b] Contents of Motion for Protective Order

The party seeking a protective order must make a particular request for a protective order and set forth facts explaining why the protective order is required. *See Brittain v. Stroh Brewery Co., 136 F.R.D. 408, 412 (M.D.N.C. 1991)* (protective order sought for allegedly confidential material). The facts must show that a clearly defined and serious injury will result if a protective order against the requested discovery is not issued. *See Federal Election Comm'n v. GOPAC, Inc., 897 F. Supp. 615, 617 (D.D.C. 1995)* (court denied defendant's request to enjoin FEC from contacting GOPAC contributors); *see also Bucher v. Richardson Hosp. Auth., 160 F.R.D. 88, 92 (N.D. Tex. 1994)* (movant must show particular and compelling need). Conclusory statements about the need for a protective order and the harm that would be suffered without one are insufficient. *See, e.g., Glenmede Trust Co. v. Thompson, 56 F.3d 476, 483 (3d Cir. 1995)* (generalized allegations of injury to reputation and to relationships with clients was insufficient to support

protective order); *Panola Land Buyers Asso. v. Shuman, 762 F.2d 1550, 1559 (11th Cir. 1985)* (burden is not met by conclusory recitation of expense and burdensomeness).

[c] Certifying That Parties Have Attempted to Resolve Dispute

A motion for a protective order must be accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. *Fed. R. Civ. P. 26(c)(1)*. The court may deny a motion for a protective order for failure to comply with this requirement. *See Frazier v. Southeastern Pa. Transp. Auth., 161 F.R.D. 309, 312 (E.D. Pa. 1995) , aff'd on other grounds, 91 F.3d 123 (3d Cir. 1999)* (court acknowledged that it could have denied plaintiff's motion for lack of certification, but addressed merits instead). The failure to comply with the certification requirement may also result in the court refusing to award the prevailing party the costs and expenses it incurred in bringing the motion for a protective order. *See Scherer v. GE Capital Corp., 185 F.R.D. 351, 352 (D. Kan. 1999)* (although court granted motion for protective order precluding further discovery, it refused to award defendant costs and expenses incurred in bringing motion because defendant failed to file certification).

[d] Timing of Motion for Protective Order

Fed. R. Civ. P. 26(c) does not impose a time limit within which a motion for a protective order must be made, but courts have required that the motion be made in a timely manner. *See Brittain v. Stroh Brewery Co., 136 F.R.D. 408, 413 (M.D.N.C. 1991)* (rule contains "implicit" timeliness requirement).

A motion for a protective order is timely if made prior to the date set for producing the discovery. *See United States v. Panhandle E. Corp., 118 F.R.D. 346, 350 (D. Del. 1988)* (motion was untimely when filed almost a month after date documents were to be produced). In the case of a deposition, a Rule 26(c) protective order should be sought before the deposition begins. *See BCI Communication Sys., Inc. v. Bell Atlanticom Sys., Inc., 112 F.R.D. 154, 159 (N.D. Ala. 1986)* (party seeking to exclude anyone from deposition must move for protective order before the deposition begins and obtain order before the exclusion can occur), *aff'd on other grounds, 995 F.2d 236 (11th Cir. 1993)* .

A failure to timely seek a protective order may be excused for good cause, such as when a party sought in good faith to negotiate a protective order. *See Brittain v. Stroh Brewery Co., 136 F.R.D. 408, 414 (M.D.N.C. 1991)* (failure excused because defendant sought stipulated protective order).

[e] Filing Motion for Protective Order

A motion for a protective order may be filed in the court in which the action is pending. *See Fed. R. Civ. P. 26(c)(1)*. In matters related to depositions, the motion for a protective order may be filed in the court in which the action is pending or in the district where the deposition is to be taken. *See Fed. R. Civ. P. 26(c)(1)*. The court in the district where the deposition is to be taken not only has the power to grant or deny the protective order, but it also has discretion to defer to the judge handling the case on the merits. *See, e.g., In re Orthopedic Bone Screw Prods. Liab. Litig., 79 F.3d 46, 48 (7th Cir. 1996)* (court where deposition was to be taken deferred to judge handling case on merits).

Although the district where the deposition will be taken has discretion to remit the decision to the district where the action is pending, remission usually occurs only if the decision involves complicated factual issues with which the court where the action is pending has greater knowledge. *See Convertino v. United States DOJ, 260 F.R.D. 678, 679 (E.D. Mich. 2008)* (typical purpose of remission for protective order ruling is to place complicated factual disputes before single court that is most familiar with case).

[4] Issuing Protective Order; Broad Discretion of Courts

Courts have broad discretion in determining whether a protective order should issue and the degree of protection that is

required. *See, e.g., Dove v. Atlantic Capital Corp., 963 F.2d 15, 16 (2d Cir. 1992)* (grant and nature of protection is singularly within district court's discretion); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination, 28 F.3d 1388, 1394 (5th Cir. 1994)* (court may exercise its sound discretion to restrict which materials are obtainable); *Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1346 (7th Cir. 1986)* (district court has substantial discretion to decide which confidential information should be protected and how to frame order); *Thomas v. IBM, 48 F.3d 478, 482 (10th Cir. 1995)* (decision to grant protective order is vested in court's discretion); *ATM Express, Inc. v. ATM Express, Inc., 2008 U.S. Dist. LEXIS 94923, at *3 (S.D. Cal. Nov. 20, 2008)* (a more stringent standard applies to warrant a protective order to seal documents appended to a dispositive motion than to a motion to seal discovery materials).

[5] Awarding Sanctions and Expenses on Motion for Protective Order

[a] Expenses Incurred in Relation to Motion

A court may award expenses incurred in relation to a motion for a protective order, including attorneys' fees, to the prevailing party, unless the court finds that filing the motion was substantially justified or that other circumstances make an award of expenses unjust. *See Fed. R. Civ. P. 37(c)(3), 37(a)(5)(A)*; *see also Rickels v. City of South Bend, 33 F.3d 785, 787 (7th Cir. 1994)* (loser may avoid payment only by establishing that his or her position was substantially justified).

[b] Persons Subject to Sanctions

A court may require that the sanctions award be paid by a party, by the party's counsel, or by both the party and its counsel. *See Fed. R. Civ. P. 37(a)(5)(A).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 26.101 -26.108.*
- *Bender's Federal Practice Forms* Form Nos. 26:100-26:192.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 16.
- *Fed. R. Civ. P. 26(c).*

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Chapter 6 DISCOVERY
PART B: MOVING TO SEEK OR OPPOSE DISCOVERY

1-6 Moore's AnswerGuide: Fed Civil Motion Practice § 6.05

§ 6.05 Moving to Request Physical or Mental Examination

[1] Requesting Physical or Mental Examination Under Rule 35

Pursuant to *Fed. R. Civ. P. 35*, when the physical or mental condition of a party or of a person under a party's custody or 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 custody for examination by a suitably licensed examiner. *Fed. R. Civ. P. 35(a).*

[2] Contents of Motion Requesting Physical or Mental Examination Under Rule 35

A motion requesting a physical or mental examination under *Fed. R. Civ. P. 35* must:

1. Specify the time, place, manner, conditions, and scope of the examination, and the person or persons by whom it is to be made. *See Fed. R. Civ. P. 35(a).*

2. Show that the proposed examinee's medical condition is in controversy. *See Schlagenhauf v. Holder, 379 U.S. 104, 118-119, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964)* (movant must make an affirmative showing that each condition as to which the examination is sought is really and genuinely in controversy).

3. Establish good cause for the examination. *See Schlagenhauf v. Holder, 379 U.S. 104, 118-119, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964)* (movant must show that good cause exists for ordering each particular examination).

[3] Discretion of Court Under Rule 35

[a] Court May Order Physical or Mental Examination

The court has discretion to order a physical or mental examination under *Fed. R. Civ. P. 35. See Curtis v. Express, Inc., 868 F. Supp. 467, 468 (N.D.N.Y. 1994)* ("[e]ven if good cause is shown, it is still within the court's discretion to determine whether to order an examination"). However, *Fed. R. Civ. P. 35* is liberally construed, and courts frequently

grant examinations if the requesting party can explain why it is pertinent. *See, e.g., Eckman v. University of Rhode Island, 160 F.R.D. 431, 433 (D.R.I. 1995)* (rule governing mental examinations construed liberally); *Blount v. Wake Elec. Membership Corp., 162 F.R.D. 102, 106 (E.D.N.C. 1993)* (rule should be liberally construed in favor of granting discovery); *Lahr v. Fulbright & Jaworski, L.L.P., 164 F.R.D. 196, 198 (N.D. Tex. 1995) , aff'd, 164 F.R.D. 204 (N.D. Tex. 1996)* (*Fed. R. Civ. P. 35* should be construed liberally) (citing **Moore's**); *but see Melton v. Simmons, 2009 U.S. Dist. LEXIS 17543, at *3 (W.D.N.C. Feb. 23, 2009)* (Rule 35 does not authorize a court to order that a plaintiff receive a medical examination of himself); *Hernandez v. Gulf Oil Corp., 21 Fed. R. Serv. 2d 1378, 1379 (E.D. Pa. 1976)* (refusing to order an examination where the examination would be painful or dangerous to the party to be examined).

[b] Court May Set Conditions on Physical or Mental Examination

In exercising its discretion, the court may set terms and conditions for an examination. *See, e.g., Nicholas v. Wyndham Int'l, Inc., 218 F.R.D. 122, 124 (D.V.I. 2003)* (district court found that limit of 13 hours for psychologists to perform their psychological examinations would not undermine purpose of *Fed. R. Civ. P. 35* and was not "clearly erroneous or contrary to law").

[c] Persons Who May Attend Physical or Mental Examination; Restrictions

[i] Counsel Generally May Not Attend Physical or Mental Examination

Courts generally prohibit counsel for the party to be examined from attending the examination. *See, e.g., Tirado v. Erosa, 158 F.R.D. 294, 297-300 (S.D.N.Y. 1994)* (plaintiff in civil rights action was not entitled to have her attorney present at psychiatric examination by defendant's expert, because plaintiff's interest in professional conduct of examination and effective cross-examination of examiner at trial could be satisfied by less intrusive means); *Neumerski v. Califano, 513 F. Supp. 1011, 1016-1017 (E.D. Pa. 1981)* (claimant seeking disability benefits not entitled to have attorney present at psychological examinations); *but see Vreeland v. Ethan Allen, Inc., 151 F.R.D. 551, 551 (S.D.N.Y. 1993)* (permitting plaintiffs' attorney to attend psychological examinations in age discrimination case in which plaintiff claimed psychological damage).

[ii] Experts Generally May Not Attend Physical or Mental Examination

Generally, courts also prohibit experts retained by the party being examined from attending the examination. *See, e.g., Duncan v. Upjohn Co., 155 F.R.D. 23, 26-27 (D. Conn. 1994)* (presence of plaintiff's psychiatrist not allowed absent evidence that defendant's psychiatrist proposed to use unorthodox or potentially dangerous techniques); *Ragge v. MCA/Universal, 165 F.R.D. 605, 609-610 (C.D. Cal. 1995)* (potential for third-party observers to interfere with mental examination is too great)*; but see Dziwanoski v. Ocean Carriers Corp., 26 F.R.D. 595, 598 (D. Md. 1960)* (allowing examination to proceed with plaintiff's physician present).

[iii] Interpreters May Attend Physical or Mental Examinations

Generally, courts allow interpreters to attend examinations. *See, e.g., Calderon v. Reederei Claus-Peter Offen GmbH & Co., 258 F.R.D. 523, 2009 U.S. Dist. LEXIS 39178, *13-*14 (S.D. Fla. Apr. 27, 2009)* (granting plaintiff's request that a certified Spanish interpreter be present at the plaintiff's medical examination, but permitting defendant's counsel to choose the interpreter because defendant would be responsible for the cost of the interpreter's services).

[d] Location of Physical or Mental Examination

Typically, examinations are ordered to be conducted in the district where the case will be tried. *See, e.g., Blount v. Wake Elec. Membership Corp., 162 F.R.D. 102, 107 (E.D.N.C. 1993)* ("most courts require the plaintiff to submit to an examination by a physician chosen by the defendant if it is held in the venue where the plaintiff chose to file the action"); *Landry v. Green B. W.R. Co., 121 F.R.D. 400, 401 (E.D. Wis. 1988)* (plaintiff compelled to undergo

orthopedic evaluation in city where case would be tried).

[e] Transcription of Physical or Mental Examination

Judges generally do not permit examinations to be transcribed by a stenographer or by electronic means. *See, e.g., Abdulwali v. Washington Metro Transit Auth., 193 F.R.D. 10, 13 (D.D.C. 2000)* (finding that videotaping is inimical to conduct of psychiatric examination, court ruled plaintiff failed to show sufficient need to be permitted to record her examination); *Nicholas v. Wyndham Int'l, Inc., 218 F.R.D. 122, 124 (D.V.I. 2003)* (courts generally, but not always, prohibit video recording when there is concern that allowing recording will tend to make examination adversarial).

[4] Timing of Motion Requesting Physical or Mental Examination Under Rule 35

A party requesting a mental or physical examination under *Fed. R. Civ. P. 35* must file a motion within the time period permitted for discovery.

Except when authorized under the Federal Rules of Civil Procedure, or by order or agreement of the parties, a party may not seek a physical or mental examination under *Fed. R. Civ. P. 35* before the parties have conducted the discovery conference required under *Fed. R. Civ. P. 26(f). See Fed. R. Civ. P. 26(d).*

On a limited basis, and subject to court approval, a party may be able to use the testimony perpetuation mechanisms of *Fed. R. Civ. P. 27* to conduct a Rule 35 examination before a court action has been filed or while an appeal is pending. *See Fed. R. Civ. P. 27*; *see also Martin v. Reynolds Metals Corp., 297 F.2d 49, 56 (9th Cir. 1961)* (authorizing use of Rule 35 discovery in prelitigation perpetuation).

[5] Complying With Meet and Confer Requirement

Local district court rules typically require parties to attempt informal resolution of discovery disputes prior to filing a motion. *See, e.g.,* C.D. Cal. L.R. 37-1 (prior to the filing of any discovery motion, counsel for the parties are required to confer in a good faith effort to eliminate the necessity for hearing the motion or to eliminate as many of the disputes as possible); N.D. Ill. L.R. 37-2 (discovery motion must include certification that parties were unable to resolve dispute after good faith meet and confer effort); N.D. Ind. L.R. 37.1(a) (requires recitation of time and place of conference or attempted conference and names of participants); D. Kan. L.R. 37.2 (certification must "describe with particularity the steps taken by all counsel to resolve the issues in dispute"); W.D. Ky. L.R. 37.1 ("The moving party must attach to every discovery motion a certification that counsel have conferred and are unable to resolve their differences. The certification must detail counsel's attempts to resolve the dispute."); D.N.J. L.R. 37.1(b)(1) ("Discovery motions must be accompanied by an affidavit certifying that the moving party has conferred with the opposing party in a good faith effort to resolve by agreement the issues raised by the motion without the intervention of the Court and that the parties have been unable to reach agreement. The affidavit shall set forth the date and method of communication used in attempting to reach agreement.").

Warning:

When the relevancy of a party's physical or mental condition is clear, parties frequently stipulate or agree to a physical or mental examination. Examination by stipulation or agreement is often preferable to seeking a court order under *Fed. R. Civ. P. 35* because: (1) it offers flexibility in terms of scheduling and the scope of the examination; and (2) the examining party is still entitled to receive a copy of the examiner's report under *Fed. R. Civ. P. 35(b)(3)* unless the parties agree to a different arrangement.

PRACTICE RESOURCES:

- *Federal Litigation Guide PP 21.01 -21.102*.
- *Moore's Federal Practice (3d ed.) §§ 35.01 -35.12*.
- *Bender's Federal Practice Forms* Form Nos. 35.1-35.120.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 11.
- *Fed. R. Civ. P. 35*.

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Chapter 6 DISCOVERY
PART B: MOVING TO SEEK OR OPPOSE DISCOVERY

1-6 Moore's AnswerGuide: Fed Civil Motion Practice § 6.06

§ 6.06 Moving for Leave to Propound Interrogatories in Excess of Number Permitted by Rule

[1] Court Can Alter 25 Interrogatory Limit

Absent a court order or the written stipulation of the parties, a party may serve up to 25 written interrogatories, including discrete subparts, upon each party. *See Fed. R. Civ. P. 33(a)(1)*. A court may alter the 25-interrogatory limit by order. *See Fed. R. Civ. P. 26(b)(2)(A)*. The court's permission may be granted at a pretrial conference or upon a formal motion.

[2] Contents of Motion for Leave to Propound Additional Interrogatories

A motion for leave to propound additional interrogatories should demonstrate that the additional interrogatories are necessary under the circumstances of the case. *See Capacchione v. Charlotte-Mecklenburg Sch., 182 F.R.D. 486, 492 (W.D.N.C. 1998)* (citing **Moore's**, court denied motion to serve 50 additional interrogatories because plaintiff did not explain nature or subject matter of additional interrogatories or why they were needed). The movant should make a particularized showing of the need for the additional interrogatories. *See Duncan v. Paragon Publ'g, Inc., 204 F.R.D. 127, 128-129 (S.D. Ind. 2001)* (court makes case-by-case analysis "with a particularized showing" by party seeking additional interrogatories in determining whether party may exceed number of interrogatories permitted by *Fed. R. Civ. P. 33*).

The court may find that it is appropriate to permit additional interrogatories in cases involving complex technical issues or significant amounts of money. *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).

[3] Certifying Attempted Voluntary Resolution of Issues

If required by the district court's local rules, the motion should contain a certification that the parties conferred in an attempt to resolve the dispute. *See, e.g.*, C.D. Cal. L.R. 37-1 (prior to the filing of any discovery motion, counsel for the parties are required to confer in a good faith effort to eliminate the necessity for hearing the motion or to eliminate as many of the disputes as possible); N.D. Ill. L.R. 37-2 (discovery motion must include certification that parties were unable to resolve dispute after good faith meet and confer effort); N.D. Ind. L.R. 37.1(a) (requires recitation of time and

place of conference or attempted conference and names of participants); D. Kan. L.R. 37.2 (certification must "describe with particularity the steps taken by all counsel to resolve the issues in dispute"); W.D. Ky. L.R. 37.1 ("The moving party must attach to every discovery motion a certification that counsel have conferred and are unable to resolve their differences. The certification must detail counsel's attempts to resolve the dispute).

PRACTICE RESOURCES:

- *Federal Litigation Guide P 12.24*.
- *Moore's Federal Practice (3d ed.) § 33.30*.
- *Bender's Federal Practice Forms* Form No. 33:110.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 7.
- *Fed. R. Civ. P. 26(b)*.

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Chapter 6 DISCOVERY
PART B: MOVING TO SEEK OR OPPOSE DISCOVERY

1-6 Moore's AnswerGuide: Fed Civil Motion Practice § 6.07

§ 6.07 Moving to Determine Sufficiency of Responses to Requests for Admission

[1] Seeking Court's Determination of Sufficiency of Responses to Requests for Admission

A party who has served requests for admissions may file a motion asking the court to determine the sufficiency of the responding party's responses. *See Fed. R. Civ. P. 36(a)(6)*. This is the equivalent of a motion asking the court to deem a matter admitted. *See Szatanek v. McDonnell Douglas Corp., 109 F.R.D. 37, 41 (W.D.N.Y. 1985)* (finding that it is logical to equate request that facts be deemed admitted with motion to determine sufficiency of answers submitted). The responding party has the burden of showing that the answer is sufficient. If the court determines that an answer does not comply with *Fed. R. Civ. P. 36*, the court may order either that the matter is admitted or that an amended answer be served. *See Fed. R. Civ. P. 36(a)(6)*.

A party may also bring a motion challenging the sufficiency of: (1) an objection to a request for admission; (2) a denial of a request for admission; or (3) or a claimed inability to admit or deny. *See Fed. R. Civ. P. 36(a)(6)*.

Warning:

Admissions made in response to Rule 36 requests for admission are binding on that party. *See Praetorian Ins. Co. v. Site Inspection, LLC, 604 F.3d 509, 514 (8th Cir. 2010)* . If facts admitted under Rule 36 are dispositive of the case, a court may properly grant summary judgment on the basis of those admitted facts. *Quasius v. Schwan Food Co., 596 F.3d 947, 950-951 (8th Cir. 2010)* .

[2] Seeking Sanctions for Failure to Admit

The court may require the losing party to pay the opposing party's reasonable expenses in connection with the motion, including attorney's fees. *See Fed. R. Civ. P. 37(a)(5)*. The court may also impose sanctions under *Fed. R. Civ. P. 26(g)(3)*, or *Fed. R. Civ. P. 37(c)(2)*. *See Fed. R. Civ. P. 26(g)(3)*, *37(c)(2)*.

[3] Complying With Local Requirements

Local rules may require that the motion be accompanied by copies of relevant portions of discovery materials and by a notice of motion, memorandum of points and authorities, and an affidavit. *See, e.g.,* S.D.N.Y. L.R. 37.1 (discovery

materials at issue must be quoted verbatim); D.D.C. L.R. 5.2(b) (discovery materials must be quoted verbatim or attached). Local rules may also specify filing deadlines and service requirements. *See, e.g.,* N.D. Cal. L.R. 5.1-5.6 (specifying requirements for filing and service of motion papers).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 36.12.*
- *Federal Litigation Guide § 19.10.*
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 13.
- *Fed. R. Civ. P. 36(a)(6).*

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1-6 Moore's AnswerGuide: Fed Civil Motion Practice § 6.08

§ 6.08 Moving to Amend or Withdraw Admission

[1] Grounds for Motion to Amend or Withdraw Admission

Pursuant to *Fed. R. Civ. P. 36(b)*, a court may permit amendment or withdrawal of an admission on motion by the party who responded to a request for admission. *See Fed. R. Civ. P. 36(b).*

The court may grant the motion if both of the following requirements are present:

1. The presentation of the merits of the action will be promoted by the amendment or withdrawal or amendment;

2. The withdrawal or amendment will not prejudice the party who made the admission in maintaining the action or defense on the merits.

See, e.g., American Auto. Ass'n v. AAA Legal Clinic of Jefferson Crooke, P.C., 930 F.2d 1117, 1119 (5th Cir. 1991) (court's discretion whether to permit amendment or withdrawal of admissions must be exercised within bounds of two-part test, which provides that presentation of merits must be subserved and party that obtained admissions must not be prejudiced in its presentation of case); *Raiser v. Utah County, 409 F.3d 1243, 1246-1247 (10th Cir. 2005)* (applying two-part test, circuit court ruled that district court erred in denying motion to amend deemed admission).

The court has discretion to permit the requested amendment or withdrawal of the response to the request for admission. *See, e.g., Kerry Steel, Inc. v. Paragon Indus., 106 F.3d 147, 154 (6th Cir. 1997)* (district court has considerable discretion over whether to permit withdrawal or amendment of admission); *Banos v. City of Chicago, 398 F.3d 889, 892 (7th Cir. 2005)* (district court in its discretion may permit party to rescind admissions when doing so better serves presentation of merits and review of court's discretion is only for abuse of discretion); *Hadley v. United States, 45 F.3d 1345, 1348 (9th Cir. 1995)* (district court's denial of motion to withdraw or amend admission is reviewed for abuse of discretion).

[2] Timing of Motion to Withdraw or Amend Admission

A party should file a motion to withdraw or amend an admission as soon as possible after it determines that a motion is

required. There is no time limit, however, in which to file a motion to withdraw or amend an admission. *See Januszewski v. Village of Oak Lawn, 2008 U.S. Dist. LEXIS 92055, at *12 (N.D. Ill. Nov. 12, 2008)* (permitting a plaintiff to withdraw responses to requests for admissions more than two years after they were made, because the answers at issue were signed and submitted by the plaintiff's former attorney without giving the plaintiff an opportunity to review the answers, and defendants failed to establish that they would be prejudiced by the withdrawal).

Exception:

A formal written motion to withdraw an admission is not always necessary. In some jurisdictions, requests to withdraw may be made orally or may be imputed from a party's action. *But see Quasius v. Schwan Food Co., 596 F.3d 947, 952 (8th Cir. 2010)* (without some filing aimed at withdrawing deemed admissions, even after court directed plaintiff to file such motion and granted additional time for that purpose, district court did not abuse its discretion by considering deemed admissions in resolving summary judgment motion). At least one court has found that a late response to requests for admission is equivalent to a withdrawal of a deemed admission. *See Chancellor v. City of Detroit, 454 F. Supp. 2d 645, 666 (E.D. Mich. 2006)* (three-day late denials to requests for admission were deemed the functional equivalent of a request to withdraw).

[3] Complying With Local Requirements

Local rules may require that the motion be accompanied by copies of relevant portions of discovery materials and by a notice of motion, memorandum of points and authorities, and an affidavit. *See, e.g.,* S.D.N.Y. 37.1 (discovery materials at issue must be quoted verbatim); D.D.C. L.R. 5.2(b) (discovery materials must be quoted verbatim or attached). The local rules may also specify filing deadlines and service requirements. *See, e.g.,* N.D. Cal. L.R. 5.1-5.6 (specifying requirements for filing and service of motion papers).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 36.13.*
- *Federal Litigation Guide P 19.102.*
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 13.
- *Fed. R. Civ. P. 36(b).*

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Chapter 6 DISCOVERY
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1-6 Moore's AnswerGuide: Fed Civil Motion Practice § 6.09

§ 6.09 Moving to Quash Subpoena

[1] Quashing Subpoena; Power of Court

[a] Quashing Subpoena; Mandatory Grounds

On timely motion, a court must quash or modify a subpoena if the subpoena:

1. Fails to allow reasonable time for compliance;

2. Requires a nonparty to travel more than 100 miles, except that a person may in order to attend trial be commanded to travel from any place within the state in which the trial is held;

3. Requires disclosure of privileged or other protected material;

4. Subjects a person to undue burden.

Fed. R. Civ. P. 45(c)(3)(A).

[b] Quashing Subpoena; Discretionary Grounds

On timely motion, a court may quash or modify a subpoena if the subpoena:

1. Requires disclosure of a trade secret or other confidential research, development, or commercial information; or

2. Requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party; or

3. Requires a nonparty to incur substantial expense to travel more than 100 miles.

Fed. R. Civ. P. 45(c)(3)(B).

[c] Issuing Court May Quash Subpoena

Only "the issuing court" may grant a motion to quash or modify a subpoena. *Fed. R. Civ. P. 45(c)(3)(A)*. Therefore, if a subpoena is issued by a district court other than the one in which the case is pending, the proper court in which to file a motion to quash or modify the subpoena is the issuing court, not the court in which the action is pending. *See In re Digital Equip. Corp., 949 F.2d 228, 231 (8th Cir. 1991)* (court in which action was pending could not hear or decide objections to subpoena for deposition because court issuing subpoena has exclusive jurisdiction).

Although only the issuing court may quash the subpoena, a nonparty deponent may seek a protective order either in the court where the action is pending or in the court for the district where the deposition will be taken. Furthermore, the district where the deposition will be taken has discretion to remit the protective order motion to the district where the action is pending, but remission usually occurs only if the decision involves complicated factual issues with which the court where the action is pending has greater knowledge. *See Convertino v. United States Dep't of Justice, 260 F.R.D. 678, 679 (E.D. Mich. 2008)* ; *see also § 6.04[3], above*.

[d] Quashing or Modifying Subpoena; Court's Discretion

The decision to quash or modify a subpoena is within the court's discretion. *See, e.g., Tiberi v. Cigna Ins. Co., 40 F.3d 110, 112 (5th Cir. 1994)* (district court's decision to quash and encourage party to file more narrowly drawn subpoena, rather than ordering modification by court, was within court's sound discretion); *Mattel Inc. v. Walking Mountain Prods., 353 F.3d 792, 813 (9th Cir. 2003)* (decision to quash subpoena is reviewed for abuse of discretion).

[2] Quashing Subpoena by Bringing Motion

[a] Parties Lack Standing to Quash Subpoena Directed at Nonparties

When a subpoena is directed to a nonparty, any motion to quash or modify the subpoena generally must be brought by the nonparty. *See, e.g., Smith v. Midland Brake, Inc., 162 F.R.D. 683, 686 (D. Kan. 1995)* (party may not move to quash subpoena on ground that discovery period has closed or that material sought is irrelevant). In particular, a party to the action does not have standing to assert any rights of the nonparty as a basis for a motion to quash or modify a subpoena. *See, e.g., Donahoo v. Ohio Dep't of Youth Servs., 211 F.R.D. 303, 306 (N.D. Ohio 2002)* (party has no standing to challenge deposition subpoena served on nonparty on ground that inadequate notice was provided to deponent); *Thomas v. Marina Assocs., 202 F.R.D. 433, 434-435 (E.D. Pa. 2001)* (party does not have standing to move to quash subpoena served on nonparty based on asserted confidentiality interest of nonparty); *Bush Dev. Corp. v. Harbour Place Assocs., 632 F. Supp. 1359, 1364 (E.D. Va. 1986)* (though third party might have had basis to resist production, party had no standing to object to third party's production of documents in response to subpoena).

Exception:

A party has a right to move to quash a subpoena where the party asserts a personal right or privilege regarding the information sought by a subpoena directed to a nonparty. *See, e.g., Allocco Recycling, Ltd. v. Doherty, 220 F.R.D. 407, 411 (S.D.N.Y. 2004)* (defendant had standing to raise privilege objections to subpoena of documents sought from third party because generation of documents sought by subpoena resulted from third party's obligations under its contract with defendant); *Minnesota Sch. Bds. Ass'n Ins. Trust v. Employers Ins. Co., 183 F.R.D. 627, 629 (N.D. Ill. 1999)* (defendant had standing to move to quash subpoena based on claim that sought materials were defendant's work product); *Doe v. 2TheMart.com Inc., 140 F. Supp. 2d 1088, 1095-1097 (W.D. Wash. 2001)* (Internet user had *First Amendment* right to anonymity, and thus, had standing to bring motion to quash subpoena that sought identification of user; motion granted because identity was not directly and materially relevant to any defense or claim).

[b] Nonparty Must File Motion to Quash Subpoena

A nonparty wishing to challenge a testimonial subpoena may not proceed by written objection to the issuing party; the nonparty must move before the court to quash or modify the subpoena. *See Innomed Labs, LLC v. Alza Corp., 211 F.R.D. 237, 240 (S.D.N.Y. 2002)* . Motions to quash are also available as an alternative to written objections for nonparties challenging subpoenas requesting production and inspection of documents and things. *See Fed. R. Civ. P. 45(c)(2), (3).*

[3] Timing of Motion to Quash Subpoena

Fed. R. Civ. P. 45 does not provide a specific time period for bringing a motion to quash or modify a subpoena, but rather, it merely states that the motion should be made "on timely motion". *Fed. R. Civ. P. 45(c)(3)(A)*. The motion should be made promptly, however, and within the subpoena's compliance date. *See, e.g., Innomed Labs, LLC v. Alza Corp., 211 F.R.D. 237, 240 (S.D.N.Y. 2002)* (motion to quash should be brought before noticed date of deposition commanded by subpoena); *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc., 238 F. Supp. 2d 270, 278 (D.D.C. 2002)* (motion made several months after compliance date, and after motion to enforce subpoena, was obviously untimely).

[4] Attempting to Resolve Dispute Informally

Parties and proposed witnesses should comply with *Fed. R. Civ. P. 26(c)*'s requirement that litigants confer in an effort to resolve the dispute without court action and accompany the motion with a certification as to the attempt. *See Fed. R. Civ. P. 26(g)*. Local district court rules also may require parties to attempt to resolve discovery disputes between themselves before seeking judicial intervention. *See, e.g.,* C.D. Cal. L.R. 37-1 (prior to the filing of any discovery motion, counsel for the parties are required to confer in a good faith effort to eliminate the necessity for hearing the motion or to eliminate as many of the disputes as possible); N.D. Ill. L.R. 37-2 (discovery motion must include certification that parties were unable to resolve dispute after good faith meet and confer effort).

[5] Serving Motion to Quash Subpoena on All Parties That Have Appeared

Motions to quash or modify subpoenas must be served on all parties that have appeared in the action. *Fed R. Civ. P. 5(a).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 45.50 -45.52.*
- *Bender's Federal Practice Forms* Form Nos. 45:20-45.50.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 14.
- *Fed. R. Civ. P. 45(c).*

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Chapter 6 DISCOVERY
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1-6 Moore's AnswerGuide: Fed Civil Motion Practice § 6.10

§ 6.10 Petitioning to Perpetuate Testimony

[1] Nature of Perpetuation Proceedings

[a] Perpetuation Preserves Testimony Before Litigation or Pending Appeal

Perpetuation is a discovery process provided for under *Fed. R. Civ. P. 27*. Its purpose is to preserve testimony before litigation is commenced or pending appeal. *Fed. R. Civ. P. 27*. This section focuses on perpetuation before an action is filed.

[b] Perpetuation Prevents Loss of Testimony or Evidence

Prelitigation perpetuation is available under *Fed. R. Civ. P. 27(a)* only if the court is "satisfied that perpetuating the testimony may prevent a failure or delay of justice." *Fed. R. Civ. P. 27(a)(3)*. This rule requires the petitioner to show that testimony or evidence needed for a future lawsuit might otherwise be lost. *See In re Petition of Chary, 1994 U.S. Dist. LEXIS 5873, at *1 (S.D.N.Y. 1994)* ("Rule 27 discovery is not to be granted in order to aid in the framing of a complaint but only to preserve evidence that might otherwise be lost.").

Prelitigation perpetuation may not be used for the following purposes:

1. As a substitute for discovery.

2. To obtain discovery not otherwise obtainable in the action;

3. To discover facts on which to draft a complaint;

4. To obtain information that is privileged or protected;

5. As a subterfuge to obtain information for use in a criminal case;

6. To determine whether a cause of action exists, and if so, against whom; and

7. As a vehicle to ascertain evidence.

[c] Purposes for Moving to Perpetuate Testimony

Fed. R. Civ. P. 27 allows a court granting perpetuation to "make orders of the character provided for by Rule 34 or 35." *Fed. R. Civ. P. 27(a)(3)*. Therefore, if a court finds that perpetuation of a person's testimony is necessary, it can order the person not only to submit to a deposition, but also to do any of the following:

1. Permit inspection, copying, testing, or sampling of tangible things;

2. Permit entry on land or other property;

3. Produce and allow inspection and copying of designated documents, which include writings, drawings, graphs, charts, photographs, phonorecords, and other data compilation; or

4. Submit to a physical or mental examination

The person seeking perpetuation may specifically request these types of additional relief. *See, e.g., In re Matter of Nabors Loffland Drilling Co., 142 F.R.D. 295, 296 (W.D. La. 1992)* (medical examination sought).

[2] Verifying Petition to Perpetuate Testimony and Making Required Factual Showing

A petition to perpetuate testimony must be verified. *Fed. R. Civ. P. 27(a)*. Furthermore, a party seeking to perpetuate testimony must make a detailed factual showing.

[a] Probable Existence of Future Litigation

A petitioner seeking to perpetuate evidence must show that he or she expects to be a party to an action cognizable in a United States court but cannot presently bring such an action or cause it to be brought. *Fed. R. Civ. P. 27(a)(1)(A)*; *see Jackson v. Good Shepherd Servs., 683 F. Supp. 2d 290, 293 (S.D.N.Y. 2009)* (court denied Rule 27 petition because, among other things, petitioner failed to establish she was not yet able to file action). The anticipated action must be civil in nature. *See In re Application of Eisenberg, 654 F.2d 1107, 1113 (5th Cir. 1981)* (*Fed. R. Civ. P. 27* is "not a 'back door' to information otherwise beyond reach under the criminal discovery rules.").

Exception:
The petitioner must show that federal jurisdiction would exist in the contemplated action. *See Arizona v. California, 292 U.S. 341, 347, 54 S. Ct. 735, 78 L. Ed. 1298 (1934)* ("There need not be an independent basis of federal jurisdiction in a proceeding to perpetuate, but it must be shown that in the contemplated action, for which the testimony is being perpetuated, federal jurisdiction would exist and thus is a matter that may be cognizable in the federal courts.").

[b] Subject Matter of Future Litigation

The petition must describe the subject matter of the expected action and the petitioner's interest. *Fed. R. Civ. P. 27(a)(1)(B)*.

[c] Facts to be Perpetuated

The petition must state the facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it. *Fed. R. Civ. P. 27(a)(1)(C)*.

[d] Expected Adverse Parties

The petition must state the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, so far as known. *Fed. R. Civ. P. 27(a)(1)(D).*

[e] Expected Deponents and Subject Matter of Testimony

The petition must state the name, address, and expected substance of the testimony of each deponent. *Fed. R. Civ. P. 27(a)(1)(E).*

[3] Requesting Order to Perpetuate Testimony

The petition must request an order authorizing the petitioner to take the depositions of the persons named in the petitions for the purpose of perpetuating the testimony or other evidence. *Fed. R. Civ. P. 27(a)(1).* It may also request orders for discovery under *Fed. R. Civ. P. 34* and *35. See, e.g., In re Matter of Nabors Loffland Drilling Co., 142 F.R.D. 295, 296 (W.D. La. 1992)* (medical examination sought).

[4] Notifying Parties and Serving Petition to Perpetuate Testimony

[a] Petitioner Must Serve Notice With Copy of Petition Attached

The petitioner must serve a notice on each expected adverse party. *Fed. R. Civ. P. 27(a)(2).* A copy of the petition must be served with the notice. *Fed. R. Civ. P. 27(a)(2).* The petitioner must specify in the notice the time and place where the petitioner will apply for the order perpetuating testimony. *Fed. R. Civ. P. 27(a)(2).*

[b] Petition Must Be Served at Least 21 Days Before Hearing Date

The notice and a copy of the petition must be served at least 21 days before the hearing date. *Fed. R. Civ. P. 27(a)(2)*; *see Fed. R. Civ. P. 4(d).*

[c] Petition May Be Served by Any Manner Permissible Under Rule 4

The notice and petition may be served either inside or outside the district or state in any manner provided in *Fed. R. Civ. P. 4.* If service cannot be made with due diligence on an expected adverse party, the court may order service by publication or otherwise. *Fed. R. Civ. P. 27(a)(2)*; *see Fed. R. Civ. P. 4(d).*

[5] Complying With Proper Venue Requirements

The petition must be filed in the United States District Court in the district of the residence of any expected adverse party. *Fed. R. Civ. P. 27(a)(1).*

[6] Attempting to Resolve Dispute Informally

Although *Fed. R. Civ. P. 27* does not explicitly require an informal attempt at resolving disputes concerning the perpetuation of testimony, local district court rules typically require that litigants attempt to resolve the dispute prior to filing discovery motions. *See, e.g.,* C.D. Cal. L.R. 37-1 (prior to the filing of any discovery motion, counsel for the parties are required to confer in a good faith effort to eliminate the necessity for hearing the motion or to eliminate as many of the disputes as possible); D.N.J. L.R. 37.1(b)(1) ("Discovery motions must be accompanied by an affidavit certifying that the moving party has conferred with the opposing party in a good faith effort to resolve by agreement the issues raised by the motion without the intervention of the Court and that the parties have been unable to reach agreement. The affidavit shall set forth the date and method of communication used in attempting to reach agreement").

[7] Rule 27(c) Action Is Alternative to Petition to Perpetuate Testimony

An alternative procedure, an action under *Fed. R. Civ. P. 27(c)* to perpetuate testimony, is also available to achieve prelitigation perpetuation of testimony. *Fed. R. Civ. P. 27(c).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 27.01 -27.52.*
- *Bender's Federal Practice Forms* Form Nos. 27:1-27.110.
- *Fed. R. Civ. P. 27.*

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Chapter 6 DISCOVERY
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1-6 Moore's AnswerGuide: Fed Civil Motion Practice § 6.11

§ 6.11 Moving to Compel Mandatory Disclosure or Discovery

[1] Grounds for Motion to Compel

[a] Failing to Make Required Mandatory Disclosures

Parties may move to compel mandatory disclosures as required by *Fed. R. Civ. P. 26(a)*. *See Fed. R. Civ. P. 37(a)(3)(A)*.

Fed. R. Civ. P. 26(a) imposes three categories of disclosure obligations on the parties:

1. **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;

2. **Expert disclosures**, which include 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;

3. **Final pretrial disclosures**, which include identification of trial witnesses and exhibits, and designation of deposition testimony that will be used at trial.

Fed. R. Civ. P. 26(a).

[b] Failing to Comply With Discovery Requests

The following types of discovery breaches may provide grounds for a motion to compel:

1. A deponent fails to answer a question asked under *Fed. R. Civ. P. 30* or *31*. *See Fed. R. Civ. P. 37(a)(3)(B)(i)*.

2. A corporation or other entity fails to properly designate a person to testify under *Fed. R. Civ. P. 30(b)(6)* or *31(a). See Fed. R. Civ. P. 37(a)(3)(B)(ii).*

3. A party fails to answer an interrogatory served in accordance with *Fed. R. Civ. P. 33. See Fed. R. Civ. P. 37(a)(3)(B)(iii).*

4. A party fails to produce documents or to permit an inspection requested pursuant to *Fed. R. Civ. P. 34. See Fed. R. Civ. P. 37(a)(3)(B)(iv).*

A responding party's provision of evasive or incomplete discovery responses may provide grounds for the requesting party to file a motion to compel further discovery and request an award of sanctions against the responding party. *See, e.g., Coane v. Ferrara Pan Candy Co., 898 F.2d 1030, 1031 n.1 (5th Cir. 1990)* (*Fed. R. Civ. P. 37(d)* supported sanctions against plaintiff who supplied wrong version of liability release form in response to request for production of documents); *Hathcock v. Navistar Int'l Transp. Corp., 53 F.3d 36, 40 (4th Cir. 1995)* (noting that sanctions are authorized for conduct less egregious than complete unresponsiveness, but reversing default judgment due to lack of notice of imposition of drastic sanction, and limited prejudice to party seeking discovery).

[i] Failing to Answer Deposition Questions

When a party or witness refuses to answer a question during an oral deposition, the examining party may either:

1. Suspend the examination and move immediately for a court order to compel an answer; or

2. Complete the examination and then move for a court order to compel an answer.

See Fed. R. Civ. P. 37(a)(3)(B)(i), 37(a)(3)(C). A motion to compel also may be used to require answers that are posed in a deposition upon written questions.

Warning:

It is generally better to complete the remainder of the deposition for the following reasons: (1) the deponent may reconsider his or her position and later provide the answers; (2) the information provided by the deponent may cause the attorney to conclude that there is no substantial need for responses to the unanswered questions; and (3) a court looks more favorably on a motion to compel when it is focused on a few questions, rather than on a motion for an open-ended order to compel responses to questions not yet posed in subject areas not yet reached.

[ii] Failure to Designate Deponent

If a business entity or governmental agency served with a deposition notice fails to designate a deponent in accordance with *Fed. R. Civ. P. 30(b)(6)* or *31(a)*, the discovering party may bring a motion to compel. *See, e.g., Republic of Philippines v. Marcos, 888 F.2d 954, 956-957 (2d Cir. 1989)* (affirming dismissal based on corporate plaintiff's designating witness whose authority regarding subject of inquiry was derived from two persons who should have been designated witnesses but were not); *Black Horse Lane Assoc., L.P. v. Dow Chemical Corp., 228 F.3d 275, 304 (3d Cir. 2000)* (Third Circuit joined those courts holding that when witness is designated by corporate party to speak on its behalf pursuant to *Fed. R. Civ. P. 30(b)(6)*, producing unprepared witness is tantamount to "failure to appear" that is sanctionable under *Fed. R. Civ. P. 37(d)*).

[iii] Failure to Answer Interrogatories

A motion may be brought to compel a party to answer an interrogatory submitted under *Fed. R. Civ. P. 33*. *See, e.g., 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).

A failure to timely serve answers or objections to interrogatories may result in the imposition of sanctions under *Fed. R. Civ. P. 37(d)*. *See Fed. R. Civ. P. 37(d)*.

If a party serves objections to some or all of the interrogatories, or serves evasive or incomplete answers, the propounding party may bring a motion for an order compelling answers. *Fed. R. Civ. P. 37(a)(4)*. Such a motion tests the validity of objections or the adequacy of the responses.

[iv] Failing to Produce Documents or to Permit Inspection

A party may bring a motion to compel an opposing party to respond to an inspection demand submitted under *Fed. R. Civ. P. 34* or to permit inspection. *See, e.g., 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); *Charter House Ins. Brokers, Ltd. 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); *Henry v. Gill Industries, Inc., 983 F.2d 943, 947 (9th Cir. 1993)* (affirming dismissal against plaintiff who produced key document repeatedly requested by defendant).

If a party serves objections to some or all of the inspection demands, or serves evasive or incomplete answers, the propounding party may bring a motion for an order compelling answers. *Fed. R. Civ. P. 37(a)(4)*. The validity of objections or the adequacy of the responses will be tested by such a motion.

A complete failure to timely serve answers or objects to inspection demands may result in the imposition of sanctions under *Fed. R. Civ. P. 37(d)*. *See Fed. R. Civ. P. 37(d)*.

[c] Identifying Inadequacies of Disclosure or Discovery

A motion to compel should specifically identify the portions of the disclosures or discovery that are inadequate, and explain what is missing or what kind of information would be necessary to make the responses adequate. *See James N. Pappas & Sons, Inc. v. McDonald's Corp., 21 Fed. R. Serv. 2d 773 (D.D.C. 1976)* .

[2] Bringing Motion to Compel; Standing Requirements

[a] Failing to Make Mandatory Disclosure; Any Party Has Standing

If a party fails to make a disclosure required by *Fed. R. Civ. P. 26(a)*, any other party may move to compel disclosure and for appropriate sanctions. *See Fed. R. Civ. P. 37(a)(3)(A)*.

[b] Failing to Comply With Discovery Request; Only Party Seeking Disclosure Has Standing

Only the party seeking disclosure has standing to move to compel where the discovery failure is one of the following:

1. A deponent fails to answer a question;

2. A corporation or other entity fails to make a required designation;

3. A party fails to answer an interrogatory;

4. A party fails to respond that a requested inspection will be permitted or fails to permit that inspection

Fed. R. Civ. P. 37(a)(3)(B).

[3] Seeking Sanctions on Motion to Compel

[a] Presumption Favoring Sanctions When Motion to Compel Granted

A rebuttable presumption favors imposing reasonable expenses, including attorney's fees, on the party against whom a motion to compel disclosures or discovery is decided. *See Fed. R. Civ. P. 37(a)(5)(A).* On the other hand, the court must not order sanctions if:

1. The movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

2. The opposing party's nondisclosure, response, or objection was substantially justified; or

3. Other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 37(a)(5)(A)(i)-(iii).

[b] Apportioning Sanctions When Motion Is Granted in Part and Denied in Part

If the motion to compel is granted in part and denied in part, the court may apportion expense-shifting sanctions among the parties. *See Fed. R. Civ. P. 37(a)(5)(C)*; *see also Cal Dive International, Inc. v. M/V Tzimin, 127 F.R.D. 213, 218 (S.D. Ala. 1989)* (awarding portion of requested sanctions where motion to compel was granted in part and denied in part).

When there is a determination that many of the discovery objections were substantially justified, courts frequently refuse to award expense-shifting sanctions to either party. *See, e.g., Smith v. Conway Org., 154 F.R.D. 73, 78 (S.D.N.Y. 1994)* (finding that as the objections raised to discovery were substantially justified, no fees or costs would be granted); *Caruso v. Coleman Co., 157 F.R.D. 344, 350 (E.D. Pa. 1994)* (not granting sanctions against defendant where defendant's objections were found to be substantially justified); *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 138 F.R.D. 530, 538-539 (C.D. Ill. 1991)* (denying sanctions on motion to compel that was granted in part and denied in part).

[c] Imposing Expense-Shifting Sanctions on Motion to Compel; Persons Affected

[i] Imposing Expense-Shifting Sanctions Against Party, Attorney, or Both

A court has discretion to impose expense-shifting sanctions against any party or attorney who is responsible for taking a position that the court rejects when it rules on a motion to compel. *See Fed. R. Civ. P. 37(a)(5)(A).* Expense-shifting sanctions may be imposed on both counsel and client. *See Fed. R. Civ. P. 37(a)(5)(A)*; *see also DeVaney v. Continental Am. Ins. Co., 989 F.2d 1154, 1160 (11th Cir. 1993)* ("a motion for sanctions under Rule 37, even one which names only a party, places both that party and its attorney on notice that the court may assess sanctions against either or both unless they provide the court with a substantial justification for their conduct.").

[ii] Imposing Expense-Shifting Sanctions Against Nonparty Deponent; Split in Authority

There is a split in authority as to whether expense-shifting sanctions may be imposed against a nonparty deponent. *Cf. Aetna Cas. & Sur. Co. v. Rodco Autobody, 130 F.R.D. 2, 4 (D. Mass. 1990)* (holding 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); *Cruz v. Meachum, 159 F.R.D. 366, 368 (D. Conn. 1994)* (ruling that a nonparty deponent was not liable for expense shifting sanctions arising out of a failure to appear at a scheduled deposition because *Fed. R. Civ. P. 37* applies only to parties).

[4] Determining Jurisdiction for Motion to Compel

[a] Filing in Court Where Action Is Pending Necessary 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. *Fed. R. Civ. P. 37(a)(2)*. If a deposition of a corporate party is taken in another district, the forum court has the power to order the deponent to answer questions. *See Independent Prods. Corp. v. Loew's, Inc., 27 F.R.D. 426, 428-429 (S.D.N.Y. 1961)* (ordering party to answer questions in deposition to take place in California); *see also Belfer v. Pence, 435 F.2d 121, 122 (9th Cir. 1970)* (Hawaii District Court had power to order depositions to take place in California).

[b] Filing in Court Where Discovery Is Taken Necessary 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. *Fed. R. Civ. P. 37(a)(2)*.

[5] Timing for Filing Motion to Compel

[a] Parties Must Have Sufficient Time to Confer and Supplement Responses

The Federal Rules do not specify a time period within which a motion to compel disclosures or discovery must be made. Such time limits may be imposed, however, by local rules, judge's standing orders, or orders entered in individual cases. *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).

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 and to allow parties to comply with their continuing duty to supplement both their disclosures and discovery responses.

[b] Inaction May Constitute Waiver

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. *See, e.g., Butler v. Pettigrew, 409 F.2d 1205, 1207 (7th Cir. 1969)* (by not bringing motion to compel answers to interrogatories until after trial and entry of judgment on merits, plaintiff waived right to bring motion); *Mercy v. County of Suffolk, 748 F.2d 52, 55-56 (2d Cir. 1984)* (motion should be waived if not made before trial).

[c] Court Has Discretion in Determining Timeliness

Courts have considerable discretion to decide whether a motion to compel has been timely filed. *See, e.g., Public Loan Co. v. Federal Deposit Ins. Corp., 803 F.2d 82, 87 (3d Cir. 1986)* (the district court was well within its discretion in denying motion to compel where record showed movant's dilatoriness); *Draper v. Coombs, 792 F.2d 915, 924 (9th Cir. 1986)* (denying motion to compel answers to interrogatories). In determining whether a motion to compel was timely

filed, courts may consider any or all of the following factors:

1. The length of the delay in bringing the motion. *See Byrnes v. Jetnet Corp., 111 F.R.D. 68, 70-71 (M.D.N.C. 1986)* (finding that delay in bringing motion to compel, standing alone, was not sufficiently egregious to stand in bar to the motion).

2. Whether the delay in filing the motion caused prejudice or undue hardship to any other party. *See Kendrick v. Heckler, 778 F.2d 253, 258 (5th Cir. 1985)* (motion to compel allowed where respondent failed to indicate any prejudice or unnecessary burden which resulted from the delay in bringing the motion).

3. Whether the delay was caused by matters over which the moving party was justifiably ignorant or over which it had no control, or about which it was justifiably ignorant. *See Petroleum Ins. Agency, Inc. v. Hartford Acci. & Indem. Co., 106 F.R.D. 59, 63 (D. Mass. 1985)* (finding that plaintiffs' argument that the defendants had waived any objection to the non-production because of defendants' counsel's failure to inquire about the missing files was without merit because defendants' counsel was entitled to reply on plaintiffs' representation that all relevant documents were being produced).

4. Whether the delay was the product of gamesmanship or was it caused by good-faith efforts to secure the requested information through other means. *See, e.g., Kendrick v. Heckler, 778 F.2d 253, 258 (5th Cir. 1985)* (delay in bringing motion to compel production was excused where a portion of the delay occurred as a result of negotiations regarding voluntary disclosure of the requested documents); *Riley v. United Air Lines, Inc., 32 F.R.D. 230, 232-233 (S.D.N.Y. 1962)* (delay in bringing motion to compel excused where it was caused by movant's attempt to obtain requested information from other sources).

5. Whether granting the motion would interfere with the pretrial schedule. *See Kendrick v. Heckler, 778 F.2d 253, 258 (5th Cir. 1985)* (motion to compel production allowed where it was filed within the discovery cut-off fixed by the district court).

[6] Notifying Parties of Motion to Compel

[a] Persons To Whom Notice Must Be Given

The party moving to compel discovery or disclosures must give notice to the other parties, and to all other persons who would be affected by the order. *See Fed. R. Civ. P. 37(a)(1).*

[b] Notice of Motion Typically Required

Typically, a formal notice of a motion to compel is required, though courts may occasionally resolve discovery disputes by means other than a regularly noticed motion in order to save the parties time and expense. *See Braziller v. Lind, 32 F.R.D. 367, 368 (S.D.N.Y. 1963)* (stating that practice in district was to have an ex parte judge available to give prompt rulings on objections to questions on oral depositions taken in this district).

When formal notice is required, the notice must comport with due process, describe the relief sought, and afford a meaningful opportunity to be heard to the party or persons receiving notice. *See Holcomb v. Allis-Chalmers Corp., 774 F.2d 398, 401 (10th Cir. 1985)* (finding that the district court's verbal order on motion to compel discovery that was delivered over the telephone did not comply with the requirements of *Fed. R. Civ. P. 37* or of due process).

Absent a contrary local rule, standing order, or case-specific directive from the assigned judge, notice of the motion to compel hearing must be served at least fourteen days before the date set for that hearing. *See Fed. R. Civ. P. 6(c)(1)*

(motion requirement).

[7] Certifying Good Faith Attempt at Resolution of Issues

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. *Fed. R. Civ. P. 37(a)(1).*

This meet-and-confer requirement may be strictly construed and enforced, such that a motion to compel can be denied because of the failure to comply with the requirement. *See, e.g., Haselhorst v. Wal-Mart Stores, 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). Courts may require that the parties confer in person as opposed to conducting the meet and confer process by letter. *See, e.g., 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 Kan. 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).

PRACTICE RESOURCES:

- *Fed. R. Civ. P. 37(a).*
- *Federal Litigation Guide PP 22.01 -22.08.*
- *Moore's Federal Practice (3d ed.) §§ 37.01 -37.06.*
- *Bender's Federal Practice Forms* Form Nos. 37:1-37:81.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 17.
- *Fed. R. Civ. P. 37(a).*

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Chapter 6 DISCOVERY
PART C: SEEKING SANCTIONS FOR VIOLATION OF DISCOVERY RULES

1-6 Moore's AnswerGuide: Fed Civil Motion Practice § 6.12

§ 6.12 Checklist for Motions Seeking Sanctions for Violation of Discovery Rules

☐ Determine the basis for seeking sanctions.

- ○ Improper certification of disclosures. *See § 6.13 below*.
- ○ Failure to comply with discovery order. *See § 6.14 below*.
- ○ Failure to disclose or supplement discovery responses. *See § 6.15 below*.
- ○ Unreasonable failure to admit genuineness of document or truth of matter. *See § 6.16 below*.
- ○ Failure to appear at deposition or respond to discovery requests. *See § 6.17 below*.
- ○ Failure to participate in discovery plan. *See § 6.18 below*.
- ○ Spoliation of evidence. *See § 6.19 below*.

☐ Does a motion for sanctions fit with the party's overall case strategy?

- ○ Has the opposing party's discovery failure prejudiced the party's ability to present its case on the merits? Although a sounds legal basis for a motion is a precondition to filing the motion, it is not necessarily a sufficient reason for doing so.
- ○ Will the motion for sanctions likely cause the party opposing discovery to comply

with future discovery requests and/or court orders?

○ Will the contemplated motion for sanctions sound reasonable to the court? Consider asymmetries in terms of the parties, their financial resources, and available materials.

○ Is a motion for sanctions consistent with the party's discovery plan? Consider in what order counsel wants discovery to take place.

○ Will a motion for sanctions cause the opposing party to take adverse positions on other matters or be used as justification for its doing so?

○ Will a motion for sanctions positively or negatively affect settlement possibilities?

☐ Determine which court has jurisdiction.

○ Typically, the court where the action is pending has jurisdiction over sanctions motions.

○ Note that in situations where a party violates a discovery order, the court that issued the order has the power to find the violating party in contempt for noncompliance. *See § 6.14[7] below*.

☐ Engage in good faith effort at resolution of issues. Not only is this a cost-effective strategy that is looked upon favorably by judges, but it is often a prerequisite to filing a motion seeking sanctions for discovery violations.

○ Some Federal Rules, such as *Fed. R. Civ. P. 37(d)*, require certification that the moving party has in good faith conferred or at least attempted to confer with the party who has failed to respond in an effort to obtain a response without the necessity of court intervention. *See, e.g., § 6.17[8] below*.

○ Local rules, such as district court rules, or a specific district court judge's rules or standing orders frequently require certification of attempted good faith resolution. *See, e.g., § 6.16[5] below*.

☐ Determine the applicable time limit, if any, for bringing the sanctions motion.

○ Check the Federal Rules governing the particular motion being brought. While they may not provide specific time limits, the Federal Rules may require that the motion for sanctions must be brought within a reasonable time after the alleged violation has occurred. *See, e.g., §§ 6.14[4], 6.16[4] below*.

○ Local rules and court orders frequently provide deadlines for bringing sanctions

motions.

☐ Request appropriate monetary sanctions.

○ Moving party's reasonable expenses. Be sure to document expenses, including attorneys' fees, incurred as a result of the other party's failure to comply with discovery.

○ Court fees and costs incurred in bringing sanctions motion.

☐ Request appropriate non-monetary sanctions.

○ Order designating facts as established.

○ Order prohibiting certain defenses.

○ Order striking pleadings in whole or in part.

○ Stay order.

○ Default judgment order.

○ Contempt order.

☐ File and serve the sanctions motion.

○ Local rules frequently dictate filing and service requirements. *See, e.g., § 6.17[9], [10] below*.

○ Absent a contrary local rule, standing order, or case specific directive, comply with the general filing and service requirements for motions set forth in the Federal Rules. *See, e.g., § 6.14[5] below* ; *see also §§ 1.09-1.13 above*.

☐ **Search by Topic:** Civil Procedure > Discovery > Misconduct

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Chapter 6 DISCOVERY
PART C: SEEKING SANCTIONS FOR VIOLATION OF DISCOVERY RULES

1-6 Moore's AnswerGuide: Fed Civil Motion Practice § 6.13

§ 6.13 Moving for Sanctions Pursuant to Rule 26(g)(3) for Improper Certification

[1] Sanctions for Improper Certification Made Without Substantial Justification

Fed. R. Civ. P. 26(g) requires that every disclosure made pursuant to *Fed. R. Civ. P. 26(a)(1)* and *(a)(3)*, and every discovery request, response or objection, be certified by an attorney of record or by the party personally, if unrepresented. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry: (A) with respect to a disclosure, it is complete and correct as of the time it is made; and (B) with respect to a discovery request, response, or objection, it is: (i) consistent with the Federal Rules of Civil Procedure and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law; (ii) not interposed for any improper purpose; and (iii) neither unreasonable nor unduly burdensome or expensive. *See Fed. R. Civ. P. 26(g)(1)*.

A court will impose mandatory sanctions if, without substantial justification, a party makes a certification in violation of *Fed. R. Civ. P. 26(g)*. *See Fed. R. Civ. P. 26(g)(3)*.

[2] Sanctions for Improper Certification Are Mandatory Under Rule 26(g)(3)

The sanction provision of *Fed. R. Civ. P. 26(g)(3)* is mandatory, stating that the court "must impose an appropriate sanction" upon a person who, without substantial justification, made a certification in violation of *Fed. R. Civ. P. 26(g)*. Thus, sanctions are required if discovery responses are made for the improper purposes of causing unnecessary delay, increasing the other party's expenses, or to prevent the other party from receiving discovery material. *See, e.g., Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1545 (11th Cir. 1993)* ("Rule 26(g) makes the imposition of an 'appropriate sanction' mandatory if a discovery request, response, or objection is interposed for an improper purpose").

[3] Standard for Issuance of Sanctions for Improper Certification Under Rule 26(g)(3)

[a] Objective Standard of Reasonableness Applies

An objective standard is applied in determining whether sanctions are to be applied under *Fed. R. Civ. P. 26(g)*. *See, e.g., Chapman & Cole v. Itel Container Int'l B.V., 116 F.R.D. 550, 557 (S.D. Tex. 1987) , aff'd, 865 F.2d 676 (5th Cir. 1989)* (test is objective standard, and what is reasonable is matter for court to decide on totality of circumstances);

Oregon RSA No. 6 v. Castle Rock Cellular Ltd. Partnership, 76 F.3d 1003, 1007 (9th Cir. 1996) ("[w]e use an objective standard to determine whether a party or attorney has responded or objected to a discovery request for an improper purpose").

[b] Subjective Bad Faith Not Required

Subjective bad faith is not required to trigger sanctions under *Fed. R. Civ. P. 26(g). See In re Byrd, Inc., 927 F.2d 1135, 1137 (10th Cir. 1991)* ("[s]ubjective bad faith is not required ..."). Rather, the test is whether the attorney or party who signed the certification conducted a reasonable inquiry into the facts supporting the disclosure or discovery document. *See In re Byrd, Inc., 927 F.2d 1135, 1137 (10th Cir. 1991)* (central issue is whether person who signed made a reasonable inquiry).

[4] Persons Subject to Sanctions for Improper Certification Under Rule 26(g)(3)

[a] Counsel

Under *Fed. R. Civ. P. 26(g)*, an attorney for a represented party is required to sign discovery requests, responses, and objections, and may be sanctioned if the discovery document being certified violates *Fed. R. Civ. P. 26(g). See, e.g., Gonsalves v. City of New Bedford, 168 F.R.D. 102, 114 (D. Mass. 1996)* (attorney sanctioned for deliberately causing client to respond falsely to defendants' interrogatories).

[b] Pro Se Litigant

A pro se litigant is responsible for signing discovery requests, responses, and objections and may be sanctioned for a violation of *Fed. R. Civ. P. 26(g). See Zimmerman v. Bishop Estate, 25 F.3d 784, 789 (9th Cir. 1994)* (pro se litigant sanctioned under *Fed. R. Civ. P. 26(g)*).

[c] Represented Party

Even when an attorney has signed the discovery request, response, or objection, a district court may still impose sanctions. *Fed. R. Civ. P. 26(g)(3)* specifically states that sanctions may be imposed not only on the person who made the certification, but on the party on whose behalf the disclosure, request, response or objection is made. *See Fed. R. Civ. P. 26(g)(3).*

If an attorney fails to certify a client's responses to discovery, but the client does, sanctions may be imposed on the client. *See United Missouri Bank, N.A. v. Bank of New York, 723 F. Supp. 408, 416 (W.D. Mo. 1989)* (defendant sanctioned for certifying interrogatory responses when no objective basis existed for believing in truth or accuracy of responses).

Sanctions may be imposed against a party and the party's attorney when both have acted in violation of *Fed. R. Civ. P. 26(g). See Perkins v. General Motors Corp., 965 F.2d 597, 601 (8th Cir. 1992)* (both attorney and client sanctioned).

[5] Awarding Sanctions for Improper Certification; Types of Sanctions Imposed

[a] Attorney's Fees and Costs as Sanction

Sanctions for improper certification of discovery requests, responses and objections can include the adverse party's attorney's fees and costs. *See Johnson Int'l Co. v. Jackson Nat'l Life Ins. Co., 19 F.3d 431, 439 (8th Cir. 1994)* (costs assessed against law firm).

[b] Court-Incurred Costs as Sanction

Sanctions imposed upon a party who fails to properly certify discovery requests, responses, and objections may include costs and fees of the court and not just those of the adverse party. *See National Ass'n of Radiation Survivors v. Turnage, 115 F.R.D. 543, 558 (N.D. Cal. 1987)* (party's discovery abuses led to court's appointment of a special master to supervise future discovery, sanctions in the form of fees and costs of special master were imposed).

[c] Evidence Preclusion as Sanction

Preclusion of evidence is a more severe sanction available to redress a violation of *Fed. R. Civ. P. 26(g). See Jankins v. TDC Management Corp., 131 F.R.D. 629, 634 (D.D.C. 1989)* (party's deliberate failure to comply with the dictates of *Fed. R. Civ. P. 26(g)* and provide complete and candid discovery responses justified imposition of harsh sanction of preclusion).

[d] Dismissal or Default Judgment as Sanction

Default judgments and dismissals are the harshest sanctions available for improperly certified discovery responses. *See generally Comiskey v. JFTJ Corp., 989 F.2d 1007, 1009 (8th Cir. 1993)* (defendant's total failure to comply with numerous court orders and with plaintiff's discovery requests was due to bad faith that justified district court's entry of default judgment pursuant to *Fed. R. Civ. P. 37*).

PRACTICE RESOURCES:

- *Federal Litigation Guide PP 22.120 -22.124.*
- *Moore's Federal Practice (3d ed.) §§ 26.150 -26.155.*
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 18.
- *Sanctions: The Federal Law of Litgation Abuse §§ 40-45.*
- *Fed. R. Civ. P. 26(g).*

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Chapter 6 DISCOVERY
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§ 6.14 Moving for Sanctions Pursuant to Rule 37(b) for Failure to Comply with Discovery Order

[1] Grounds for Rule 37(b) Sanctions for Failure to Comply With Discovery Order

Fed. R. Civ. P. 37(b) provides for sanctions for the violation of a court order or direction. *Fed. R. Civ. P. 37(b).*

Sanctions are available under *Fed. R. Civ. P. 37(b)* when:

1. a deponent fails to be sworn or answer a question after being directed to do so by the court;

2. a party (or its designee) fails to obey an order to provide or permit discovery;

3. a party fails to obey an order under *Fed. R. Civ. P. 26(f).*

Fed. R. Civ. P. 37(b)(1), (2).

The absence of a prior court order or directive precludes the imposition of sanctions pursuant to *Fed. R. Civ. P. 37(b). See Brandt v. Vulcan, Inc., 30 F.3d 752, 756 (7th Cir. 1994)* (plaintiff's request for sanctions denied because no court order compelling discovery had been issued).

[2] Court Issuing Original Discovery Order Determines Violation and Makes Subsequent Orders

The court that issued the original discovery order determines whether any parties have violated that order. Moreover, the court that issued the original order has the power to make subsequent orders, such as a sanctions award, that will apply to the parties who are governed by the original discovery order.

[a] Order Must Be Directed at Specific Party

The court's order must be directed at the party against whom the sanctions are sought to be imposed. *See Daval Steel Prods. v. M/V Fakredine, 951 F.2d 1357, 1364 (2d Cir. 1991)* (holding that sanctions could not be imposed on one defendant when the order compelling discovery was directed only to its codefendant).

[b] Order Must Give Adequate Notice of Duties Imposed

The discovery form alleged to have been violated must adequately identify the duties it imposes. If the terms of the discovery order are too vague or general to give fair notice of its obligations, it cannot support sanctions. *See, e.g., R. W. Int'l Corp. v. Welch Foods, Inc., 937 F.2d 11, 16 (1st Cir. 1991)* (court stated it was reluctant to read a specific order by implication into district court's blanket directive, especially as the sanction sought was dismissal); *Salahuddin v. Harris, 782 F.2d 1127, 1131-1132 (2d Cir. 1986)* (finding there was no specific court order upon which to base sanctions).

[c] Order Need Not Be Formal; Source of Authority Need Not Be Stated

A court may award sanctions for violation of any order compelling discovery, and the order need not be formal in nature. Informal, minute orders may be sufficient to support sanctions. *Properties International, Ltd. v. Turner, 706 F.2d 308, 310 (11th Cir. 1983)* (order found where a court directed a party to provide its opponent "with complete discovery"); *Penthouse International, Ltd. v. Playboy Enterprises, Inc., 663 F.2d 371, 387-390 (2d Cir. 1981)* (finding that violation of oral order supported sanctions).

[d] Order Need Not Be Written

An oral order may support sanctions if both the following circumstances exist:

1. The party to whom the oral order was directed had adequate opportunity to persuade the trial court that the discovery in question should not be compelled; and

2. The oral order gave the party who failed to comply sufficiently clear notice of what the order required that party to do.

See, e.g., Nike Inc. v. Wolverine World Wide, 43 F.3d 644, 648 (Fed. Cir. 1994) (affirming award of sanctions pursuant to oral order that put party on notice of its discovery obligation); *Halas v. Consumer Servs., 16 F.3d 161, 165 (7th Cir. 1994)* (dismissal sanction warranted where plaintiff disobeyed court's order to attend deposition); *Bhan v. NME Hosp., Inc., 929 F.2d 1404, 1415 (9th Cir. 1991)* (affirming sanctions for failure to comply with oral discovery order).

[e] Subpoena Is Not Order for Purposes of Awarding Sanctions Under Rule 37(b)

Failure to obey a subpoena does not constitute a violation of a court order for purposes of awarding sanctions under *Fed. R. Civ. P. 37(b). See, e.g., Daval Steel Products, Div. of Francosteel Corp. v. M/V Fakredine, 951 F.2d 1357, 1364 (2d Cir. 1991)* (subpoena is not an order within the meaning of *Fed. R. Civ. P. 37*); *Wm. T. Thompson Co. v. General Nutrition Corp., 671 F.2d 100, 102 (3d Cir. 1982)* (*Fed. R. Civ. P. 45* provides the only enforcement mechanism for subpoena); *Fremont Energy Corp. v. Seattle Post Intelligencer, 688 F.2d 1285, 1286-1287 (9th Cir. 1982)* (subpoena did not constitute order for purposes of sanctions under *Fed. R. Civ. P. 37(b)*).

[f] Court Will Not Reexamine Original Discovery Order

If sanctions are sought for failure to obey an earlier discovery order, the court generally will not consider the propriety of the original discovery order.

[3] Timing of Motion for Rule 37(b) Sanctions for Failure to Comply With Discovery Order

Fed. R. Civ. P. 37(b) does not provide a specific time limit for filing a motion for sanctions. *See Fed. R. Civ. P. 37(b).* Nevertheless, *Fed. R. Civ. P. 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. *See, e.g., Brandt v. Vulcan, Inc., 30 F.3d 752, 756 (7th Cir. 1994)* (holding that motion for sanctions within reasonable time).

[4] Notifying Parties Affected by Rule 37(b) Motion

Absent a contrary local rule, standing order, or specific directive from the assigned judge, a motion for sanctions predicated upon a party's failure to comply with a discovery order must be served at least fourteen days before the date set for that hearing. *See Fed. R. Civ. P. 6(c)(1).*

[5] Certifying Good Faith Attempt at Resolution of Issues

The Federal Rules do not require a "meet and confer" with opposing counsel before filing a motion for sanctions under *Fed. R. Civ. P. 37(b). See Fed. R. Civ. P. 37(b).*

The local rules of many district courts, however, impose a duty to confer with opposing counsel before seeking relief from the court. *See, e.g.,* C.D. Cal. L.R. 37-1 (prior to the filing of any discovery motion, counsel for the parties are required to confer in a good faith effort to eliminate the necessity for hearing the motion or to eliminate as many of the disputes as possible); N.D. Ill. L.R. 37-2 (discovery motion must include certification that parties were unable to resolve dispute after good faith meet and confer effort); N.D. Ind. L.R. 37.1(a) (requires recitation of time and place of conference or attempted conference and names of participants); D. Kan. L.R. 37.2 (certification must "describe with particularity the steps taken by all counsel to resolve the issues in dispute"); W.D. Ky. L.R. 37.1 ("The moving party must attach to every discovery motion a certification that counsel have conferred and are unable to resolve their differences. The certification must detail counsel's attempts to resolve the dispute."); D.N.J. L.R. 37.1(b)(1) ("Discovery motions must be accompanied by an affidavit certifying that the moving party has conferred with the opposing party in a good faith effort to resolve by agreement the issues raised by the motion without the intervention of the Court and that the parties have been unable to reach agreement. The affidavit shall set forth the date and method of communication used in attempting to reach agreement.").

[6] Jurisdiction for Rule 37(b) Motion

[a] Sanctions Against Nonparty Deponent; Court Issuing Original Order Has Jurisdiction

If sanctions are sought against a nonparty deponent for failure to comply with a discovery order, the court that issued the discovery order has jurisdiction over the motion. *See Fed. R. Civ. P. 37(b)(1).* If the court that hears the sanctions motion is not hearing the action, its power is limited to a finding of contempt. *See Fed. R. Civ. P. 37(b)(1).*

[b] Sanctions Against Party; Forum Court Has Jurisdiction

If sanctions are sought against a party for failure to comply with an order, the motion may be brought in the court where the action is pending. *See Fed. R. Civ. P. 37(b)(2).* In such a situation, 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. *See Fed. R. Civ. P. 37(b)(2)(A)(i)-(vii).*

[7] Imposing Sanctions Under Rule 37(b); Types of Sanctions Available

[a] Contempt Sanctions for Failure to Testify

If the court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. *See Fed. R. Civ. P. 37(b)(1).*

Warning:

In addition, a Rule 45 subpoena is the equivalent of a "court order" and may be the basis for contempt sanctions if a nonparty fails to comply with the subpoena. *See Smith v. Pefanis, 652 F. Supp. 2d 1308, 1338 (N.D. Ga. 2009)* .

The principal purposes of contempt sanctions are: (1) to secure compliance with the specific order that has been disobeyed; (2) to generally promote respect for court orders, and discourage non-compliance; and (3) when appropriate, to impose punishment on a deponent who, without justification, flouts the law, jeopardizes the truth finding process, and forces the courts to intervene in the deposition process. *See generally, Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770, 783 (9th Cir. 1983)* (contempt sanctions may serve either remedial and compensatory purposes or punitive and deterrent purposes)

[b] Sanctions for Failure to Comply With Discovery Order

If a party has failed to comply with a discovery order, the court in which the action is pending "may issue further just orders" including the following:

1. **Directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims.** *See Fed. R. Civ. P. 37(b)(2)(A)(i)*; *see also Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 709, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982)* (upholding trial court's sanction that established facts necessary to support personal jurisdiction over foreign defendants after defendants refused to comply with order compelling discovery on jurisdictional question).

2. **Prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence.** *See Fed. R. Civ. P. 37(b)(2)(A)(ii)*; *see also Daval Steel Prods. v. M/V Fakredine, 951 F.2d 1357, 1362-1363, 1366 (2d Cir. 1991)* (defendants were precluded from submitting evidence on issue of alter ego liability when they failed to obey court order requiring production of witness and documents at deposition); *EEOC v. Kenosha Unified Sch. Dist. No. 1, 620 F.2d 1220, 1226 (7th Cir. 1980)* (government's proposed rebuttal witness was prohibited from testifying when government failed to comply with order to produce witness's reports); *Jankins v. TDC Management Corp., 21 F.3d 436, 444 (D.C. Cir. 1994)* (defendants were barred from presenting evidence to refute plaintiff's proof on three separate issues when they failed to produce court ordered documents on those issues).

3. **Striking pleadings in whole or in part.** *See Fed. R. Civ. P. 37(b)(2)(A)(iii)*; *see also Jaffe v. Grant, 793 F.2d 1182, 1189-1190 & n.5 (11th Cir. 1986)* (upholding decision to strike defendant's pleadings, noting that defendant had engaged in intentional misconduct).

4. **Staying further proceedings until the order is obeyed.** *See Fed. R. Civ. P. 37(b)(2)(A)(iv)*; *see also United States v. Richardson, 204 F.2d 552, 554-556 (5th Cir. 1953)* (condemnation action was abated until government cooperated with discovery); *Zalatuka v. Metropolitan Life Ins. Co., 108 F.2d 405, 405-406 (7th Cir. 1939)* (court stayed proceedings in wrongful death action until plaintiff consented to exhumation of deceased's body).

5. **Dismissing the action or proceeding in whole or in part.** *See Fed. R. Civ. P. 37(b)(2)(A)(v)*; *see also Serra-Lugo v. Mayaguez Consortium-Las Marias, 271 F.3d 5, 6 (1st Cir. 2001)* (district court did not abuse its discretion in dismissing case after repeated violations of its discovery orders, and after court warned plaintiff of consequences of noncompliance); *Bass v. Jostens, Inc., 71 F.3d 237, 243 (6th Cir.*

1995) (dismissal against plaintiff); *Payne v. Exxon Corp., 121 F.3d 503, 509-510 (9th Cir. 1997)* (district court did not abuse its discretion in dismissing plaintiff's claims against both defendants based on plaintiff's failure to obey order compelling discovery).

6. **Rendering a default judgment against the disobedient party.** *See Fed. R. Civ. P. 37(b)(2)(A)(vi)*; *see also Rose v. Franchetti, 979 F.2d 81, 86-87 (7th Cir. 1992)* (default judgment against defendant).

7. **Treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.** *See Fed. R. Civ. P. 37(b)(2)(A)(vii)*; *see also Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1472 (9th Cir. 1992)* (upholding contempt sanction); *Pesaplastic, C.A. v. Cincinnati Milacron Co., 799 F.2d 1510, 1519-1522 (11th Cir. 1986)* (defendant held in contempt for refusal to comply with document production ordered by court and consistent obstruction of discovery process).

[c] Sanctions for Failure to Produce Person for Physical or Mental Examination

When a party fails to comply with an order requiring that party to produce another for physical or mental examination, the court may order any of the following as sanctions:

1. Direct that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

2. Prohibit the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

3. Strike pleadings in whole or in part;

4. Stay further proceedings until the order is obeyed;

5. Dismiss the action or proceeding in whole or in part;

6. Render a default judgment against the disobedient party.

See Fed. R. Civ. P. 37(b)(2)(B) (stating that if a party fails to produce a person for a mental or physical examination, the court may issue any of the sanctions listed in *Fed. R. Civ. P. 37(b)(2)(A)(i)-(vi)*, unless the disobedient party shows that it cannot produce the person).

[d] Court May Require Disobedient Party to Pay Reasonable Expenses, Including Attorney's Fees

Instead of or in addition to any of the enumerated sanctions for failure to comply with a discovery order, 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. *See Fed. R. Civ. P. 37(b)(2)(C)*; *see also Tamari v. Bache & Co. (Lebanon) S.A.L., 729 F.2d 469, 474-475 (7th Cir. 1984)* (upholding monetary sanctions); *Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770, 784 (9th Cir. 1983)* (upholding sanctions); *De Vaney v. Continental Am. Ins. Co., 989 F.2d 1154, 1163 (11th Cir. 1993)* (upholding sanctions); *Mugavero v. Arms Acres, Inc., 680 F. Supp. 2d 544, 575 (S.D.N.Y. 2010)* ("[g]iven that the relative culpability of Plaintiff and her counsel in perpetrating these discovery abuses is not clear, Plaintiff and Plaintiff's counsel will be held equally liable for the attorneys' fee award ultimately imposed").

[e] District Court Has Broad Discretion To Impose Sanctions for Rule 37(b) Violations

The district court has broad discretion regarding whether to impose sanctions, and the types of sanction to be imposed. *See, e.g., Chilcutt v. United States, 4 F.3d 1313, 1320 (5th Cir. 1993)* ("District courts' discretion in fashioning appropriate sanctions for parties who disobey their orders is quite broad, though not unlimited."); *Pesaplastic, C.A. v. Cincinnati Milacron Co., 799 F.2d 1510, 1519 (11th Cir. 1986)* (district court has broad, although not unbridled, discretion in imposing sanctions under *Fed. R. Civ. P. 37*); *Tamari v. Bache & Co. (Lebanon) S.A.L., 729 F.2d 469, 472 (7th Cir. 1984)* (district court has broad discretion in imposing sanctions).

[f] Factors Considered by Court When Imposing Severe Rule 37(b) Sanctions

District courts often consider factors such as the following when determining whether to impose a dismissal or default sanction under *Fed. R. Civ. P. 37(b)*:

1. **Whether violations were the product of willfulness, bad faith, or some other substantial fault.** *See, e.g., Valentine v. Museum of Modern Art, 29 F.3d 47, 49-50 (2d Cir. 1994)* (sustained and willful intransigence supported dismissal); *Brown v. Southeastern Pa. Transp. Auth. (In re Paoli R.R. Yard PCB Litig.), 35 F.3d 717, 791-792 (3d Cir. 1994)* (exclusion of critical evidence is extreme sanction, requiring willfulness); *Philips Med. Sys. Int'l, B.V. v. Bruetman, 982 F.2d 211, 214 (7th Cir. 1992)* (default judgment proper against party whose conduct was product of willfulness, bad faith, and fault).

2. **Whether violations prejudiced other parties, and if so, the severity of the prejudice, and whether prejudice was remediable.** *See, e.g., Archibeque v. Atchison, T. & S.F. Ry, 70 F.3d 1172, 1175 (10th Cir. 1995)* (order of dismissal affirmed where litigant's willful conduct seriously interfered with the judicial process); *Hyde & Drath v. Baker, 24 F.3d 1162, 1166-1167 (9th Cir. 1994)* (affirming dismissal of complaint as sanction where the district court found that plaintiff's discovery misconduct resulted in a lack of crucial information, and inability to construct a defense).

3. **Whether violations caused delay in the proceedings, and if so, to what extent.** *See, e.g., Marx v. Kelly, Hart & Hallman, 929 F.2d 8, 10-11 (1st Cir. 1991)* (deliberate pattern of delay and disregard for court procedures warranted dismissal).

4. **Whether disobedient party had been warned that violations could or would result in drastic sanction.** *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)

5. **Whether disobedience was isolated incident or part of a pattern of misconduct.** *See, e.g., McLeod, Alexander, Powel & Apffel, P.C. v. Quarles, 894 F.2d 1482, 1486 (5th Cir. 1990)* (ongoing refusal to comply based on summary objections that had been found to be insufficient warranted default judgment).

6. **Whether less severe sanctions imposed previously on disobedient party were without sufficient effect.** *See, e.g., Marquis Theatre Corp. v. Condado Mini Cinema, 846 F.2d 86, 88 (1st Cir. 1988)* (initial sanction of striking defendant's affirmative defense was followed by sanction striking defendant's answer after first sanction did not elicit cooperation).

7. **Whether trial judge who imposed the severe sanction first considered alternative, less severe measures but concluded, for articulated reasons, why less drastic sanction would not be effective.** *See, e.g., Computer Task Group, Inc. v. Brotby, 364 F.3d 1112, 1116 (9th Cir. 2004)* (lower court appropriately considered, and rejected, alternative lesser sanctions); *Hathcock v. Navistar Int'l Transp. Corp., 53 F.3d 36, 41 (4th Cir. 1995)* ("we have also encouraged trial courts initially to consider

imposing sanctions less severe than default").

[g] Imposing Sanctions Against Pro Se Litigants

Pro se litigants may be sanctioned for failing to comply with discovery orders, particularly if the court concludes that the disobedience was deliberate, or if the litigant was warned in advance that sanctions would ensue if the litigant did not comply. *See, e.g., Valentine v. Museum of Modern Art, 29 F.3d 47, 49-50 (2d Cir. 1994)* (dismissal warranted because of pro se plaintiff's sustained and willful intransigence in the face of repeated and explicit warnings from the court that the refusal to comply with court orders to appear for his deposition would result in the dismissal of his action); *Phipps v. Blakeney, 8 F.3d 788, 790-791 (11th Cir. 1993)* (affirming dismissal as the record clearly demonstrated that pro se plaintiff deliberately and defiantly refused to comply with several discovery orders and told the court that he would not comply in the future).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.40 -37.44, 37.50 -37.51.*
- *Federal Litigation Guide PP 22.20 -22.25.*
- *Bender's Federal Practice Forms* Form Nos. 37:100-37:104.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 18.
- *Sanctions: The Federal Law of Litgation Abuse §§ 47-50.*
- *Fed. R. Civ. P. 37(b)* (failure to comply with a court order).

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Chapter 6 DISCOVERY
PART C: SEEKING SANCTIONS FOR VIOLATION OF DISCOVERY RULES

1-6 Moore's AnswerGuide: Fed Civil Motion Practice § 6.15

§ 6.15 Moving for Sanctions Pursuant to Rule 37(c)(1) for Failure to Disclose or Supplement Discovery Responses

[1] Party's Failure to Comply With Mandatory Disclosure Requirements of Rule 26(a) or 26(e) or Duty to Supplement Prior Responses May Result in Preclusion of Evidence

If a party, without substantial justification, fails to provide information or identify a witness as required by *Fed. R. Civ. P. 26(a)* or *(e)*, or fails to supplement a prior response to discovery as also required by *Fed. R. Civ. P. 26(e)*, 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. *See Fed. R. Civ. P. 37(c)(1).*

[2] Preclusion Sanction Designed to Be Automatic

Generally, the sanction for failure to comply with Rule 26(a) disclosure requirements is "automatic and mandatory exclusion from trial of the omitted evidence" unless nondisclosure was justified or harmless. *See Happel v. Walmart Stores, Inc., 602 F.3d 820, 825 (7th Cir. 2010)* .

The evidence-preclusion sanction for a party's failure to make mandatory, voluntary disclosures is intended to be "self-executing" and "automatic," so that the evidence-preclusion sanction is to be imposed without need for a motion, and without an exercise of discretion by the trial judge. *See, e.g., Alevras v. Paulis-Kneski, 2006 U.S. Dist. LEXIS 86356, at *2 (S.D.N.Y. 2006)* ("If an individual is improperly omitted from a Rule 26(a)(1) disclosure and he or she is not otherwise identified or disclosed in the proceedings as a potential witness, the automatic sanction is preclusion.").

An evidence-preclusion sanction is typically triggered when a party must seek to use previously undisclosed evidence. If the party does not seek to use the evidence, there is no occasion to invoke the automatic preclusion sanction. As a practical matter, however, courts will not know that the evidence a party proffers for use at trial or in connection with a motion should have been but was not disclosed unless the opposing party finds some method of bringing this fact to the court's attention. This issue can be brought to the court's attention by: (1) a motion in limine to exclude the evidence or testimony (*see §§ 11.50 -11.55 below*); (2) a motion to exclude the evidence or testimony made later in the proceedings; or (3) a motion for exclusion in combination with a motion to compel.

[3] Other Sanctions Available for Rule 37(c)(1) Violations

In addition to a preclusion order, the court may, on noticed motion, compel supplementation or impose other appropriate sanctions including:

1. An award of attorney's fees caused by the failure to supplement;

2. Informing the jury of the failure to disclose or supplement;

3. Other appropriate sanctions.

See Fed. R. Civ. P. 37(c)(1)(A)-(C).

[4] Rule 37(c)(1) Sanctions Not Permitted If Failure to Disclose or Amend Was Substantially Justified or Harmless

[a] No Sanctions if Failure Was Substantially Justified

Sanctions may not be imposed if a party's failure to disclose information or identify a witness as required by *Fed. R. Civ. P. 26(a)* or *(e)* was substantially justified. *Fed. R. Civ. P. 37(c)(1)*; *see also Hinton v. Patnaude, 162 F.R.D. 435, 439 (N.D.N.Y. 1995)* (Rule 37(c)(1) penalties "should not apply if the offending party's failure to disclose was 'substantially justified.' "). "Substantially justified" means reasonable people could differ as to the appropriateness of the contested action. *See Neumont v. Florida, 610 F.3d 1249, 1253 (11th Cir. 2010)* . Examples of substantial justifications for a discovery failure include:

1. A genuine discovery dispute. *See Nguyen v. IBP, Inc., 162 F.R.D. 675, 680 (D. Kan. 1995)* (court refused to find substantial justification for plaintiff's failure to satisfy expert witness disclosure requirements when plaintiff offered no explanation for failure).

2. Pro se party who is ignorant of disclosure requirement. *See generally Miller v. Los Angeles County Bd. of Educ., 827 F.2d 617, 620 (9th Cir. 1987)* (noting that a grant of attorney fees in Title VII case against a pro se plaintiff should depend on ability to recognize the merits of the claims).

3. If a party did not foresee the relevance of the evidence. *See, e.g., Metro. Opera Ass'n v. Local 10, Hotel 100, Hotel Emples. & Rest. Emples. Int'l Union, 2004 U.S. Dist. LEXIS 17093, at *86 (S.D.N.Y. 2004)* (noting that a party may be substantially justified in not disclosing evidence if the party could not have been expected to foresee its relevance).

[b] No Sanctions if Failure Was Harmless

Sanctions may not be imposed if a party's failure to disclose information required by *Fed. R. Civ. P. 26(a)* or *Fed. R. Civ. P. 26(e)(1)* was harmless. *Fed. R. Civ. P. 37(c)(1)*. Examples of harmless failures to disclose include:

1. **Inadvertent omission from a Rule 26(a)(1) disclosure of the name of a potential witness known to all parties.** *See, e.g., Newman v. GHS Osteopathic, 60 F.3d 153, 156 (3d Cir. 1995)* (defendant's failure to supply names of two witnesses who would testify at trial was harmless when there was no reason to believe that defendant acted in bad faith, and plaintiff knew names of those witnesses and scope of their relative knowledge well before trial); *Chapple v. Alabama, 174 F.R.D. 698, 701 (M.D. Ala. 1997)* (district court refused to preclude plaintiff's expert from testifying for failure to comply with Rule 26 requirements for expert witness reports because, although failure to provide report was irritating, it was harmless in light of defendant's familiarity with expert, who was well-known and used by plaintiff

in previous class action in which counsel for both sides had participated).

2. **Failure to disclose a document of which other parties had knowledge**. *See U.S. Axminster v. Chamberlain, 176 F.R.D. 532, 533-534 (N.D. Miss. 1997)* (district court found that plaintiff's failure to disclose document in formal disclosure statement did not prejudice defendant because defendant learned of document in deposition taken several months before discovery deadline).

The burden of establishing harmlessness is on the party who failed to make the required disclosure. *See Russell v. Bronson Heating & Cooling, 345 F. Supp. 2d 761, 778 (E.D. Mich. 2004)* ("With Rule 37 the burden of establishing harmlessness is on the party who failed to make the required disclosure.").

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.60 -37.63*.
- *Federal Litigation Guide PP 22.40 -22.45*.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 18.
- *Sanctions: The Federal Law of Litgation Abuse §§ 47-50*.
- *Fed. R. Civ. P. 37(c)(1)*.

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Chapter 6 DISCOVERY
PART C: SEEKING SANCTIONS FOR VIOLATION OF DISCOVERY RULES

1-6 Moore's AnswerGuide: Fed Civil Motion Practice § 6.16

§ 6.16 Moving for Sanctions Pursuant to Rule 37(c)(2) for Unreasonable Failure to Admit Genuineness of Document or Truth of Matter

[1] Seeking Sanctions Pursuant to Rule 37(c)(2) for Unreasonable Failure to Admit

Fed. R. Civ. P. 37(c)(2) provides that if a party fails to admit the genuineness of a document or the truth of a matter as requested pursuant to *Fed. R. Civ. P. 36*, the requesting party may seek sanctions, including attorney's fees, incurred in making that proof. *See Fed. R. Civ. P. 37(c)(2).*

While parties may recover fees incurred proving a matter that was unjustifiably denied, parties are not entitled, under *Fed. R. Civ. P. 37(c)(2)*, to attorney's fees incurred in drafting and prosecuting a motion for an award of such fees and costs. *See House v. Giant of Md., LLC, 232 F.R.D. 257, 261 (E.D. Va. 2005)* (*Fed. R. Civ. P. 37(c)(2)* specifically limits attorney's fees to those included in the reasonable expenses incurred in making that proof).

[2] Sanctions Are Mandatory Under Rule 37(c)(2) Unless Exception Applies

Sanctions are mandatory under *Fed. R. Civ. P. 37(c)(2)* unless the court finds:

1. The request for admission was objectionable;

2. The admission sought was of no substantial importance;

3. The party failing to admit had reasonable grounds for believing it might prevail on the issue; or

4. There was other good reason for the failure to admit.

See Fed. R. Civ. P. 37(c)(2)(A)-(D).

[3] Parties, Not Counsel, Are Subject to Sanctions Under Rule 37(c)(2)

Only parties, and not their counsel, are subject to sanctions under *Fed. R. Civ. P. 37(c)(2)*. When a court determines that an attorney played a culpable role in a party's unreasonable failure to admit the genuineness of a document or the truth

of a matter, the court may look to another source of authority to impose sanctions against the attorney. Potential sources include:

1. Other provisions of *Fed. R. Civ. P. 37*;

2. *Fed. R. Civ. P. 26(g)(3)*, which authorizes sanctions for discovery certifications made in violation of *Fed. R. Civ. P. 26(g)(2)*;

3. *Fed. R. Civ. P. 11(c)*, which permits sanctions for violations of the obligation to conduct a reasonable inquiry into the law and facts;

4. *28 U.S.C. § 1927*, which authorizes sanctions against an attorney who "multiplies the proceedings in any case unreasonably and vexatiously;" and

5. A district court's inherent authority.

[4] Timing of Motion for Sanctions Pursuant to Rule 37(c)(2)

Fed. R. Civ. P. 37(c)(2) does not set forth a time limit for filing a motion for sanctions for the unreasonable failure to admit the genuineness of a document or the truth of a matter. Often, such motions are filed after trial based on the required that the court find that the moving party has "proven" the truth of the matter for which an admission was requested.

[5] Certifying Good Faith Attempt at Resolution of Issues

Although *Fed. R. Civ. P. 37(c)(2)* does not have a meet-and-confer requirement, many local rules require counsel to attempt to informally resolve disputes before filing a motion. *See, e.g.*, C.D. Cal. L.R. 37-1 (prior to the filing of any discovery motion, counsel for the parties are required to confer in a good faith effort to eliminate the necessity for hearing the motion or to eliminate as many of the disputes as possible); N.D. Ill. L.R. 37-2 (discovery motion must include certification that parties were unable to resolve dispute after good faith meet and confer effort); N.D. Ind. L.R. 37.1(a) (requires recitation of time and place of conference or attempted conference and names of participants); D.N.J. L.R. 37.1(b)(1) ("Discovery motions must be accompanied by an affidavit certifying that the moving party has conferred with the opposing party in a good faith effort to resolve by agreement the issues raised by the motion without the intervention of the Court and that the parties have been unable to reach agreement. The affidavit shall set forth the date and method of communication used in attempting to reach agreement.").

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.70 -37.76*.
- *Federal Litigation Guide P 22.204*.
- *Bender's Federal Practice Forms* Form No. 37:300.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 18.
- *Sanctions: The Federal Law of Litgation Abuse §§ 47-50*.
- *Fed. R. Civ. P. 37(c)(2)*.

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Chapter 6 DISCOVERY
PART C: SEEKING SANCTIONS FOR VIOLATION OF DISCOVERY RULES

1-6 Moore's AnswerGuide: Fed Civil Motion Practice § 6.17

§ 6.17 Moving for Sanctions Pursuant to Rule 37(d) for Failure to Appear at Deposition or to Respond to Discovery Requests

[1] Seeking Appropriate Relief for Party's Failure to Appear at Deposition, or Respond to Discovery Requests

Pursuant to *Fed. R. Civ. P. 37(d)*, 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. *Fed. R. Civ. P. 37(d)*.

[2] Awarding Sanctions Under Rule 37(d); Court Has Broad Discretion

District courts have broad discretion in determining whether to impose sanctions pursuant to *Fed. R. Civ. P. 37(d)*. *See Fed. R. Civ. P. 37(d)*; *see also Zappala v. Albicelli, 954 F. Supp. 538, 548 (N.D.N.Y. 1997)* (The appropriateness of a given sanction is not guided by any clearly defined rule or doctrine but should be just, in accordance with the terms of *Fed. R. Civ. P. 37(d)*, and should serve the following guidelines: (1) that a party will not benefit from failure to comply with discovery requests; (2) act as specific deterrents in a case to a particular party; and (3) have a general deterrent effect on the case at hand and on other litigation).

[3] Requesting Court to Impose Specific Types of Sanctions Available Under Rule 37(d)

[a] Seeking Sanctions for Reasonable Expenses Caused by Discovery Failure

The court may require a party that fails to appear for deposition, or that fails 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 the failure was substantially justified or other circumstances make an award of expenses unjust. *See Fed. R. Civ. P. 37(d)*.

[b] Seeking Sanctions Deeming Facts Established Under Rule 37(d)

The court may order that specified facts or other matters related to the discovery failure be deemed established in accordance with the claim of the party seeking the discovery. *See Fed. R. Civ. P. 37(d)*.

[c] Seeking Sanctions Prohibiting Support or Opposition to Claims or Introduction of Evidence Under Rule 37(d)

The court may enter an order refusing to allow the party failing to provide discovery from supporting or opposing designated claims or defenses, or prohibiting that party from introducing designated matters into evidence. *See Fed. R. Civ. P. 37(d)*; *see also Fed. R. Civ. P. 37(b)(2)(A)(ii)*.

[d] Seeking Sanctions Striking Pleadings or Staying Further Proceedings Under Rule 37(d)

The court may strike pleadings or parts of pleadings, or staying further proceedings until the discovery obligations are met. *See Fed. R. Civ. P. 37(d)*; *see also Fed. R. Civ. P. 37(b)(2)(A)(iii), (iv)*.

[e] Seeking Sanctions Dismissing Action or Entering Default Judgment Under Rule 37(d)

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. *See Fed. R. Civ. P. 37(d)*; *see also Fed. R. Civ. P. 37(b)(2)(A)(v), (vi)*.

[f] Seeking Sanctions Imposing "Such Orders as Are Just" Under Rule 37(d)

Pursuant to *Fed. R. Civ. P. 37(d)*, the court may make such orders in regard to the discovery failure as are just. *See Fed. R. Civ. P. 37(d)*. While this provision is rarely invoked as a specific basis for imposing sanctions, a party may request the court to impose specific sanctions that do not fall neatly into any other category under this open-ended provision.

[g] Factors Considered by Court When Awarding Sanctions Under Rule 37(d)

Although this list is not exhaustive, district courts may consider the following factors in determining which sanctions, if any, are appropriate to award in an individual case:

1. **Whether violation was the product of bad faith, willfulness, or other substantial fault.** *See, e.g., Bobal v. Rensselaer Polytechnic Inst., 916 F.2d 759, 763-766 (2d Cir. 1990)* (affirming dismissal sanction as record supported a finding that pro se plaintiff acted with willfulness, bad faith, or other fault); *Henry v. Gill Industries, Inc., 983 F.2d 943, 948-949 (9th Cir. 1993)* (affirming dismissal based on plaintiff's willfulness and bad faith, even though defense ultimately received all discovery it sought).

2. **Whether violation was isolated event or part of a pattern of repeated breaches of pretrial duties.** *See, e.g., United States v. Aldeco, 917 F.2d 689, 690 (2d Cir. 1990)* (reversing default judgment in forfeiture action that was based on single failure to timely answer interrogatories).

3. **Extent to which party's discovery failure may be attributed to circumstances beyond its control.** *See, e.g., Beil v. Lakewood Eng'g & Mfg. Co., 15 F.3d 546, 552 (6th Cir. 1994)* (reversing dismissal sanction because plaintiff never had capacity to produce requested evidence).

4. **Severity of prejudice to propounding party caused by discovery failure.** *See, e.g., Henry v. Gill Industries, Inc., 983 F.2d 943, 948 (9th Cir. 1993)* (affirming dismissal when plaintiff's misconduct caused irreparable prejudice to defense, even though defense ultimately received all discovery it sought); *Archibeque v. Atchison, T. & S.F. Ry., 70 F.3d 1172, 1175 (10th Cir. 1995)* (affirming dismissal when plaintiff's false and misleading answers irreparably prejudiced defendant in preparation of its defense).

5. **Whether evidence that was not produced could be discovered from other sources.** *See, e.g., El-Yafi v. 360 East 72nd Owners Corp., 164 F.R.D. 12, 17-18 (S.D.N.Y. 1995)* (information sought was material to defense, and plaintiff's failure to appear at deposition or respond to interrogatories on that

topic made discovery impossible).

6. **Whether entering judgment against violating party might cause unfair prejudice to parties aligned with, but not controlled by, violating party**. *See, e.g., Acme Printing Ink Co. v. Menard, Inc., 812 F. Supp. 1498, 1521 (E.D. Wis. 1992)* (court gave some defendants second chance to answer interrogatories rather than enter judgment against them, out of concern that entry of judgment would adversely affect other defendants).

7. **Whether court warned violating party that dismissal or default was a possible sanction.** *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).

8. **Whether less severe measure would adequately achieve purpose of sanctions rules.** *See, e.g., Hyde & Drath v. Baker, 24 F.3d 1162, 1167 (9th Cir. 1994)* (affirming dismissal for failure to appear at depositions when court had previously imposed sanction of attorney's fees).

[4] Persons Against Whom Sanctions May Be Imposed Under Rule 37(d)

[a] Seeking Rule 37(d) Sanctions Against Party

Pursuant to *Fed. R. Civ. P. 37(d)*, 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 sanction the party.

[b] Seeking Rule 37(d) Sanctions Against Attorney; No Bad Faith Requirement

Furthermore, *Fed. R. Civ. P. 37(d)* authorizes the court to order the attorney for the party that failed to fulfill its discovery obligations to pay all reasonable expenses caused by the violation, including attorney's fees, to the party seeking discovery.

Expense-shifting sanctions may be imposed against an attorney even if the attorney did not act in bad faith. *See Hyde & Drath v. Baker, 24 F.3d 1162, 1171 (9th Cir. 1994) , amended on other grounds, 24 F.3d 1162 (9th Cir. 1994)* (lack of evidence that law firm acted in bad faith did not immunize law firm from sanctions).

Courts may look to other sources of authority to impose more severe sanctions against an attorney. Possible sources include:

1. *Fed. R. Civ. P. 26(g)*, which authorizes sanctions for improper discovery certifications;

2. *28 U.S.C. § 1927*, which authorizes sanctions against an attorney who "multiplies the proceedings in any case unreasonably and vexatiously;"

3. A district court's inherent authority. *See Natural Gas Pipeline Co. v. Energy Gathering, 2 F.3d 1397, 1410-1411 (5th Cir. 1993)* (court has inherent power to impose sanctions for bad faith conduct during litigation).

[5] Forum Court Has Jurisdiction Over Motion for Rule 37(d) Sanctions

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 brought in the court where the action is pending. *See Fed. R. Civ. P. 37(d).*

The forum court is the appropriate jurisdiction to hear the motion, even if the failure physically occurred in a different jurisdiction. Sanctions under *Fed. R. Civ. P. 37(d)* 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. *See generally Fed. R. Civ. P. 37(d).*

[6] Timing for Motion for Sanctions Under Rule 37(d)

Fed. R. Civ. P. 37(d) does not set a time limit within which a motion for sanctions based on a party's failure to appear for deposition or to respond to discovery must be filed.

The timing of the motion may be affected by the nature of the sanctions sought. For example, if the sanctions sought would affect the court's consideration of the merits of the action, the motion obviously must be filed before the court reaches a decision on the merits.

The best practice is 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.

[7] Providing Opportunity to Be Heard Before Imposing Rule 37(d) Sanctions

Before sanctions may be imposed, the party to be sanctioned must have an opportunity to be heard either by an oral hearing or through written submissions. *See Williams v. National Hous. Exch., 165 F.R.D. 405, 411-412 (S.D.N.Y. 1996)* (parties had an adequate opportunity to be heard in connection with sanction).

[8] Certifying Good Faith Attempt to Obtain Response Before Filing Rule 37(d) Sanctions Motion

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. *See Fed. R. Civ. P. 37(d).*

Local rules in many district courts contain special requirements concerning the duty to attempt informal resolution before approaching the court. *See, e.g.,* C.D. Cal. L.R. 37-1 (prior to the filing of any discovery motion, counsel for the parties are required to confer in a good faith effort to eliminate the necessity for hearing the motion or to eliminate as many of the disputes as possible); N.D. Ill. L.R. 37-2 (discovery motion must include certification that parties were unable to resolve dispute after good faith meet and confer effort).

[9] Complying With Local Procedural Rules for Sanctions Motion Under Rule 37(d)

Local rules in many districts contain special requirements governing the preparation of papers supporting and opposing sanctions motions, as well as service of such papers. *See, e.g.,* N.D. Cal. L.R. 7-8 (setting forth requirements for the form and timing of motion for sanctions).

[10] Complying With Local Filing Rules for Sanctions Motion Under Rule 37(d)

Moreover, local rules in many districts specify which discovery materials must be quoted or attached verbatim with discovery motions. *See, e.g.,* S.D.N.Y. L.R. 37.1 (discovery materials at issue must be quoted verbatim); D.D.C. L.R. 5.2(b) (discovery materials must be quoted verbatim or attached).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.90 -37.99.*
- *Federal Litigation Guide PP 22.80 -22.85.*
- *Bender's Federal Practice Forms* Form Nos. 37:400-37:403.
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 18.
- *Sanctions: The Federal Law of Litgation Abuse §§ 47-50.*
- *Fed. R. Civ. P. 37(d).*

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Chapter 6 DISCOVERY
PART C: SEEKING SANCTIONS FOR VIOLATION OF DISCOVERY RULES

1-6 Moore's AnswerGuide: Fed Civil Motion Practice § 6.18

§ 6.18 Moving for Sanctions Pursuant to Rule 37(f) for Failure to Participate in Discovery Plan

[1] Imposing Sanctions for Failure to Participate in Discovery Plan

Fed. R. Civ. P. 37(f) provides for sanctions if a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by *Fed. R. Civ. P. 26(f)*. *See Fed. R. Civ. P. 37(f)*.

[2] Granting of Rule 37(f) Sanctions Is Discretionary

Sanctions pursuant to *Fed. R. Civ. P. 37(f)* are not mandatory. The district court has broad discretion to decide whether to impose sanctions, even if the failure was willful or in bad faith. *See Fed. R. Civ. P. 37(f)*.

[3] Only Monetary Sanctions Available Under Rule 37(f)

Sanctions under *Fed. R. Civ. P. 37(f)* are limited to the reasonable expenses, including attorney's fees, caused by the party's or attorney's failure to participate in a discovery plan. *See Fed. R. Civ. P. 37(f)*.

[4] Awarding Sanctions for Failure to Participate in Discovery Plan; Alternative Sources of Authority

A breach of a pretrial order that directs a 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 *Fed. R. Civ. P. 16(f)*, which governs failure to obey a pretrial or scheduling order, and *Fed. R. Civ. P. 37(b)(2)*, which governs failure to comply with a discovery order. *See, e.g., United States use of Wiltec Guam, Inc. v. Kahaluu Constr. Co., 857 F.2d 600, 602-603 & n. 3 (9th Cir. 1988)* (*Fed. R. Civ. P. 37(b)(2)* authorizes sanctions against a party who fails to obey a discovery scheduling order).

[5] Bringing Failure to Participate in Discovery Plan to Court's Attention

Counsel who wants sanctions for the opposing party's failure to participate in good faith in the development and submission of a proposed discovery plan should bring the party's failure to the court's attention.

[6] Providing Party to Be Sanctioned Under Rule 37(f) With Opportunity to Be Heard

A judge must afford a party an opportunity to be heard before sanctioning the party for failing to participate in good faith in the development of a discovery plan. *See Fed. R. Civ. P. 37(f).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.110-37.111.*
- *Federal Litigation Guide PP 22.100-22.102.*
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 18.
- *Sanctions: The Federal Law of Litgation Abuse §§ 47-50.*
- *Fed. R. Civ. P. 37(f).*

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Chapter 6 DISCOVERY
PART C: SEEKING SANCTIONS FOR VIOLATION OF DISCOVERY RULES

1-6 Moore's AnswerGuide: Fed Civil Motion Practice § 6.19

§ 6.19 Moving for Sanctions for Spoliation of Evidence

[1] Determining Whether Spoliation or Failure to Preserve Evidence Has Occurred

Spoliation is the intentional destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. *See West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 778 (2d Cir. 1999)* ("Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.").

The obligation to preserve evidence may arise through a discovery request, through information alleged in the complaint, or prior to the litigation when a party is on notice that legal proceedings are likely. *See Smith v. City of New York, 388 F. Supp. 2d 179, 189 (S.D.N.Y. 2005)* ("The obligation to preserve evidence may arise through a discovery request, through information alleged in the complaint, or prior to the initiation of litigation where a party is on notice that legal proceedings are likely.").

Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents. *Treppel v. Biovail Corp., 249 F.R.D. 111, 118 (S.D.N.Y. 2008)* ; *Zubulake v. UBS Warburg LLC (Zubulake IV), 220 F.R.D. 212, 218 (S.D.N.Y. 2003)* .

[2] Elements of Spoliation

In order to sustain a prima facie claim for spoliation of evidence, the following elements must be established:

1. Pending or probable litigation involving the plaintiff;

2. Knowledge on the part of the party that litigation exists or is probable;

3. Willful destruction of evidence by party designed to disrupt the opposing party's case;

4. Disruption of the party's case; and

5. Damages proximately caused by the opposing party's acts.

See, e.g., Nye v. CSX Transp., Inc., 437 F.3d 556, 569 (6th Cir. 2006) (in order to sustain a prima facie claim for spoliation of evidence, the following elements must be established: (1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts); *Green Leaf Nursery v. E.I. DuPont De Nemours and Co., 341 F.2d 1292, 1308 (11th Cir. 2003)* ("The elements of a spoliation claim are (1) the existence of a potential civil action; (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action; (3) destruction of that evidence; (4) significant impairment in the ability to prove the lawsuit; (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit; and (6) damages.").

In determining whether spoliation has occurred, the court may also consider whether evidence was destroyed with a "culpable state of mind." The "culpable state of mind" factor is satisfied by a showing that the evidence was destroyed knowingly, even if without intent to breach a duty to preserve it, or negligently. *See Residential Funding Corp. v. DeGeorge Financial Corp., 306 F.3d 99, 108 (2d Cir. 2002)* (stating that "culpable state of mind" factor can be satisfied even though the failure to produce evidence was not the result of bad faith); *but see Consol. Aluminum Corp. v. Alcoa, Inc., 244 F.R.D. 335, 343-344 (M.D. La. 2006)* ("For the spoliator to have a 'culpable state of mind,' it must act with fraudulent intent and a desire to suppress the truth.").

[3] Imposing Sanctions for Spoliation of Evidence; Alternative Sources of Authority

Sanctions for spoliation of evidence as a violation of discovery rules have been awarded pursuant to:

1. *Fed. R. Civ. P. 37(b)*, for failure to comply with a discovery order;

2. *Fed. R. Civ. P. 37(d)*, for failure to respond to discovery requests;

3. The court's inherent authority to maintain its institutional integrity. *See Chambers v. NASCO, 501 U.S. 32, 43-49, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)* (discussing the inherent power of the federal courts).

[4] Sanctions Generally Unavailable for Loss of Electronically Stored Information Through Routine Operation of System

The obligation to preserve electronic data and documents requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation. However, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant electronic data. *See Consol. Aluminum Corp. v. Alcoa, Inc., 244 F.R.D. 335, 345 n. 18 (M.D. La. 2006)* (holding that corporation did not act in bad faith in failing to preserve electronic data); *see also Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 217 (S.D.N.Y. 2003)* (corporation does not have a duty to preserve every shred of paper, every e-mail or electronic document, and every backup tape, since such a rule would cripple large corporations that are almost always involved in litigation).

Moreover, absent exceptional circumstances, a court may not sanction a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system. *See Fed R. Civ. P. 37(e)*. The protection provided under *Fed. R. Civ. P. 37(e)* applies only to sanctions under the Federal Rules of Civil Procedure, and does not affect other sources of authority to impose sanctions or rules of professional responsibility. *See Fed. R. Civ. P. 37(f)*, advisory committee note of 2006.

Judge Scheindlin of the United States District Court for the Southern District of New York has devised a four-part analytical framework for determining whether to impose sanctions for failure to preserve electronically stored

information. First, the court must assess the party's level of culpability. That is, was their conduct of discovery acceptable or was it negligent, grossly negligent, or willful. The second step is the interplay between the duty to preserve evidence and the spoliation of evidence. The third step is to determine which party should bear the burden of proving that evidence has been lost or destroyed and the consequences resulting from that loss. In all cases, the innocent party must prove the following three elements: that the spoliating party (1) had control over the evidence and an obligation to preserve it at the time of destruction or loss; (2) acted with a culpable state of mind upon destroying or losing the evidence; and that (3) the missing evidence is relevant to the innocent party's claim or defense. The fourth step is to determine the appropriate remedy for the harm caused by the spoliation. *See Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 463 (S.D.N.Y. 2010)* .

[5] Imposing Dismissal, Default, or Other Sanctions for Spoliation of Evidence

[a] Dismissal or Default Imposed Upon Party Found Guilty of Spoliation of Evidence

Courts are more likely may punish spoliation of evidence with the ultimate sanction of dismissal or default in either of two situations:

1. The destroyed evidence is relevant to the disposition of an issue, claim, or defense, upon which the outcome of the litigation turns; or

2. The guilty party has destroyed primary evidence such the court cannot fashion effective issue-related remedies.

See Thiele v. Oddy's Auto & Marine, Inc., 906 F. Supp. 158, 161-163 (W.D.N.Y. 1995) (spoliation of critical evidence barred claims against defendant).

[b] Other Sanctions Imposed Upon Party Found Guilty of Spoliation of Evidence

In less egregious instances of spoliation of evidence, courts have ordered the following types of sanctions:

1. Preclusion orders. *See, e.g., Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 368-369 (9th Cir. 1992)* (excluding plaintiff's expert from testifying that cause of fire was heater that had been destroyed).

2. Orders deeming certain facts to be established. *See, e.g., Pressey v. Patterson, 898 F.2d 1018, 1022-1024 (5th Cir. 1990)* (suggesting appropriate sanction on remand might be deeming certain facts admitted).

3. Monetary awards, which are not necessarily limited to expenses incurred as a result of the spoliation. *See, e.g., Marketing Specialists, Inc. v. Bruni, 129 F.R.D. 35, 52-54 (W.D.N.Y. 1989)* , *aff'd without opinion*, *923 F.2d 843 (2d Cir. 1990)* (monetary sanctions awarded for spoliation of evidence where there was no proof of intentional destruction); *United States v. Philip Morris USA, Inc., 327 F. Supp. 2d 21, 26 (D.D.C. 2004)* (a monetary sanction was held to be appropriate where the court had no way of knowing what, if any, value the destroyed emails had to the plaintiff's case, and, because of the absence of that knowledge, it was impossible for the court to fashion a proportional evidentiary sanction that would accurately target the discovery violation. Despite that, the court found that it was essential that the defendants' conduct be deterred, and that the amount of the monetary sanction fully reflect the reckless disregard and gross indifference displayed by the defendants toward their discovery and document preservation obligations).

4. Instructions to the jury regarding adverse inferences that may be drawn against party responsible for the spoliation of evidence. *See, e.g., Reilly v. Natwest Mkts. Group, Inc., 181 F.3d 253, 268 (2d Cir. 1999)* (finding of bad faith or intentional misconduct is not prerequisite to sanctioning spoliator with adverse inference instruction); *TeleQuest Int'l Corp. v. Dedicated Bus. Sys., Inc.*, 2009 U.S. Dist. LEXIS 19546, at *15 (D.N.J. Mar. 11, 2009) (adverse inference instruction was the appropriate sanction for defendants who "scrubbed" their computer hard drive before turning it over to plaintiff's forensic consultant pursuant to court order, based on: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether a lesser sanction could both avoid unfairness to the opposing party and deter such conduct by others in the future); *but see Rimkus Consulting Group, Inc. v. Cammarata, 688 F. Supp. 2d 598, 614 (S.D. Tex. 2010)* (district court held that severe sanctions, including adverse inference instructions, may not be imposed absent finding of bad faith or willful destruction of evidence).

5. Striking one or more of the defendant's defenses. *See, e.g., Bayoil, S.A. v. Polembros Shipping, Ltd., 196 F.R.D. 479, 482-483 (S.D. Tex. 2000)* (district court ordered sanctions in form of striking defendants' personal jurisdiction and forum non conveniens defenses as punishment for defendants' shredding of documents concerning their operations for last five years).

[6] Circumstances in Which Sanctions Not Awarded for Spoliation of Evidence

Courts have denied sanctions for the spoliation of evidence where the spoliation was found to have occurred:

1. Pursuant to routine document destruction policies. *See, e.g., Stevenson v. Union Pac. R.R., 354 F.3d 739, 749 (8th Cir. 2004)* (railroad company's destruction of track maintenance records from up to two years prior to the accident pursuant to its document retention policy did not warrant adverse inference instruction).

2. As a result of accident or inadvertence. *See Brewer v. Quaker State Oil Refining Corp., 72 F.3d 326, 334 (3d Cir. 1995)* ("[I]t must appear that there has been an actual suppression or withholding of the evidence. No unfavorable inference arises when the circumstances indicate that the document ... in question has been lost or accidentally destroyed, or where the failure to produce it is otherwise properly accounted for.").

3. For reasons unrelated to the lawsuit. *See, e.g., Rogers v. Exxon Research & Eng'g Co., 550 F.2d 834, 843 (3d Cir. 1977)* (refusing to draw an adverse inference where destruction of a diary could have been unrelated to the lawsuit).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.120 -37.122.*
- *Federal Litigation Guide PP 22.110 -22.112.*
- *Moore's AnswerGuide: Federal Discovery Practice* Ch. 18.
- *Sanctions: The Federal Law of Litgation Abuse §§ 52-58.*

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Chapter 7 SANCTIONS AND CONTEMPT

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Chapter 7 SANCTIONS AND CONTEMPT
PART A: PROCEDURAL CONTEXT

1-7 Moore's AnswerGuide: Fed Civil Motion Practice § 7.01

§ 7.01 Procedural Context--Sanctions and Contempt

A party may seek sanctions from the court against either an opposing party or opposing counsel for improper conduct. In addition, a party may ask the court to hold an adversary in contempt for misconduct that offends the court's dignity or prevents it from properly conducting the proceedings.

District courts are authorized, under their own inherent authority, to issue sanctions for conducting litigation in bad faith and to issue contempt orders. Moreover, several Federal Rules and federal statutes authorize the district courts to impose sanctions under particular circumstances, including the following:

- *Fed. R. Civ. P. 11*, allowing sanctions for frivolous or improper filings, allegations or defenses;
- *Fed. R. Civ. P. 41*, allowing dismissal for failing to prosecute a claim or comply with a court order;
- *Fed. R. Civ. P. 16(f)*, allowing sanctions for failing to comply with pretrial requirements; and
- *28 U.S.C. § 1927*, allowing sanctions for multiplying proceedings unreasonably and vexatiously.

A party may also seek sanctions or contempt orders against an adverse party that refuses to cooperate in discovery proceedings. For a thorough discussion of the imposition of sanctions for misconduct during the discovery process. *See §§ 6.12 -6.19 below*.

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Chapter 7 SANCTIONS AND CONTEMPT
PART B: SEEKING OR OPPOSING RULE 11 SANCTIONS

1-7 Moore's AnswerGuide: Fed Civil Motion Practice § 7.02

§ 7.02 Checklist for Seeking or Opposing Rule 11 Sanctions

☐ Determine whether grounds for imposing Rule 11 sanctions exist because opponent's pleading, written motion, or other filing meets any of the following criteria (*see § 7.03[1] below*):

- ○ Type of filing upon which Rule 11 sanctions can be based. *See Fed. R. Civ. P. 11(b)*;
- ○ Filing not properly signed;
- ○ Filing presented for improper purpose;
- ○ Filing contains claims, defenses, or other legal contentions that are unwarranted by either existing law or nonfrivolous argument to change existing law or establish new law;
- ○ Filing contains allegations or factual contentions that do not have or are unlikely to have evidentiary support; or
- ○ Filing contains denials of factual contentions that are unwarranted by evidence.

☐ Inform opponent in writing of intent to request Rule 11 sanctions. *See Fed. R. Civ. P. 11*, advisory committee note of 1993; *see also § 7.04[1] below*.

☐ Check local district court rules and individual judge's rules for the following (*see § 7.04[1] below*):

- ○ General motion procedure;

- ○ Motion procedure applicable to sanctions motions in general; and
- ○ Any procedure applicable to particular sanctions sought.

☐ Clearly allege grounds for sanctions. *See Fed. R. Civ. P. 11(c)(2)*; *see also § 7.04[2] below*.

☐ Request type of sanction that will deter improper conduct (*see Fed. R. Civ. P. 11(c)(4)*; *see also §§ 7.03[2]*, *7.04[2]*, *7.05[2]*, *[3] below*):

- ○ Assessing attorney's fees and costs;
- ○ Imposing a fine;
- ○ Striking the sanctionable filing; or
- ○ Dismissing action or claim.

☐ Draft supporting documents, e.g., affidavits and memoranda of law, if required by local rules. *See § 7.04[2] below*.

☐ State intent to reply to opposition, if required by local rules. *See § 7.04[2] below*.

☐ Serve filing-ready motion for sanctions and supporting documents on opposing party. It is possible that the opposing party may come to the negotiating table, which would avoid the necessity of filing the motion. *See Fed. R. Civ. P. 11(c)(2)*; *see also § 7.04[3] below*.

☐ File the motion for sanctions at least 21 days after service. *See Fed. R. Civ. P. 11(c)(2)*; *see also § 7.04[3] below*.

- ○ Note that the opposing party may cure violation before the motion is filed, during the 21-day safe harbor period. *See § 7.04[3] below*.
- ○ Observe local rules on filing motions.

☐ If opposing a motion for sanctions, be sure to consider the following (*see § 7.06 below*):

- ○ Cure Rule 11 violation, if possible, during 21-day safe-harbor period. *See § 7.06[1] below*.
- ○ If motion file before 21-day safe-harbor period ends, oppose sanctions as being

premature. *See § 7.06[1] below*.

○ If applicable, argue that contention in question was made in good faith. *See § 7.06[2][b] below*.

○ Substantiate legal authority supporting contention in question, particularly if point is unsettled in that circuit. *See § 7.06[2][c] below*.

○ Argue that the conduct in question is not covered by *Fed. R. Civ. P. 11*, e.g., it does not involve a signature on a court filing. *See § 7.06[2][a] below*.

○ Dispute reasonableness or amount of attorney's fees sought. *See § 7.06[2][d] below*.

☐ Determine whether sanctions available under other rules. *See §§ 7.08, 7.09 below*.

○ Rule 41 dismissal for failure to prosecute claim or comply with court order. *See Fed. R. Civ. P. 41(b)*; *see also §§ 7.03, 7.08 below*.

○ Rule 16(f) sanctions for failure to comply with pretrial requirements or participate in good faith. *See Fed. R. Civ. P. 16(f)*; *see also §§ 7.03, 7.09 below*.

☐ **Search by Topic:** Sanctions > Baseless Filings

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Chapter 7 SANCTIONS AND CONTEMPT
PART B: SEEKING OR OPPOSING RULE 11 SANCTIONS

1-7 Moore's AnswerGuide: Fed Civil Motion Practice § 7.03

§ 7.03 Determining Availability of Rule 11 Sanctions

[1] Determining Whether Filings Qualify for Rule 11 Sanctions

[a] Pleadings and Papers Must Be Properly Signed

Every pleading, written motion, and other filing requiring an attorney's signature or party's signature must be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, by the party. Each filing must state the signer's address, e-mail address, and telephone number. *See Fed. R. Civ. P. 11(a).* Generally, the signature must be handwritten, not typed. However, a typed signature is generally acceptable in courts that accept electronic filings. *See Becker v. Montgomery, 532 U.S. 757, 764-768, 121 S. Ct. 1801, 149 L. Ed. 2d 983 (2001)* (court read *Fed. R. Civ. P. 11* to require a handwritten signature or a handmade mark).

Parties should bear in mind that if they mistakenly file a document without the required signature, they can usually avoid having the document stricken by promptly correcting the omission as soon as possible after learning about it.

Warning:

Generally, *Fed. R. Civ. P. 11* does not apply to certain papers filed with the intent to present them to the court, such as correspondence or settlement agreements not filed for court approval. Furthermore, *Fed. R. Civ. P. 11* is not a panacea for all improper conduct during litigation and, in some cases, sanctions must be sought under other procedural rules discussed in Part C.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 11.02, 11.03.*
- *Sanctions: The Federal Law of Litigation Abuse § 5(D).*
- *Fed. R. Civ. P. 11(a)* (signature).

[b] Rule 11 Requires Counsel to Make Reasonable Investigation

Fed. R. Civ. P. 11 requires counsel to make a reasonable investigation, under the circumstances, of the facts and the law before submitting pleadings. *See Fed. R. Civ. P. 11(b)*. An attorney may be sanctioned for failing to conduct a reasonable factual investigation and to confirm whether the theoretical underpinnings of the complaint are warranted by existing law or a good-faith argument to extend, modify, or reverse existing law. *See Christian v. Mattel, Inc., 286 F.3d 1118, 1127 (9th Cir. 2002)* (before filing a complaint, an attorney must not only conduct a reasonable factual investigation, but must also perform adequate legal research to confirm whether the theoretical underpinnings of the complaint are warranted by existing law or a good-faith argument to extend, modify or reverse existing law); *see also Fox v. Acadia State Bank, 937 F.2d 1566, 1569 n.1 (11th Cir. 1991)* (an attorney's or party's signature certifies that the signer believes the filing to be well grounded in fact and warranted by existing law or a good faith argument to extend, modify, or reverse the law after making a reasonable inquiry).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 11.02 -11.03*.
- *Sanctions: The Federal Law of Litigation Abuse §§ 8, 10*.
- *Fed. R. Civ. P. 11(b)* (representations to the court).

[c] Rule 11 Prohibits Frivolous Pleadings

An attorney may be sanctioned if a filing is either legally frivolous, that is, clearly has no chance of success, or is factually unsupported. *See Fed. R. Civ. P. 11(b)(2), (3)*; *see also Kaplan v. DaimlerChrysler, A.G., 331 F.3d 1251, 1255 (11th Cir. 2003)* (court may assess Rule 11 sanctions when party files pleading that has no reasonable factual basis or is based on legal theory that has no reasonable chance of success); *Pierce v. F.R. Tripler & Co., 955 F.2d 820, 830 (2d Cir. 1992)* (frivolous legal position for purposes of *Fed. R. Civ. P. 11* must not be merely unsuccessful, but clearly have no chance of success).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 11.02 -11.03*.
- *Sanctions: The Federal Law of Litigation Abuse §§ 14(A), (D)(4)*.
- *Fed. R. Civ. P. 11(b)(2)* (claims, defenses and other legal contentions must be warranted by existing law or nonfrivolous argument to extend, modify, reverse or establish new law).
- *Fed. R. Civ. P. 11(b)(3)* (allegations and other factual contentions must have or be likely to have evidentiary support).

[d] Rule 11 Prohibits Pleadings Filed for Improper Purpose

An attorney may be sanctioned for filing pleadings for an improper purpose, such as to harass or to cause unnecessary delay. *See Fed. R. Civ. P. 11(b)(1)*; *Raspanti v. Keaty (In re Keaty), 397 F.3d 264, 273 (5th Cir. 2005)* (Rule 11 sanctions may be imposed on attorney who signs pleading with any improper purpose, such as to harass or to cause unnecessary delay or needless increase in litigation costs).

[e] Legal Contentions Must Be Justified by Existing Law

Fed. R. Civ. P. 11 requires that legal contentions in pleadings be warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or establishing new law. To be nonfrivolous, an argument must have an objectively reasonable chance of success. *See Fed. R. Civ. P. 11(b)(2)*; *see also Salovaara v. Eckert, 222 F.3d 19, 34 (2d Cir. 2000)* (standard for triggering the fee award under *Fed. R. Civ. P. 11* is "objective unreasonableness").

Warning:

Rule 11 motions should not be used in lieu of summary judgment or other motions intended to test the sufficiency or efficacy of allegations in pleadings. *See Blue v. United States Dep't of Army, 914 F.2d 525, 535 (4th Cir. 1990)* (a party is not required as a matter of law to move for summary judgment before seeking sanctions, but usually dismissing a frivolous case on the merits should be a first option and imposing sanctions a matter of last resort); *Safe-Strap Co. v. Koala Corp., 270 F. Supp. 2d 407, 416 (S.D.N.Y. 2003)* (*Fed. R. Civ. P. 11* should not be used to raise issues of legal sufficiency that can be disposed of more properly by a motion to dismiss, a motion for a more definite statement, or a motion for summary judgment).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 11.02 -11.03.*
- *Sanctions: The Federal Law of Litigation Abuse §§ 11 -13.*
- *Fed. R. Civ. P. 11(b)(1)* (filing must not be made for any improper purpose).
- *Fed. R. Civ. P. 11(b)(2)* (claims, defenses and other legal contentions must be warranted by existing law or nonfrivolous argument to extend, modify, reverse or establish new law).

[2] Determining Nature of Appropriate Sanctions

After notice and a reasonable opportunity to respond, the court may impose an appropriate sanction on the attorneys, law firms, or parties that have either directly violated *Fed. R. Civ. P. 11(b)* or are responsible for the violation. *See Fed. R. Civ. P. 11(c)(1)*. Sanctions are determined based on an objective standard of reasonable conduct. Any fees awarded must be a direct result of the offending conduct and the court must consider the deterrent effect of any fee award. *See Fed. R. Civ. P. 11(c)(4)*; *see also Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 406, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)* (*Fed. R. Civ. P. 11* allows an award only of expenses directly caused by the offending filing).

Warning:

Rule 11 sanctions are not directed at general misconduct, but at signing papers in violation of the rule. *See Truesdell v. S. Cal. Permanente Med. Group, 293 F.3d 1146, 1154 (9th Cir. 2002)* (remanding because the record was not clear as to the bases for sanctions). Furthermore, *Fed. R. Civ. P. 11* is not applicable when other rules apply more directly. *See Fed. R. Civ. P. 11(d)*. In cases of general misconduct, the court may more appropriately exercise its authority under either *28 U.S.C. § 1927* or its inherent power to discipline attorney misconduct. *See Zaldivar v. Los Angeles, 780 F.2d 823, 829-830 (9th Cir. 1986)* (*Fed. R. Civ. P. 11* is not a panacea intended to remedy all types of attorney misconduct occurring before or during civil trials and does not repeal or modify the federal courts' authority to deal with abuses of counsel under *28 U.S.C. § 1927* or under its inherent power to discipline attorney

misconduct); *see also Adduono v. World Hockey Asso., 824 F.2d 617, 621 (8th Cir. 1987)* (*Fed. R. Civ. P. 11* is not a panacea intended to remedy all manner of attorney misconduct occurring before or during the trial of civil cases and only applies when an attorney has signed a pleading, motion, or other paper).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 11.20.*
- *Fed. R. Civ. P. 11(c)(1)* (how to initiate sanctions).
- *Fed. R. Civ. P. 11(d)* (inapplicability to discovery).

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Chapter 7 SANCTIONS AND CONTEMPT
PART B: SEEKING OR OPPOSING RULE 11 SANCTIONS

1-7 Moore's AnswerGuide: Fed Civil Motion Practice § 7.04

§ 7.04 Moving for Rule 11 Sanctions

[1] Notifying Opposing Counsel Informally of Rule 11 Motion

Counsel should notify opposing counsel by letter of the intent to seek Rule 11 sanctions ("Rule 11 letter"). *See Fed. R. Civ. P. 11*, advisory committee note of 1993 (in most cases, counsel should give informal notice of a potential violation to the other party, in person or by telephone or letter, before preparing and serving a Rule 11 motion). The letter should outline the grounds for sanctions and request counsel to withdraw or correct the offending filing.

Strategic Point:

Informal notice is almost always a good idea except in the most egregious cases. It may achieve the necessary relief without a fight, which the judge will appreciate.

Warning:

At the outset, counsel must consult the local rules of the district court in which the case is pending as well and individual judge's rules and standing orders. The rules and practices in different districts regarding the form, content, supporting documents, timing requirements, or other matters related to Rule 11 motions can vary widely.

[2] Stating Grounds for Sanctions and Relief Sought Under Rule 11

[a] Stating Grounds for Sanctions Under Rule 11

A motion for sanctions must comply with *Fed. R. Civ. P. 7*, which requires that, among other things, the motion must:

1. State with particularity the grounds for sanctions; and

2. Request the relief sought.

See Fed. R. Civ. P. 7(b)(1).

A Rule 11 sanctions motion must, at the very least, include a complete description of the specific conduct or omission alleged to violate the rule, which would give the party that is the subject of the motion the opportunity to prepare a defense. *See Fed. R. Civ. P. 11(c)(2)*; *see also Storey v. Cello Holdings, L.L.C., 347 F.3d 370, 389 (2d Cir. 2003)* (*Fed. R. Civ. P. 11* requires that moving party describe specific conduct or omission for which sanctions are being considered so that the subject of the motion can prepare its defense).

[b] Stating Relief Sought Under Rule 11

The moving party must state the type of relief it seeks under *Fed. R. Civ. P. 11*, including:

1. Monetary sanctions against counsel, e.g. attorney's fees and costs or fine, *see Fed. R. Civ. P. 11(c)(4)*, *(c)(5)(A)*; *see also Simon DeBartolo Group, L.P. v. Richard E. Jacobs Group, Inc., 186 F.3d 157, 166 (2d Cir. 1999)* (the court may impose monetary sanctions for Rule 11 violations; however, they may only be imposed on the party's attorneys).

2. Directives of a nonmonetary nature, e.g., striking the filing, in whole or part, or dismissing claims or case, *see Fed. R. Civ. P. 11(c)(4)*; *see also Morris v. Wachovia Secs., 448 F.3d 268, 284-285 (4th Cir. 2006)* (*Fed. R. Civ. P. 11* allows the court to impose nonmonetary sanctions, such as striking a document, admonishing a lawyer, requiring the lawyer to undergo education, or referring an allegation to appropriate disciplinary authorities).

Strategic Point:

When requesting reasonable costs and attorney's fees, counsel should submit a brief and supporting documents detailing the costs and attorney's fees incurred, including hourly rates, along with a proposed order. *See Ivanova v. Columbia Pictures Indus., 217 F.R.D. 501, 514 (C.D. Cal. 2003)* (imposing sanction of fees and costs after movant submitted brief and supporting documents detailing amount, including hourly rates, along with proposed order).

Warning:

Courts should not grant sanctions lightly, and neither *Fed. R. Civ. P. 11* nor any other sanctioning authority should be used to "chill" creative advocacy or attorneys' enthusiasm in pursuing legal or factual theories. *See Townsend v. Holman Consulting Corp., 914 F.2d 1136, 1141 (9th Cir. 1990)* (*Fed. R. Civ. P. 11* must be read in light of concerns that it will spawn satellite litigation and chill vigorous advocacy, because if vigorous advocacy was chilled by the excessive use of sanctions, wrongs would go uncompensated); *see also Tahfs v. Proctor, 316 F.3d 584, 594-595 (6th Cir. 2003)* (*Fed. R. Civ. P. 11* is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories). Nor should a party seek sanctions 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, or conduct discovery. *See Fed. R. Civ. P. 11*, advisory committee note of 1993. Because a motion for sanctions is subject to the certification requirements of *Fed. R. Civ. P. 11*, a court may sanction an attorney or party for filing a sanctions motion for an improper purpose. *See Fed. R. Civ. P. 11(b)(1)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 11.22[1].*

- *Bender's Federal Practice Forms* Form Nos. 11:100-11:104.
- *Fed. R. Civ. P. 7(b)(1)* (motions and other papers in general).
- *Fed. R. Civ. P. 11(b)(1)* (representations to court should not be for any improper purpose).
- *Fed. R. Civ. P. 11(c)* (sanctions).
- *Fed. R. Civ. P. 11*, advisory committee note of 1993.

[3] Abstaining From Filing Motion if Challenged Pleading Is Corrected or Withdrawn

A party should serve a Rule 11 motion at least 21 days before filing. *See Fed. R. Civ. P. 11(c)(2)*. Opposing counsel has a 21-day "safe harbor" period within which to withdraw or correct the offending filing. Moreover, a party should not file its Rule 11 motion if opposing counsel did indeed withdraw or correct the challenged paper within 21 days from service of the motion. *See Fed. R. Civ. P. 11(c)(2)*; *see also In re Pennie & Edmonds LLP, 323 F.3d 86, 89 (2d Cir. 2003)* (although *Fed. R. Civ. P. 11* contains no explicit time limit for serving the motion, the "safe harbor" provision requires that the movant wait at least 21 days after service before filing the motion or it will be disallowed as untimely).

Timing:

A party should not wait to seek Rule 11 sanctions until the court has ruled on the offending filing because serving the motion after the offending complaint has been dismissed deprives opposing counsel of the opportunity to use the safe harbor provision. *See Retail Flooring Dealers of Am., Inc. v. Beaulieu of Am., LLC, 339 F.3d 1146, 1150 (9th Cir. 2003)* (allowing a party to wait until judgment is entered before serving Rule 11 motion would effectively eliminate the safe harbor altogether).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 11.22[1][c].*
- *Fed. R. Civ. P. 11(c)(2)* (motion for sanctions).

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Chapter 7 SANCTIONS AND CONTEMPT
PART B: SEEKING OR OPPOSING RULE 11 SANCTIONS

1-7 Moore's AnswerGuide: Fed Civil Motion Practice § 7.05

§ 7.05 Arguing Motion for Rule 11 Sanctions

[1] Hearing on Affidavits, Oral Testimony, or Depositions

When a motion is based on facts not appearing of record, the court may hear the matter on the parties' affidavits. However, the court may direct that the matter be heard wholly or partly on oral testimony or depositions. *See Fed. R. Civ. P. 43(c).*

Warning:

Fed. R. Civ. P. 11 does not require a court hearing on a sanctions motion and an order imposing sanctions may be issued by default, as long as the sanctioned party was given the required notice and an opportunity to respond.

[2] Requesting Appropriate Sanctions for Rule 11 Violation

[a] Requesting Monetary Sanctions for Rule 11 Violation

A monetary sanction will often consist of an order to pay a penalty into court. Additionally, if warranted, the court may award to the prevailing party on a Rule 11 motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. *See Fed. R. Civ. P. 11(c)(4)*; *see also Harara v. Conoco Phillips Co., 2005 U.S. Dist. LEXIS 1426, at *4-*5 (N.D. Cal. 2005)* (court may award to party prevailing on Rule 11 motion reasonable expenses and attorney's fees incurred in presenting or opposing motion).

Strategic Point:

Monetary sanctions are neither encouraged nor forbidden. Because the main purpose of *Fed. R. Civ. P. 11* is to deter improper conduct, the district court does not err by imposing some other appropriate sanction rather than an award of fees.

[b] Requesting Nonmonetary Sanctions for Rule 11 Violation

Because the purpose of sanctions under *Fed. R. Civ. P. 11* is deterrence, rather than compensation or punishment, a court may impose nonmonetary sanctions. Among the options for nonmonetary sanctions are striking the offending filing from the record, admonishing a lawyer, requiring the lawyer to undergo education, referring an allegation to appropriate disciplinary authorities, and dismissing claims or complaints or pleadings. *See Morris v. Wachovia Secs., 448 F.3d 268, 284-285 (4th Cir. 2006)* (*Fed. R. Civ. P. 11* allows court to impose nonmonetary sanctions, such as striking document, admonishing lawyer, requiring lawyer to undergo education, or referring allegation to appropriate disciplinary authorities).

Strategic Point:

Although dismissal is a severe sanction, when appropriate, a court may dismiss a case in order to deter egregious sanctionable conduct. *See Carman v. Treat, 7 F.3d 1379, 1382 (8th Cir. 1993)* (finding district court did not abuse its discretion by dismissing Carman's civil rights action with prejudice as a Rule 11 sanction for ignoring the district court's repeated warnings and for failing to provide any evidence substantiating the allegations in his motion for injunctive relief); *but see Safe-Strap Co. v. Koala Corp., 270 F. Supp. 2d 407, 417-418 (S.D.N.Y. 2003)* (court has discretion to dismiss case with prejudice as Rule 11 sanction, but it's the harshest sanction available to a district court and should thus be imposed only in extreme circumstances).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 11.22 -11.24.*
- *Bender's Federal Practice Forms* Forms Nos. 11:30, 11:102-11:104.
- *Fed. R. Civ. P. 11(c)(4)* (nature of a sanction).
- *Fed. R. Civ. P. 43(c)* (evidence on a motion).

[3] Requesting Joint Liability for Sanctions Against Law Firms and Parties

Absent exceptional circumstances, a law firm will be held jointly liable for Rule 11 violations committed by its partners, associates, and employees. The court may also sanction a represented party that is responsible for a violation of Rule 11. *See Fed. R. Civ. P. 11(c)(1).*

[4] Obtaining Appropriate Order for Rule 11 Sanctions

A court order imposing Rule 11 sanctions must describe the conduct determined to have violated this rule and explain the basis for the sanction imposed. *See Fed. R. Civ. P. 11(c)(6).*

A court may not award monetary sanctions against a represented party for a violation of *Fed. R. Civ. P. 11(b)(2)*, that is, if the claims, defenses, and other legal contentions therein are not warranted by existing law nor by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. *See Fed. R. Civ. P. 11(c)(5)(A)*; *see also Simon DeBartolo Group, L.P. v. Richard E. Jacobs Group, Inc., 186 F.3d 157, 166 (2d Cir. 1999)* (monetary sanctions may not be awarded against represented party for violation of *Fed. R. Civ. P. 11(b)(2)*, because monetary responsibility for such violations is more properly placed solely on party's attorneys). Fees requested should be limited to amounts incurred as a result of the rule violation, to be determined by the court based on a reasonable hourly rate multiplied by a reasonable number of hours expended, keeping in mind the deterrent effect of the amount. *See Divane v. Krull Elec. Co., 319 F.3d 307, 314 (7th Cir. 2003)* (district court has broad discretion in setting

sanction award that it believes will serve *Fed. R. Civ. P. 11*'s deterrent purpose, including ordering the offending party to pay the other party's reasonable attorney's fees).

Exception:

Although the text of *Fed. R. Civ. P. 11* does not require findings when a court decides not to impose sanctions, the Seventh and Ninth Circuits have required that the trial court give a reasoned basis for doing so. *See, e.g., Independent Lift Truck Builders Union v. NACCO Materials Handling Group, Inc., 202 F.3d 965, 969 (7th Cir. 2000)* (district court provided sufficient explanation of decision denying sanctions to allow for meaningful appellate review); *Simpson v. Lear Astronics Corp., 77 F.3d 1170, 1177 (9th Cir. 1996)* (court vacated order denying sanctions because record did not reflect district court's reasons for its decision). By contrast, the Third Circuit is among those which do not require express findings when the record clearly shows enough reasons to deny sanctions. *See, e.g., Mellon Bank Corp. v. First Union Real Estate Equity and Mortg. Inv., 951 F.2d 1399, 1413 (3d Cir. 1991)* (upheld denial of sanctions based on complainant's conduct and plausibility of plaintiff's claims).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 11.23[6], 11.25.*
- *Bender's Federal Practice Forms* Form No. 11:120.
- *Fed. R. Civ. P. 11(c)(1)* (sanctions in general).
- *Fed. R. Civ. P. 11(b)(2)* (claims, defenses, and other legal contentions must be warranted by existing law or nonfrivolous argument to extend, modify, or reverse existing law or establish new law).
- *Fed. R. Civ. P. 11(c)(5)* (limitations on monetary sanctions).
- *Fed. R. Civ. P. 11(c)(6)* (requirements for a sanctions order).

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§ 7.06 Opposing Motion for Rule 11 Sanctions

[1] Using "Safe Harbor" Provision to Cure Rule 11 Violation

During the 21-day period between service and filing of a Rule 11 motion, the responding party can correct or withdraw any paper it has filed, thereby curing the alleged misconduct. *See Fed. R. Civ. P. 11(b), (c)(2); Truesdell v. S. Cal. Permanente Med. Group, 293 F.3d 1146, 1151 (9th Cir. 2002)* (movant must wait 21 days after serving Rule 11 motion before filing it, to give responding party an opportunity to remedy any alleged misconduct before court imposes sanctions).

Timing:

A party moving for sanctions under *Fed. R. Civ. P. 11* must wait 21 days after serving the motion to file it or opposing counsel can move to dismiss it as premature.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 11.23[3].*
- *Bender's Federal Practice Forms* Form No. 11:120.
- *Fed. R. Civ. P. 11(b)* (representations to court).
- *Fed. R. Civ. P. 11(c)* (nature of sanction; limitations).

[2] Asserting Grounds to Oppose Motion for Sanctions

[a] Conduct Provides Inadequate Basis for Rule 11 Sanctions

Rule 11 sanctions are limited to specified representations to the court in violation of that rule. *See Fed. R. Civ. P. 11.* The district court may not consider extra-pleadings conduct as a basis for Rule 11 sanctions, nor conduct in depositions,

discovery meetings of counsel, oral representations at hearings, and behavior in prior proceedings. *See United States v. International Bhd. of Teamsters, 948 F.2d 1338, 1344 (2d Cir. 1991)* (*Fed. R. Civ. P. 11* does not license district court to sanction any action by attorney or party that it disapproves of, but allows sanctions to be imposed based on pleading, motion or other paper signed and filed in federal court).

Warning:

Even if Rule 11 sanctions are not available for conduct alleged in a Rule 11 motion, the court may choose to impose sanctions for the same conduct under another authority, *e.g., Fed. R. Civ. P. 37*; *28 U.S.C. § 1927*, or the court's inherent authority to impose sanctions.

[b] Rule 11 Does Not Apply to Contentions Made in Good Faith

A party may oppose a request for sanctions under *Fed. R. Civ. P. 11(b)(2)* on the ground that the person subject to sanctions made a good-faith argument in support of that contention. *See, e.g., Benson v. Tulanian, 1991 U.S. App. LEXIS 22665, at *3 (9th Cir. 1991)* (filing is frivolous if it is both baseless and made without a reasonable and competent inquiry, and relevant inquiry is whether proponent of legal argument has an objectively good faith belief in its merit).

[c] Rule 11 Does Not Apply to Contentions Supported by Law and Fact

A party may oppose a request for sanctions under *Fed. R. Civ. P. 11(b)(2)* on the ground that the contentions are supported by law and fact. *See, e.g., Somerset Marine v. Forespar Prods. Corp., 876 F. Supp. 1114, 1116 (C.D. Cal. 1994)* (Rule 11 sanctions denied, because alleged offender made good faith argument).

Strategic Point:

Relying on good direct authority for a contention will strengthen the argument against awarding sanctions and may prevent sanctions from being imposed, particularly if the authority involves an issue that is unsettled or unclear in that circuit. *See, e.g., Somerset Marine v. Forespar Prods. Corp., 876 F. Supp. 1114, 1115-1116 (C.D. Cal. 1994)* (defendant's motion for Rule 11 sanctions denied although motion for summary judgment granted).

[d] Rule 11 Does Not Apply When Attorney's Fees Unreasonable or Not Incurred by Challenged Filing

A party responding to a Rule 11 motion should oppose a fee award if the moving party has not sufficiently shown that the fee requested is based on a reasonable rate for a reasonable number of hours spent addressing the specific Rule 11 violation described in the motion. *See, e.g., Christian v. Mattel, Inc., 286 F.3d 1118, 1131-1132 (9th Cir. 2002)* (court directed on remand to ensure that the time spent by attorneys seeking sanctions was reasonably and appropriately spent in relation to both the patent frivolousness of the complaint and the services directly caused by the sanctionable conduct).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 11.23[2], [3].*
- *Bender's Federal Practice Forms* Form No. 11:120.
- *Sanctions: The Federal Law of Litigation Abuse § 16(D).*

- *Fed. R. Civ. P. 11(b)(2)* (claims, defenses and other legal contentions must be warranted by existing law or nonfrivolous argument to extend, modify, reverse, or establish new law).

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1-7 Moore's AnswerGuide: Fed Civil Motion Practice § 7.07

§ 7.07 Checklist for Determining Whether Sanctions Available Under Rule 41(b) or Rule 16(f)

☐ Determine whether Rule 41(b) allows defendant to move for dismissal of claim or action for one or more of the following reasons (*see § 7.08 below*):

- ○ Plaintiff fails to prosecute;
- ○ Plaintiff fails to comply with court order;
- ○ Dismissal allowable due to extreme situation.

☐ Determine whether Rule 16 sanctions may be imposed against party, party's attorney, or both, based on the following conduct (*see § 7.09 below*):

- ○ Failure to obey scheduling or pretrial order;
- ○ Failure to appear at scheduling or pretrial conference;
- ○ Being substantially unprepared to participate in scheduling or pretrial conference;
- ○ Failure to participate in good faith in scheduling or pretrial conference.

☐ **Search by Topic:** Civil Procedure > Dismissals > Involuntary Dismissals

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1-7 Moore's AnswerGuide: Fed Civil Motion Practice § 7.08

§ 7.08 Seeking Dismissal Under Rule 41 for Failure to Prosecute Claim or Comply With Court Order

Fed. R. Civ. P. 41 lets a defendant move to dismiss a claim or action if the plaintiff fails to prosecute or to comply with a court order. *See Fed. R. Civ. P. 41(b)*; *see also O'Rourke Bros., Inc. v. Nesbitt Burns, Inc., 201 F.3d 948, 950 (7th Cir. 2000)* (*Fed. R. Civ. P. 41(b)* provides for involuntary dismissal for failing to prosecute an action or to comply with court orders). *See §§ 3.18 -3.19 above*.

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1-7 Moore's AnswerGuide: Fed Civil Motion Practice § 7.09

§ 7.09 Seeking Rule 16(f) Sanctions for Failure to Comply With Pretrial Requirements

Fed. R. Civ. P. 16(f) allows sanctions against a party, a party's attorney, or both on any of the following grounds:

1. Failure to obey a scheduling or pretrial order;

2. Failure to appear at a scheduling or pretrial conference;

3. Being substantially unprepared to participate in a scheduling or pretrial conference; or

4. Failure to participate in good faith.

See Fed. R. Civ. P. 16(f).

Warning:

Fed. R. Civ. P. 16(f) is limited to imposing sanctions in these four specific instances and is not available to punish a general failure to cooperate in discovery. *See Fed. R. Civ. P. 16(f).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 16.90 -16.94, 41.50 -41.53.*
- *Bender's Federal Practice Forms* Form Nos. 16:501-16:502, 41:50-41.55.
- *Fed. R. Civ. P. 16(f)* (sanctions).
- *Fed. R. Civ. P. 41(b)* (dismissal by court order).

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1-7 Moore's AnswerGuide: Fed Civil Motion Practice § 7.10

§ 7.10 Checklist for Seeking or Opposing Sanctions Under 28 U.S.C. § 1927 for Multiplying Proceedings Unreasonably and Vexatiously

☐ Determine particular actions of opposing counsel that have multiplied proceedings unreasonably and vexatiously. *See § 7.11 below*.

☐ Consider how to prove bad faith or recklessness. *See § 7.11 below*.

☐ Determine time reasonably spent responding to conduct. *See § 7.12 below*.

- ○ Calculate excess costs.
- ○ Calculate expenses related only to this conduct.
- ○ Calculate attorney's fees.

☐ Draft motion for sanctions under *28 U.S.C. § 1927*. *See § 7.13[1] below*.

- ○ State grounds with particularity.
- ○ Request relief or order sought.

☐ Draft order with specific finding of bad faith. *See § 7.13 below*.

- ○ Follow procedure applicable to motions generally.

- ○ File motion papers with clerk.
- ○ Serve motion pursuant to *Fed. R. Civ. P. 5*.
- ○ Comply with time limits specified by local district court rules.
- ○ Note individual judge's rules may require pre-motion "heads up" of intended motion, followed by pre-motion conference.

☐ If opposing sanctions under *28 U.S.C. § 1927*, consider the following (*see § 7.14 below*):

- ○ Assert *28 U.S.C. § 1927* is inapplicable to facts. *See § 7.14[1] below*.
- ○ Assert that motion filed for purpose other than deterrence. *See § 7.14[2] below*.
- ○ Assert respondent acted from mere negligence or ignorance, not amounting to recklessness. *See § 7.14[3] below*.

☐ **Search by Topic:** Civil Procedure > Sanctions

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1-7 Moore's AnswerGuide: Fed Civil Motion Practice § 7.11

§ 7.11 Determining Grounds for Sanctions Under 28 U.S.C. § 1927

The following considerations apply when determining whether to seek sanctions under *28 U.S.C. § 1927*:

1. A court may impose sanctions on any attorney who unreasonably and vexatiously multiplies legal proceedings. *See 28 U.S.C. § 1927*; *see also Amlong & Amlong, P.A. v. Denny's, Inc., 500 F.3d 1230, 1239 (11th Cir. 2006)* (for a court to impose sanctions under *28 U.S.C. § 1927*, the statute requires in part that the attorney to be sanctioned have unreasonably and vexaciously multiplied legal proceedings).

2. A finding of recklessness or bad faith will support a sanctions award under *28 U.S.C. § 1927*. *See B.K.B. v. Maui Police Dep't, 276 F.3d 1091, 1107 (9th Cir. 2002)* (sanctions award under *28 U.S.C. § 1927* requires a finding of recklessness or bad faith).

3. Section 1927 sanctions may be imposed on attorneys only and not on a represented party, even if the client is jointly and severally responsible for a sanctionable action. *See 1507 Corp. v. Henderson, 447 F.2d 540, 542 (7th Cir. 1971)* (*28 U.S.C. § 1927* does not authorize ordering recovery of costs from a party, but only from an attorney or otherwise admitted representative of a party); *see also FTC v. Alaska Land Leasing, Inc., 799 F.2d 507, 510 (9th Cir. 1986)* (*28 U.S.C. § 1927* does not authorize recovery from a party or an employee, but only from an attorney or otherwise admitted representative of a party).

Exception:

A represented party may be declared a vexatious litigant and be required to obtain leave of court before filing specified claims. *See, e.g., Tripati v. Beaman, 878 F.2d 351, 352 (10th Cir. 1989)* (there is strong precedent establishing the inherent power of federal courts to regulate the activities of abusive litigants by imposing carefully tailored restrictions under the appropriate circumstances, and even onerous conditions may be imposed upon a litigant if they are designed to assist the district court in curbing the particular abusive behavior involved); *Molski v. Mandarin Touch Rest., 347 F. Supp. 2d 860, 867 (C.D. Cal. 2004)* (ADA plaintiff found to be vexatious litigant who filed complaints to extort settlements); *but see Molski v. Arby's Huntington Beach, 359 F. Supp. 2d 938, 945 (C.D. Cal. 2005)* (plaintiff's motive is

irrelevant to jurisdiction and standing).

Unlike Rule 11 sanctions, which only attach based on the attorney's signature on pleadings, motions, or other papers, *28 U.S.C. § 1927* sanctions are available based on, among other things, misconduct occurring in later proceedings. They apply to conduct occurring after a case commences, including during trial. *See United States v. International Bhd. of Teamsters, 948 F.2d 1338, 1346 (2d Cir. 1991)* (misconduct under *Fed. R. Civ. P. 11* must be judged as of the time the paper was signed, whereas *28 U.S.C. § 1927* invites attention to a course of conduct, and imposes a continuing obligation on attorneys to avoid dilatory tactics); *West Coast Theater Corp. v. Portland, 897 F.2d 1519, 1528 (9th Cir. 1990)* (although Rule 11 sanctions attach only on the basis of the attorney's signature on the pleadings, motion, or other paper, *28 U.S.C. § 1927* sanctions are available for later proceedings); *Jensen v. Phillips Screw Co., 546 F.3d 59, 65 (1st Cir. 2008)* (sanctions under *28 U.S.C. § 1927* may not be based on the original complaint or any acts taken in the course of commencing an action).

Warning:

A finding of ignorance or negligence, as opposed to recklessness, will not justify imposing sanctions under *28 U.S.C. § 1927*. *See Fink v. Gomez, 239 F.3d 989, 993 (9th Cir. 2001)* (combining discussion of sanctions under inherent powers and *28 U.S.C. § 1927*, but properly finding sanctions not warranted based on ignorance or negligence); *Amlong & Amlong, P.A. v. Denny's, Inc., 500 F.3d 1230, 1241-1242 (11th Cir. 2006)* (negligent conduct, standing alone, will not support a finding of bad faith under *28 U.S.C. § 1927*).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 11.40.*
- *Sanctions: The Federal Law of Litigation Abuse §§ 19-21.*
- *28 U.S.C. § 1927* (sanctions against counsel for multiplication of proceedings).

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1-7 Moore's AnswerGuide: Fed Civil Motion Practice § 7.12

§ 7.12 Determining Appropriate Sanctions Under 28 U.S.C. § 1927

A party seeking *28 U.S.C. § 1927* sanctions must determine the excess costs, expenses and attorney's fees incurred due to the prohibited conduct, as provided in the statute. *See 28 U.S.C. § 1927*; *Shales v. General Chauffeurs, Sales Drivers & Helpers Local Union No. 330, 557 F.3d 746, 749-750 (7th Cir. 2009)* (a lawyer's ability to pay does not affect the appropriate award for a violation of § *28 U.S.C. § 1927*).

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1-7 Moore's AnswerGuide: Fed Civil Motion Practice § 7.13

§ 7.13 Moving for Sanctions Under 28 U.S.C. § 1927

[1] Stating Specific Grounds for Sanctions and Relief Sought

A motion for sanctions must comply with *Fed. R. Civ. P. 7*, which requires the motion to state:

1. The grounds for sanctions "with particularity"; and

2. The relief sought.

See Fed. R. Civ. P. 7(b)(1).

A draft order filed with the motion should include a specific finding of bad faith or recklessness. *See Amlong & Amlong, P.A. v. Denny's, Inc., 457 F.3d 1180, 1202-1203 (11th Cir. 2006)* (sanctions under *28 U.S.C. § 1927* reversed because district court did not make valid finding of bad faith to support them).

Timing:

A motion for excess costs and attorney's fees under Section 1927 is not subject to the "safe harbor" provision of *Fed. R. Civ. P. 11*, and may be made after final judgment in a case. *See Steinert v. Winn Group, Inc., 440 F.3d 1214, 1223-1224 (10th Cir. 2006)* (court held *Fed. R. Civ. P. 11* "safe-harbor procedure" did not apply to *28 U.S.C. § 1927* sanctions and such sanctions are not untimely if sought or imposed after final judgment, provided resort to sanctions was not unnecessarily or unreasonably delayed).

Warning:

A court may award attorney's fees under Section 1927 either pursuant to a motion by a party or sua sponte, as long as it provides the attorney with notice regarding sanctionable conduct and opportunity to be heard. *See Jolly Group, Ltd. v. Medline Indus., Inc., 435 F.3d 717, 720 (7th Cir. 2006)* (district court acting under *28 U.S.C. § 1927* is not bound by parties' motions and may, in its sound discretion, impose

sanctions sua sponte as long as it provides the attorney with notice regarding sanctionable conduct and opportunity to be heard).

[2] Serving Motion Pursuant to Rule 5

The motion must be served pursuant to *Fed. R. Civ. P. 5* on all parties that have appeared in the action. *See Fed. R. Civ. P. 5(a)*; *see also § 1.13[1] above*.

Warning:

Local district court rules may impose additional or different requirements for motions and should be consulted before preparing, serving and filing them. Individual judge's rules may require pre-motion notification of the intended motion, followed by a pre-motion conference.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 11.40*.
- *Sanctions: The Federal Law of Litigation Abuse §§ 24, 25*.
- *28 U.S.C. § 1927* (sanctions against counsel for multiplication of proceedings).
- *Fed. R. Civ. P. 5(a)* (when service required).
- *Fed. R. Civ. P. 7(b)(1)* (motions and other papers in general).

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1-7 Moore's AnswerGuide: Fed Civil Motion Practice § 7.14

§ 7.14 Opposing Motion for Sanctions Under 28 U.S.C. § 1927

[1] Asserting Inapplicability of § 1927

A party opposing sanctions under *28 U.S.C. § 1927* may assert, when appropriate, that the statute is inapplicable to the case. *See, e.g., Mirch v. Frank, 2008 U.S. App. LEXIS 2840, at *5 (9th Cir. 2008)* (unpublished opinion; *28 U.S.C. § 1927* does not apply to an initial pleading).

[2] Asserting § 1927 Motion Filed for Illegitimate Purpose

If appropriate, a party opposing a motion under *28 U.S.C. § 1927* may assert that the motion was not filed for a legitimate purpose under the statute, in that it did not seek sanctions intended to deter attorney misconduct. *See, e.g., Truesdell v. S. Cal. Permanente Med. Group, 209 F.R.D. 169, 176 (C.D. Cal. 2002) , aff'd, 293 F.3d 1146 (9th Cir. 2002)* (like *Fed. R. Civ. P. 11*, sanctions under *28 U.S.C. § 1927* may be an award of reasonable attorney's fees, but an attorney may be ordered to pay only excess costs resulting from improper conduct).

[3] Asserting Conduct Was Product of Mere Ignorance or Negligence

If the respondent engaged in conduct involving mere ignorance or negligence rather than bad faith or recklessness, the responding party should oppose the Section 1927 motion on that basis, because such conduct provides inadequate grounds for sanctions. *See Fink v. Gomez, 239 F.3d 989, 993 (9th Cir. 2001)* (combining discussion of sanctions under inherent powers and *28 U.S.C. § 1927*, but properly finding sanctions not warranted based on ignorance or negligence).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 11.40.*
- *Sanctions: The Federal Law of Litigation Abuse §§ 22, 23.*
- *28 U.S.C. § 1927* (sanctions against counsel for multiplication of proceedings).

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1-7 Moore's AnswerGuide: Fed Civil Motion Practice § 7.15

§ 7.15 Checklist for Seeking or Opposing Sanctions for Bad-Faith Litigation Abuse Under Court's Inherent Power

☐ Determine whether party engaged in some type of objectionable conduct, including the following (*see §§ 7.16, 7.17 below*):

- ○ Disobedience of a judicial order.
- ○ Fraud.
- ○ Abuse of judicial process.
- ○ Actions that are vexatious, wanton, or for oppressive purpose.
- ○ Attempt by an attorney to influence or manipulate proceedings in one case in order to gain tactical advantage in another case.

☐ Consider whether particular federal rule or statute applies to conduct at issue. *See § 7.16[1] below*.

☐ Determine whether party acted in bad faith or in manner tantamount to bad faith. *See § 7.16[2] below*.

☐ Determine whether any of the following sanctions listed below would be appropriate (*see § 7.18 below*):

- ○ Attorney's fees.
- ○ Dismissal of the action.
- ○ Default judgment against the offending party.
- ○ Vacation of judgment.
- ○ Contempt citation.
- ○ Disqualifying or suspending counsel.
- ○ Injunction against further litigation.
- ○ Exclusion of evidence.
- ○ Monetary sanctions to compensate wronged party.

☐ Draft motion for sanctions under court's inherent power. *See § 7.19[1] below*.

- ○ State grounds for sanctions with particularity.
- ○ State relief sought.

☐ Follow procedure applicable to motions generally. *See § 7.19[2] below*.

- ○ File motion papers with clerk.
- ○ Comply with time limits specified by local district court rules.
- ○ Note that individual judge's rules may require pre-motion notification of intended motion, followed by pre-motion conference.

☐ Oppose motion for sanctions under court's inherent power. *See § 7.20 below*.

- ○ Dispute facts asserted in motion.
- ○ Assert that respondent acted in good faith, and support assertion with explanation showing respondent neither acted in bad faith nor in manner tantamount to bad faith. *See § 7.20[1] below*.

○ Assert that sanctions requested or imposed are so severe that normal motion procedure is inadequate, in that respondent entitled to due process protections available for criminal contempt. *See § 7.20[2] below*.

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1-7 Moore's AnswerGuide: Fed Civil Motion Practice § 7.16

§ 7.16 Determining Availability of Sanctions Under Court's Inherent Power

[1] Determining Whether Rule 11 or Statutory Sanctions Available

Although the U.S. Supreme Court cautions against reliance on inherent powers, if appropriate, sanctions can be imposed under provisions such as *Fed. R. Civ. P. 11*, neither *Fed. R. Civ. P. 11* nor *28 U.S.C. § 1927* must be invoked before seeking sanctions under the court's inherent authority. A party may seek sanctions under the court's inherent power, when the conduct sanctionable under the rules is intertwined with conduct that can only be reached by the court's inherent power, and applying the rules before resorting to inherent power would only needlessly delay litigation. *See Chambers v. NASCO, 501 U.S. 32, 46, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)* (sanctioning scheme of statute and rules does not displace court's inherent power to impose sanctions for bad-faith conduct).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 11.41[3].*
- *Sanctions: The Federal Law of Litigation Abuse § 26.*
- *28 U.S.C. § 1927* (sanctions against counsel for multiplication of proceedings).
- *Fed. R. Civ. P. 11* (signing pleadings, motions, and other papers; representations to the court; sanctions).

[2] Determining Whether Party Acted in Bad Faith or Conduct Tantamount to Bad Faith

Under its own inherent power, a district court may impose sanctions upon a finding of bad faith or conduct tantamount to bad faith. *See Fink v. Gomez, 239 F.3d 989, 993-994 (9th Cir. 2001)* (court has inherent authority to impose sanctions if it specifically finds bad faith or conduct tantamount to bad faith); *see also Sussman by & Through Guilden v. Bank of Isr., 56 F.3d 450, 459 (2d Cir. 1995)* (court has inherent power to supervise and control its own proceedings and to sanction counsel or litigant for bad-faith conduct).

Strategic Point:

In order to impose sanctions under the court's inherent power, a finding of bad faith does not require the legal and factual basis for the action to be totally frivolous. The court may assess attorney's fees under its inherent power, even if the sanctioned party asserts a colorable claim, if that party is substantially motivated by vindictiveness, obduracy, or bad faith. *See B.K.B. v. Maui Police Dep't, 276 F.3d 1091, 1108 (9th Cir. 2002)* (for purposes of imposing sanctions under inherent power of court, if litigant is substantially motivated by vindictiveness, obduracy, or bad faith, assertion of colorable claim will not bar assessment of attorney's fees).

Warning:

The court may impose civil sanctions as long as it provides the subject of the sanctions with adequate notice and an opportunity to be heard. *See International Union, UMW v. Bagwell, 512 U.S. 821, 827, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994)* (civil contempt sanctions may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard); *United States v. Seltzer, 227 F.3d 36, 42 (2d Cir. 2000)* (for court to impose sanctions, specific notice of conduct alleged to be sanctionable and an opportunity to be heard on the matter is required). However, if the sanction imposed under the court's inherent power is tantamount to a finding of criminal contempt, the person subject to sanctions is entitled to all the procedural protections available to an alleged criminal contemnor. *See F.J. Hanshaw Enters. v. Emerald River Dev., Inc., 244 F.3d 1128, 1139 (9th Cir. 2001)* (when court uses inherent powers to impose criminal sanctions, it must provide same due process protections that would be available in criminal contempt proceeding); *see also SEC v. McNamee, 481 F.3d 451, 456-458 (7th Cir. 2007)* (case remanded for district court to consider whether party sanctioned with criminal fine and, if so, offer sanctioned party procedures required before adjudication in criminal contempt).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 11.41[1].*
- *Sanctions: The Federal Law of Litigation Abuse § 27.*

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1-7 Moore's AnswerGuide: Fed Civil Motion Practice § 7.17

§ 7.17 Imposing Sanctions Under Court's Inherent Power

[1] Imposing Sanctions Under Court's Inherent Power Based on Willful Conduct

Although this list is not exhaustive, under their inherent authority, district courts have imposed sanctions for the following types of willful misconduct:

1. **Disobeying judicial orders.** *See In re McMinn, 2002 U.S. Dist. LEXIS 25477, at *11 (N.D. Iowa 2002)* (district court has inherent authority to sanction lawyers who willfully and intentionally violate its lawful orders);

2. **Fraud.** *See Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 580, 66 S. Ct. 1176, 90 L. Ed. 1447 (1946)* (if court finds after proper hearing that fraud has been practiced upon it, entire cost of proceedings could justly be assessed against the guilty parties); *Illinois C. R. Co. v. R.R. Land, Inc., 1992 U.S. Dist. LEXIS 1901, at *26 (E.D. La. 1992)* (federal court's inherent power to impose sanctions is particularly appropriate where fraud, deception, and misrepresentation has been practiced upon it);

3. **Abuse of judicial process.** *See Roadway Express, Inc. v. Piper, 447 U.S. 752, 766-767, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980)* (if court may tax counsel fees against party who has litigated in bad faith, it certainly may assess those expenses against counsel who willfully abuse judicial processes);

4. **Acting vexatiously, wantonly, or for oppressive purpose.** *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-259, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975)* (court may assess attorney's fees when losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons);

5. **Attorney's reckless misstatements of law and fact, coupled with an improper purpose, e.g., an attempt to influence or manipulate proceedings in one case in order to gain tactical advantage in another case.** *See Fink v. Gomez, 239 F.3d 989, 994 (9th Cir. 2001)* (sanctions under court's inherent power are available for variety of willful actions, including recklessness when combined with additional

factor such as frivolousness, harassment, or improper purpose); and

6. **Flagrant violation of Federal Rules of Evidence.** *See B.K.B. v. Maui Police Dep't, 276 F.3d 1091, 1108-1109 (9th Cir. 2002)* (district court's resort to its inherent powers to sanction party who flagrantly violated one of Federal Rules of Evidence was eminently reasonable and justified).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 11.41[3].*
- *Sanctions: The Federal Law of Litigation Abuse § 27(B).*

[2] Determining Conduct Involves Recklessness Combined With Aggravating Factor

Sanctions imposed under the court's inherent powers require bad faith or willful misconduct consisting of something more egregious than mere negligence or recklessness. *See, e.g., Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1197 (9th Cir. 2003)* ; *United States v. Wallace, 964 F.2d 1214, 1219 (D.C. Cir. 1992)* (it is settled that finding of bad faith required for sanctions under court's inherent powers). Sanctions are available only if recklessness is combined with an additional factor, such as frivolousness, harassment, or an improper purpose. *See, e.g., Kreager v. Solomon & Flanagan, P.A., 775 F.2d 1541, 1543 (11th Cir. 1985)* (courts have inherent power to assess attorney's fees as fines when losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons). Thus, the court may sanction the following types of misconduct under the court's inherent power:

1. An attorney's reckless misstatements of law and fact, when coupled with an improper purpose, *see B.K.B. v. Maui Police Dep't, 276 F.3d 1091, 1108-1109 (9th Cir. 2002)* (the district court's resort to its inherent powers to sanction a party who flagrantly violated one of the Federal Rules of Evidence was eminently reasonable and justified); and

2. A party who acts for an improper purpose, even if the acts consist of making a truthful statement or a nonfrivolous argument or objection, *see Gomez v. Vernon, 255 F.3d 1118, 1134 (9th Cir. 2001)* (sanctions are justified when a party acts for an improper purpose, even if the act consists of making a truthful statement or a nonfrivolous argument or objection).

Warning:

Recklessness suffices for *28 U.S.C. § 1927*, but bad faith is required for sanctions under the court's inherent power. *See B.K.B. v. Maui Police Dep't, 276 F.3d 1091, 1107 (9th Cir. 2002)* (recklessness suffices for *28 U.S.C. § 1927* sanctions, but bad faith is required for sanctions under the court's inherent power).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 11.41[3].*
- *Sanctions: The Federal Law of Litigation Abuse § 27(B)(1).*

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Chapter 7 SANCTIONS AND CONTEMPT
PART E: SEEKING OR OPPOSING SANCTIONS FOR BAD-FAITH LITIGATION ABUSE UNDER COURT'S INHERENT POWER

1-7 Moore's AnswerGuide: Fed Civil Motion Practice § 7.18

§ 7.18 Choosing Appropriate Sanctions Under Court's Inherent Power

The district court's wide discretion to impose sanctions under its inherent power includes the severe sanction of dismissal of a case. *See Chambers v. NASCO, 501 U.S. 32, 43-44, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)* (court's inherent power to punish conduct that abuses judicial process includes sanctions ranging from dismissing lawsuit to assessing attorney's fees). A court should not impose unnecessarily severe sanctions, however, but rather, should impose sanctions that adequately address the harm identified. *See Klein v. Stahl GMBH & Co., 185 F.3d 98, 109-110 (3d Cir. 1999)* (court should have considered less extreme sanction instead of imposing sanction that foreclosed potentially meritorious claim).

For example, a district court may impose the following types of sanctions under its inherent power:

1. **Attorney's fees.** *See, e.g., Towerridge, Inc. v. T.A.O., Inc., 111 F.3d 758, 765 (10th Cir. 1997)* (courts have inherent power to assess attorney's fees when losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons);

2. **Dismissal of the action.** *See, e.g., Chambers v. NASCO, 501 U.S. 32, 43-44, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)* (court's inherent power to punish conduct that abuses judicial process includes dismissing lawsuit);

3. **Default judgment against the offending party.** *See Shepherd v. ABC, 62 F.3d 1469, 1475 (D.C. Cir. 1995)* (court's inherent power to impose sanctions for attorney or party misconduct includes power to enter default judgment);

4. **Vacation of judgment.** *See, e.g., Chambers v. NASCO, 501 U.S. 32, 44, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)* (court has inherent power to vacate its own judgment upon proof that fraud has been perpetrated upon it);

5. **Contempt citation.** *See, e.g., Chambers v. NASCO, 501 U.S. 32, 44, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)* (power to punish for contempt is inherent in all courts);

6. **Disqualifying or suspending counsel.** *See, e.g., Lasar v. Ford Motor Co., 399 F.3d 1101, 1107 (9th Cir. 2005)* (upheld revocation of attorney's pro hac vice bar admission); *Shepherd v. ABC, 62 F.3d 1469, 1475 (D.C. Cir. 1995)* (inherent power sanctions available to courts include disqualifying or suspending counsel, among other things).

7. **Injunction against further litigation.** *See, e.g., Shafii v. British Airways, 83 F.3d 566, 571 (2d Cir. 1996)* (filing repetitive and frivolous suits is type of abuse for which injunction barring further litigation may be appropriate sanction);

8. **Exclusion of evidence.** *See, e.g., Shepherd v. ABC, 62 F.3d 1469, 1475 (D.C. Cir. 1995)* (courts may invoke inherent power to sanction party by excluding evidence, among other things);

9. **Monetary sanctions to compensate wronged party.** *See B.K.B. v. Maui Police Dep't, 276 F.3d 1091, 1108-1109 (9th Cir. 2002)* (upheld monetary award to plaintiff as sanctions for defendant's violation of federal rule of evidence resulting in plaintiff's public embarrassment);

10. **Monetary sanctions payable to district court to reimburse court for its expenses.** *See Lasar v. Ford Motor Co., 399 F.3d 1101, 1107 (9th Cir. 2005)* (court allowed monetary sanction in amount to reimburse costs related to empaneling jury); and

11. **Order requiring vexatious litigant to file motion for leave to file complaint before filing any new litigation.** *See Molski v. Mandarin Touch Rest., 347 F. Supp. 2d 860, 868 (C.D. Cal. 2004)* (ADA plaintiff found to be vexatious litigant who filed complaints to extort settlements and court required him to seek leave to file further ADA lawsuits).

Warning:

If a specific statutory basis for sanctions applies, a court may be reluctant to award sanctions under its inherent authority.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 11.41[5].*
- *Sanctions: The Federal Law of Litigation Abuse § 28.*

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1-7 Moore's AnswerGuide: Fed Civil Motion Practice § 7.19

§ 7.19 Moving for Sanctions Under Court's Inherent Power

[1] Stating Specific Grounds for Sanctions and Relief Sought

A party requesting that the court impose sanctions under its inherent power must comply with *Fed. R. Civ. P. 7*, which requires, among other things that the motion:

1. State with particularity the grounds for sanctions.

2. State the relief sought.

See Fed. R. Civ. P. 7(b)(1); *see also §§ 1.02 -1.08 above*.

[2] Serving Motion for Sanctions Pursuant to Rule 5

A party asking the court to impose sanctions under its inherent authority must serve the motion, pursuant to *Fed. R. Civ. P. 5*, on all parties that have appeared in the action. *See Fed. R. Civ. P. 5(a)*; *see also §§ 1.12 -1.13 above*.

Warning:

Local district rules may impose additional or different requirements for motions and should be consulted before preparing, serving and filing them. Individual judge's rules may require a pre-motion notification of an intended motion, followed by a pre-motion conference.

Timing:

The Third Circuit has ruled that a party must move for sanctions before the court enters a final order and the district court must raise and resolve sanctions issues before or during its resolution of the case. *See, e.g., Prosser v. Prosser, 186 F.3d 403, 406 (3d Cir. 1999)* (like sanctions imposed under *Fed. R. Civ. P. 11*, sanctions imposed under court's inherent authority must be filed before final judgment); *but see Chambers v. NASCO, 501 U.S. 32, 56, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)* (sanctions may be imposed years after judgment on merits).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 11.41[4], [6].*
- *Sanctions: The Federal Law of Litigation Abuse § 29.*
- *Fed. R. Civ. P. 5(a)* (when service required).
- *Fed. R. Civ. P. 7(b)(1)* (motions and other papers in general).

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1-7 Moore's AnswerGuide: Fed Civil Motion Practice § 7.20

§ 7.20 Opposing Motion for Sanctions Under Court's Inherent Power

[1] Asserting Absence of Bad Faith in Opposition to Motion for Sanctions

If a person did engage in the conduct described in the motion, and the conduct would otherwise be grounds for sanctions under the court's inherent power, the person may raise lack of bad faith as a defense. *See Durrett v. Jenkins Brickyard, Inc., 678 F.2d 911, 918-919 (11th Cir. 1982)* (sanctions under court's inherent power should not be imposed lightly and only if party willfully disobeyed court order or losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons).

[2] Asserting Nature of Sanctions Requires Due Process Protections Available for Criminal Contempt

Parties should bear in mind that if the sanctions to be imposed under the court's inherent powers are tantamount to a finding of criminal contempt, the person subject to sanctions is entitled to all procedural protections available to an alleged criminal contemnor. *See F.J. Hanshaw Enters. v. Emerald River Dev., Inc., 244 F.3d 1128, 1139 (9th Cir. 2001)* (when a court uses its inherent powers to impose criminal sanctions, it must provide the same due process protections that would be available in a criminal contempt proceeding).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 11.41[3], [4].*
- *Sanctions: The Federal Law of Litigation Abuse §§ 27, 29.*

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Chapter 7 SANCTIONS AND CONTEMPT
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1-7 Moore's AnswerGuide: Fed Civil Motion Practice § 7.21

§ 7.21 Checklist for Seeking or Opposing Civil Contempt Order

☐ Determine appropriate procedure for seeking contempt. *See § 7.22 below*.

- ○ Seek summary adjudication for direct contempt.
- ○ Provide notice and seek hearing if contempt proceedings delayed.

☐ Determine whether to seek civil or criminal contempt. *See § 7.23 below*.

- ○ Determine whether contempt sought for remedial purpose, i.e., civil contempt.
- ○ Determine whether contempt sought for punitive purpose, i.e., criminal contempt.

☐ Determine grounds for seeking civil contempt.

- ○ Find clear and convincing evidence of violation of court order. *See § 7.24[1] below*.
- ○ Find any other conduct offensive to court's dignity or preventing it from properly conducting proceedings. *See § 7.24[2] below*.

☐ Move for contempt.

- ○ State specific grounds for contempt and relief sought. *See § 7.25[1] below*.

- ○ Give alleged contemnor notice and opportunity to be heard, through formal service if required. *See § 7.25[2] below*.
- ○ Specify the particular order sought. *See § 7.25[1] below*.
- ○ State, and support with evidence, any claims for damages resulting from the contumacious conduct and the attorney's fees incurred as a result of the contempt proceeding. *See § 7.25[1] below*.
- ○ Check local district court rules regarding need for evidence of damages. *See § 7.25[1] below*.

☐ File motion papers and supporting documents with clerk of the court, unless court has authorized filing with judge. *See § 7.25[1] below*.

- ○ Note that individual judge's rules may require scheduling pre-motion conference.
- ○ Serve motion papers on contemnor or contemnor's attorney, if formal service required. *See § 7.25[2] below*.

☐ Oppose or otherwise respond to motion for contempt.

- ○ Purge contempt by complying with order. *See § 7.26[1] below*.
- ○ Assert good faith and reasonable interpretation of order. *See § 7.26[2] below*.
- ○ Raise impossibility of compliance as defense, if not self created. *See § 7.26[3] below*.
- ○ Demand hearing or jury trial, if applicable. *See § 7.26[4] below*.

☐ **Search by Topic:** Civil Procedure > Sanctions > Contempt > Civil Contempt

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§ 7.22 Distinguishing Direct and Indirect Contempt

Direct contempt occurs within the court's presence and indirect contempt takes place out of court. *See International Union, UMW v. Bagwell, 512 U.S. 821, 827 n.2, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994)* .

Strategic Point:

Petty, direct contempt in the court's presence traditionally has been subject to summary adjudication due to the court's substantial interest in quickly coercing compliance and restoring order. However, if a court delays punishing a direct contempt until later in the proceedings, the court must provide notice and a hearing. *See International Union, UMW v. Bagwell, 512 U.S. 821, 832-833, 827, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994)* (direct contempt may be immediately adjudged and sanctioned summarily, but delay in punishing contempt requires that contemnor's rights to notice and hearing be respected); *see also United States v. Rangolan, 464 F.3d 321, 324-325 (2d Cir. 2006)* (summary adjudication of direct contempt is justified in light of court's substantial interest in rapidly coercing compliance and restoring order, but if court delays adjudication of direct contempt, the defendant is entitled to notice and a hearing before a different judge); *F.J. Hanshaw Enters. v. Emerald River Dev., Inc., 244 F.3d 1128, 1138 (9th Cir. 2001)* (petty, direct contempt in the presence of the court traditionally has been subject to summary adjudication, because of court's substantial interest in rapidly coercing compliance and restoring order, but if court delays punishing direct contempt until later in proceedings, it must provide notice and hearing).

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§ 7.23 Distinguishing Civil and Criminal Contempt

A civil contempt order's purpose is remedial; it is intended to compensate for the costs of the contemptuous conduct or to coerce future compliance with the court's order. *See International Union, UMW v. Bagwell, 512 U.S. 821, 826-827, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994)* (civil contempt is imposed to remedy harm to party; criminal contempt is imposed to effect punishment); *see also Kirkland v. Legion Ins. Co., 343 F.3d 1135, 1140 (9th Cir. 2003)* .

On the other hand, a criminal contempt sentence is punitive, and vindicates the authority of the court by punishing past acts of disobedience. *See International Union, UMW v. Bagwell, 512 U.S. 821, 827-828, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994)* (criminal contempt order is punitive and intended to vindicate court's authority).

Strategic Point:

A civil contempt sanction can be avoided or purged if the contemnor complies with the terms of the original order. *See Hicks v. Feiock, 485 U.S. 624, 635 n.7, 108 S. Ct. 1423, 99 L. Ed. 2d 721 (1988)* (critical feature distinguishing civil contempt order from criminal one is whether contemnor can avoid sentence imposed on him, or purge himself of it, by complying with terms of original order). By contrast, a criminal contempt sanction is fixed and unconditional and does not terminate upon compliance with the court's order. *See International Union, UMW v. Bagwell, 512 U.S. 821, 828-829, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994)* (fixed sentence of imprisonment imposed for contempt is punitive and criminal if it is imposed retrospectively for completed act of disobedience, and contemnor cannot avoid or minimize confinement through later compliance).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 65.80, 202.11[9].*

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1-7 Moore's AnswerGuide: Fed Civil Motion Practice § 7.24

§ 7.24 Determining Grounds for Seeking Civil Contempt Order

[1] Finding Clear and Convincing Evidence of Violation of Court Order

In a civil contempt proceeding, the movant must establish by clear and convincing evidence that:

1. A court order was in effect;

2. The order required specified conduct by the respondent; and

3. The respondent failed to comply with the court's order.

See United States v. City of Jackson, 359 F.3d 727, 731 (5th Cir. 2004) .

Furthermore, the moving party must show that the other party violated the order beyond substantial compliance and that the violation was not based on a good faith and reasonable interpretation of the order. *See Wolfard Glassblowing Co. v. Vanbragt, 118 F.3d 1320, 1322 (9th Cir. 1997)* (contempt movant must show by clear and convincing evidence that other party violated consent judgment beyond substantial compliance and that violation was not based on good faith, reasonable interpretation of judgment).

[2] Finding Other Conduct Offensive to Court's Dignity or Preventing It From Properly Conducting Proceedings

A party may be found in contempt for conduct other than failure to obey a court order, such as the following:

1. Failing without adequate excuse to obey a subpoena;

2. Filing summary judgment motions in bad faith or solely to cause delay; and

3. Failing to convey land or perform another specific act required by a judgment within a specified time period.

See Fed. R. Civ. P. 45, 56, 70.

Strategic Point:

Be sure to consult local district court rules and individual judge's rules to determine whether additional sanctions are available for attorney misconduct or unprofessional conduct.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 65.80.*
- *Fed. R. Civ. P. 45* (subpoenas).
- *Fed. R. Civ. P. 56* (summary judgment).
- *Fed. R. Civ. P. 70* (enforcing a judgment for a specific act).

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1-7 Moore's AnswerGuide: Fed Civil Motion Practice § 7.25

§ 7.25 Moving for Civil Contempt

[1] Stating Specific Grounds for Contempt and Relief Sought

A motion for contempt must identify specifically the court order that has not been obeyed or state other specific grounds for finding the party in contempt. *See Fed. R. Civ. P. 7(b)(1)(B)*. The motion must also state the relief sought. *See Fed. R. Civ. P. 7(b)(1)(C)*. Counsel should specifically state claims for damages resulting from the misconduct, which may include reasonable attorney's fees. *See, e.g., United States v. United Mine Workers, 330 U.S. 258, 303-304, 67 S. Ct. 677, 91 L. Ed. 884 (1947)* (motion for contempt that seeks compensation must be based on evidence of complainant's actual loss). The motion should be filed with the court clerk unless the court has authorized filing it with judge. *See Fed. R. Civ. P. 7(d)*.

Warning:

Be sure to consult local district court, which may vary, particularly with regard to proving damages, to determine whether additional specifications are required for contempt orders. Furthermore, individual judge's rules may require scheduling a pre-motion conference with the parties.

[2] Providing Alleged Contemnor Notice and Opportunity to Be Heard

The moving party must serve the contempt motion and supporting papers on contemnor or contemnor's attorney, if formal service is required. *See Fed. R. Civ. P. 7(d)*. Moreover, a court may impose civil contempt in an ordinary proceeding as long as it has given the contemnor advance notice and an opportunity to be heard. A jury trial, evidentiary hearing, and proof beyond a reasonable doubt, are not required. *See United States v. Ayres, 166 F.3d 991, 995-996 (9th Cir. 1999)* (finding party in civil contempt without full-blown evidentiary hearing does not deny due process of law to contemnor); *see also In re Grand Jury Proceedings, 894 F.2d 881, 882-883 (7th Cir. 1989)* (federal civil contempt proceeding requires evidentiary hearing only if there are genuine issues of material fact).

Strategic Point:

A district court ordinarily should not impose contempt sanctions solely on the basis of affidavits. *See*

Peterson v. Highland Music, 140 F.3d 1313, 1324 (9th Cir. 1998) (district court ordinarily should not impose contempt sanctions solely on basis of affidavits). However, where the affidavits offered in support of a finding of contempt are uncontroverted, a district court's decision not to hold a full-blown evidentiary hearing does not violate due process. *See, e.g., United States v. Ayres, 166 F.3d 991, 995 (9th Cir. 1999)* ; *Rogers v. Webster, 776 F.2d 607, 611 (6th Cir. 1985)* (trial court may in civil contempt proceeding narrow issues by requiring that affidavits on file be controverted by counter-affidavits and may thereafter treat as true facts set forth in uncontroverted affidavits).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 37.51[7][b].*
- *Bender's Federal Practice Forms* Form Nos. CTMPT:1 -CPMPT:42.
- *Fed. R. Civ. P. 7* (motions and other papers).

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1-7 Moore's AnswerGuide: Fed Civil Motion Practice § 7.26

§ 7.26 Responding to and Opposing Motion for Civil Contempt Order

[1] Nullifying Contempt by Affirmative Act

A party held in civil contempt can purge the contempt by obeying the court order. *See International Union, UMW v. Bagwell, 512 U.S. 821, 828, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994)* (civil contemnor can purge contempt by complying with order, and thus "carries the keys of his prison in his own pocket"); *see also United States v. Ayres, 166 F.3d 991, 997 (9th Cir. 1999)* (civil contempt can be avoided if contemnor purges contempt by his own affirmative act).

[2] Asserting Good Faith and Reasonable Interpretation of Order

Inadvertence is a defense to contempt if the person who violated a court order interpreted it in a reasonable manner and in good faith. *See Go-Video v. Motion Picture Ass'n of Am. (In re Dual-Deck Video Cassette Recorder Antitrust Litig., 10 F.3d 693, 695 (9th Cir. 1993)* (judgment of contempt vacated because plaintiff substantially complied with a reasonable interpretation of the protective order).

[3] Raising Impossibility of Compliance With Court Order as Defense

A party's inability to comply with a judicial order constitutes a defense to a charge of civil contempt, unless it is the intended result of his or her own conduct. *See Huber v. Marine Midland Bank, 51 F.3d 5, 10 (2d Cir. 1995)* (party's complete inability to comply with court order is defense to charge of civil contempt); *see also FTC v. Affordable Media, LLC, 179 F.3d 1228, 1239 (9th Cir. 1999)* (party's inability to comply with judicial order constitutes defense to charge of civil contempt).

Strategic Point:

Once a prima facie showing of contempt is made, the burden shifts to the alleged contemnor to produce evidence explaining his or her noncompliance. Ability to comply is the crucial inquiry, and a court will weigh all the evidence properly before it determines whether the alleged contemnor presently has the ability to obey. *See United States v. Ayres, 166 F.3d 991, 994 (9th Cir. 1999)* (alleged contemnor may defend against finding of contempt by demonstrating present inability to comply); *see also Commodity*

Futures Trading Com. v. Wellington Precious Metals, Inc., 950 F.2d 1525, 1529 (11th Cir. 1992) (party seeking to show contempt has burden of proving ability to comply).

[4] Demand Hearing or Jury Trial, if Applicable

If a court delays punishing a direct contempt order until later in the proceedings, the court must provide notice and a hearing. *See International Union, UMW v. Bagwell, 512 U.S. 821, 832-833, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994)* (if court delays punishing direct contempt until completion of trial, for example, due process requires that contemnor's rights to notice and hearing be respected); *see also United States v. Rangolan, 464 F.3d 321, 324-325 (2d Cir. 2006)* (if court delays adjudication of direct contempts, it is usually because defendant or other witnesses may testify and, in such cases, defendant entitled to notice and hearing before different judge); *F.J. Hanshaw Enters. v. Emerald River Dev., Inc., 244 F.3d 1128, 1138 (9th Cir. 2001)* (if court delays punishing direct contempt until later in proceedings, it must provide notice and hearing).

By contrast, a party subject to criminal contempt must be granted due process, in the form of a hearing or jury trial, before a court may find it in contempt. *See Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1194 (9th Cir. 2003)* (due process requires that individual accused of criminal contempt receive several procedural protections, including jury trial, before serious criminal penalties can be imposed); *see also United States v. Bukowski, 435 F.2d 1094, 1100 (7th Cir. 1970)* (Constitution requires jury trial before imposing serious criminal contempt); *Richmond Black Police Officers Asso. v. Richmond, 548 F.2d 123, 126 (4th Cir. 1977)* (criminal contempt shall be prosecuted on notice stating time and place of hearing, allowing reasonable time for preparation of defense, and shall state essential facts constituting criminal contempt charged).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 37.51[7][b], 45.62.*

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Chapter 8 CLASS ACTIONS AND DERIVATIVE ACTIONS

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Chapter 8 CLASS ACTIONS AND DERIVATIVE ACTIONS
PART A: PROCEDURAL CONTEXT

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§ 8.01 Procedural Context--Class Actions and Derivative Actions

A class action is a procedural device for joining parties, which permits single-action litigation of multiple claims involving similar or identical questions of law and fact that arise from a common set of operative facts. Thus, the named plaintiffs in a class action represent interests common to a large group and litigate a common wrong on behalf of the class. Class actions serve several basic purposes, including promoting judicial economy and efficiency by avoiding multiple adjudications of the same issues, enhancing access to the courts by spreading litigation costs among numerous litigants with similar claims, and protecting defendants from repeated and potentially inconsistent adjudications. *Fed. R. Civ. P. 23*, which governs class actions in federal courts, attempts to balance judicial efficiency of class action litigation against fairness and due process concerns, by providing procedures and safeguards designed to ensure fair, adequate protection of the interests of absentee class members.

Fed. R. Civ. P. 23 sets forth the specific requirements that apply to class actions in federal courts. *Fed. R. Civ. P. 23(a)* sets out four prerequisites for bringing a class action, including: (1) numerosity of parties; (2) commonality of legal and factual issues; (3) typicality of claims and defenses of the class representatives; and (4) adequacy of representation. In addition to satisfying all four of these requirements, in order to be certified, a proposed class action must fit within one or more of the three categories of class actions established by 23(b), concerning: (1) risk of inconsistent results posed by individual actions; (2) situations in which the party opposing a class has acted or refused to act on grounds applicable to the class as a whole; and (3) situations in which questions of law or fact common to class members predominate over questions applicable only to individual members.

Moreover, *Fed. R. Civ. P. 23(c)* governs the court's determination of whether to certify the class and includes special notice requirements. *Fed. R. Civ. P. 23(d)* authorizes the court to enter orders to control the conduct of the action. *Fed. R. Civ. P. 23(e)* governs the settlement, voluntary dismissal, or compromise of a certified class action. *Fed. R. Civ. P. 23(g)* sets forth the procedures for appointing class counsel, and *Fed. R. Civ. P. 23(h)* governs awards of attorney's fees.

Besides *Fed. R. Civ. P. 23*, other sources of federal law govern class actions. *Fed. R. Civ. P. 23* itself must often be implemented in combination with other Federal Rules of Civil Procedure. In addition, the Class Action Fairness Act of 2005 provides for removal to federal court of a wide variety of class actions filed in state court, and contains provisions governing the conduct of class actions. Finally, the district court's local rules and individual judge's standing orders may provide additional procedural requirements beyond those set out in *Fed. R. Civ. P. 23*.

Fed. R. Civ. P. 23.1 governs the procedural requirements for derivative actions brought by shareholders on behalf of corporations and by members on behalf of unincorporated associations. Among other things, *Fed. R. Civ. P. 23.1* provides specific requirements for the disposition of derivative actions by compromise, settlement, or dismissal, including particular requirements for court approval and notice to absent shareholders. *Fed. R. Civ. P. 23.2* provides further rules governing the conduct of actions by or against representative members of an unincorporated association.

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Chapter 8 CLASS ACTIONS AND DERIVATIVE ACTIONS
PART B: MOTION FOR CLASS CERTIFICATION

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§ 8.02 Checklist for Motion for Class Certification

☐ Determine whether sufficiently definite class exists and named representatives are members of proposed class. *See § 8.03 below*.

☐ Determine whether the four requirements of *Fed. R. Civ. P. 23(a)* are satisfied:

- ○ Numerosity: The class must be so numerous that joinder is impracticable. *See § 8.04[1] below*.
- ○ Commonality: Some questions of fact or law must be common to the class members. *See § 8.04[2] below*.
- ○ Typicality: The claims or defenses of the class representatives must be typical of those of the other class members. *See § 8.04[3] below*.
- ○ Adequacy of representation: The class representatives must be able to protect the class interests fairly and adequately. *See § 8.04[4] below*.

☐ Determine whether the action may be maintained under at least one of the categories of *Fed. R. Civ. P. 23(b)*:

- ○ Risk of prejudice to putative class parties. *See § 8.05[1], [2] below*.
- ○ Involves injunctive or declaratory relief regarding same conduct toward all class members. *See § 8.05[3] below*.

○ Common questions predominate and class action superior method for fair and efficient adjudication of controversy. *See § 8.05[4] below*.

☐ Determine whether action meets jurisdictional requirements. *See § 8.06[1] below*.

☐ Include class allegations in complaint. *See § 8.06 below*.

☐ File timely motion for class certification and submit supporting affidavits and memorandum of law in compliance with applicable local rules. *See § 8.06[2] below*.

☐ Consider filing immediate interlocutory appeal if certification decision is unfavorable. *See § 8.09 below*.

☐ **Search by Topic:** Civil Procedure > Class Actions > Certification

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Chapter 8 CLASS ACTIONS AND DERIVATIVE ACTIONS
PART B: MOTION FOR CLASS CERTIFICATION

1-8 Moore's AnswerGuide: Fed Civil Motion Practice § 8.03

§ 8.03 Determining Whether Class Exists

[1] Establishing Sufficient Class Definition

In order for a class action to be certified, a class must exist that can be precisely defined. *See In re A.H. Robins Co., 880 F.2d 709, 728 (4th Cir. 1989)* (*Fed. R. Civ. P. 23* implicitly requires existence of identifiable class). The standard for measuring precision is whether the definition provides objective criteria for determining whether a particular individual is or is not a member of the proposed class. *See Garrish v. UAW, 149 F. Supp. 2d 326, 331 (E.D. Mich. 2001)* (citing **Moore's**, "[t]he identity of class members, moreover, must be ascertainable by reference to objective criteria"). *Fed. R. Civ. P. 23* requires the court to set out the class definition in its order certifying the class. *See Fed. R. Civ. P. 23(c)(1)(B)*. The court must also find that each class representative is a member of the class as defined. Class membership should turn on objective criteria and not require determination of the merits of the litigation. *See Crosby v. Social Sec. Admin., 796 F.2d 576, 580 (1st Cir. 1986)* .

Exception:

If seeking certification under *Fed. R. Civ. P. 23(b)(2)* for the purpose of obtaining injunctive or declaratory relief, a precise class definition is less critical. Courts generally require that classes be defined with precision to ensure that they can identify those entitled to notice, those bound by the judgment, and those entitled to relief. In actions under *Fed. R. Civ. P. 23(b)(2)*, however, notice need not be given to all class members, and members do not have the right to opt out of the class.

[2] Satisfying Specific Requirements of Rule 23

The party seeking certification of a case as a class action must also establish each of the following four prerequisites specified by *Fed. R. Civ. P. 23(a)*:

1. Numerosity;

2. Commonality;

3. Typicality; and

4. Adequacy of representation.

See Fed. R. Civ. P. 23(a); *§ 8.04 below* .

Finally, the party seeking certification must establish that the case falls into one or more of the following four conditions specified by *Fed. R. Civ. P. 23(b)*:

1. Risk exists for party opposing the class of inconsistent results;

2. Risk exists for individual class members of inconsistent results;

3. Party opposing the class has acted or refused to act on grounds applicable to the class as a whole, addressable by injunctive or declaratory relief; or

4. Common questions of law or fact predominate over questions applicable only to individual members, and a class action is superior to any other available method for the fair and efficient adjudication of the controversy.

See Fed. R. Civ. P. 23(b); *§ 8.05 below* .

Strategic Point:

The party seeking class certification has the burden of demonstrating that all the requirements for a class action under *Fed. R. Civ. P. 23(a)* and *(b)* have been met and that the action should be certified as a class action. *See General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)* ; *Fleming v. Travenol Laboratories, Inc., 707 F.2d 829, 832 (5th Cir. 1983)* (plaintiff in class action has burden of establishing Rule 23 prerequisites).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 23.20, 23.21.*
- *Federal Litigation Guide PP 42.30 -42.34.*
- *Fed. R. Civ. P. 23(a), (b).*

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Chapter 8 CLASS ACTIONS AND DERIVATIVE ACTIONS
PART B: MOTION FOR CLASS CERTIFICATION

1-8 Moore's AnswerGuide: Fed Civil Motion Practice § 8.04

§ 8.04 Satisfying Class Action Prerequisites Specified in Rule 23(a)

[1] Class Must Be So Numerous That Joinder Is Impracticable

A court may certify a class only if the proposed class is so numerous that joinder of all the class members would be impracticable. *See Fed. R. Civ. P. 23(a)(1)*. The determination of whether joinder would be impracticable does not turn on precise criteria, and involves a wide variety of circumstances particular to the individual case. *See In re American Med. Sys., Inc., 75 F.3d 1069, 1079 (6th Cir. 1996)* (numerosity requirement entails examination of specific facts of each case); *Robidoux v. Celani, 987 F.2d 931, 935 (2d Cir. 1993)* (practicability determination depends on all circumstances surrounding case).

Although the most important factor is the absolute size of the proposed class, a court determining impracticability is also likely to take into account the following factors:

1. Judicial economy arising from avoiding multiple actions;

2. The geographic dispersion of the class members;

3. The financial resources of the class members;

4. The claimants' ability to institute individual suits; and

5. Requests for prospective and injunctive relief that could affect future class members.

See Robidoux v. Celani, 987 F.2d 931, 936 (2d Cir. 1993) (listing impracticability factors); *Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030, 1038 (5th Cir. 1981)* (listing impracticability factors).

The requirement that the class be so numerous that joinder is impracticable does not mean that joinder must be impossible, but only that the court must find that the difficulty or inconvenience of joining all members of the class makes class litigation desirable. *See Robidoux v. Celani, 987 F.2d 931, 935 (2d Cir. 1993)* .

Warning:

Even if all other requirements for certification are satisfied, failure to make an adequate showing as to numerosity will lead to denial of the motion for certification. *See Golden v. City of Columbus, 404 F.3d 950, 965-966 (6th Cir. 2005)* (impracticality of joinder must be positively shown and cannot be speculative).

[2] Common Questions of Law or Fact Must Exist

A court may certify a class only if questions of law or fact are common to the class members. *See Fed. R. Civ. P. 23(a)(2)*. Commonality may be found in cases involving shared legal issues with divergent factual predicates, or in cases with a common core of salient facts coupled with disparate legal theories and remedies. *See Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019-1020 (9th Cir. 1998)* . A single common issue of fact is sufficient to satisfy the commonality requirement. *See Baby Neal for & by Kanter v. Casey, 43 F.3d 48, 56 (3d Cir. 1994)* (commonality requirement may be satisfied by single common issue).

Strategic Point:

In order to obtain certification of a class under *Fed. R. Civ. P. 23(b)(3)*, the class proponent must show that questions of law or fact common to the members of the class predominate over questions affecting only individual class members. *See Fed. R. Civ. P. 23(b)(3)*; *§ 8.05[4] below* . For *Fed. R. Civ. P. 23(b)(3)* class actions, the commonality requirement is subsumed under, or superseded by, the predominance inquiry. *See Amchem Prods. v. Windsor, 521 U.S. 591, 609, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* .

[3] Representative's Claims or Defenses Must Be Typical of Class

A court may certify a class only if the claims or defenses of the representative party or parties are typical of the claims or defenses of the class members as a whole. *See Fed. R. Civ. P. 23(a)(3)*. The typicality requirement will be satisfied if the class representative's claims arise from the same events, practice, or conduct, and are based on the same legal theory, as those of other class members. *See Alpern v. UtiliCorp United, 84 F.3d 1525, 1541 (8th Cir. 1996)* (named plaintiff's claim was typical because it involved same course of conduct and advanced similar legal theories as claims of class). A class representative's claims are considered typical if they are reasonably co-extensive with those of absent class members; they need not be substantially identical with those of absent class members. *See James v. City of Dallas, 254 F.3d 551, 571 (5th Cir. 2001)* ; *Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992)* (typicality "refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought," and is satisfied if other members have similar injury resulting from same course of conduct and if action is not based on conduct unique to named plaintiff).

Strategic Point:

The typicality requirement is met in different ways in actions involving distinct substantive areas, such as claims related to antitrust, securities, consumer fraud, employment discrimination, civil rights, products liability, patent infringement, and certain other claims arising under specific statutes. *See Moore's Federal Practice (3d ed.) § 23.24[8]*.

[4] Representative Must Fairly and Adequately Protect Class Interests

A class may be certified only if the representative parties will fairly and adequately protect the interests of the class. *See*

Fed. R. Civ. P. 23(a)(4). Adequacy of representation is essentially a factual issue depending on the circumstances of a particular case. *See Ballan v. Upjohn Co., 159 F.R.D. 473, 482 (W.D. Mich. 1994)* (adequate representation is question of fact to be determined by circumstances of each case). An adequacy determination involves two primary components:

1. Whether the class representative has any conflicts with other class members. *See Ortiz v. Fibreboard Corp., 527 U.S. 815, 854-859, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)* (class representative will not represent absent class members adequately if the representative has significant conflicts with other class members); and

2. Whether the class representative will prosecute the action vigorously on behalf of the class.

See Stout v. J.D. Byrider, 228 F.3d 709, 717-718 (6th Cir. 2000) .

Prior to the 2003 amendments to *Fed. R. Civ. P. 23*, adequacy of counsel was also considered when determining adequacy of the class representative. Although *Fed. R. Civ. P. 23(g)* now requires that the court separately appoint counsel who will fairly and adequately represent the interests of the class, adequacy of the representative's chosen counsel still plays some role as part of the measure of the adequacy of the class representative. If a class representative is closely affiliated with class counsel, for instance, this may create a conflict of interest with other class members. *See London v. Wal-Mart Stores, Inc., 340 F.3d 1246, 1255 (11th Cir. 2003)* . For the same reason, class counsel may not serve as class representative. *See Matassarin v. Lynch, 174 F.3d 549, 559 (5th Cir. 1999)* .

Warning:

When divergent interests are present among the class members, class certification is proper only if separate subclasses are formed and separate representatives named to represent each subclass. Adverse subgroups may not be bound to a judgment or settlement except by consent given through representatives. *See Amchem Prods. v. Windsor, 521 U.S. 591, 625-628, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 23.21 -23.25.*
- *Federal Litigation Guide PP 42.40 -42.87.*
- *Fed. R. Civ. P. 23(a)* (class action prerequisites).

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Chapter 8 CLASS ACTIONS AND DERIVATIVE ACTIONS
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1-8 Moore's AnswerGuide: Fed Civil Motion Practice § 8.05

§ 8.05 Satisfying Rule 23(b) Requirements as to Type of Class Action

In addition to meeting the requirements of *Fed. R. Civ. P. 23(a)*, a party seeking certification must also establish that the contemplated class action falls within one of the four categories of class actions specified in *Fed. R. Civ. P. 23(b)*. *See Fed. R. Civ. P. 23(b)*.

[1] Rule 23(b)(1)(A) Requires Risk That Separate Litigation Will Result in Inconsistent or Varying Adjudications

An action may be maintained as a Rule 23(b)(1)(A) class action if prosecution of separate actions by or against individual class members would create a risk of inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class. *See Fed. R. Civ. P. 23(b)(1)(A)*.

Fed. R. Civ. P. 23(b)(1)(A) generally applies to cases seeking injunctive or declaratory relief, not those primarily seeking damages. *See In re Dennis Greenman Sec. Litigation, 829 F.2d 1539, 1545 (11th Cir. 1987)* . Certification may nevertheless be proper even if the plaintiffs seek money damages, as long as damages are not the predominant relief requested but are merely incidental to injunctive relief. *See Robertson v. National Basketball Ass'n, 556 F.2d 682, 685 (2d Cir. 1977)* .

Members in Rule 23(b)(1)(A) classes are neither entitled to notice of class certification nor an opportunity to opt out. However, the court may direct notice to the class if appropriate. *See Fed. R. Civ. P. 23(c)(2)(A)*. Although class members do not have the right to opt out of the class even when the court provides notice to class members, the court has the discretion to authorize opt-out rights for class members in a "hybrid" class action in which incidental monetary damages are sought as well as injunctive relief. *See Eubanks v. Billington, 110 F.3d 87, 94-95 (D.C. Cir. 1997)* .

[2] Rule 23(b)(1)(B) Requires Risk of Adjudications That Would Be Dispositive of Interests of Nonparty Class Members

An action may be certified as a Rule 23(b)(1)(B) class action if the prosecution of separate actions by or against individual members of the class would create a risk of adjudications with respect to individual members of the class that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual

adjudications or would substantially impair their ability to protect their interests. *See Fed. R. Civ. P. 23(b)(1)(B).*

Rule 23(b)(1)(B) class actions typically involve a "limited fund" that displays the following presumptively necessary characteristics:

1. The fund has a definitely ascertained limit;

2. All of which would be distributed to satisfy all those with liquidated claims based on a common theory of liability; and

3. The distribution would be on an equitable, pro rata basis.

See Ortiz v. Fibreboard Corp., 527 U.S. 815, 834, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999) .

Strategic Point:

A settlement fund that is limited solely as a result of an agreement of the parties is not a limited fund for purposes of *Fed. R. Civ. P. 23(b)(1)(B)*. Settling parties seeking certification must present evidence that the fund is limited independent of the parties' agreement. *See Ortiz v. Fibreboard Corp., 527 U.S. 815, 848-849, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)* .

Class members in 23(b)(1)(B) classes ordinarily are not entitled to notice of certification nor an opportunity to opt out. However, the court has discretion to direct notice to the class in appropriate cases. *See Fed. R. Civ. P. 23(c)(2)(A).*

[3] Rule 23(b)(2) Requires That Action Seek Injunctive or Corresponding Declaratory Relief With Respect to Class as a Whole

An action may be maintained as a Rule 23(b)(2) class action if the party opposing the class has acted or refused to act on grounds generally applicable to the class as whole, thus making it appropriate that there be final injunctive relief or corresponding declaratory relief with respect to the class as a whole. *See Fed. R. Civ. P. 23(b)(2). Fed. R. Civ. P. 23(b)(2)* requires that the defendant's acts or omissions upon which the suit is based apply generally to the class. *See Fed. R. Civ. P. 23(b)(2)*. This requirement is met even if the defendant's actions have taken effect or threatened only some members of the class, as long as the actions have general applicability to the class. *See Fed. R. Civ. P. 23(b)(2)*, advisory committee note of 1966.

Certification is appropriate under *Fed. R. Civ. P. 23(b)(2)* only when the primary relief sought is an injunction or a declaratory judgment. *See Lemon v. International Union of Operating Eng'rs, Local No. 139, 216 F.3d 577, 580-582 (7th Cir. 2000)* . Declaratory relief corresponds to injunctive relief when, as a practical matter, it affords injunctive relief or serves as a basis for later injunctive relief, and does not include cases in which the appropriate final relief relates exclusively or predominantly to money damages. *See Fed. R. Civ. P. 23(b)(2)*, advisory committee note of 1966.

Strategic Point:

Fed. R. Civ. P. 23(b)(2) was intended to facilitate civil rights actions claiming discrimination, and is appropriate with respect to classes whose members are incapable of specific enumeration; however, *Fed. R. Civ. P. 23(b)(2)* is not limited to civil rights claims. *See Fed. R. Civ. P. 23(b)(2)*, advisory committee note of 1966.

[4] Rule 23(b)(3) Requires That Common Questions Predominate and Class Action Is Superior Method of

Adjudication

An action may be maintained as a Rule 23(b)(3) class action if the court finds both of the following:

1. Questions of law or fact common to the class members predominate over any questions affecting only individual members; and

2. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

See Fed. R. Civ. P. 23(b)(3).

The *Fed. R. Civ. P. 23(b)(3)* predominance requirement is more demanding than the *Fed. R. Civ. P. 23(a)* commonality requirement. To warrant certification under *Fed. R. Civ. P. 23(b)(3)*, the common questions of law or fact required by *Fed. R. Civ. P. 23(a)* must predominate over questions affecting only individual class members. *See Fed. R. Civ. P. 23(b)(3)*. There is no precise test for predominance, which is determined by a case-specific assessment of the entire action and the issues involved. *See Augustin v. Jablonsky (In re Nassau County Strip Search Cases), 461 F.3d 219, 227-229 (2d Cir. 2006)* (all factual or legal issues that are common to class inform predominance analysis). In making such an assessment, courts have given weight to circumstances such as the following:

1. The substantive elements of class members' claims require the same proof for each class member. *See Rosario v. Livaditis, 963 F.2d 1013, 1018 (7th Cir. 1992)* (*Fed. R. Civ. P. 23(b)(3)* requires that entire class share common nucleus of operative facts).

2. The proposed class is bound together by a mutual interest in resolving common questions more than it is divided by individual interests. *See Doe v. Guardian Life Ins. Co., 145 F.R.D. 466, 476 (N.D. Ill. 1992)* .

3. The resolution of an issue common to the class would significantly advance the litigation. *See McClendon v. Continental Group, Inc., 113 F.R.D. 39, 43-44 (D.N.J. 1986)* (predominance exists if common question meaningfully advances litigation).

4. One or more common issues constitute significant parts of each class member's individual cases. *See Jenkins v. Raymark Indus., 782 F.2d 468, 470 (5th Cir. 1986)* (issue predominates if it comprises significant part of underlying individual action).

5. The common questions are central to all of the members' claims. *See Edgington v. R.G. Dickinson & Co., 139 F.R.D. 183, 190 (D. Kan. 1991)* (predominance turns on whether common issues of suit are central to class claims).

6. The same theory of liability is asserted by or against all class members, and all defendants raise the same basic defenses. *See Alexander Grant & Co. v. McAlister, 116 F.R.D. 583, 590 (S.D. Ohio 1987)* (predominance with respect to defendant class requires common defense in opposition to same theory of liability).

To warrant certification under *Fed. R. Civ. P. 23(b)(3)*, the class proponent must show not only that common questions predominate over individual questions, but also that a class action will be superior to other available methods for the fair and efficient adjudication of the controversy. *See Fed. R. Civ. P. 23(b)(3)*. Superiority is determined by comparing the efficiency and fairness of all available methods of adjudicating the matter. *See 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). The superiority analysis assesses the advantages and disadvantages of using the class-action device in relation to other methods of litigation, including consideration of the following non-exhaustive criteria suggested by *Fed. R. Civ. P. 23(b)(3)*:

1. The class members' interests in individually controlling the prosecution or defense of separate actions;

2. The extent and nature of any litigation concerning the controversy already begun by or against class members;

3. The desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

4. The likely difficulties in managing a class action.

See Fed. R. Civ. P. 23(b)(3).

Although *Fed. R. Civ. P. 23(b)(3)* does not exclude from certification cases in which individual damages are high, its primary goal is to facilitate the resolution of claims that individually would be too small to pursue. *See Amchem Prods. v. Windsor, 521 U.S. 591, 617, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 23.40 -23.47*
- *Federal Litigation Guide PP 42.100 -42.183.*
- *Fed. R. Civ. P. 23(b)* (types of class actions).

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§ 8.06 Satisfying Additional Class Action Requirements

[1] Determining Standing and Jurisdiction Requirements

[a] Complying With Requirements for Constitutional Standing

The class representative must meet all the requirements of constitutional standing to maintain a class action, including the existence of an actual case or controversy between the named plaintiff and the defendant. *See O'Shea v. Littleton, 414 U.S. 488, 494, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974)* ("if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class").

If a named plaintiff's claims become moot after a class has been certified, however, jurisdiction is not necessarily lost. If the dispute remains alive between any of the class members and the defendant, this satisfies the constitutional case or controversy requirement. *See Sosna v. Iowa, 419 U.S. 393, 401-402, 95 S. Ct. 553, 42 L. Ed. 2d 532 (1975)* . If, however, the class representative's claims become moot and a class has yet not been certified, the court loses jurisdiction and the action must be dismissed. *See Board of Sch. Comm'rs v. Jacobs, 420 U.S. 128, 129, 95 S. Ct. 848, 43 L. Ed. 2d 74 (1975)* .

Exception:

If the claims at issue are so inherently transitory that the trial court will not be able to rule on class certification before the named plaintiff's individual claim expires, a later certification is considered to relate back to the time that the action was filed and an actual controversy is still considered to exist, even if the named representative's claims become moot. *See County of Riverside v. McLaughlin, 500 U.S. 44, 52, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991)* .

Warning:

If the named plaintiffs cannot show that they have valid claims against the defendants, they lack standing to bring the suit, and certification is improper. Moreover, the court lacks jurisdiction over the suit and must dismiss rather than allow substitution of another class member as class representative. *See Lierboe v. State Farm Mut. Auto. Ins. Co., 350 F.3d 1018, 1022-1023 (9th Cir. 2003)* .

Strategic Point:

Resolving an action on the merits before certification has no preclusive effect with respect to putative class members other than the named representatives. Thus, a defendant may prefer to litigate the case as a class action and resolve the issues with respect to the entire class, rather than move for judgment before certification, unless it is likely that no other proposed class member will seek to bring the case as a class action or if only a small proportion of the class will eventually file suit.

[b] Jurisdiction Must Be Conferred by Specific Jurisdictional Statute

Parties should bear in mind that federal jurisdiction does not exist merely because a case is pled as a class action. Jurisdiction must be conferred by an appropriate jurisdictional statute, such as the federal question jurisdiction statute or the diversity jurisdiction statute. *See 28 U.S.C. §§ 1331, 1332.*

When the other elements of jurisdiction are present and at least one named plaintiff in the action satisfies the amount-in-controversy requirement for diversity jurisdiction, supplemental jurisdiction extends to the claims of other plaintiffs in the same Article III case or controversy even if those claims are for less than the requisite amount. *See 28 U.S.C. § 1367*; *Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 549, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005)* (supplemental jurisdiction statute clearly and unambiguously provides authority in diversity class actions to exercise supplemental jurisdiction over claims of class members who do not meet minimum amount in controversy, provided district court has original jurisdiction over claims of at least one class representative).

Timing:

The commencement of a class action tolls the statute of limitations applicable to all putative class members until the certification question is resolved. If certification is denied, putative class members may, within the time remaining in the limitations period, either intervene in the same action as plaintiffs, or file their own separate suits. *See Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 354, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983)* (separate suits); *American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974)* (intervention). When the court grants certification, the tolling of the statute of limitations ceases with respect to class members who opt out of the class. The statute begins to run again from the date the class member opts out. *See Realmonte v. Reeves, 169 F.3d 1280, 1284 (10th Cir. 1999)* .

[c] Class Action Fairness Act Expands Federal Jurisdiction Over Certain Class Actions

Under the Class Action Fairness Act of 2005, a district court has original jurisdiction of certain class actions in which:

1. The matter in controversy exceeds the sum or value of $5 million, exclusive of interest and costs;

2. Diversity of citizenship exists between *any* member of a class of plaintiffs and *any* defendant; and

3. There are 100 or more members in all proposed plaintiff classes.

See 28 U.S.C. § 1332(d). The claims of individual class members are aggregated to determine whether the amount in controversy exceeds $5 million. *See 28 U.S.C. § 1332(d)(6)*. For further discussion of the provisions of the Class Action Fairness Act, *see §§ 8.14, 8.15 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 23.63, 23.63A, 107.15[13].*
- *Federal Litigation Guide PP 42.20 -42.26.*
- *28 U.S.C. § 1331* (federal question jurisdiction).
- *28 U.S.C. § 1332* (diversity jurisdiction).
- *28 U.S.C. § 1367* (supplemental jurisdiction).

[2] Complying With Timing Requirements for Filing Motion for Certification

A motion for class certification should be filed within the time provided by the court's scheduling order and by any applicable local rules. *See Fed. R. Civ. P. 16(b).* The motion should be accompanied by declarations showing that the *Fed. R. Civ. P. 23(a)* and *(b)* requirements have been met, along with a supporting brief or memorandum. *See General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)* (party seeking class certification has burden of showing that all requirements for class action have been met).

In addition to requesting certification, the motion should request appointment of class counsel, or be accompanied by an application to serve as class counsel. If the court certifies the class, the court must also appoint class counsel. *See Fed. R. Civ. P. 23(c)(1)(B)*; *see also* §§ *8.10, 8.11 below.*

Strategic Point:

The Ninth Circuit has held that defendants need not wait for plaintiffs to move for class certification, but may themselves move for an order denying class certification. *See Vinole v. Countrywide Home Loans, Inc., 571 F.3d 935, 941-944 (9th Cir. 2009)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 23.82.*
- *Bender's Federal Practice Forms* Form Nos. 23:20, 23:22, 23:30, 23:31.
- *Federal Litigation Guide PP 42.212, 42.213.*
- *Fed. R. Civ. P. 23(c)* (class certification).

[3] Complying With Applicable Pleading Requirements

Fed. R. Civ. P. 8, which sets forth the general Fed. R. Civ. P.s on pleading an action in federal court, applies to class actions. *See Fed. R. Civ. P. 8(a)*; *see also* Ch. 1 *above.* All ordinary filing requirements also apply in class actions. *See Fed. R. Civ. P. 5(d).* In addition, the complaint must name one or more plaintiffs who meet the requirements to serve as class representative and must set out a workable class definition. *See Fed. R. Civ. P. 23.*

Warning:

Although not required by the Federal Rules of Civil Procedure, local district court rules may require that

the complaint contain class allegations. *See*, *e.g.*, S.D. Ga. L. R. 23.1; E.D. L.R. 23-1. If the class allegations are attacked as deficient under a local rule, the court ordinarily should allow the pleader to amend to correct the deficiency. *See Fed. R. Civ. P. 15*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 8.01 -8.10*.
- *Federal Litigation Guide PP 42.190 -42.192*.
- *Bender's Federal Practice Forms* Form Nos. 23:1, 23:13, 23.14.
- *Fed. R. Civ. P. 5(d)*, *8(a)*, *15*, *23*.

[4] Satisfying Additional Requirements for Securities Class Actions

The Private Securities Litigation Reform Act sets out procedures that must be followed in securities class actions, in addition to the requirements of *Fed. R. Civ. P. 23*. *See 15 U.S.C. §§ 77z-1*, *78u-4*. The following additional requirements must be met:

1. Each named plaintiff seeking to serve as a class representative must provide a sworn certification of the matters set forth at *15 U.S.C. §§ 77z-1(a)(2)* and *78u-4(a)(2)*.

2. Within 20 days of filing the complaint, the plaintiff must publish the notice specified in *15 U.S.C. §§ 77z-1(a)(3)(A)(i)* and *78u-4(a)(3)(A)(i)* in a widely circulated national business-oriented publication or wire service. *See 15 U.S.C. §§ 77z-1(a)(3)(A)(i)*, *78u-4(a)(3)(A)(i)*.

3. Not later than 90 days after the date on which the plaintiff publishes the required notice to class members, the court must appoint as lead plaintiff the class member that is the most adequate plaintiff, which the statute presumes to be the person who has the largest financial interest in the relief sought by the class. *See 15 U.S.C. §§ 77z-1(a)(3)(B)*, *78u-4(a)(3)(B)*.

4. The lead plaintiff appointed by the court must, subject to the approval of the court, select and retain counsel to represent the class. *See 15 U.S.C. §§ 77z-1(a)(3)(B)(v)*, *78u-4(a)(3)(B)(v)*.

5. The class representative's share of any final judgment or settlement must be equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class. *See 15 U.S.C. §§ 77z-1(a)(4)*, *78u-4(a)(4)*.

6. Attorney's fees and expenses awarded to plaintiffs' counsel may not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class. *See 15 U.S.C. §§ 77z-1(a)(6)*, *78u-4(a)(6)*.

7. A person may be a lead plaintiff in no more than five plaintiff class actions within any three-year period. *See 15 U.S.C. §§ 77z-1(a)(4)*, *78u-4(a)(4)*.

8. Any proposed or final settlement agreement is subject to extensive disclosure requirements and generally cannot be filed under seal. *See 15 U.S.C. §§ 77z-1(a)*, *78u-4(a)*.

Warning:

The Securities Litigation Uniform Standards Act (SLUSA) preempts certain class actions alleging fraud under state law with respect to the purchase or sale of securities. *See 15 U.S.C. §§ 77p, 78bb.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 23.190 -23.194, 107.15[14].*
- *Federal Litigation Guide P 42.87.*
- *Bender's Federal Practice Forms* Form Nos. 23:210, 23:212-23:215.
- *15 U.S.C. §§ 77z-1, 78u-4* (Private Securities Litigation Reform Act).
- *15 U.S.C. §§ 77p, 78bb* (Securities Litigation Uniform Standards Act).

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Chapter 8 CLASS ACTIONS AND DERIVATIVE ACTIONS
PART B: MOTION FOR CLASS CERTIFICATION

1-8 Moore's AnswerGuide: Fed Civil Motion Practice § 8.08

§ 8.08 Understanding Court Action on Certification Motion

[1] Process for Determining Certification Issue

When a case is filed as a class action, the court must determine by order whether to certify the action as a class action "at an early practicable time." *Fed. R. Civ. P. 23(c)(1)(A)*. The court must conduct a rigorous analysis to determine whether the party seeking certification has met the requirements of *Fed. R. Civ. P. 23*, and may certify the class only if the class proponent establishes that all prerequisites of Fed. R. Civ. P.'s 23(a) and (b) have been satisfied. *See General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)* ; *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008)* (clarifying three key aspects of class certification procedure: (1) the court must resolve all factual or legal disputes relevant to class certification even if they overlap with the merits; (2) the decision whether to certify a class requires findings by the court by a preponderance of the evidence, not merely a threshold showing; and (3) the court must consider relevant expert testimony offered by either side).

The court may not merely accept as true the allegations in the complaint, but must make whatever factual and legal inquiries are necessary to resolve all certification issues. *See Miles v. Merrill Lynch & Co. (In re Initial Pub. Offering Sec. Litig.), 471 F.3d 24, 40-41 (2d Cir. 2006)* (court must receive sufficient evidence at class certification stage to determine whether each Rule 23 requirement has been met); *Gariety v. Grant Thornton, LLP, 368 F.3d 356, 365-367 (4th Cir. 2004)* (district court failed to comply adequately with Rule 23 procedural requirements when it accepted plaintiffs' allegations as true for purposes of its certification decision and failed to conduct rigorous analysis of whether requirements were met). Accordingly, the court is likely to hold an evidentiary hearing to allow proof on whether the requirements of *Fed. R. Civ. P. 23* have been met. *See In re American Med. Sys., Inc., 75 F.3d 1069, 1079 (6th Cir. 1996)* (although hearing before class certification is not always required, it may be necessary for court to probe beyond pleadings to decide certification question); *Shepard v. Beaird-Poulan, Inc., 617 F.2d 87, 89 (5th Cir. 1980)* (district court should ordinarily conduct evidentiary hearing on class certification).

A district court may even accept expert scientific evidence if it is critical to class certification, but must perform a full *Daubert* analysis and conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on the class certification motion. *See American Honda Motor Co. v. Allen, 600 F.3d 813, 815-816 (7th Cir. 2010)* .

The court may also permit discovery to determine whether certification is appropriate, may limit that discovery to class

certification issues, and may make appropriate orders to control the course of proceedings. *See Armstrong v. Davis, 275 F.3d 849, 872 n.28 (9th Cir. 2001)* .

A court should not make a premature determination on the merits of the action in determining whether a class action is appropriate. *See Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 675-677 (7th Cir. 2001)* (court should make certification decision before decision on merits and without considering whether class is likely to prevail); *Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 291 (2d Cir. 1999)* ("a motion for class certification is not an occasion for examination of the merits of the case"). The court may nevertheless resolve issues necessary to the certification decision even if they overlap with merits issues. *See Miles v. Merrill Lynch & Co. (In re Initial Pub. Offering Sec. Litig.), 471 F.3d 24, 39-42 (2d Cir. 2006)* (before certifying class action, district court must satisfy itself that all requirements of *Fed. R. Civ. P. 23* have been met, and this obligation is not avoided when inquiry overlaps with issues on merits); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 168 (3d Cir. 2001)* (preliminary inquiry into merits is sometimes necessary to determine whether claims can be properly resolved as class action).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 23.81.*
- *Federal Litigation Guide P 42.210.*
- *Fed. R. Civ. P. 23(c)* (class certification).

[2] Outcome of Certification Motion

The court must determine by order whether to certify the action as a class action. *See Fed. R. Civ. P. 23(c)(1)(A).* If the court denies certification, it may order the parties to amend their pleadings to eliminate the class allegations, and then proceed with the individual claims. *See Fed. R. Civ. P. 23(d)(4).*

If the court certifies the class, the order must:

1. Define the class and the class claims, issues, or defenses;

2. Appoint class counsel;

3. Specify that all the requirements of *Fed. R. Civ. P. 23* have been met; and

4. Indicate the subsection(s) of *Fed. R. Civ. P. 23(b)* under which the action is proceeding.

See Fed. R. Civ. P. 23(c)(1)(B).

When certifying a class, a court may, when appropriate, make the following specifications regarding certification:

1. An action may be certified as a class action only with respect to particular issues, such as liability. *See Fed. R. Civ. P. 23(c)(4).*

2. A proposed class may be divided into subclasses, each of which will be treated as a separate class for purposes of the Rule 23 requirements. *See Fed. R. Civ. P. 23(c)(5).*

3. A settlement-only class may be certified if all relevant requirements of *Fed. R. Civ. P. 23* are met. *See*

Fed. R. Civ. P. 23(e).

4. An action may be certified against a class of defendants under *Fed. R. Civ. P. 23(b)(1)* or *(b)(3). See Fed. R. Civ. P. 23(b)(1),(3).*

Warning:

An order certifying or refusing to certify a class action may be altered or amended as appropriate at any time before final judgment. *See Fed. R. Civ. P. 23(c)(1)(C).*

Warning:

For any class certified under *Fed. R. Civ. P. 23(b)(1)* or *(2)*, the court may, in its discretion, direct appropriate notice to the class and allow the class members an opportunity to opt out. *See Fed. R. Civ. P. 23(c)(2)(A), (d).* For classes certified under *Fed. R. Civ. P. 23(b)(3)*, the best notice practicable is required, and class members must be allowed an opportunity to opt out. *See Fed. R. Civ. P. 23(c)(2)(B).* The cost of notice is generally borne by the plaintiffs. *See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)* ; *see also Moore's Federal Practice (3d ed.) § 23.106*; *Federal Litigation Guide P 42.224.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 23.41[7], 23.86, 23.87, 23.161[2][a].*
- *Fed. R. Civ. P. 23(c).*
- *Fed. R. Civ. P. 23(e)* (settlement, voluntary dismissal, or compromise).

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Chapter 8 CLASS ACTIONS AND DERIVATIVE ACTIONS
PART B: MOTION FOR CLASS CERTIFICATION

1-8 Moore's AnswerGuide: Fed Civil Motion Practice § 8.09

§ 8.09 Seeking Judicial Review of Certification Decision

A decision certifying or refusing to certify a class is not a final order or appealable collateral order and, therefore, is not immediately appealable as of right. The decision may be reviewed as of right only on appeal from the final judgment. *See Coopers & Lybrand v. Livesay, 437 U.S. 463, 468, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978)* . A court of appeals may, in its unfettered discretion, permit an interlocutory appeal from a district court order granting or denying class certification. *See Fed. R. Civ. P. 23(f)*. An appeal will not stay proceedings in the district court unless the district judge or the court of appeals so orders. *See Fed. R. Civ. P. 23(f)*.

Timing:

The moving party must apply for interlocutory review to the court of appeals within 14 days after entry of the district court order. *See Fed. R. Civ. P. 23(f)*. A motion for reconsideration filed within the 14-day period tolls the time for making the application until the district court rules on the motion for reconsideration. *See Shin v. Cobb County Bd. of Educ., 248 F.3d 1061, 1063-1065 (11th Cir. 2001)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 23.88, 203.34.*
- *Fed. R. Civ. P. 23(f)* (appeal from order granting or denying class action certification).

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Chapter 8 CLASS ACTIONS AND DERIVATIVE ACTIONS
PART C: MOTION SEEKING APPOINTMENT AS CLASS COUNSEL

1-8 Moore's AnswerGuide: Fed Civil Motion Practice § 8.10

§ 8.10 Checklist for Motion Seeking Appointment as Class Counsel

☐ Consider the following factors prior to moving for appointment as class counsel:

- ○ The court must appoint counsel in its certification order. *See § 8.11[1] below*.
- ○ If there is no satisfactory application for class counsel, the court may deny class certification or may invite new applications. *See § 8.11[2] below*.
- ○ The primary obligation of class counsel is to the class rather than to the class representative. *See § 8.11[3] below*.

☐ File formal application to be appointed class counsel, taking into account range of factors to be considered by court. *See § 8.11[1], [2] below*.

☐ Decide whether to request a fee award. *See §§ 8.20 -8.21 below*.

☐ **Search by Topic:** Civil Procedure > Class Actions > Class Counsel

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Chapter 8 CLASS ACTIONS AND DERIVATIVE ACTIONS
PART C: MOTION SEEKING APPOINTMENT AS CLASS COUNSEL

1-8 Moore's AnswerGuide: Fed Civil Motion Practice § 8.11

§ 8.11 Moving for Appointment as Class Counsel

[1] Factors Considered by Court in Appointing Class Counsel

When a court certifies a class, the court must also appoint class counsel in its certification order unless a specific statute provides otherwise. *See Fed. R. Civ. P. 23(c)(1)(B), (g)(1)*. An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class. *See Fed. R. Civ. P. 23(g)(4)*. The primary obligation of class counsel is to the class rather than to the class representatives.

In appointing class counsel, a court will consider the following factors:

1. The work counsel has done in identifying or investigating potential claims in the action;

2. Counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

3. Counsel's knowledge of the applicable law; and

4. The resources that counsel will commit to representing the class.

See Fed. R. Civ. P. 23(g)(1)(A).

In addition to these factors, the court may consider any other matter pertinent to counsel's ability to represent the interests of the class fairly and adequately, and may direct potential applicants for class counsel to provide information on any subject the court deems pertinent to the appointment. *See Fed. R. Civ. P. 23(g)(1)(B), (C).*

[2] Filing Formal Application for Appointment

Attorneys wishing to be appointed class counsel should file a formal application detailing their suitability for the position. For counsel who filed the action, the materials submitted in support of the motion for class certification may be sufficient to justify appointment. *See Fed. R. Civ. P. 23(g)*, advisory committee note of 2003.

When there is only one applicant for appointment as class counsel, the court may appoint that applicant only if the court determines the applicant to be adequate. 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. *See Fed. R. Civ. P. 23(g)(2)*. If the court determines that none of the applicants would be satisfactory class counsel, the court may either deny class certification or delay certification and invite new applications, or make any other appropriate order. *See Fed. R. Civ. P. 23(g)*, advisory committee note of 2003.

[3] Obligations and Status of Class Counsel

The class representative does not have an unfettered right to fire class counsel, nor can the class representative command class counsel to accept or reject a settlement. Counsel must determine whether a settlement would be in the best interests of the class as a whole. *See Fed. R. Civ. P. 23(g)*, advisory committee note of 2003. Control of the class action is not left completely in the control of class counsel, however. If counsel and the class representative disagree about a significant matter, such as whether to accept a settlement, they should submit the dispute to the court for resolution. *See Maywalt v. Parker & Parsley Petroleum Co., 67 F.3d 1072, 1078 (2d Cir. 1995)* .

The order appointing class counsel may also include provisions about the award of attorney's fees or nontaxable costs. *See Fed. R. Civ. P. 23(g)(1)(D)*.

Strategic Point:

Prior to determining whether to certify an action, the court may designate interim counsel to act on behalf of the putative class. *See Fed. R. Civ. P. 23(g)(3)*. More often, however, pre-certification matters will be handled by the attorneys who filed the action rather than by specially designated counsel. *See Fed. R. Civ. P. 23(g)*, advisory committee note of 2003. Whether or not formally appointed, pre-certification counsel have a duty to act in the best interests of the class as a whole rather than the class representative. *See Fed. R. Civ. P. 23(g)*, advisory committee note of 2003.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 23.120 -23.125*.
- *Bender's Federal Practice Forms* Form Nos. 23.160, 23.162.
- *Federal Litigation Guide P 42.86*.
- *Fed. R. Civ. P. 23(g)* (appointment of class counsel).

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Chapter 8 CLASS ACTIONS AND DERIVATIVE ACTIONS
PART D: MOTION FOR ORDER REGULATING CONDUCT OF CLASS ACTION

1-8 Moore's AnswerGuide: Fed Civil Motion Practice § 8.12

§ 8.12 Moving for Order Regulating Conduct of Class Action

Fed. R. Civ. P. 23(d) authorizes courts to enter appropriate orders to govern the conduct of class actions. The Rule specifically authorizes the following types of orders:

1. Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

2. Requiring that notice be given to some or all class members of any step in the action, of the proposed extent of the judgment, or of the opportunity to signify whether the members consider the representation fair and adequate;

3. Permitting persons to intervene and present claims or defenses, or otherwise to come into the action;

4. Imposing conditions on the representative parties or on intervenors;

5. Requiring that the pleadings be amended to eliminate allegations as to representation of absent persons; and

6. Dealing with similar procedural matters.

See Fed. R. Civ. P. 23(d)(1). Any such order may also be combined with an order under *Fed. R. Civ. P. 16*, which governs pretrial conferences, scheduling, and case management.

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. *See Fed. R. Civ. P. 23(d)(2)*; *International Union of Elec., Elec. Salaried, Mach., & Furniture Workers v. Unisys Corp., 155 F.R.D. 41, 47 (E.D.N.Y. 1994)* (court has authority under *Fed. R. Civ. P. 23(d)* to vacate order for notice requiring recipients to file notice of appearance with court and state objections to settlement by prescribed date).

The "catch-all" provision set out in *Fed. R. Civ. P. 23(d)(1)(E)*, which permits courts to issue orders dealing with similar

procedural matters, has been interpreted broadly to allow virtually any type of procedural order that facilitates the fair and efficient conduct of the action and protects the interests of absent class members. *See Fed. R. Civ. P. 23(d)(1)(E)*; *County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1304 (2d Cir. 1990)* (*Fed. R. Civ. P. 23(d)(1)(E)* must receive liberal interpretation). Courts have frequently cited this catch-all provision in conjunction with one or more of the other, more specific provisions of *Fed. R. Civ. P. 23(d)* as authority to enter orders that are not explicitly authorized under the Rule. *See Gulf Oil Co. v. Bernard, 452 U.S. 89, 99-100, 101 S. Ct. 2193, 68 L. Ed. 2d 693 (1981)* (*Fed. R. Civ. P. 23(d)(1)(E)*, in conjunction with *Fed. R. Civ. P. 23(d)(1)(C)*, gives court authority to issue orders placing limitations on communications by named parties or their counsel with putative class members); *Avery v. Secretary of Health & Human Services, 762 F.2d 158, 164-165 (1st Cir. 1985)* (*Fed. R. Civ. P. 23(d)(1)(E)*, in conjunction with *Fed. R. Civ. P. 23(d)(1)(A)* and *23(d)(1)(B)*, gives court authority to order defendant to send notice in prescribed form and manner and to follow certain procedures in determining class membership). Thus, it is possible to move under *Fed. R. Civ. P. 23(d)* for a wide variety of orders furthering the fair and efficient prosecution and defense of a class action, whether or not explicitly mentioned in *Fed. R. Civ. P. 23(d)*.

The general rules governing motion practice under applicable federal and local district rules determine the procedure for motions filed in class actions under *Fed. R. Civ. P. 23(d)*. *See*, *e.g.*, E.D. La. L.R. 7; D.N.H. L.R. 7.1. Motions for Rule 23(d) orders should be made in accordance with the ordinary rules governing motions set out in *Fed. R. Civ. P. 5*, *7*, and *10*, and in compliance with applicable local rules. *See* Ch. 1 *above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 23.140 -23.146*.
- *Federal Litigation Guide PP 42.231* -42.235.
- *Fed. R. Civ. P. 23(d)*.

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Chapter 8 CLASS ACTIONS AND DERIVATIVE ACTIONS
PART E: NOTICE OF REMOVAL

1-8 Moore's AnswerGuide: Fed Civil Motion Practice § 8.13

§ 8.13 Checklist for Notice of Removal

☐ Determine whether Class Action Fairness Act (CAFA) is applicable by considering the following factors:

- ○ Did case originally commence on or after February 18, 2005? *See § 8.14 below*.
- ○ Does case qualify as covered class action or mass action and does not fall within specified exceptions? *See § 8.15 below*.
- ○ Does case meet minimal diversity requirements? *See § 8.15[3] below*.
- ○ Does case meet applicable amount-in-controversy requirement? *See § 8.15[2], [3] below*.

☐ Draft notice of removal, including identification of removal statute and short and plain statement facts supporting removal under statute. *See § 4.28 above*.

☐ Comply with timing requirements for filing notice of removal under § 1453(b), by filing notice within *30 days* after the earlier of:

- ○ 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); or
- ○ The date on which the *first* defendant receives a copy of a pleading, motion, or order from which it first may be ascertained that the case has become removable. *See §*

4.28[4] above.

☐ File notice of removal in appropriate federal court, with a copy of all process, pleadings, and orders served on removing defendant in the action. *See § 4.28[3] above*.

☐ Provide prompt written notice of filing to adverse parties. *See § 4.28[3] above*.

☐ File prompt notice of removal with state court clerk. *See § 4.28[3] above*.

☐ **Search by Topic:**

- ○ Civil Procedure > Class Actions > Class Action Fairness Act
- ○ Civil Procedure > Removal

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Chapter 8 CLASS ACTIONS AND DERIVATIVE ACTIONS
PART E: NOTICE OF REMOVAL

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§ 8.14 Removing Class Actions Under Class Action Fairness Act (CAFA)

Class actions filed in state court have traditionally been removable to federal court on the same basis and under the same procedures applicable to other civil actions. Removal of most class actions is now governed by the Class Action Fairness Act of 2005, which significantly broadens the scope of diversity jurisdiction in class actions and eliminates several procedural hurdles to removal. *See 28 U.S.C. §§ 1332(d), 1453*. The Act applies to class actions or "mass actions" commenced on or after the date of its enactment, February 18, 2005, regardless of whether a court has entered a class certification order. *See 28 U.S.C. § 1332(d)(8)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 23.63A, 107.15[13]*.
- *Federal Litigation Guide P 42.26*.
- *28 U.S.C. §§ 1332(d), 1453*.

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Chapter 8 CLASS ACTIONS AND DERIVATIVE ACTIONS
PART E: NOTICE OF REMOVAL

1-8 Moore's AnswerGuide: Fed Civil Motion Practice § 8.15

§ 8.15 Establishing That Case Falls Under Class Action Fairness Act (CAFA)

Federal district courts have original jurisdiction over any class action governed by the Class Action Fairness Act: (1) that meets the Act's minimal diversity requirements; and (2) in which the aggregated claims of all class members exceed the sum or value of $5,000,000, exclusive of interests and costs. *See 28 U.S.C. § 1332(d)(2)*. The Act also makes certain "mass actions" involving claims for monetary relief of 100 or more persons and common questions of law or fact removable in the same manner as class actions, provided that such actions satisfy both: (1) the Act's minimal diversity requirements; and (2) the traditional amount in controversy requirement. *See 28 U.S.C. § 1332(d)(11)*.

The Eleventh Circuit has held that CAFA does not require any single plaintiff in a class action in which jurisdiction is asserted under CAFA to meet the $75,000 amount in controversy requirement of *28 U.S.C. § 1332(a)*. *See Cappuccitti v. DirecTV, Inc., 623 F.3d 1118, 1122 (11th Cir. 2010)* (vacating prior Ninth Circuit opinion holding to contrary in *Cappuccitti v. DirecTV, Inc., 611 F.3d 1252, 1256 (11th Cir. 2010)*).

[1] Determining Whether Case Is Covered as a Class Action Under CAFA

The Class Action Fairness Act defines a "class action" as any civil action filed under *Fed. R. Civ. P. 23* or a similar state statute or rule of judicial procedure authorizing an action to be brought as a class action. *See 28 U.S.C. §§ 1332(d)(1)(B)*, *1453(b)*. There is no requirement that any court certify a case as a proper class action in order for an action brought as a class action in state court to be subject to the special removal procedures of the Act.

The Act does not apply, however, to removal of certain types of class actions specifically excluded from its provisions, including the following:

1. Securities class actions involving only claims 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. *See 28 U.S.C. § 1453(d)(1)*;

2. Class actions involving only claims that relate 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. *See 28 U.S.C. § 1453(d)(3)*;

3. Class actions involving only claims that relate to the internal affairs or governance of a corporation or other form of business enterprise and arising under or by virtue of the laws of the state in which the corporation or business enterprise is incorporated or organized. *See 28 U.S.C. § 1453(d)(2)*;

4. Class actions 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. *See 28 U.S.C. § 1332(d)(5)(A)*; and

5. Small classes in which the number of members of all proposed plaintiff classes, in the aggregate, is less than 100. *See 28 U.S.C. § 1332(d)(5)(B)*.

[2] Determining Whether Action Is Covered as a Mass Action Under CAFA

The Class Action Fairness Act defines a "mass action," with certain exceptions, as a civil action other than a class action in which claims for 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. *See 28 U.S.C. § 1332(d)(11)(B)(i)*; *see also Bullard v. Burlington N. Santa Fe. Ry. Co., 535 F.3d 759, 762 (7th Cir. 2008)* (for purposes of determining whether the claims of more than 100 plaintiffs are "proposed to be tried jointly," making the action a "mass action," a single complaint may be read as implicitly proposed a single trial for all plaintiffs' claims). The Act makes mass actions removable in almost the same manner as class actions. *See 28 U.S.C. § 1332(d)(11)(A)*. Thus, a federal district court may exercise subject matter jurisdiction over a mass action that satisfies both: (1) the Act's minimal diversity requirement; and (2) the traditional diversity jurisdiction amount in controversy requirement of $75,000 for each plaintiff. *See 28 U.S.C. § 1332(a), (d)(2), (d)(11)*.

Certain types of actions are explicitly excepted from the Act's definition of a "mass action," including the following actions:

1. Any civil action in which all 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;

2. Any civil action in which the claims are joined on motion of a defendant;

3. Any civil action in which all 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 this type of action; or

4. Any civil action in which the claims have been consolidated or coordinated solely for pretrial proceedings.

See 28 U.S.C. § 1332(d)(11)(B)(ii).

Strategic Point:

The removal of a mass action under the Act also means that the case will be treated as a class action for purposes of the statute of limitations, so that the limitations periods are tolled for the period during which the action is pending in federal court. *See 28 U.S.C. § 1332(d)(11)(D)*.

Warning:

Any 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. *See 28 U.S.C. § 1332(d)(11)(C)(i)*.

[3] Satisfying the Minimal Diversity Requirement Under CAFA

The Class Action Fairness Act requires only minimal diversity in order to confer subject matter jurisdiction over any covered class action or mass action in which the appropriate amount in controversy requirement is met. The Act's minimal diversity requirement is satisfied by establishing one of the following circumstances:

1. Any member of a plaintiff class is a citizen of a state different from any defendant; or

2. 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

3. 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.

See 28 U.S.C. § 1332(d)(2).

Exception:

The expanded diversity jurisdiction authorized by the Class Action Fairness Act specifically excludes certain types of class actions, including: (1) securities actions; (2) actions concerning fiduciary duties and related obligations with respect to securities; and (3) actions concerning intracorporate and business organization litigation. *See 28 U.S.C. § 1453(d)*.

There are two situations, however, in which a federal court must decline to exercise minimal diversity jurisdiction over a class action and must remand the action to state court. First, the court must decline minimal diversity jurisdiction in class actions in which one the following circumstances exists:

1. 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;

2. At least one defendant is both: (a) a citizen of the state in which the action was originally filed; and (b) a defendant from whom significant relief is sought by the plaintiff class and whose alleged conduct forms a significant basis for the claims asserted;

3. 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

4. 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.

See 28 U.S.C. § 1332(d)(4)(A). Second, a court must decline minimal diversity jurisdiction if both two-thirds or more of the members of all proposed plaintiff classes, as well as the primary defendants, are citizens of the state in which the action was originally filed. *See 28 U.S.C. § 1332(d)(4)(B)*.

A federal court has discretion to decline minimal diversity jurisdiction over a class action and remand it to state court in the presence of all of the following circumstances:

1. 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;

2. 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;

3. The primary defendants are citizens of the state in which the action was originally filed; and

4. The court finds that declining jurisdiction is in the interests of justice, looking at the totality of the circumstances.

See 28 U.S.C. § 1332(d)(3).

To determine whether declining jurisdiction is in the interests of justice, a district court should consider the following six factors:

1. Whether the claims asserted involve matters of national or interstate interest;

2. Whether the governing law will be that of the forum state or of other states;

3. Whether the class action has been pleaded in a manner that seeks to avoid federal jurisdiction;

4. Whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

5. Whether citizens of the state in which the action was originally filed predominate among the plaintiffs; and

6. Whether, during the three-year period preceding the filing of that 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.

See 28 U.S.C. § 1332(d)(3); *Preston v. Tenet Healthsystems Mem. Med. Ctr., Inc., 485 F.3d 804, 811 (5th Cir. 2007)* (in considering decline of discretionary jurisdiction, "[t]he district court must consider these factors").

Strategic Point:

In actions governed by the Class Action Fairness Act, 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 within ten days after entry of the order. *See 28 U.S.C. § 1453(c)(1).*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 23.63A, 107.15[13].*
- *Bender's Federal Practice Forms* Form Nos. 23:200-23:203.

- *Federal Litigation Guide P 42.26.*
- *Fed. R. Civ. P. 81.*
- *28 U.S.C. §§ 1332, 1453.*

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Chapter 8 CLASS ACTIONS AND DERIVATIVE ACTIONS
PART F: MOTION TO INTERVENE

1-8 Moore's AnswerGuide: Fed Civil Motion Practice § 8.16

§ 8.16 Checklist for Motion to Intervene

☐ Determine adequacy of representation under *Fed. R. Civ. P. 23(a)(4)*. *See § 8.17[1] below*.

☐ Consider moving for intervention as of right under *Fed. R. Civ. P. 24(a)* and, in the alternative, permissive intervention under *Fed. R. Civ. P. 24(b)*. *See § 8.17[2] below*.

☐ If moving pursuant to *Fed. R. Civ. P. 24(a)*, include the following allegations:

- ○ Interest in subject matter of action that may be impaired or impeded because not adequately represented by existing parties. *See § 8.17[1] below*.
- ○ Timely filing of motion. *See § 8.17[2] below*.
- ○ Direct, legally protectable interest in property or transaction that is subject matter of action. *See § 8.17[2] below*.
- ○ Disposition of action will impair or impede applicant's interest. *See § 8.17[2] below*.
- ○ Applicant's interest not adequately represented by existing parties. *See § 8.17[2] below*.

☐ If moving pursuant to *Fed. R. Civ. P. 24(b)*, include the following allegations:

- ○ Common question of fact or law. *See § 8.17[2] below*.

- ○ Timely filing of motion. *See § 8.17[2] below*.
- ○ Intervention will not unduly delay or prejudice any party. *See § 8.17[2] below*.

☐ If required, include detailed discussion of legal basis supporting intervention in accompanying memorandum of points and authorities. *See § 8.17 below*.

☐ Pleading setting forth the claim or defense must accompany the motion. *See Fed. R. Civ. P. 24(c)*.

☐ Serve motion on all parties. *See § 8.17[2] below*.

☐ **Search by Topic:** Civil Procedure > Parties > Intervention

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Chapter 8 CLASS ACTIONS AND DERIVATIVE ACTIONS
PART F: MOTION TO INTERVENE

1-8 Moore's AnswerGuide: Fed Civil Motion Practice § 8.17

§ 8.17 Establishing Criteria for Intervention

[1] Satisfying Adequacy of Representation Inquiry

In order to assure that the class is adequately represented as required by *Fed. R. Civ. P. 23(a)(4)*, absentee class members may be given the opportunity to intervene and present claims or defenses, or otherwise come into the action. *See Fed. R. Civ. P. 23(d)(1)(A)*. In addition to the general intervention authority provided in *Fed. R. Civ. P. 24*, *Fed. R. Civ. P. 23(d)(1)(B)* implicitly authorizes courts to permit absent class members to intervene in class actions by specifically providing that a court may order notice to class members informing them of the opportunity to intervene and present claims or defenses. *See Fed. R. Civ. P. 24*, *23(d)(1)(B)*.

In deciding a motion for intervention in a certified class action, courts generally emphasize the adequacy of the proposed representation. *See 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)* , *overruled in part on other grounds by Devlin v. Scardelletti, 536 U.S. 1, 122 S. Ct. 2005, 153 L. Ed. 2d 27 (2002)* (proposed intervenors failed to raise adequacy of representation as support for their right to intervene, "as is required for such intervention"). In analyzing the adequacy of class representatives in connection with a motion to intervene, a court applies the same *Fed. R. Civ. P. 23(a)(4)* standard that it uses to measure adequacy of class representatives in connection with certification motions. *See Gottlieb v. Wiles, 11 F.3d 1004, 1008 n.4 (10th Cir. 1993)* , *overruled in part on other grounds by Devlin v. Scardelletti, 536 U.S. 1, 122 S. Ct. 2005, 153 L. Ed. 2d 27 (2002)* ; *Diduck v. Kaszycki & Sons Contractors, Inc., 149 F.R.D. 55, 57-59 (S.D.N.Y. 1993)* .

Courts generally liberally permit intervention for any class members who would be bound by a judgment in a class action. *See Fed. R. Civ. P. 24(a)*, advisory committee note of 1966 ("A class member who claims that his 'representative' does not adequately represent him ... should, as a general rule, be entitled to intervene in the action."); *In re Vitamins Antitrust Class Actions, 215 F.3d 26, 28-31 (D.C. Cir. 2000)* (right of class members to intervene to contest fairness of proposed settlement is founded in binding effect settlement will have on them if it is approved).

[2] Satisfying Rule 24 Standards for Intervention in Class Action

A class member seeking to intervene also typically must satisfy the requirements of *Fed. R. Civ. P. 24* governing

intervention in ordinary actions. *See Fed. R. Civ. P. 24(a)*, advisory committee note of 1966; *Wyatt By & Through Rawlins v. Poundstone, 169 F.R.D. 155, 167 (M.D. Ala. 1995)* (*Fed. R. Civ. P. 24* governs intervention in class actions); *Diduck v. Kaszycki & Sons Contractors, Inc., 149 F.R.D. 55, 57-58 (S.D.N.Y. 1993)* (*Fed. R. Civ. P. 23(d)* intervention provision "should be construed harmoniously with Rule 24").

Fed. R. Civ. P. 24 sets standards for both intervention as of right and permissive intervention. *See Fed. R. Civ. P. 24(a), (b)*. To intervene as of right under *Fed. R. Civ. P. 24(a)*, an applicant has the burden of establishing the following four elements:

1. That the application is timely;

2. That the applicant has an interest in the action;

3. That the applicant's interest may be impaired by the disposition of the action; and

4. That the applicant's interest is not adequately protected by the parties to the action.

See Fed. R. Civ. P. 24(a).

If a class member seeking to intervene shows that there is a sufficient probability that the intervenor's interests are not being adequately represented, a court is likely to conclude that intervention is warranted. *See Fed. R. Civ. P. 24*, advisory committee note of 1966 (when "sufficient probability" of inadequate representation shown, intervenor "should, as a general rule, be entitled to intervene"); *Diduck v. Kaszycki & Sons Contractors, Inc., 149 F.R.D. 55, 58 (S.D.N.Y. 1993)* (intervention should be liberally allowed). Intervention as of right is likely to be unavailable, however, if the court determines that absent class members are adequately represented. *See Cook v. Powell Buick, Inc., 155 F.3d 758, 762 (5th Cir. 1998)* , *overruled in part on other grounds by Devlin v. Scardelletti, 536 U.S. 1, 122 S. Ct. 2005, 153 L. Ed. 2d 27 (2002)* (intervention as of right denied where interests of proposed intervenors were adequately represented by existing parties and class counsel); *Twelve John Does v. District of Columbia, 117 F.3d 571, 575 (D.C. Cir. 1997)* (determination that class counsel provided adequate representation justified denial of intervention as of right). In such a case, permissive intervention may still be possible at the court's discretion.

Under the permissive intervention rule, a court has discretion to permit intervention if the applicant satisfies the following three requirements:

1. Files a timely application;

2. Shows that the proposed intervenor's claims and the existing claims in the class action share common questions of law or fact; and

3. Shows that the intervention will not unduly delay or prejudice any party.

See Fed. R. Civ. P. 24(b); *Comer v. Cisneros, 37 F.3d 775, 801 (2d Cir. 1994)* ; *Ardrey v. Federal Kemper Ins. Co., 142 F.R.D. 105, 116 (E.D. Pa. 1992)* (absent class members granted permissive intervention because they met all three requirements for permissive intervention).

Courts have broad discretion as to whether to allow permissive intervention. *See Smith v. Pennington, 352 F.3d 884, 892 (4th Cir. 2003)* ("[t]ypically, a decision to deny permissive intervention under Rule 24(b) 'lies within the sound discretion of the trial court' "). Nevertheless, *Fed. R. Civ. P. 24(b)(3)* specifies that courts must consider whether intervention will unduly delay or prejudice adjudication of the rights of the original parties. *See Fed. R. Civ. P. 24(b)(3)*. Thus, considerations of equity and judicial economy are likely to predominate in the court's decision of a motion to

intervene under *Fed. R. Civ. P. 24(b). See Daggett v. Commission on Governmental Ethics & Election Practices, 172 F.3d 104, 112 (1st Cir. 1999)* ; *Garza v. County of Los Angeles, 918 F.2d 763, 777 (9th Cir. 1990)* (motion to intervene in voting rights action denied because it would have resulted in irreversible prejudicial delay).

Timing:

Although there is no definite time period within which a motion to intervene must be filed, *Fed. R. Civ. P. 24* provides that intervention should be sought upon timely application, to be determined according to the facts and circumstances of each case. *See Fed. R. Civ. P. 24(a), (b)*; *Beckert v. TPLC Holdings, Inc. (In re Telectronics Pacing Sys.), 221 F.3d 870 (6th Cir. 2000)* (motions to intervene were timely filed after receipt of notice of proposed settlement providing reason to object and prohibiting opt-out). An inquiry into the timeliness requirement will therefore involve consideration of the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the possibility of prejudice to the existing parties. *See Acree v. Republic of Iraq, 370 F.3d 41, 49 (D.C. Cir. 2004)* (post-judgment intervention was not untimely when government sought to intervene in case with great impact on government's conduct of foreign policy); *Crawford v. Equifax Payment Servs., 201 F.3d 877 (7th Cir. 2000)* (district court should freely allow intervention by unnamed class members objecting to proposed settlement who had previously been justified in believing they would be adequately represented); *but see D'Amato v. Deutsche Bank, 236 F.3d 78 (2d Cir. 2001)* (motion to intervene was untimely after three-month lapse following notice of proposed settlement and three days prior to fairness hearing, where other parties would be prejudiced thereby).

Strategic Point:

For further detail regarding moving to intervene under *Fed. R. Civ. P. 24*, *see § 2.13 above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 23.143*.
- *Federal Litigation Guide P 42.232*.
- *Bender's Federal Practice Forms* Form Nos. 24:1-24:4, 24:40, 24:41.
- *Fed. R. Civ. P. 23, 24*.

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Chapter 8 CLASS ACTIONS AND DERIVATIVE ACTIONS
PART F: MOTION TO INTERVENE

1-8 Moore's AnswerGuide: Fed Civil Motion Practice § 8.18

§ 8.18 Determining Outcome of Intervention

Fed. R. Civ. P. 23(d) authorizes the court to impose reasonable conditions on intervenors in order to provide for the proper conduct of the class proceedings. *See Fed. R. Civ. P. 23(d)*; *County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1422, 1425 (E.D.N.Y. 1989)* (intervenors denied right to participate in settlement negotiations). Where a court finds that the class representatives adequately represent the remaining class members, the court may limit the scope of permissive intervention. For instance, a court may limit the extent of intervenors' participation in the action, allowing full participation in some aspects of the case and little or no participation in others. *See County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1422, 1425 (E.D.N.Y. 1989)* (permissive intervention by class members whose interests were already adequately represented limited to participation in fairness hearing on proposed settlement).

Strategic Point:

Although class members in actions certified under *Fed. R. Civ. P. 23(b)(3)* have an explicit right to appear in the action, the entry of an appearance by itself provides only the right to receive copies of papers filed in the action. In other words, unless a class member formally intervenes in the action, that class member does not possess the right to participate directly in court hearings. *See Ramsey v. Arata, 406 F. Supp. 435, 442 (N.D. Tex. 1975)* (rule permitting class member's appearance is intended only to afford absent class members opportunity to receive pleadings and other papers so they may decide whether to intervene).

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Chapter 8 CLASS ACTIONS AND DERIVATIVE ACTIONS
PART G: MOTION TO REQUEST FEE AWARD PURSUANT TO RULE 54

1-8 Moore's AnswerGuide: Fed Civil Motion Practice § 8.19

§ 8.19 Checklist for Motion to Request Fee Award Pursuant to Rule 54

☐ Determine authorization for fee award. *See § 8.20[1] below*.

☐ File timely motion for fee award under *Fed. R. Civ. P. 54(d)(2)*, including:

- ○ Specification of judgment. *See § 8.20[1] below*.
- ○ Statement of grounds for fee award. *See § 8.20[1] below*.
- ○ Estimate of amount sought. *See § 8.20[1] below*.
- ○ Any additional information required by court under *Fed. R. Civ. P. 54*. *See § 8.20[1] below*.

☐ If case involves coupon settlement, comply with procedural requirements of Class Action Fairness Act. *See § 8.21[3] below*.

☐ Provide reasonable notice of motion to applicable parties and class members, as directed by court. *See § 8.20[2] below*.

☐ Attend hearing on motion, if held. *See § 8.20[2] below*.

☐ **Search by Topic:** Civil Procedure > Class Actions > Class Counsel > Fees

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Chapter 8 CLASS ACTIONS AND DERIVATIVE ACTIONS
PART G: MOTION TO REQUEST FEE AWARD PURSUANT TO RULE 54

1-8 Moore's AnswerGuide: Fed Civil Motion Practice § 8.20

§ 8.20 Requesting Fee Award by Rule 54 Motion

[1] Establishing Basis for Fee Award Under Rule 54(d)(2)

A court may award reasonable attorney's fees and reimbursement for nontaxable costs in an action certified as a class action as authorized by law or by an agreement of the parties. A request for a fee award in a class action must be made by motion under *Fed. R. Civ. P. 54(d)(2)*, subject to the provisions of *Fed. R. Civ. P. 23(h)*, at a time set by the court. *See Fed. R. Civ. P. 23(h)(1)*, *54(d)(2)*.

Timing:

The time for filing a motion for attorney's fees in a class action must be set by the court. *See Fed. R. Civ. P. 23(h)(1)*. In cases involving a proposed settlement, the court will require filing in time for inclusion of information about the proposed fee award in the settlement notice that must be provided to the class as required by *Fed. R. Civ. P. 23(e)*. In cases litigated to judgment, the court also may order prompt filing of the motion in order to expedite notice to the class under *Fed. R. Civ. P. 23(h)*. *See Fed. R. Civ. P. 23(h)(1)*, advisory committee note of 2003.

Because *Fed. R. Civ. P. 23* does not provide an independent basis for awarding attorney's fees, a party seeking a fee award in a class action must appeal to one of the following independent bases for an award of attorney's fees and reimbursement for nontaxable costs:

1. A statute providing for fee-shifting, giving victims of the conduct proscribed by the statute the right to recover attorney's fees and costs from a defendant if the plaintiff has prevailed in a civil action for damages. *See*, *e.g.*, *15 U.S.C. § 15* (persons injured by violation of antitrust laws may recover reasonable attorney's fees incurred in private suit for damages resulting from violation); *42 U.S.C. § 1988* (in certain circumstances, prevailing plaintiffs in damages actions under various civil rights laws may recover reasonable attorney's fees);

2. The creation of a common fund benefiting the class, but also entitling counsel whose efforts contributed to the fund to an award of reasonable fees derived from the fund, on the basis of equitable principles of quantum meruit or unjust enrichment. *See Boeing Co. v. Van Gemert, 444 U.S. 472, 478,*

100 S. Ct. 745, 62 L. Ed. 2d 676 (1980) ("a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole" to avoid unjust enrichment); or

3. An agreement providing for fees between the counsel applying for the fee award and the beneficiaries in the judgment in the action. *See Fed. R. Civ. P. 23*, advisory committee note of 2003.

Exception:

Fed. R. Civ. P. 54(d) does not apply when the controlling substantive law provides for the prevailing party to recover attorney's fees and costs as part of a damages award, in which case the amount of attorney's fees and costs to be awarded must be determined by the finder of fact at trial. *See Fed. R. Civ. P. 54*, advisory committee note of 1993.

According to *Fed. R. Civ. P. 54(d)*, a motion for attorney's fees must contain the following allegations:

1. A specification of the judgment entitling the moving party to fees;

2. A statement of the grounds for the fee award, that is, the statutory, equitable, or other basis for the award; and

3. A fair estimate of the amount of the fee sought.

See Fed. R. Civ. P. 54(d)(2)(B). The court also has discretion to order that the fee motion disclose the terms of attorney's fees agreements that affect the fees sought in the motion. *See Fed. R. Civ. P. 54(d)(2)(B)*. Thus, the court may order the moving party to disclose, in the motion, not only the fee agreement between the fee-moving party and his or her counsel, but also agreements between counsel and other attorneys as to how attorney's fees will be split or agreements between adversaries settling a class action or derivative action. *See Fed. R. Civ. P. 54*, advisory committee note of 1993.

[2] Requesting Fee Award in Accordance With Procedural Requirements of Rule 23(h)

Fed. R. Civ. P. 23(h) provides procedures for the court to follow when awarding attorney's fees in a class action. When a timely fee motion is brought under *Fed. R. Civ. P. 54(d)(2)*, subject to the provisions of *Fed. R. Civ. P. 23(h)*, the court may award reasonable attorney's fees and nontaxable costs as authorized by law or by the parties' agreement in accordance with the following procedures:

1. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner;

2. A class member, or a party from whom payment is sought, may object to the motion;

3. The court may hold a hearing and must find the facts and state its legal conclusions under *Fed. R. Civ. P. 52(a)*; and

4. The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in *Fed. R. Civ. P. 54(d)(2)(D)*.

See Fed. R. Civ. P. 23(h).

Fed. R. Civ. P. 23(h) requires "reasonable" notice of the fee motion, in contrast to the "best notice practicable" that is

required to advise class members that a class has been certified, but does not specify the type or timing of notice required by *Fed. R. Civ. P. 23(h)(1)*, both of which are left to the discretion of the court. *See Fed. R. Civ. P. 23(c)(2)(B)*, *23(h)*. The notice must be sufficient to provide a basis for class members to exercise their right to object. *See Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 286 (7th Cir. 2002)* (insufficient information "paralyzes objectors"). Notice should also be sent sufficiently in advance of the objection deadline to afford class members an opportunity to object. *See Fed. R. Civ. P. 23(h)(2)*, advisory committee note of 2003.

Strategic Point:

When a class action is settled, notice of class counsel's fee motion should be combined with the notice to class members of the proposed settlement required by *Fed. R. Civ. P. 23(e)*. *See Fed. R. Civ. P. 23(e)(3)*; *Fed. R. Civ. P. 23(h)(1)*, advisory committee note of 2003.

A class member or a party from whom payment is sought may object to the motion for fees. *See Fed. R. Civ. P. 23(h)(2)*. The court may allow an objector discovery relevant to the objections. *See Fed. R. Civ. P. 23(h)(2)*, advisory committee note of 2003.

The court may hold a hearing on a motion for an award of attorney's fees; however, *Fed. R. Civ. P. 23* does not require a formal hearing in all cases. *See Fed. R. Civ. P. 23(h)(3)*, advisory committee note of 2003. The court may also refer issues related to the amount of the award to a special master or to a magistrate judge. *See Fed. R. Civ. P. 23(h)(3)*, *(4)*.

The court must state its findings of fact and conclusions of law concerning its decision whether to grant a motion for an award of fees and if so, how much the award should be in accordance with the provisions of *Fed. R. Civ. P. 52(a)*. *See Fed. R. Civ. P. 23(h)(3)*; *Fed. R. Civ. P. 52(a)*; *Hensley v. Eckerhart, 461 U.S. 424, 437, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)* (district court should "provide a concise but clear explanation of its reasons" for its conclusions regarding attorneys' fee award).

For a discussion of attorney's fees awards in derivative actions governed by *Fed. R. Civ. P. 23.1*, *see Moore's Federal Practice (3d ed.) § 23.1.17*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 23.124*, *23.125*.
- *Federal Litigation Guide P 42.249*.
- *Bender's Federal Practice Forms* Form Nos. 23:170-23:174.
- *Fed. R. Civ. P. 23(h)*, *52(a)*, *54(b)*.

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Chapter 8 CLASS ACTIONS AND DERIVATIVE ACTIONS
PART G: MOTION TO REQUEST FEE AWARD PURSUANT TO RULE 54

1-8 Moore's AnswerGuide: Fed Civil Motion Practice § 8.21

§ 8.21 Calculating Attorney's Fee Award

Two widely accepted methods exist for calculating a reasonable attorney's fee award in a class action. The first is the lodestar method, calculated according to the number of hours reasonably billed multiplied by an appropriate hourly rate. The second calculation method is known as the percentage-of-funds method, according to which the court sets a percentage of the recovery as attorney's fees. *See Goldberger v. Integrated Resources, Inc., 209 F.3d 43, 47 (2d Cir. 2000)* . *Fed. R. Civ. P. 23* does not affect the court's selection of one or the other of these two methods. *See Fed. R. Civ. P. 23*, advisory committee note of 2003.

[1] Calculating Fee Award According to Lodestar Method

Under the lodestar approach or method, the court scrutinizes the fee petition to ascertain the number of hours reasonably expended by counsel on the case and multiplies this number by a reasonable hourly rate, which is then adjusted upward or downward to reflect representing the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors, thus obtaining the "lodestar." *See City of Burlington v. Dague, 505 U.S. 557, 559, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992)* (defining "lodestar").

The lodestar approach is mandatory in cases in which the class's right to recover damages is granted by a federal fee-shifting statute providing for attorney's fees as part of the damages awarded to a party. *See, e.g., 15 U.S.C. § 15* (suit for violation of antitrust laws); *42 U.S.C. § 1973* (suit for violation of right to vote); *42 U.S.C. § 1988* (suit for violations of various civil rights statutes); *see also Gisbrecht v. Barnhart, 535 U.S. 789, 802, 122 S. Ct. 1817, 152 L. Ed. 2d 996 (2002)* ("[t]he lodestar method today holds sway in federal-court adjudication of disputes over the amount of fees properly shifted to the loser in the litigation"). The court need not require, however, that the party pay the attorney the full or exact amount of the damages awarded to the party by the fee-shifting statute. *See Staton v. Boeing Co., 327 F.3d 938, 967-969 (9th Cir. 2003)* (recovery of attorney's fees calculated as percentage of fund awarded to class is proper even when there is applicable fee-shifting statute).

Warning:

Counsel has no right to insist either on the exact amount awarded to the party under the lodestar method or on any other amount, including one calculated on a percentage-of-funds basis. For example, it is not an abuse of discretion for a court to refuse to make an award under the percentage-of-funds approach

when class counsel has already received the amounts awarded to the class as its reasonable attorney's fee, the amount calculated under the lodestar approach in accordance with the applicable fee-shifting statute. *See Brytus v. Spang & Co., 203 F.3d 238, 245-247 (3d Cir. 2000)* .

[2] Calculating Fee Award According to Percentage-of-Funds Approach

When the court uses the percentage-of-funds approach, the amount of the fee is based on a percentage of the value of the fund or recovery amount, determined by considering the same factors used to determine the multiplier for the lodestar. The size of the percentage is adjusted upwards or downwards from a presumptive starting point depending on a number of relevant factors. *See Staton v. Boeing Co., 327 F.3d 938, 968 (9th Cir. 2003)* ; *Goldberger v. Integrated Resources, Inc., 209 F.3d 43, 47 (2d Cir. 2000)* .

The percentage-of-funds approach is considered appropriate when the result of the action is the creation of a common fund for the benefit of the class. *See Blum v. Stenson, 465 U.S. 886, 900 n.16, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984)* (in calculating attorney's fees award under common fund doctrine, reasonable attorney's fees are percentage of fund bestowed on class). Most courts have ruled that the district court has discretion to determine attorney's fees using either the percentage or the lodestar method in common fund cases. *See In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 300 (3d Cir. 2005)* (percentage-of-recovery method is usually favored in common fund cases because it rewards counsel for success and penalizes counsel for failure); *Goldberger v. Integrated Resources, Inc., 209 F.3d 43, 50 (2d Cir. 2000)* (use of lodestar method was not abuse of discretion because both lodestar and percentage-of-funds methods were available to court).

Strategic Point:

In diversity cases, when the party's or counsel's entitlement to an award of attorney's fees is dependent on state law, the choice of method for determining the amount of fees (and the factors to be considered in employing that method) is a matter of state law.

[3] Class Action Fairness Act (CAFA) Provides Special Rules for Calculating Fee Awards in Coupon Settlements

Attorney's fees are limited in class actions involving coupon settlements in which a proposed settlement provides that class members will be compensated in whole or in part by means of redeemable coupons. The Class Action Fairness Act of 2005 provides a specific mechanism for calculating attorney's fees awards in coupon settlements arising out of class actions commenced on or after February 18, 2005. *See 28 U.S.C. §§ 1712, 1713*. Under the Act, in a case in which the class receives redeemable coupons as part of its recovery, the court must base the portion of the attorney's fees awarded to class counsel that is attributable to the class recovery of coupons on the value to class members of the coupons that are actually redeemed. *See 28 U.S.C. § 1712(a), (c)(1)*. The 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. *See 28 U.S.C. § 1712(d)*.

Warning:

Distribution of unredeemed coupons to charity does not increase the amount of fees in coupon-settlement cases. Although distribution of the value of unredeemed coupons has a cost to the defendant, the charitable distribution may not be used to calculate attorney's fees. *See 28 U.S.C. § 1712(e)*.

It is only the contingency-fee-like portion of an attorney's fees award, the portion based on the recovery by the class of coupons, that is subject to the statutory limit. Any other portion of the fee award in a case involving an award of coupons, which is not attributable to the award of coupons, must be based on the amount of time class counsel

reasonably expended on the work. *See 28 U.S.C. § 1712(b)(1), (c)(2).* In particular, any fee for obtaining equitable or injunctive relief must be computed based on the amount of time expended by class counsel. The Class Action Fairness Act specifically authorizes use of the lodestar method for compensating class counsel in such cases. *See 28 U.S.C. § 1712(b)(2).*

Warning:

The Act's provisions on "coupons" and "coupon settlements" do not define those terms. *See 28 U.S.C. §§ 1711, 1712.* In the absence of statutory definitions, it should be presumed that the Act's provisions apply to any settlement in which some or all of the recovery by the class consists of coupons or vouchers that may be redeemed for any kind of goods or services.

The procedures to be followed for seeking court approval of attorney's fees resulting from a proposed coupon settlement closely resemble the procedures followed with respect to fees awarded in connection with any form of proposed class action settlement. The court must approve the settlement, including the award of fees, only after a hearing and only on a written finding that the settlement is fair, reasonable, and adequate for class members. *See 28 U.S.C. § 1712(b)(2), (e); cf. Fed. R. Civ. P. 23(e)(2)* (virtually identical procedures followed for all proposed class action settlements). The fees award in a coupon settlement case, however, may not be computed or paid until after the redemption period for the coupons has elapsed. *See 28 U.S.C. § 1712(a)* (value of redeemed coupons is basis for calculation of fee).

[4] Determining Reasonableness of Fee Award

An award of attorney's fees or reimbursement of nontaxable costs in a class action must be reasonable, regardless of the amount determined by agreement of the parties. *See Fed. R. Civ. P. 23(h); Fed. R. Civ. P. 23*, advisory committee note of 2003. The court is required to determine the reasonableness of a fee award without regard to whether the requested award is the result of a settlement of the action or is sought after a litigated judgment in the class's favor. *See Staton v. Boeing Co., 327 F.3d 938, 969-972 (9th Cir. 2003)* (court abused its discretion in approving settlement that fixed amount of fees awarded); *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 819 (3d Cir. 1995)* (thorough judicial review of fee applications is required in all class action settlements). Numerous factors are considered in determining the reasonableness of a fee award, including the monetary relief obtained for the class, the value of any non-monetary benefits obtained for the class, fee agreements between class counsel and class representatives, and the fees charged by class counsel or other attorneys for representing individual claimants or objectors in the action. *See Fed. R. Civ. P. 23(h)*, advisory committee note of 2003.

Strategic Point:

Because the lodestar method requires the court to multiply a reasonable hourly rate times a reasonable number of hours, there is a strong presumption that a lodestar-method fee is reasonable. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565, 106 S. Ct. 3088, 92 L. Ed. 2d 439 (1986) .*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 23.124, 23.125.*
- *Federal Litigation Guide P 42.249.*
- *28 U.S.C. §§ 1712, 1713* (attorney's fees under Class Action Fairness Act).

- *Fed. R. Civ. P. 23(h)* (attorney's fees and nontaxable costs).
- *Fed. R. Civ. P. 54(d)* (costs and attorney's fees).

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Chapter 8 CLASS ACTIONS AND DERIVATIVE ACTIONS
PART H: MOTION FOR APPROVAL OF DISMISSAL OR SETTLEMENT OF CLASS ACTION

1-8 Moore's AnswerGuide: Fed Civil Motion Practice § 8.22

§ 8.22 Checklist for Motion for Approval of Dismissal or Settlement of Class Action

☐ If prior to certification, parties may voluntarily dismiss or settle claims *before* certification. *See § 8.23 below*.

☐ If after certification, submit settlement agreement for court approval. *See § 8.24 below*.

- ○ Ensure that the negotiated settlement is fair, reasonable, and adequate. *See § 8.24[1] below*.

☐ Provide notice to federal and state officials within 10 days of moving for approval. *See § 8.24[4] below*.

☐ Provide notice to all class members, as directed by the court. *See § 8.24[3] below*.

☐ Attend fairness hearing on motion and obtain court's findings on proposed settlement. *See § 8.24[3] below*.

☐ Ensure that judgment indicates who is bound. *See § 8.24[5] below*.

☐ **Search by Topic:** Civil Procedure > Class Actions > Compromises

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Chapter 8 CLASS ACTIONS AND DERIVATIVE ACTIONS
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1-8 Moore's AnswerGuide: Fed Civil Motion Practice § 8.23

§ 8.23 Voluntarily Dismissing or Settling Claims Prior to Certification

Fed. R. Civ. P. 23 requires court approval of any settlement, voluntary dismissal, or compromise of any claims, issues, or defenses of a certified class, after notice to the class members. *See Fed. R. Civ. P. 23(e)*. Because the requirement of court approval applies only to a certified class, however, prior to certification, plaintiffs may freely settle or dismiss their individual claims as in an individual action. *See Fed. R. Civ. P. 23(e)*, advisory committee note of 2003. Similarly, in an action that has not been certified, the plaintiffs may amend the complaint to delete the class allegations and proceed as in an individual suit. *See Fed. R. Civ. P. 15*. Class members other than those named as class representatives are not parties before certification and are not bound by any judgment if the action is not certified. *See Fed. R. Civ. P. 23(c)(3)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 23.160*.
- *Bender's Federal Practice Forms* Form Nos. 23:100, 23:101.
- *Federal Litigation Guide PP 42.240, 42.244*.
- *Fed. R. Civ. P. 15* (amendment of complaint).
- *Fed. R. Civ. P. 23(c)(3)* (class action judgment).

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Chapter 8 CLASS ACTIONS AND DERIVATIVE ACTIONS
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1-8 Moore's AnswerGuide: Fed Civil Motion Practice § 8.24

§ 8.24 Obtaining Court Approval When Settling or Voluntarily Dismissing After Certification

[1] Court Must Find That Settlement or Voluntary Dismissal Is Fair, Reasonable, and Adequate

Fed. R. Civ. P. 23 provides that the court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class. *See Fed. R. Civ. P. 23(e)*. The court may give its approval only on the basis of a finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate. *See Fed. R. Civ. P. 23(e)(2)*.

Strategic Point:

The settlement review is also an opportunity to review the initial certification decision. The terms of the settlement may reveal a need to redefine the class or to create subclasses. *See Fed. R. Civ. P. 23(e)*, advisory committee note of 2003. Implicit in the rule is the requirement that the parties disclose all terms of a settlement to the court so that the court may evaluate the settlement. *See Fed. R. Civ. P. 23(e)*, advisory committee note of 2003.

To determine whether a settlement agreement is fair, reasonable, and adequate, the court will consider a number of factors, including the amount of the settlement and the strength of plaintiff's case. *See D'Amato v. Deutsche Bank, 236 F.3d 78, 84-87 (2d Cir. 2001)* . The settlement may not unreasonably favor some class members at the expense of others. *See Staton v. Boeing Co., 327 F.3d 938, 975-978 (9th Cir. 2003)* . The settlement may nevertheless include modest incentive awards payable to the class representatives. *See Staton v. Boeing Co., 327 F.3d 938, 976-978 (9th Cir. 2003)* ; *Class Plaintiffs v. Seattle, 955 F.2d 1268, 1291 (9th Cir. 1992)* (district court's ultimate determination will involve balancing of several factors).

Although the factors to be considered in determining the adequacy of a proposed settlement vary, the most significant of these factors fall within the following categories:

1. The strength of the plaintiff's case on the merits balanced against the amount offered in settlement. *See In re Marine Midland Motor Vehicle Leasing Litig., 155 F.R.D. 416, 420 (W.D.N.Y. 1994)* .

2. The presence of collusion in reaching a settlement. *See Crawford v. Equifax Payment Servs., 201 F.3d 877, 880, 881-882 (7th Cir. 2000)* .

3. The reaction of members of the class to the settlement. *See In re Fleet/Norstar Sec. Litig., 935 F. Supp. 99, 107 (D.R.I. 1996)* .

4. The stage of the proceedings and the amount of discovery completed. *See County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1304 (2d Cir. 1990)* .

5. The additional opportunity to opt-out. *See In re Fleet/Norstar Sec. Litig., 935 F. Supp. 99, 106 (D.R.I. 1996)* .

The court has broad discretion in weighing the factors enumerated above. *See Detroit Police Officers Ass'n v. Young, 920 F. Supp. 755, 761 (E.D. Mich. 1995)* (court's application of factors in determining fairness, reasonableness, and adequacy of proposed class action settlement is discretionary). The proponents of the settlement have the burden of proving that the applicable factors weigh in favor of approval. *See In re GMC Pick-Up Truck Fuel Tank Litig., 55 F.3d 768, 785 (3d Cir. 1995)* (proponents of class action settlement have burden of showing that applicable factors indicate settlement's fairness, reasonableness, and adequacy).

In a proposed settlement of a class action commenced on or after February 18, 2005, under which class members will be awarded coupons, the court has the discretion to require that the proposed agreement provide for the distribution of a part of the value of unclaimed coupons to one or more charitable or governmental organizations. *See 28 U.S.C. § 1712(e).*

[2] Obtaining Preliminary Court Approval of Settlement

Although not required by *Fed. R. Civ. P. 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:

1. To establish an initial presumption of fairness through a cursory review of the settlement's terms;

2. To determine whether the negotiations occurred at arm's length;

3. To establish whether there was sufficient discovery;

4. To determine whether the proponents of the litigation are experienced in similar litigation; and

5. To establish that the number of actual or anticipated objections to the settlement is not large when compared to the class size.

See In re GMC Pick-Up Truck Fuel Tank Litig., 55 F.3d 768, 785 (3d Cir. 1995) .

Strategic Point:

A party seeking approval of a settlement, voluntary dismissal, or compromise of a certified class action must also file with the court a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise. *See Fed. R. Civ. P. 23(e).*

[3] Court Must Order Notice of Proposed Settlement and Allow Opportunity to Object at Fairness Hearing

The court must direct that notice be sent in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise through claim or issue preclusion. *See Fed. R. Civ. P. 23(e)(1)*. In contrast to notice of certification, which is required only under *Fed. R. Civ. P. 23(b)(3)*, the court must direct notice of a *settlement* to all class members who would be bound, regardless of the subsection of *Fed. R. Civ. P. 23(b)* under which the action is certified. *See Fed. R. Civ. P. 23(e)(1)*. Notice of the proposed settlement is also required when the settlement and class certification are proposed simultaneously. Notice is not required when the settlement takes place before certification because only the named parties are bound by such a settlement. *See Fed. R. Civ. P. 23(e)(1)*, advisory committee note of 2003.

Exception:

Fed. R. Civ. P. 23 does not require notice to class members of *involuntary* dismissal, whether before or after certification. Therefore, the court may order an involuntary dismissal of a class action without prior notice to the class or holding a hearing at which class members may appear and object.

Strategic Point:

Frequently, parties will move for certification and request approval of a settlement at the same time. In those circumstances, it is appropriate to combine notice of certification and settlement in order to save costs. *See Fed. R. Civ. P. 23(e)*, advisory committee note of 2003.

Fed. R. Civ. P. 23(e)(1) requires "reasonable" notice, not the "best notice practicable" such as is required to advise class members that a class has been certified under *Fed. R. Civ. P. 23(b)(3)*. The standard for reasonable notice generally depends on the facts of the particular case, and the court has broad discretion on this issue. *See Gottlieb v. Wiles, 11 F.3d 1004, 1013 (10th Cir. 1993)* , *overruled in part on other grounds by Devlin v. Scardelletti, 536 U.S. 1, 122 S. Ct. 2005, 153 L. Ed. 2d 27 (2002)* (content and form of *Fed. R. Civ. P. 23(e)* notice are left to court's discretion). Although there are numerous ways to provide notice of a proposed settlement, voluntary dismissal, or compromise, notice by mail to individual class members is the most common manner selected. *See County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1422, 1424 (E.D.N.Y. 1989)* . Notice by publication may be sufficient, however, either by itself or as a supplement to individually mailed notice. *See Walsh v. Great Atlantic & Pacific Tea Co., 726 F.2d 956, 963 (3d Cir. 1983)* (fact that some class members would not be likely to see either newspaper specified by court for publication of notice did not make notice inadequate).

In order to be meaningful, the notice must accomplish the following:

1. Inform class members of the time and place of the fairness hearing;

2. Advise class members how and when to register any objections. Every class member has a right to object to the proposed settlement; and

3. Contain a copy of the proposed settlement agreement or a summary of its terms that fairly apprises the class members of the terms of the settlement. *See Gottlieb v. Wiles, 11 F.3d 1004, 1013 (10th Cir. 1993)* , *overruled in part on other grounds by Devlin v. Scardelletti, 536 U.S. 1, 122 S. Ct. 2005, 153 L. Ed. 2d 27 (2002)* .

Any class member has a right to object to a proposed settlement, voluntary dismissal, or compromise. *See Fed. R. Civ. P. 23(e)(5)*. An objection may be withdrawn only with the court's approval. *See Fed. R. Civ. P. 23(e)(5)*. The court is obligated to consider class members' objections in its determination of whether a proposed settlement agreement is fair, adequate, and reasonable. *See In re Fleet/Norstar Sec. Litig., 935 F. Supp. 99, 107 (D.R.I. 1996)* ; *In re Marine*

Midland Motor Vehicle Leasing Litig., 155 F.R.D. 416, 420 (W.D.N.Y. 1994) . A class member who has objected may appeal the approval of a settlement even if the class member was not a named party and even if the class member has not formally intervened in the district court. *See Devlin v. Scardelletti, 536 U.S. 1, 8, 122 S. Ct. 2005, 153 L. Ed. 2d 27 (2002)* .

In an action certified under *Fed. R. Civ. P. 23(b)(3)*, the court may refuse to approve a settlement that does not afford a new opportunity to opt out to individual class members who had an earlier opportunity to request exclusion but did not do so. *See Fed. R. Civ. P. 23(e)(4).*

The court has discretion to permit discovery by objectors that may assist the court in determining the fairness and adequacy of the settlement. Discovery concerning settlement negotiations is allowed only where there is evidence of collusion between the plaintiff and defendant. *See United Wisc. Servs. v. Mylan Labs, Inc. (In re Lorazepam & Clorazepate Antitrust Litig.), 205 F.R.D. 24, 26 (D.D.C. 2001)* .

The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on a finding that it is fair, reasonable, and adequate. *See Fed. R. Civ. P. 23(e)(2)*; *28 U.S.C. § 1712(e)* (coupon settlements). The court's findings must be set out in sufficient detail to explain to class members and the court of appeals the factors that bear on the court's decision. *See Fed. R. Civ. P. 23(e)*, advisory committee note of 2003.

[4] Notifying Federal and State Officials When Proposed Settlement Is Filed With Court After Certification

Within 10 days after a proposed settlement of a class action commenced on or after February 18, 2005, is filed in court, each participating defendant must serve certain state and federal officials with notice of the proposed settlement. Notice must be served on the appropriate state official of each state in which a class member resides. *See 28 U.S.C. § 1715(b)*. The required notice must contain the papers and notices specified in *28 U.S.C. § 1715(b)*. The defendant must notify the United States Attorney General, or if the defendant is a depository institution or holding company, a foreign bank, or a nondepository institution subsidiary of such an entity (as such terms are defined in *12 U.S.C. § 1813*), the defendant must notify its federal and state regulatory agencies. *See 28 U.S.C. § 1715(a), (c).*

Warning:

A class member may refuse to comply with and may choose not to be bound by a settlement agreement if the class member demonstrates that a defendant has not served the required notice on the appropriate federal and state officials, unless the defendant merely erred as to who was an appropriate state official and served notice on both the appropriate federal official and either the state attorney general or the person who has primary regulatory, supervisory, or licensing authority over the defendant. *See 28 U.S.C. § 1715(e)(1), (2).*

Timing:

An order giving final approval of a proposed settlement may not issue earlier than 90 days after the later of the dates on which the appropriate federal and state officials are served with the required notice of the settlement. *See 28 U.S.C. § 1715(d).*

[5] Judgment Must Indicate Parties to Be Bound

When a class action has been certified under *Fed. R. Civ. P. 23(b)(1)* or *(2)*, the judgment, whether favorable or unfavorable to the class, must include and describe those whom the court finds to be members of the class. *See Fed. R. Civ. P. 23(c)(3)*. When a class action is certified under *Fed. R. Civ. P. 23(b)(3)*, the judgment, whether favorable or unfavorable to the class, must include and specify or describe those to whom the notice provided in *Fed. R. Civ. P. 23(c)(2)* was directed, and who have not requested exclusion, and whom the court finds to be members of the class. *See*

Fed. R. Civ. P. 23(c)(3).

A judgment in a properly certified class action is binding on all class members as described in the judgment. The principles of claim and issue preclusion apply. *See Cooper v. Federal Reserve Bank, 467 U.S. 867, 874, 104 S. Ct. 2794, 81 L. Ed. 2d 718 (1984)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 23.162A -23.171.*
- *Bender's Federal Practice Forms* Form Nos. 23:120-23:121, 23:150.
- *Federal Litigation Guide PP 42.240 -42.252.*
- *12 U.S.C. § 1813* (various banking entities defined).
- *28 U.S.C. § 1715* (notification to appropriate federal and state officials regarding settlement of class action).
- *Fed. R. Civ. P. 23(e)* (settlement, voluntary dismissal, or compromise of class action judgment).

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Chapter 8 CLASS ACTIONS AND DERIVATIVE ACTIONS
PART I: MOTION TO DISMISS DERIVATIVE ACTION

1-8 Moore's AnswerGuide: Fed Civil Motion Practice § 8.25

§ 8.25 Overview of Derivative Action and Scope of Rule 23.1

A derivative action is 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 or to redress an injury to the corporation that the management of the corporation has failed to redress by suit on behalf of the corporation. *See Fed. R. Civ. P. 23.1(a). Fed. R. Civ. P. 23.1* governs the procedural requirements for derivative actions by shareholders on behalf of corporations and by members on behalf of unincorporated associations. *See Fed. R. Civ. P. 23.1(a).* By its express terms, *Fed. R. Civ. P. 23.1* applies only to derivative actions, and does not apply when the plaintiff mischaracterizes a direct action as a derivative action. *See Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 529, 104 S. Ct. 831, 78 L. Ed. 2d 645 (1984)* (derivative action under *Fed. R. Civ. P. 23.1(a)* includes only actions that corporation could have brought itself); *Simcox v. San Juan Shipyard, Inc., 754 F.2d 430, 438 (1st Cir. 1985)* (designation of suit as derivative action did not alter direct nature of claims).

Strategic Point:

A shareholder derivative action is similar to a class action in that each is brought by a representative party purporting to represent its own interests and the interests of others similarly situated; however, a derivative action differs from a class action in that a derivative action is brought on behalf of the entity in which the shareholders, as a class, have an interest, while a class action is brought on behalf of the class itself.

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Chapter 8 CLASS ACTIONS AND DERIVATIVE ACTIONS
PART I: MOTION TO DISMISS DERIVATIVE ACTION

1-8 Moore's AnswerGuide: Fed Civil Motion Practice § 8.26

§ 8.26 Moving for Dismissal of Derivative Action Under Rule 12(b)(6)

If the complaint in a derivative action fails to satisfy the pleading requirements of *Fed. R. Civ. P. 23.1(b)*, the complaint may be dismissed under *Fed. R. Civ. P. 12(b)(6). See Levner v. Prince Alwaleed Bin Talal Bin Abdulaziz Al Saud, 903 F. Supp. 452, 458 (S.D.N.Y 1994)* (dismissal for failure to sufficiently plead futility of making demand on directors). Thus, a party seeking dismissal may file a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, alleging that the complaint fails to state a claim because it lacks one or more of the following elements required by *Fed. R. Civ. P. 23.1*:

1. Allegations necessary to establish the corporation or association's substantive right to relief;

2. 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 by operation of law;

3. An allegation that the action is not a collusive one to confer jurisdiction that the court would not otherwise have; and

4. Allegations stating with particularity any efforts made by the plaintiff to obtain action 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.

See Fed. R. Civ. P. 23.1(a), (b).

The party seeking dismissal under *Fed. R. Civ. P. 12(b)(6)* should file a timely motion with the court, accompanied by the relevant supporting papers as required by *Fed. R. Civ. P. 12(b)(6)* and *23.1*, and by the court. For further information regarding a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, *see § 3.08 above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 23.1.01 -23.1.17.*

- *Bender's Federal Practice Forms* Form No. 23.1:30.
- *Fed. R. Civ. P. 23.1* (derivative actions).
- *Fed. R. Civ. P. 12(b)(6)* (motion to dismiss for failure to state claim).

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Chapter 8 CLASS ACTIONS AND DERIVATIVE ACTIONS
PART J: MOTION FOR COURT APPROVAL OF COMPROMISE, SETTLEMENT, OR VOLUNTARY DISMISSAL IN DERIVATIVE ACTION

1-8 Moore's AnswerGuide: Fed Civil Motion Practice § 8.27

§ 8.27 Checklist for Motion for Court Approval of Compromise, Settlement, or Voluntary Dismissal in Derivative Action

- ☐ If drafting compromise or settlement agreement, consider:
  - ○ Fairness and reasonableness. *See § 8.28[3] below*.
  - ○ Best interests of those who will be affected. *See § 8.28[3] below*.
  - ○ Interests of corporation. *See § 8.28[3] below*.
- ☐ Submit proposed dismissal or settlement agreement to court for approval. *See § 8.28 below*.
  - ○ Include supporting memorandum and proposed form of notice. *See § 8.28 below*.
- ☐ Provide proper notice to absent shareholders as directed by court, accompanied by:
  - ○ Copy of proposed settlement. *See § 8.28 below*.
  - ○ Notice of hearing. *See § 8.28[1], [3] below*.
- ☐ Attend fairness hearing. *See § 8.28[2] below*.
- ☐ **Search by Topic:** Civil Procedure > Class Actions > Compromises

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Chapter 8 CLASS ACTIONS AND DERIVATIVE ACTIONS
PART J: MOTION FOR COURT APPROVAL OF COMPROMISE, SETTLEMENT, OR VOLUNTARY DISMISSAL IN DERIVATIVE ACTION

1-8 Moore's AnswerGuide: Fed Civil Motion Practice § 8.28

§ 8.28 Satisfying Requirements for Court Approval of Compromise or Dismissal Under Rule 23.1

Fed. R. Civ. P. 23.1(c) provides that a derivative action may be settled, voluntarily dismissed, or compromised only with the court's approval. *See Fed. R. Civ. P. 23.1(c)*. The court must weigh and protect the interests of the nonparty shareholders in evaluating a proposed dismissal or compromise.

Exception:

The fact that a shareholder's derivative suit is pending does not prevent the officers and the corporation from making an out-of-court settlement of other claims against other defendants without securing court approval; the court's supervision over compromise and dismissal relates only to the shareholder's suit itself. *See Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc., 455 F.2d 770 (2d Cir. 1972)* ; *Wolf v. Barkes, 348 F.2d 994 (2d Cir. 1965)* .

[1] Determining Method and Content of Notice of Proposed Compromise, Settlement, or Voluntary Dismissal

The contents of the notice of any proposed compromise or voluntary dismissal are not fixed by the rule, and the court may determine what is appropriate in each case. Any such notice, however, must provide sufficient information to allow the shareholders to make an informed choice regarding whether to intervene to challenge the proposed disposition of the litigation. *See Bell Atl. Corp. v. Bolger, 2 F.3d 1304, 1317-1318 (3d Cir. 1993)* (notice was sufficient when it was sent to all 1.1 million shareholders, it summarized background of litigation and terms of proposed settlement, and it informed shareholders of right to object).

In pursuing this goal, a court has discretion to determine the method and content of a notice of proposed dismissal or compromise of a derivative action. In some cases, a simple copy of the notice of the motion to settle or dismiss the case will be sufficient. *See Bernstein v. Mediobanca Banca di Credito Finanziario-Societa Per Azioni, 78 F.R.D. 1, 3 (S.D.N.Y. 1978)* (notice of hearing described terms of settlement and history of litigation). In more complex cases or in actions involving a large volume of documents, more substantial notice will be required. *See Oppenlander v. Standard Oil Co., 64 F.R.D. 597, 622 (D. Colo. 1974)* (notice contained instructions regarding filing of claims). Even in complicated cases, however, summary statements and descriptions may be sufficient, but should be clearly labeled as such, and should include information on how to obtain more complete materials. *See Maher v. Zapata Corp., 714 F.2d*

436, 450-451 (5th Cir. 1983) (notice properly informed shareholders that additional information was available from court's files). Furthermore, if the settlement raises res judicata implications, this should also be explained in language that would be clear to a layperson. *See Bell Atl. Corp. v. Bolger, 2 F.3d 1304, 1318 (3d Cir. 1993)* (notice worded so that layperson would understand res judicata implications).

[2] Providing for Meaningful Participation in Settlement Hearing by Objecting Shareholders

If one or more shareholders object to a proposed settlement, the shareholders must be allowed to have meaningful participation at a settlement hearing. Meaningful participation includes certain rights to discovery and cross-examination on issues pertaining to the settlement, but does not encompass the right to explore the merits of the case. *See Bell Atl. Corp. v. Bolger, 2 F.3d 1304, 1314-1315 (3d Cir. 1993)* (objector had adequate opportunity before settlement hearing to access and examine discovery materials, and requested documents not furnished on privilege grounds were inconsequential).

[3] Obtaining Court Approval of Compromise or Settlement

Settlements of derivative actions are favored due to the difficulty and cost of litigating such cases. *See Maher v. Zapata Corp., 714 F.2d 436, 455 (5th Cir. 1983)* (settlements are favored because derivative litigation is notoriously difficult and unpredictable); *Principe v. Ukropina (In re Pacific Enters. Sec. Litig., 47 F.3d 373, 378 (9th Cir. 1995)* (noting that derivative suits that proceed to trial are rarely successful). Nonetheless, the court must weigh and protect the interests of the nonparty shareholders in evaluating a proposed compromise or settlement. In approving settlements, courts seek to ensure that the interests of both the corporation and the shareholders are adequately protected. *See Clark v. Lomas & Nettleton Financial Corp., 625 F.2d 49, 54 (5th Cir. 1980)* . If a court determines that the settlement proposal is not in the corporation's best interests, the court will likely reject that proposal. *See In re Pittsburgh & L. E. R. Co. Sec. & Antitrust Litig., 543 F.2d 1058, 1070 (3d Cir. 1976)* (rejecting settlement that would yield minimal or non-existent benefit to corporation). The proponents of a compromise or settlement have the burden of proving that the settlement is in the best interests of the corporation. *See Maher v. Zapata Corp., 714 F.2d 436, 454 (5th Cir. 1983)* .

The court has broad discretion in reviewing a proposed compromise or settlement, but must consider its fairness, reasonableness, and adequacy, determining whether the settlement taken as a whole is fair, adequate, and reasonable. *See United Founders Life Ins. Co. v. Consumers Nat'l Life Ins. Co., 447 F.2d 647 (7th Cir. 1971)* .

The proponents of a compromise or settlement of a derivative action have the burden of proving that the compromise or settlement satisfies all of the following criteria:

1. Is fair and reasonable;

2. Is in the best interests of all those who will be affected by it; and

3. Fairly, reasonably, and adequately serves the interests of the corporation.

See In re General Tire and Rubber Co. Sec. Litigation, 726 F.2d 1075 (6th Cir. 1984) ; *Maher v. Zapata Corp., 714 F.2d 436 (5th Cir. 1983)* ; *Greenspun v. Bogan, 492 F.2d 375 (1st Cir. 1974)* .

Even if a settlement agreement is fair, a court must also ensure that there are no fraudulent or collusive features of the settlement. *See Maher v. Zapata Corp., 714 F.2d 436, 455 (5th Cir. 1983)* (court must determine that there was no fraud or collusion and that agreement is fair, reasonable, and adequate); *Levy v. GE Capital Assur. Co., 50 F. Supp. 2d 931, 932 (E.D. Mo. 1999)* (explaining need for judicial approval of derivative settlement).

Thus, in deciding to approve a settlement, a court will need to evaluate the settlement to see if it is fair, adequate, and

reasonable, and that it has been made without fraud or collusion. In order to evaluate the fairness, adequacy, and reasonableness of the proposed settlement, the court will balance the likelihood of success in the derivative suit against the amount offered in settlement. The analysis should begin with an examination of the potential outcome of the derivative suit absent a settlement. Viewing the situation in the light most beneficial to the corporation, the court should then examine the potential benefit available to the corporation and weigh it against the risks involved in establishing liability and proving damages, as well as the costs of prolonged litigation. *See Principe v. Ukropina (In re Pacific Enters. Sec. Litig., 47 F.3d 373, 378 (9th Cir. 1995)* (court concluded settlement was fair when plaintiffs were unlikely to succeed on merits, even though potential amount of recovery was large); *Bell Atl. Corp. v. Bolger, 2 F.3d 1304, 1311-1314 (3d Cir. 1993)* (despite difficulty in measuring value of potential benefit of structural changes in corporation's governance, several factors favored settlement, including improbability of success on merits of case, minute number of objecting shareholders, and costs of prolonged litigation); *In re General Tire & Rubber Co. Sec. Litigation, 726 F.2d 1075, 1086 (6th Cir. 1984)* (probability of success on merits critical factor since it provides gauge against which benefits of settlement must be measured); *Jones v. Nuclear Pharmacy, Inc., 741 F.2d 322, 324 (10th Cir. 1984)* (in assessing whether settlement is fair, reasonable, and adequate, district court should consider whether proposed settlement was fairly and honestly negotiated, whether serious questions of law and fact exist, placing ultimate outcome of litigation in doubt, whether value of immediate recovery outweighs mere possibility of future relief after protracted and expensive litigation, and judgment of parties that settlement is fair and reasonable). The district court must also inspect the settlement agreement for fraudulent or collusive features, such as any conflict of interest that may be present, and must ensure that the interests of both the corporation and the shareholders are adequately represented. *See In re Oracle Sec. Litig., 829 F. Supp. 1176, 1186-1190 (N.D. Cal. 1993)* (settlement of consolidated class and derivative actions denied when court found lack of evidence that board of directors acted independently in approving settlement).

Settlement agreements may also contain broad releases from claims. A court may approve a release of claims not included in the complaint if the claims are related to matters alleged in the complaint. In a case involving the release of related claims, the court should consider the settlement agreement as a whole to determine whether it is fair, adequate, and reasonable. *See Maher v. Zapata Corp., 714 F.2d 436, 459 (5th Cir. 1983)* (agreement that included release of claims outside complaint approved because settlement was fair and reasonable when considered in its totality).

Warning:

If a settlement includes nonpecuniary benefits to the corporation, such as corporate governance reforms, which are inherently difficult to measure, this may increase the risk that the agreement will be found to be unfair or collusive. *See Granada Invest., Inc. v. DWG Corp., 962 F.2d 1203, 1206 (6th Cir. 1992)* (noting that nonpecuniary benefits make fairness harder to assess).

Plaintiffs' counsel who successfully litigate a derivative action are entitled to an award of attorney's fees and expenses, even if a monetary benefit is not conferred on the corporation. *See Mills v. Electric Auto-Lite Co., 396 U.S. 375, 396, 90 S. Ct. 616, 24 L. Ed. 2d 593 (1970)* (fact that case may never produce a monetary recovery does not bar attorney's fee award where other benefits justify award). If the parties agree on the amount of attorney's fees and expenses, a court is likely to give that agreement substantial deference. *See Hensley v. Eckerhart, 461 U.S. 424, 437, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)* (question of fees should not result in second litigation where agreement has been reached).

Regardless of whether a court approves or rejects a compromise or settlement proposal, a party may appeal the decision. If a court approves the proposal, the settlement order constitutes a final judgment entered pursuant to *Fed. R. Civ. P. 54(b). See Marshall v. Holiday Magic, Inc., 550 F.2d 1173, 1175 (9th Cir. 1977)* (settlement order constitutes final judgment under *Fed. R. Civ. P. 54(b)*). If the court rejects the settlement, the collateral order doctrine allows for an appeal of the court's order. *See Carson v. American Brands, Inc., 450 U.S. 79, 88-90, 101 S. Ct. 993, 67 L. Ed. 2d 59 (1981)* (orders refusing entry of settlement appealable prior to final judgment because parties would otherwise be denied right to compromise their dispute on mutually agreeable terms). The court must present a reasoned response to objections made to a settlement, including findings of fact and conclusions of law as necessary, which provides a basis

for a meaningful review of the court's determination in the event of an appeal. *See Principe v. Ukropina (In re Pacific Enters. Sec. Litig.), 47 F.3d 373, 377 (9th Cir. 1995)* (district court that does not respond to objections with findings of fact and conclusions of law must provide reasoned response elsewhere in record).

Strategic Point:

Approval and notice requirements apply to derivative suits in the federal courts even if such prerequisites are not required by the substantive law of the state; however, in diversity cases, additional state substantive law requirements for the maintenance of a shareholder derivative suit must be complied with. *See Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.)* Ch. 23.1.
- *Bender's Federal Practice Forms* Form Nos. 23.1:40-23.1:42.
- *Fed. R. Civ. P. 23.1* (derivative actions).
- *Fed. R. Civ. P. 23(e)* (settlement, voluntary dismissal, or compromise of class action judgment).

[4] Satisfying Criteria for Obtaining Court Approval of Voluntary Dismissal

Fed. R. Civ. P. 23.1(c) provides that a derivative action shall not be dismissed without the approval of the court, and that notice of the proposed dismissal shall be given to shareholders in the manner that the court directs. This provision limits the conditions under which a derivative action may be dismissed. *See Saylor v. Bastedo, 623 F.2d 230, 238, 239-240 (2d Cir. 1980)* (reversing dismissal of action without notice). Although this specific provision controls over the general voluntary dismissal provisions of *Fed. R. Civ. P. 41(a)*, *Fed. R. Civ. P. 41(a)* is applicable to derivative actions when it does not conflict with *Fed. R. Civ. P. 23.1*. *See Creighton v. Taylor, 1990 U.S. Dist. LEXIS 15597, at *5 (D. Conn. 1990)* (reference to *Fed. R. Civ. P. 41(a)(1)* in granting leave to dismiss pursuant to *Fed. R. Civ. P. 23.1*); *see also §§ 3.16 -3.17 above*.

Exception:

Notice to shareholders is required only for voluntary dismissals or settlements, but not for involuntary dismissals. *See Burks v. Lasker, 441 U.S. 471, 485 n.16, 99 S. Ct.1831, 60 L. Ed. 2d 404 (1979)* (*Fed. R. Civ. P. 23.1* does not apply when plaintiff's action is involuntarily dismissed by court).

Strategic Point:

A derivative action may be dismissed on the recommendation of a special litigation committee created by a corporation to investigate the claims of the shareholders and make a recommendation as to whether the claims should be settled, litigated, or dismissed. If such a committee recommends dismissal, a court may defer to its decision and dismiss the suit. *See Burks v. Lasker, 441 U.S. 471, 477-480, 486, 99 S. Ct. 1831, 60 L. Ed. 2d 404 (1979)* ; *Moore's Federal Practice (3d ed.) § 23.1.08*.

The notice of a proposed dismissal must generally be given to nonparty shareholders when the corporate claim has not been adjudicated on the merits. *See Papilsky v. Berndt, 466 F.2d 251 (2d Cir. 1972)* . Absent proper notice, a voluntary dismissal will not have res judicata or collateral estoppel effect. *See Papilsky v. Berndt, 466 F.2d 251,*

257-258 (2d Cir. 1972) (dismissal for failure to comply with discovery order analogous to voluntary dismissal and therefore requires notice to nonparty shareholders to be given res judicata effect).

If notice and shareholder representation are adequate, however, a decree of settlement of a derivative action is considered a judgment on the merits and given res judicata effect. *See Smith v. Alleghany Corp., 394 F.2d 381 (2d Cir. 1968)* . Res judicata has a potentially significant impact in the context of shareholders' derivative actions, since an adjudication on the merits operates to bind all shareholders. *See Cramer v. General Telephone & Electronics Corp., 582 F.2d 259 (3d Cir. 1978)* . Accordingly, notice of dismissal is a precondition to the application of res judicata unless the dismissal can be considered to be either one of the following:

1. On the ground of lack of jurisdiction; or

2. On the merits with adequate representation.

See Colan v. Monumental Corp., 524 F. Supp. 1023 (N.D. Ill. 1981) (disposition of derivative action analogous to a voluntary dismissal or consent to entry of summary judgment without notice was not res judicata as to a subsequent suit involving the same facts brought by a different plaintiff against the same defendants).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 23.1.01 -23.1.17.*
- *Bender's Federal Practice Forms* Form No. 23.1:30.
- *Fed. R. Civ. P. 23.1* (derivative actions).
- *Fed. R. Civ. P. 23(e)* (settlement, voluntary dismissal, or compromise of class action judgment).

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Chapter 8 CLASS ACTIONS AND DERIVATIVE ACTIONS
PART K: MOTION FOR ORDER REGULATING CONDUCT OF ACTIONS INVOLVING UNINCORPORATED ASSOCIATIONS

1-8 Moore's AnswerGuide: Fed Civil Motion Practice § 8.29

§ 8.29 Moving for Order Regulating Conduct of Actions Involving Unincorporated Associations

Fed. R. Civ. P. 23.2 governs actions by and against members of unincorporated associations, and enables a class action to be brought by or against the members of an unincorporated association by naming certain members as representative parties. *See Fed. R. Civ. P. 23.2*. Such an action is maintainable only if the court determines that the representative parties will fairly and adequately protect the interests of the association and its members.

Fed. R. Civ. P. 23.2 expressly makes *Fed. R. Civ. P. 23(d)* concerning court orders in the conduct of class actions applicable to derivative actions. *See Fed. R. Civ. P. 23.2(c)*. In conducting a derivative action, the court may therefore issue any appropriate orders corresponding with those in *Fed. R. Civ. P. 23(d)*. *See Management Television Systems, Inc. v. National Football League, 52 F.R.D. 162, 164 (E.D. Pa. 1971)* (appropriate orders could be entered permitting individual members to assert their separate contentions). Accordingly, motions for orders regulating the conduct of a derivative action should follow the procedures for requesting orders in ordinary class actions under *Fed. R. Civ. P. 23(d)*. For further information regarding the appropriate procedures, *see § 8.12 above*.

Fed. R. Civ. P. 23.2 also specifies that the provisions of *Fed. R. Civ. P. 23(e)* are applicable to derivative actions. The procedures for settlement, voluntary dismissal, or compromise of a derivative action must therefore correspond with the procedure in *Fed. R. Civ. P. 23(e)*, and will be the same as those followed in general class actions. *See Fed. R. Civ. P. 23.2*.

Other than the explicit references to *Fed. R. Civ. P. 23(d)* and *(e)*, there is controversy over the extent to which the requirements of *Fed. R. Civ. P. 23* govern actions involving unincorporated associations. *See Fed. R. Civ. P. 23.2*, advisory committee note of 1966 (*Fed. R. Civ. P. 23.2* "refer[s] where appropriate to *Fed. R. Civ. P. 23*").

Circuit Split:

Courts are split regarding whether other Rule 23 requirements apply to suits brought under *Fed. R. Civ. P. 23.2*. *See Curley v. Brignoli, Curley & Roberts Assoc., 915 F.2d 81, 86 (2d Cir. 1990)* (because *Fed. R. Civ. P. 23.2* incorporates *Fed. R. Civ. P. 23(d)*, *(e)* by reference, if drafters had wanted to incorporate requirements of *Fed. R. Civ. P. 23(a)*, they would have done so expressly); *but see Suchem, Inc. v. Central Aguirre Sugar Co., 52 F.R.D. 348, 355 (D.P.R. 1971)* (Rule 23 requirements must be fulfilled in

class actions under *Fed. R. Civ. P. 23.2*).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 23.2.01 -23.2.09, 23.140 -23.146.*
- *Fed. R. Civ. P. 23.2* (actions involving unincorporated associations).
- *Fed. R. Civ. P. 23(d)* (orders regulating conduct of class actions), (e) (dismissal of class actions).

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Chapter 9 SUMMARY JUDGMENT

1-9 Moore's AnswerGuide: Fed Civil Motion Practice 9.syn

§ 9.syn Synopsis to Chapter 9: SUMMARY JUDGMENT

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[2] 1986 "Trilogy" of Supreme Court Summary Judgment Decisions Altered Landscape

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§ 9.06 Checklist for Timely Filing and Serving Summary Judgment Motion

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[f] Complying With Formatting Requirements for Summary Judgment Motions

[2] Drafting Memorandum (Brief) of Points and Authorities

[3] Drafting Statement of Undisputed, Uncontroverted, or Material Facts

[4] Drafting and Attaching Proposed Judgment or Order

[5] Offering Supporting Evidence

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§ 9.21 Preparing Opposition to Motion for Summary Judgment

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[c] Including Statement of Disputed Material Facts With Opposition to Summary Judgment Motion

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[2] Offering Evidence in Opposition to Summary Judgment

[a] Presenting Evidence That Sets Forth Specific Facts Showing Genuine Issue for Trial

[b] Including Admissible Evidence in Opposition to Summary Judgment Motion

[c] Drafting and Attaching Affidavits to Opposition to Summary Judgment

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§ 9.22 Drafting and Attaching Objections to Evidence Offered by Party Moving for Summary Judgment

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Chapter 9 SUMMARY JUDGMENT
PART A: PROCEDURAL CONTEXT

1-9 Moore's AnswerGuide: Fed Civil Motion Practice § 9.01

§ 9.01 Procedural Context--Moving for Summary Judgment

The summary judgment motion is one of the most powerful devices available to a litigant. If used wisely and with proper preparation, it can dispose of an entire case, or important parts of a case, with less expense and risk than trial. It can also improve prospects for settlement negotiation and frame a case favorably for the court. On the other hand, an ill-timed or poorly prepared summary judgment motion can have serious consequences for litigants; it could impede settlement, place the case in a negative light with the court, weaken a party's position for trial, as well as waste considerable time and money. Deciding if and when to move for summary judgment motion requires careful thought, and preparation of the motion warrants as much care and attention as preparing for trial.

Briefly stated, *Fed. R. Civ. P. 56* provides that the district court may resolve a case before trial when both of the following requirements are present:

- There is no genuine dispute as to any material fact
- The movant is entitled to judgment as a matter of law

See Fed. R. Civ. P. 56(a).

In essence, filing a summary judgment motion requires the court to decide if the evidence presents sufficient disagreement to require submission to a jury, or if the evidence is so one-sided that one party must prevail as a matter of law, which would justify granting a *Fed. R. Civ. P. 56* motion. *See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* .

A party may move for summary judgment with respect to an entire case or part of a case. For example, parties commonly request partial summary in cases where liability may be separate from damages or in situations where they seek to enforce indemnification obligations.

For judges, well-prepared summary judgment motions provide an effective tool that assists them with the task of isolating and disposing of factually unsupported claims or defenses, *see Celotex Corp. v. Catrett, 477 U.S. 317, 323-324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* , and are an integral component of the underlying rationale behind

the Federal Rules of Civil Procedure--promoting the just, speedy, and inexpensive resolution of cases.

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Chapter 9 SUMMARY JUDGMENT
PART A: PROCEDURAL CONTEXT

1-9 Moore's AnswerGuide: Fed Civil Motion Practice § 9.01A

§ 9.01A Major Revisions to Rule 56 in 2010

In 2010, *Fed. R. Civ. P. 56*, which governs motions for summary judgment, was revised to improve procedures for presenting and deciding summary judgment motions, and to make the procedures consistent with those already used in many courts. The standard for granting summary judgment was not changed, and the amendments were not intended to affect decisional law construing Rule 56. *See Fed. R. Civ. P. 56*, 2010 advisory committee note. On the other hand, the extensive reorganization of the rule placed many common summary judgment concepts in different subsections than where they appeared in the rule traditionally. For example, the summary judgment standard expressed in former subdivision (c) is now found in subdivision (a). This renumbering should be kept in mind when referring to pre-2010 case law. Another significant change is the replacement of the phrase "genuine issue as to any material fact" with "genuine dispute as to any material fact," in the summary judgment standard. The phrase "genuine issue of material fact" appears extensively in the case law, and is likely to continue to be used, although the advisory committee felt that the term "dispute" more accurately reflects the proper focus of a summary judgment determination.

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Chapter 9 SUMMARY JUDGMENT
PART B: UNDERSTANDING COURTS' INCREASING ACCEPTANCE OF SUMMARY JUDGMENT MOTIONS

1-9 Moore's AnswerGuide: Fed Civil Motion Practice § 9.02

§ 9.02 Appreciating Changing Judicial Attitudes Toward Summary Judgment

[1] Limited Use of Summary Judgment Before 1986

The law governing summary judgment, and judicial attitudes toward the appropriateness of summary judgment, shifted markedly in 1986. Cases before 1986 reflected judicial reluctance to grant summary judgment, or even hostility toward the motion. *See Poller v. CBS, 368 U.S. 464, 473-475, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962)* (summary judgment unavailable in complex antitrust litigation where mental state and credibility of defendant corporation's officers was at issue); *Heyman v. Commerce & Industrial Ins. Co., 524 F.2d 1317, 1320 (2d Cir. 1975)* (summary judgment a "drastic device since its prophylactic function, when exercised, cuts off a party's right to present his case to the jury"); *Brunswick Corp. v. Vineberg, 370 F.2d 605, 612 (5th Cir. 1967)* (summary judgment "lethal weapon" requiring courts to "beware of overkill"); *Whitaker v. Coleman, 115 F.2d 305, 307 (5th Cir. 1940)* (summary judgment can be "catch penny contrivance to take unwary litigants into its toils and deprive them of a trial").

[2] 1986 "Trilogy" of Supreme Court Summary Judgment Decisions Altered Landscape

In 1986, the U.S. Supreme Court altered the landscape of summary judgment in a now well-known "trilogy" of summary judgment cases: *Matsushita Elec. Indus. Co., v. Zenith Radio Corp., 475 U.S. 574, 597-598, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (denial of summary judgment reversed in large, complex antitrust matter); *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* (denial of summary judgment reversed in defamation claim); *Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* (denial of summary judgment reversed in product liability claim; movant need not submit affidavits to satisfy initial burden of establishing right to summary judgment).

These three cases established legal doctrine that substantially increased the availability of summary judgment. The Court also used the opinions to encourage trial courts to use summary judgment as a means of case management and judgment. Quoting Chief Justice Rehnquist in *Celotex*:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action" [quoting Rule 1]. ... Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to

> have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (citations omitted).

Matsushita Elec. Indus. Co., v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) , involved a massive antitrust lawsuit by American consumer electronics manufacturers against their Japanese competitors, alleging that the Japanese defendants had conspired for more than 20 years to sell goods below cost in the U.S. in order to restrain trade and monopolize the market. The case, to a significant degree, turned on the state of mind of the defendants. Up to that time there had been a virtual blanket exception to summary judgment for the "big case," "complex case," "antitrust," or cases turning on the defendant's motive and state of mind. *Matsushita* changed all that. After the Supreme Court reversed denial of summary judgment for the defendants in *Matsushita*, summary judgment could not be denied solely on the basis of the size, complexity, or subject matter of the case or the need to assess a defendant's motive or state of mind. Although these factors continue to have bearing on the appropriateness of summary judgment in specific cases, they no longer effectively preclude summary judgment.

The second case, *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* , raised the standard for defeating summary judgment. In *Liberty Lobby,* the Court held that in ruling on summary judgment motions, the trial court must consider the nonmovant's burden of persuasion at trial. So, for example, in cases where the defendant has filed a motion for summary judgment, the court must consider the plaintiff's burden of persuasion at trial in ruling on the motion for summary judgment. *Liberty Lobby* was a defamation case in which the nonmovant claimant had to bear a heightened burden of proof to support its claim. Therefore, the court reasoned, the nonmovant should be required to produce a greater quantum of evidence to oppose summary judgment successfully. Consequently, defendants facing defamation claims or any claim subject to a "clear and convincing evidence" burden of persuasion standard (e.g., fraud or punitive damages) may seek summary judgment and the claimants will be required to present more persuasive material than they would have had to in the past in order to successfully oppose summary judgment. *Liberty Lobby* also made clear that in order to establish a genuine issue of material fact, more than a "scintilla" of evidence is required; substantial evidence is needed. *See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-254, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* . In essence, *Liberty Lobby* made the test for the existence of a genuine issue of fact under *Fed. R. Civ. P. 56* the functional equivalent of the standard for granting judgment as a matter of law under *Fed. R. Civ. P. 50.*

In the third case, *Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* , the Court held that a summary judgment movant who does not bear the burden of persuasion at trial may show presumptive entitlement to summary judgment by demonstrating the absence of factual support for an essential element of plaintiff's claim.

For a detailed discussion of this "trilogy" of cases, *see Moore's Federal Practice (3d ed.) § 56.03.*

[3] Increased Judicial Receptivity to Summary Judgment Post-1986

After the 1986 "trilogy," lower courts generally have made summary judgment more available. *Michelson v. Exxon Research & Engineering Co., 808 F.2d 1005, 1009 (3d Cir. 1987)* (summary judgment granted when evidence submitted by nonmovant in support of its wrongful discharge claim is not "significantly probative"); *California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468, 1470 (9th Cir. 1987)* ("[n]o longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment"); *Raynor v. Richardson-Merrell, Inc., 643 F. Supp. 238, 245 (D.D.C. 1986)* (summary judgment motion is "bulwark against claims based on speculation and [impermissible or farfetched] inference").

In evaluating a case for summary judgment, it is important to keep these shifts in the law and in judicial attitudes toward

summary judgment in mind for two reasons. First, it is obviously important to evaluate any case law based upon its relationship to the 1986 "trilogy" of cases. In defending against a motion for summary judgment, for example, it would not be advisable to rely heavily upon language from a pre-1986 opinion that suggests that summary judgment should be granted only in rare instances or that it is not available in complex cases.

Second, it is important to recognize that the law and judicial attitudes are still in flux over 20 years after the "trilogy." The 1986 cases did not open the door for easy summary judgment in all cases. There may also be a backlash when it is perceived that a frivolous case for summary judgment is being advanced for tactical reasons. Courts continue to show reluctance to grant summary judgment unless the case for granting the motion is both doctrinally solid and practically persuasive. *See United Food & Chemical Workers United Local No. 88 v. Middendorf Meat Co., 794 F. Supp. 328, 329-330 (E.D. Mo. 1992)* , *aff'd without opinion, 991 F.2d 801 (8th Cir. 1993)* (summary judgment "harsh" remedy available only if "moving party has established his right to judgment with such clarity as not to give rise to controversy"); *United States v. Pepper's Steel and Alloys, Inc., 823 F. Supp. 1574, 1579 (S.D. Fla. 1993)* (summary judgment "extreme remedy," which should not be granted unless moving party has established right to judgment "beyond controversy").

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 56.50, 56.51.*
- *Fed. R. Civ. P. 56.*

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Chapter 9 SUMMARY JUDGMENT
PART C: EVALUATING CASE FOR SUMMARY JUDGMENT

1-9 Moore's AnswerGuide: Fed Civil Motion Practice § 9.03

§ 9.03 Checklist for Evaluating Case for Summary Judgment

☐ Consider whether case is appropriate for summary judgment by determining whether:

○ Movant can meet initial burden of proof on motion, if it can prove: (1) that there is no genuine dispute as to any material fact; (2) it is entitled to judgment as a matter of law.

○ Nonmovant cannot prove essential element on which it has burden of proof at trial.

○ Nonmovant's evidence fails to meet applicable evidentiary standard, so that a reasonable trier of fact could not return verdict for nonmovant.

☐ Determine whether case is ripe for summary judgment in that:

○ Sufficient discovery completed to obtain evidence required for movant to meet necessary burdens of proof.

○ Sufficient discovery completed to minimize the likelihood that nonmovant will be able to obtain a continuance for further discovery.

○ Case has developed to the point where it is unlikely that the court will view a motion for summary judgment as premature.

○ It is not so near the trial date that the court will deem a motion for summary judgment to be untimely.

☐ Conduct risk/benefit analysis:

- ○ Define the desired outcome.
- ○ Assign value to advantages. *See* § *9.04[3]*, *[5] below*.
- ○ Consider risks. *See* § *9.04[4]*, *[5] below*.
- ○ Assess likelihood of success.

☐ If appropriate, consider moving for partial summary judgment on:

- ○ Issues representing less than whole case;
- ○ Issue of liability alone; or
- ○ Less than full relief requested.

☐ Identify and articulate sound policy reasons for granting summary judgment to reinforce the legal case for summary judgment.

☐ Consider consultation with client.

☐ Ensure that the motion or any affidavits submitted in support of the motion are not groundless or in bad faith.

☐ **Search by Topic:**

- ○ Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview
- ○ Civil Procedure > Summary Judgment > Opposition > General Overview

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Chapter 9 SUMMARY JUDGMENT
PART C: EVALUATING CASE FOR SUMMARY JUDGMENT

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§ 9.04 Determining Whether to File a Motion for Summary Judgment

One of the most important decisions for counsel in civil litigation is deciding whether and when to move for summary judgment. Despite courts' increasing receptivity to summary judgment in recent years, these motions remain frequently unsuccessful. Summary judgment motions may entail substantial costs and outcome risks. They should be carefully evaluated and prepared in order to be cost-effective, and client consultation may be called for.

Of course, "slam-dunk" summary judgment motions that require relatively little time and attention and have an excellent chance of success are obviously worth making, but there may also be good reasons to forgo seeking summary judgment. For example, counsel may reasonably conclude that a motion has a solid but not overwhelming chance of success, but that filing the motion could unduly delay the trial date. That may be particularly true if the trial judge has a reputation for deferring decisions on motions or a tendency to deny dispositive motions.

At the other extreme are costly motions (particularly when the client is paying a noncontingent hourly rate) with little or no realistic chance of success that would also act to delay or impede alternative resolution of the case. Clearly, such motions should be avoided. In between lie potential summary judgment motions that must be carefully evaluated according to a number of factors and the client's own views, expressed after consultation with counsel.

[1] Complying for Requirements for Successful Summary Judgment Motion

The party seeking summary judgment bears the initial burden of production on the motion. *Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* . To meet this burden, the moving party generally must make a showing that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. *See Fed. R. Civ. P. 56(a)*. A fact is "material" if it is necessary to the proof or defense of a claim. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* . An issue or dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* .

Summary judgment is appropriate if the record, read in the light most favorable to the nonmoving party, demonstrates the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* .

A party asserting that a fact cannot be or is genuinely disputed must support the assertion by citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, interrogatory answers, or other materials. *Fed. R. Civ. P. 56(c)(1)(A)*. In addition, a party may show that the materials cited by the opposition do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact. *Fed. R. Civ. P. 56(c)(1)(B)*. The court is required to consider only the materials cited by the parties, but may consider other materials in the record at its discretion. *Fed. R. Civ. P. 56(c)(3)*.

A party may move for summary judgment on all or part of a claim or defense. *See Fed. R. Civ. P. 56(a)*.

[2] Defining Desired Outcome of Summary Judgment Motion

The basic inquiry should be: (1) what aspects of the case are susceptible to summary judgment; and (2) would obtaining summary judgment on these matters provide significant gain for the client in the litigation? Parties should bear in mind that summary judgment may:

1. Completely resolve a case (e.g., entry of judgment for plaintiff or defendants);

2. Completely resolve a claim (e.g., entry of judgment for defendants as to plaintiff's antitrust claim but not as to plaintiff's breach of contract claim);

3. Completely determine the status of a particular party (e.g., entry of judgment in favor of a peripheral entity erroneously named as a defendant);

4. Resolve a particular claim's application to a particular party (e.g., determining that one of several plaintiffs lacks standing to assert a statutory claim); or

5. Establish a fact or ruling applicable to the case as it is further adjudicated. This last type of "summary judgment" is more akin to a pretrial evidence ruling or a procedural ruling on matters of case administration. Nonetheless, these kinds of decisions are often labeled partial summary judgment, and are specifically contemplated by *Fed. R. Civ. P. 56*. *See Fed. R. Civ. P. 56(g)* (if court does not grant all relief requested by 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").

At the top of the scale, a summary judgment motion that completely resolves a matter is worth pursuing, provided it survives a thorough cost-benefit assessment. Likewise, a successful summary judgment motion that favorably resolves a claim may be worthwhile, but seeking summary judgment of an unimportant claim merely because it is available is unwise. On the other hand, it may be prudent for a defending party to devote a substantial amount of hours on a motion for summary judgment in an attempt to remove a dangerous punitive damages claim slated for trial before a potentially hostile jury.

At the low end of the scale, instead of using partial summary judgment as a fact or issue-narrowing device for case management, it may be more effective to achieve these goals through pretrial rulings on issues regarding admissible evidence, limits on discovery, and so on.

[3] Assessing Advantages of Summary Judgment

As part of the thorough cost-benefit analysis that every party should conduct before investing the time and resources required to prepare a successful motion for summary judgment, a party should consider the following potential

advantages to summary judgment:

1. Avoiding time and expense of trial, as well as minimizing uncertainties inherent in trial.

2. Even if the court does not grant summary adjudication of all the claims or relief requested, the motion may still succeed at disposing some of the claims or requested relief.

3. Requiring the opposing party to mount a paper trial at an early stage in the proceedings, often before significant discovery has been conducted, providing a preview of the opponent's case or of previously undisclosed evidence.

4. Expose to the court and the opposing party weaknesses in the opponent's case, which may ultimately lead to settlement or to a favorable final judgment for the moving party.

5. From the court's standpoint, summary judgment is a vital procedural tool for avoiding wasteful trials and winnowing from the trial calendar those cases whose facts make them a likely candidate for directed verdict. *See, e.g., Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., 996 F.2d 537, 541 (2d Cir. 1993)* ; *United Nat'l Ins. Co. v. Tunnel, Inc., 988 F.2d 351, 355 (2d Cir. 1993)* .

6. Focusing the litigation for trial; thus, even if the motion is not successful in its entirety, upon hearing the motion, the court will distinguish material facts that exist without substantial controversy from those facts that are actually and in good faith disputed. The court will then make an order specifying the facts that appear without substantial controversy. At trial, the facts so specified will be deemed established and the trial conducted accordingly. *See Fed. R. Civ. P. 56(g).*

[4] Weighing Risks of Summary Judgment Process

Parties should also consider the negative aspects and potentially disadvantageous consequences of moving for summary judgment, including the following:

1. **Expense.** Preparation of motions, briefs, affidavits or declarations, and other summary judgment papers may require significant time and expense for both parties. The process may be especially onerous for plaintiffs, who may lack the financial resources of some defendants.

2. **Unpredictable effect on settlement process.** Parties facing a potential ruling on a summary judgment motion may be spurred to take settlement negotiations to a more serious level. In other cases, the fact that a summary judgment motion has been prepared and is pending may lower the possibility of pretrial settlement. In these cases, movants may be reluctant to engage in serious settlement discussions until after a ruling on the motion.

3. **Risk of weakening position for trial.** A summary judgment motion may result in a party revealing more of its case strategy than was intended or was desirable, particularly if the motion proves unsuccessful.

4. **Risk of weakening negotiating posture.** If the motion fails, thereby alerting the opponent that the movant cannot resolve certain issues as a matter of law, this is likely to devalue the worth of the movant's case, and potentially negatively impact the movant's position at settlement.

5. **Risk of falling out of favor with court.** Particularly if the court perceives the motion as lacking merit or thinks that the movant brought the motion primarily to harass or annoy its opponent, an unsuccessful

summary judgment motion may place a party out of the good graces of the court, which could hurt the movant later on in the course of the litigation.

[5] Calculating Benefits, Risks, and Likelihood of Success

Parties should bear in mind that bringing a summary judgment motion may not be cost-effective, even if the court does eventually grant the motion, especially if:

1. The client's chances of prevailing at trial equal or exceed the odds of winning the motion;

2. Jurors are expected to be neutral or favorable to the client; or

3. The trial process is likely to be swift and relatively inexpensive.

Moreover, it is important to remember that although courts have become far more sympathetic to summary judgment since the 1986 trilogy of Supreme Court cases, discussed in *§ 9.02*, *above*, many summary judgment motions are denied because the standard of proof is high, and situations where there are no genuine factual disputes are rare.

If the likely benefits of summary judgment, adjusted by the realistic chances of prevailing on the motion, outweigh the estimated costs and risks, counsel should seek summary judgment aggressively and professionally. On the other hand, for simple matters set for early trial dates, or for litigants with a strong but not an open-and-shut case, it may be more prudent to simply move forward to trial rather than lengthening the motion practice phase of trial.

Strategic Point:

Familiarity with the idiosyncratic traits of district court judges is invaluable to the cost-benefit analysis of a party that is considering moving for summary judgment. Judges who enjoy deciding motions will give summary judgment motions prompt and reflective attention, and may be more likely to grant a well-crafted summary judgment motion. Moreover, they may be more likely to rule quickly on all motions, thereby minimizing the chances that a failed summary judgment motion will only have served to delay trial. By contrast, a party may wish to avoid bringing a summary judgment motion, even if it has a strong argument, before a judge who dislikes motion practice and avoids it by allowing motions to pile up, because it could cost the movant more in unnecessary expense and delay than would be gained from the potential success of the motion.

[6] Avoiding Moving for Summary Judgment to "Educate the Court"

Counsel may be tempted to use a summary judgment motion as a means of persuading the court of the soundness of its litigation position, reasoning that the motion will be effective public relations even if the court will probably deny the motion. Parties should not give into this temptation, however, because courts are likely to view summary judgment motions with only a remote chance of success as more annoying than educational, which may harm the movant in close rulings later in the case.

[7] Recognizing Courts' Discretion to Deny Summary Judgment Even if Legal Standards Are Met

Rule 56(a) provides that a court "shall" grant summary judgment if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The word "shall" is not intended to mean "must" or "should," however. *See Fed. R. Civ. P. 56(a)*, 2010 advisory committee note. Instead, the case law has long recognized that a court may exercise its discretion and deny summary judgment when it believes further pretrial activity or trial adjudication will sharpen the facts and law at issue and lead to a more accurate or just decision, or when further

development of the facts may enhance the court's legal analysis. *See Kennedy v. Silas Mason Co., 334 U.S. 249, 256, 68 S. Ct. 1031, 92 L. Ed. 1347 (1948)* (declining to deny summary judgment in case of statutory interpretation because of importance of case and view that trial would better illuminate issues of law and policy).

In evaluating a case for summary judgment, therefore, it is not enough to assess whether a bare legal case has been established. It is also important to ask whether a court would be inclined, for policy or other reasons, to grant the motion.

[8] Consulting With Client Before Moving for Summary Judgment

Counsel considering a summary judgment motion should consult with and seek approval from the client. Because summary judgment motions are expensive and can significantly alter the course of the litigation, before investing time and resources into preparing the motion, counsel should discuss with their client: (1) estimated costs of summary judgment motion; (2) likely outcome of motion; (3) reasons for bringing the motion; and (4) any potential drawbacks or adverse consequences.

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Chapter 9 SUMMARY JUDGMENT
PART D: PREPARING AND FILING MOTION FOR SUMMARY JUDGMENT

1-9 Moore's AnswerGuide: Fed Civil Motion Practice § 9.05

§ 9.05 Checklist for Preparing Summary Judgment Motion and Supporting Papers

☐ Carefully examine all local rules governing form and filing of motions for summary judgment.

☐ Timely bring motion for summary judgment. *See § 9.07 below*.

☐ Include in motion papers:

- ○ Notice of motion specifying date, time, and location of hearing on motion.
- ○ Motion specifying which party seeks summary judgment, claims involved in motion, and legal and factual grounds for motion.
- ○ Supporting affidavits.
- ○ Proposed order granting summary judgment as requested by movant.
- ○ Proof of service.

☐ Comply with writing requirement by filing:

- ○ Written notice of hearing on motion.
- ○ Combined notice of motion and motion setting forth required contents (better practice).

☐ At minimum, set forth in motion:

- ○ Grounds for motion, including: (1) theories on which movant proceeds; (2) list of pleadings and papers on which movant relies; and (3) statement that movant must make pursuant to *Fed. R. Civ. P. 56*.
- ○ Relief or order sought.
- ○ Request for oral argument or waiver of argument on motion, as desired.

☐ Fulfill additional requirements imposed by local rule (e.g., statement of uncontroverted facts and conclusions of law).

☐ Properly format motion, following:

- ○ Rules applicable to formatting pleadings generally. *See § 1.04 above*.
- ○ Applicable local rules.

☐ Draft and attach proposed judgment or order after properly formatting order, as required. *See § 9.08[4] below*.

☐ Draft and attach signed affidavits or declarations to support factual contentions in motion and prepare supporting motion papers. Ensure that supporting affidavits or declarations:

- ○ Are made on personal knowledge;
- ○ Set forth specific facts that would be admissible in evidence; and
- ○ Affirmatively show that affiant or declarant is competent to testify to matters in affidavit.

☐ Attach affidavit to motion for filing with court and serve on opponent.

☐ Attach to affidavit sworn or certified copies of all documents referred to in the affidavit.

☐ Evaluate affidavits to determine that they are not made in bad faith or for delay.

☐ Draft and attach brief or memorandum of points and authorities supporting motion as required by local rule. *See § 9.08[2] below*.

☐ Set forth in brief or memorandum:

- ○ Issues or grounds on which summary judgment is sought.
- ○ Brief procedural history of case, including: (1) filing date; (2) claims presented; (3) discovery undertaken or attempted; (4) any dispositive motions filed in case and disposition of those motions; and (5) listing of any other motions pending.
- ○ A statement of facts relevant to the issues to be decided in the case.
- ○ Concise legal argument on the grounds supporting summary judgment, with cites to relevant authority.

☐ Properly format supporting memoranda and briefs by following:

- ○ Rules applicable to formatting briefs and memoranda generally.
- ○ Applicable local rules.

☐ Draft and attach statement of undisputed, uncontroverted, or material facts supporting motion as required by local rules. *See § 9.08[3] below*.

☐ Attach evidence supporting summary judgment motion to:

- ○ Inform court of basis for motion; and
- ○ Identify portions of record supporting assertion of no triable issue of fact.

☐ Determine initial burden of proof on motion, depending on burden of persuasion at trial. *See* § 9.38 *below*.

- ○ If moving party bears burden of persuasion at trial, support motion with credible evidence showing no genuine issue of material fact.
- ○ If nonmoving party has burden of persuasion at trial, either: (1) submit affirmative evidence negating essential element of nonmovant's claim; or (2) demonstrate that nonmovant's evidence is insufficient to establish essential element of nonmovant's claim.

☐ Ensure that evidence contained in attached material is:

- ○ Based on personal knowledge.

- ○ Based on specific facts that are admissible in evidence.
- ○ Properly authenticated.

☐ Consider attaching excerpts of pleadings or deposition transcripts to motion.

☐ If attaching deposition excerpt to motion, attach cover page of deposition and reporter's certification or consider submitting complete deposition with relevant portions highlighted.

☐ Ensure that exhibits supporting the summary judgment motion, such as answers to interrogatories or requests for admissions, or other documents obtained through discovery, are filed with the court clerk.

☐ **Search by Topic:**

- ○ Civil Procedure > Summary Judgment > Motions for Summary Judgment > Written Motions
- ○ Civil Procedure > Summary Judgment > Supporting Materials > Affidavits
- ○ Civil Procedure > Summary Judgment > Supporting Materials > Memoranda of Law
- ○ Civil Procedure > Summary Judgment > Time Limitations

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Chapter 9 SUMMARY JUDGMENT
PART D: PREPARING AND FILING MOTION FOR SUMMARY JUDGMENT

1-9 Moore's AnswerGuide: Fed Civil Motion Practice § 9.06

§ 9.06 Checklist for Timely Filing and Serving Summary Judgment Motion

☐ Carefully examine all local district court rules and individual judge's rules governing form, content and filing of motions for summary judgment, because they will often vary significantly from the guidelines set forth in *Fed. R. Civ. P. 56*.

☐ Timely serve summary judgment motion on opposing party.

- ○ Unless local rule provides otherwise, serve motion no less than 10 days before hearing on motion.

☐ Remember to add three days for service by mail, electronic, or alternate means of delivery.

☐ Include certificate of service with moving papers filed with court. *See § 9.09[2] below*.

☐ Follow applicable local rules requiring consultation with opposing counsel before filing summary judgment motion. Even if not required, the moving party should attempt to confer with opposing counsel before filing, because it could resolve issues that would otherwise take up space in the motion, and may foster settlement. Unless the surprise of filing a summary judgment motion is central to a particular litigation strategy, it generally does not put the movant at a disadvantage.

☐ Timely file summary judgment motion with the district court. *See §§ 9.07, 9.09[2] below*.

- ○ First, determine if deadline for filing summary judgment motions was set forth by the court in its case management order.

- ○ File motion and supporting papers with court clerk within reasonable time after

service and include a courtesy copy to be sent to the judge's chambers.

Search by Topic:

Civil Procedure > Summary Judgment > Motions for Summary Judgment > Written Motions

Civil Procedure > Summary Judgment > Time Limitations

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Chapter 9 SUMMARY JUDGMENT
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1-9 Moore's AnswerGuide: Fed Civil Motion Practice § 9.07

§ 9.07 Complying With Timing Requirements for Filing Summary Judgment Motion

Rules concerning timing of motions for summary judgment are extremely important and should be calendared and tracked carefully. A party may move for summary judgment at any time until 30 days after the close of all discovery unless a different time is set by local rule or the court orders otherwise.

In addition to restrictions on when a motion for summary judgment may be filed, there are strategic considerations that parties should consider, so that they may avoid filing prematurely or too late in the course of litigation. *See § 9.07[2] below*.

Warning:

Local district court rules and individual judge's rules or standing orders often modify the time periods governing motions for summary judgment. Therefore, it is essential to review local rules on this issue with extreme care.

[1] Earliest Date on Which Summary Judgment Motion May Be Filed

[a] Summary Judgment Motion Can Be Filed at Any Time Until 30 Days After 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. *Fed. R. Civ. P. 56(b)*. A summary judgment motion may even be filed as early as the commencement of an action. There is no longer a waiting period before a party can move for summary judgment.

A party caught short by an opposing party's summary judgment motion at the outset of litigation may seek additional time to conduct discovery to obtain facts to support its opposition to the motion for summary judgment. *See Fed. R. Civ. P. 56(d)* (if a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may, among other remedies, allow time to take discovery); *see also §§ 9.24 -9.28 below*.

[b] Defendant's Motion for Summary Judgment May Toll Defendant's Time to Answer Complaint

A defendant's answer to the complaint is not a prerequisite for a motion for summary judgment, regardless of which party brings the motion. *See HS Res., Inc. v. Wingate, 327 F.3d 432, 440 (5th Cir. 2003)* (motion made at time defendant had filed only motion to dismiss, but answer to complaint was not prerequisite to court's consideration of motion).

A defendant generally has 21 days after service of the complaint to serve an answer. *See Fed. R. Civ. P. 12(a)(1)(A)*. Although the rules are unclear on the matter, it appears that a defendant may file a motion for summary judgment in lieu of an answer. Only a few cases have considered the matter, but most of them have concluded that a defendant's summary judgment motion made prior to the filing of an answer to the complaint tolls the moving defendant's time to answer the complaint. *See Brooks v. Chappius, 2006 U.S. Dist. LEXIS 8821, at *2 (W.D.N.Y. 2006)* (plaintiff not entitled to default because defendant, although not answering complaint within time allowed, filed motion within that time, and thus did "otherwise defend" against action with meaning of *Fed. R. Civ. P. 55(a)*); *Rashidi v. Albright, 818 F. Supp. 1354, 1356 (D. Nev. 1993)* (summary judgment motion filed by defendant constituted defense to action, which precluded entry of default).

In other words, if the defendant files a motion for summary judgment within the time allowed to answer the complaint, the court may not enter a default against the defendant for failing to answer the complaint within the time allowed. Under *Fed. R. Civ. P. 55(a)*, a court may enter a default against a defendant only when that defendant has "failed to plead or otherwise defend" within the time allowed. The courts have reasoned that a defendant's pre-answer motion for summary judgment comes within the ambit of the Rule's phrase "otherwise defend."

In so doing, the courts treat defendants' motions for summary judgment filed in lieu of an answer in the same manner that they treat *Fed. R. Civ. P. 12(b)* motions to dismiss that are filed in lieu of an answer. Thus, a timely filed motion to dismiss precludes an entry of default against the moving defendant. If a pre-answer motion to dismiss is denied, the defendant will be given an opportunity to answer the complaint at that time. *See Fed. R. Civ. P. 12(a)(4)(A), (b)*. *See* Chapter 3, *above*, for analysis of *Fed. R. Civ. P. 12(b)* motions to dismiss.

There is limited authority, however, suggesting that a pre-answer summary judgment motion may not automatically toll the response period. An older decision from one district court held that the right to an extension of time to file a responsive pleading until determination of a motion for summary judgment is not a definite and fixed right but a matter to be granted or denied after consideration of all the circumstances and a showing of good cause for postponement. *See Poe v. Cristina Copper Mines, Inc., 15 F.R.D. 85, 87 (D. Del. 1953)* (court denied request for enlargement of time after several extensions were given to defendants and when summary judgment motion, even if granted, would not entirely dispose of action).

Regardless of whether the defendant's time in which to answer a complaint is tolled by filing a motion for summary judgment, it is definitely the better practice to file an answer within the required time. At the very least, pleadings may help the parties and the court to understand the relevant facts, issues, and law. *See Rashidi v. Albright, 818 F. Supp. 1354, 1356 (D. Nev. 1993)* (however, defendant's belief that time to answer is tolled by filing of summary judgment motion "minimally amounts to a good faith interpretation of the law").

[2] Considering Implications of Premature or Tardy Motions for Summary Judgment

[a] Avoiding Filing Premature Motions for Summary Judgment

Despite the desire to resolve litigation as quickly and efficiently as possible, counsel for moving party should be aware of the problems posed by filing a motion for summary judgment before the case is ripe for summary adjudication.

First, a successful motion will require a sufficient evidentiary basis upon which a movant can establish the required lack of disputed material facts and entitlement to judgment. *See Celotex Corp. v. Catrett, 477 U.S. 317, 328, 106 S. Ct.*

2548, 91 L. Ed. 2d 265 (1986) (White, J., concurring) (to discharge its initial burden in seeking summary judgment, movant must do more than simply allege that claimant non-movant has failed to prove its case).

If a motion is filed too early in the case and the non-movant is unable to set out specific facts showing a genuine issue for trial because discovery has not been significantly completed, it may file a *Fed. R. Civ. P. 56* motion for continuance to allow for further discovery, which the court is likely to grant.

Furthermore, both the courts and the moving party should be wary of the fact that appellate courts are likely to use the lack of an opportunity for discovery as grounds for reversing a summary judgment. *See Hellstrom v. United States Dep't of Veterans Affairs, 201 F.3d 94, 97 (2d Cir. 2000)* (reversing summary judgment in favor of defendant, noting that summary judgment should rarely be granted against plaintiff who has not had opportunity to conduct discovery).

[b] Avoiding Filing Late Motions for Summary Judgment

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. *Fed. R. Civ. P. 56(b)*. Summary judgment motions filed at the last possible moment may pose significant problems for litigants, however, because it is common for *Fed. R. Civ. P. 16(b)* scheduling orders to set deadlines for the filing of dispositive motions. *See Fed. R. Civ. P. 16(b)(2)* (district judge or magistrate judge must enter scheduling order); *Fed. R. Civ. P. 16(b)(3)(A)* ("The scheduling order must limit the time to ... file motions.").

Some courts have determined that, unlike other motions, a motion for summary judgment may be filed after the deadline for filing dispositive motions set in a scheduling order. *See Delaney v. Wal-Mart Stores, Inc., 408 F. Supp. 2d 240, 242 (N.D. Miss. 2005)* . By contrast, most courts have found that *Fed. R. Civ. P. 16* precludes last-minute summary judgment motions filed after the scheduling order deadline. *See, e.g., United States Dominator, Inc. v. Factory Ship Robert E. Resoff, 768 F.2d 1099, 1104 (9th Cir. 1985)* ; *Dedge v. Kendrick, 849 F.2d 1398, 1398 (11th Cir. 1988)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.)* § 56.60.
- *Fed. R. Civ. P. 56*

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Chapter 9 SUMMARY JUDGMENT
PART D: PREPARING AND FILING MOTION FOR SUMMARY JUDGMENT

1-9 Moore's AnswerGuide: Fed Civil Motion Practice § 9.08

§ 9.08 Preparing Motion for Summary Judgment and Supporting Documents

[1] Drafting Summary Judgment Motion and Supporting Papers

[a] Summary Judgment Motion Must Be in Writing

A summary judgment motion ordinarily must be made in writing. *See In re Hailey, 621 F.2d 169, 171 (5th Cir. 1980)* (oral summary judgment motion generally improper and sua sponte motion, although ordinarily available, improperly utilized due to insufficient notice to nonmovant prior to grant of summary judgment); *see also Sequoia Union High School Dist. v. United States, 245 F.2d 227, 228 (9th Cir. 1957)* (appellate court reversed summary judgment awarded to plaintiff because motion made orally).

[b] Supporting Papers Must Be Filed Along With Summary Judgment Motion

Although local rules will vary, generally, a party seeking summary judgment should include the following documents in its package of motion papers filed with the court:

1. The notice of the motion, including the date, time, and location of the hearing on the motion previously obtained through the chambers of the judge who will hear and decide the motion.

2. The motion itself, which simply identifies the party seeking summary judgment, the claims on which summary judgment is sought, and the legal and factual grounds for the motion.

3. A proposed order that, if signed by the court without alteration, would provide the disposition and relief sought by the motion.

4. Affidavits or other papers in support of the motion.

5. A memorandum of law, which is a legal brief explaining why the court should grant the motion.

[c] Complying With Specific Filing Requirements for Summary Judgment Motions Set Forth in Local Rules

Local rules may also impose specific requirements regarding the content and format of motions for summary judgment, and the time within which parties must file and serve them. For example, local rules may require the moving party to annex to the notice of motion a separate, short, and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried.

[d] Stating Grounds for Summary Judgment Motion and Relief Sought

At a minimum, a motion for summary judgment must state with particularity the grounds for the motion, and the relief sought. *See Fed. R. Civ. P. 7(b)(1).* A motion for summary judgment is made "with particularity" when it:

1. States the theory on which the movant proceeds;

2. Lists the pleadings and papers on which the movant relies; and

3. States that the movant is bringing the motion pursuant to *Fed. R. Civ. P. 56* authorizing summary judgment.

See California Dep't of Toxic Substances Control v. Interstate Non-Ferrous Corp., 298 F. Supp. 2d 930, 938 (E.D. Cal. 2003) .

Again, it is likely that local rules will impose additional requirements regarding the content of summary judgment motions. Therefore, counsel must become familiar with and should adhere to local rules in the district in which the case is filed, as well as the individual judge's rules and standing orders pertaining to summary judgment motions.

[e] Requesting or Waiving Oral Argument on Summary Judgment Motion

District courts often determine summary judgment motions without holding an oral hearing. *See Fed. R. Civ. P. 78, 83.* Furthermore, district courts may provide by local rule that a party desiring oral argument on a motion for summary judgment must request oral argument or risk waiver.

Strategic Point:

Consult the rules in the relevant district to determine whether the court automatically provides a hearing on summary judgment motion or whether counsel must specifically request a hearing. The safest practice is to request a hearing in the motion or opposition papers. Because summary judgment motions are dispositive, counsel should request oral argument on the motion in most cases.

[f] Complying With Formatting Requirements for Summary Judgment Motions

The rules applicable to formatting of pleadings generally also apply to motions for summary judgment. *See Fed. R. Civ. P. 7(b)(2).* For example, a motion for summary judgment must contain a caption, and must be signed in accordance with *Fed. R. Civ. P. 11.*

Local rules may impose additional format requirements. *See, e.g.,* C.D. Cal. L.R. 7-4 (required contents of notice of motion). Therefore, counsel must familiarize themselves with and adhere to the local rules in the district in which the case is filed.

[2] Drafting Memorandum (Brief) of Points and Authorities

Though not explicitly required by the Federal Rules of Civil Procedure, local rules commonly require moving parties to

file a brief or memorandum of points and authorities in support of the motion, and many of these rules set forth specific page limits for briefs. Counsel must therefore become familiar with and follow local rules in the district in which the case is filed.

In general, a memorandum or brief in support of a summary judgment motion should include the following:

1. The issues or grounds on which the party seeks summary judgment;

2. A brief procedural history of the case, including the filing date, the claims presented, discovery undertaken or attempted, any dispositive motions filed in the case and the disposition of those motions, and a list of any other motions pending.

3. A statement of facts relevant to the issues to be decided in the case.

4. Concise legal argument stating the grounds supporting summary judgment, including cites to relevant authority and to specific evidence supporting the argument.

Strategic Point:

Counsel should not overstate or exaggerate the evidence supporting the motion and risk losing credibility with the judge. Moreover, counsel should acknowledge facts favoring the opponent, while demonstrating that those facts do not preclude a grant of summary judgment. Although counsel has more leeway in arguing for an expansive legal position than in misstating facts, counsel should take care not to misstate the law. Furthermore, parties should be sure to keep their briefs within the page limits specified by local rule.

[3] Drafting Statement of Undisputed, Uncontroverted, or Material Facts

Though not explicitly required by the Federal Rules, most districts automatically require a party filing a motion for summary judgment to file an accompanying statement of undisputed, uncontroverted, or material facts. *See, e.g.,* C.D. Cal. L.R. 56-1; S.D.N.Y. & E.D.N.Y. L.R. 56.1(a).

Generally, these rules require that the moving party list the material facts it relied in support of the legal arguments stated in the motion. The statements also cite the portion of the pleadings, affidavits, depositions, interrogatory answers, admissions, or other evidence relied on to establish the specific fact.

Even when not required, statements of undisputed fact are a helpful way of focusing the attention of the court on the elements at issue in the motion. More important, a party's failure to contest an opposing party's statement of uncontested facts is a binding admission of the truth of those facts. *See Tobey v. Extel/JWP, Inc., 985 F.2d 330, 333 (7th Cir. 1993)* .

In drafting a statement of undisputed, uncontroverted, or material facts, counsel should assist the court with the tasks of finding and verifying the facts by:

1. Quoting the particular evidence relied on when appropriate;

2. Citing the exact location of the evidence in the record by using page, paragraph, and line cites when possible; and

3. Attaching admissible excerpts to an accompanying affidavit or declaration.

Warning:

When a party referring to evidence in a statement of material facts fails to cite to a specific location in the motion papers that is sufficient to enable the court to find the material, the trial court may exclude the evidence. *See Orr v. Bank of Am., NT & SA, 285 F.3d 764, 774-775 (9th Cir. 2002)* (failure to cite page and line numbers of deposition).

Strategic Point:

Courts prefer to receive joint or stipulated statements of undisputed facts from parties. Joint statements are particularly helpful in complex commercial cases in which there is a great deal of technical information, such as patent or contract disputes. Joint statements are relatively straightforward to prepare in a contract dispute, in that all parties should be able to agree on the language of the contract and on the circumstances of formation. If opposing counsel is recalcitrant, however, attempting to obtain a joint statement can be very time-consuming, and may not always be possible.

[4] Drafting and Attaching Proposed Judgment or Order

Some district courts require that a proposed judgment or order be submitted along with the motion for summary judgment. When local rules do not require the submission of a proposed order, counsel should determine the court's preference in this matter. Some judges strongly prefer that counsel do not submit proposed orders and rarely refer to counsel's proposals in drafting their orders. However, most judges are quite receptive to and appreciative of suggestions by counsel in the form of proposed orders, including proposed findings. Proposed orders not only assists the court in drafting the final order, but preparing the proposed order helps focus counsel's attention on the specific relief that it seeks, and which factual evidence is or is not disputed on the motion.

A party should submit a proposed order in a format that makes it truly useful to the court. For example, in some districts, parties must e-mail proposed orders to the judge's chambers in Microsoft Word or WordPerfect format, so that the judge can modify the proposed order easily and conveniently to his or her liking. In other courts, it may also be possible to submit proposed orders in an easily modifiable form, such as with an additional copy being submitted on disk. Once again, a party should seek out and adhere to the judge's preferences in these matters.

[5] Offering Supporting Evidence

[a] Using Affidavits or Declarations in Summary Judgment Motions

Fed. R. Civ. P. 56 does not require that affidavits or declarations must accompany a motion for summary judgment. As long as the moving party satisfies the standard for summary judgment set forth in *Fed. R. Civ. P. 56(a)*, summary judgment should be granted. *See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* .

Note that earlier versions of Rule 56 specified the use of "affidavits" in support of or in opposition to a motion for summary judgment. 2010 amendments to Rule 56 provided that a formal affidavit is no longer required. Instead, a written unsworn declaration subscribed as true under penalty of perjury may be substituted for an affidavit. *See Fed. R. Civ. P. 56(c)(4)*, 2010 advisory committee note; *see also 28 U.S.C. § 1746*.

Notwithstanding the fact that affidavits are not required by *Fed. R. Civ. P. 56*, parties typically use them to support the facts alleged in their summary judgment motions. Affidavits accompanying a summary judgment motion must be sworn

or declared to be true under penalty of perjury. *See DeMars v. O'Flynn, 287 F. Supp. 2d 230, 242 (W.D.N.Y. 2003)* . Moreover, they must contain evidence that would be admissible at trial. Therefore, the affidavit should not include hearsay statements of persons other than the affiant. *See Dora Homes, Inc. v. Epperson, 344 F. Supp. 2d 875, 882 (E.D.N.Y. 2004)* .

Warning:

Some local district court rules require that a motion for summary judgment be accompanied by an affidavit. Be sure to consult the local district court rules as well as individual judge's rules and standing orders to determine whether affidavits are required.

[b] Preparing Affidavits or Declarations Accompanying Motion for Summary Judgment

Even if not required, affidavits are usually necessary to provide the factual record for a district court to act on a summary judgment motion. If a party decides to submit affidavits along with summary judgment motions, they must meet certain standards, as set forth in case law and in Rule 56 itself. Specifically, Rule 56 requires that affidavits or declarations 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. *Fed. R. Civ. P. 56(c)(4).*

[i] Basing Affidavit or Declaration Accompanying Summary Judgment Motion on Personal Knowledge

A summary judgment affidavit or declaration must be based on personal knowledge. *See Fed. R. Civ. P. 56(c)(4).* Thus, as a procedural safeguard, it is common practice for the affiant to state affirmatively in the affidavit that it is based on personal knowledge. This affirmation should also be supported by facts showing how and why the affiant has personal knowledge. Parties should be forewarned, however, that a statement that an affidavit is based on the affiant's personal belief does not automatically satisfy the requirement that the affidavit be based on personal knowledge. Proof of personal knowledge may be established through specificity included in the affidavit, such as including statements of individuals whose utterances constitute exceptions to the hearsay rule. Offering these statements may establish the affiant's knowledge of the information included in the affidavit. *See Schroeder v. McDonald, 41 F.3d 1272, 1278 (9th Cir. 1994)* (personal knowledge demonstrated by reference to statements from others made during two specific instances that were relevant to lawsuit).

Proof that the information contained in the affidavit is based on personal knowledge may also be inferred from the content. *See DIRECTV Inc. v. Budden, 420 F.3d 521, 530 (5th Cir. 2005)* (district courts may rely on affidavits when the affiants' "personal knowledge and competence to testify are reasonably inferred from their positions and the nature of their participation in the matters to which they swore"). Counsel may submit summary judgment affidavits, but only to the extent that the relevant facts are within counsel's personal knowledge. For example, attorney affidavits may be appropriate to certify the authenticity of copies of discovery material. *See Sitts v. United States, 811 F.2d 736, 741-742 (2d Cir. 1987)* (attorney's affidavit that identified and discussed procedural facts that related to plaintiff's claim was sufficient to support motion for summary judgment).

[ii] Stating Admissible Evidence in Affidavit or Declaration Supporting Summary Judgment Motion

The evidence presented in the affidavit must be evidence that would be admissible if presented at trial through the testimony of the affiant as a sworn witness. *See Fed. R. Civ. P. 56(c)(4)*; *Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* . For the content contained in the affidavit to be considered admissible evidence, it must not only be based on personal knowledge and contain evidence that would be admissible at trial, but the affiant must also be competent to testify to the matters set forth in the affidavit.

[iii] Setting Forth Specific Facts, Not General Contentions in Affidavit or Declaration Supporting Summary Judgment Motion

The affidavit, in addition to presenting admissible evidence, must be sufficiently specific to support the affiant's position. Allegations that proffer legal conclusions supporting movant's position, but are not buttressed with specific factual support set out in the affidavit, may not serve as the basis for summary judgment. *See Burlington Coat Factory Warehouse Corp. v. Esprit De Corp., 769 F.2d 919, 922-923 (2d Cir. 1985)* (conclusory allegations of antitrust violations have no value when they are without factual support or supported only by uncorroborated hearsay).

[iv] Attaching Copies of Papers and Exhibits Referred to in Affidavit or Declaration Supporting Summary Judgment Motion

It is improper for a summary judgment affidavit to refer to papers or other exhibits without attaching a sworn or certified copy of those papers. *See Fed. R. Civ. P. 56(c)(1)(A).* If the affidavit refers to or cites documentary evidence as the source, the document must be attached, even if it is expensive or inconvenient to do so and even if the affiant claims personal knowledge of the matter. *See School Dist. No. 1J v. AC&S, Inc., 5 F.3d 1255, 1262 (9th Cir. 1993)* .

[c] Using Other Evidence to Support Summary Judgment Motion

To meet its initial burden of showing it is entitled to summary judgment, the moving party must inform the district court of the basis for its motion, and must identify the portions of the record supporting its assertion that there is no triable issue of fact. *See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* ; *see also Fed. R. Civ. P. 56(c).* In making this showing, the movant must cite to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, interrogatory answers, or other materials. *See Fed. R. Civ. P. 56(c)(1)(A).*

Strategic Point:

Counsel should consider compiling a "chambers copy" of the portions of the record filed with the motion that they want the judge to review when deciding the summary judgment motion, especially if the evidence filed with the motion is voluminous. The chambers copy is separate from the official copy of the evidence filed with the motion and should include a table of contents and index tabs to assist the court in locating the documents referred to in the motion. It should also contain locator information that would help the judge find the document in the official court records.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 56.70.*
- *Bender's Federal Practice Forms* Form Nos. 56:1-56:8, 56:30-56:32, 56.40-56.41.
- *Fed. R. Civ. P. 56(c)(1), (4).*

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Chapter 9 SUMMARY JUDGMENT
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§ 9.09 Filing and Serving Motion for Summary Judgment

[1] Party May File Motion for Summary Judgment at Any Time Until 30 Days After Close of All Discovery

A party may file a motion for summary judgment at any time until 30 days after the close of all discovery, even at the commencement of an action. *See Fed. R. Civ. P. 56(b)*; *see also § 9.07[1][a] above*.

Warning:

Counsel must also be aware that some district courts' local rules require notice periods for summary judgment motions. Therefore, it is critical to check the local rules, as well as an individual judge's standing orders, and comply with them.

[2] Filing Summary Judgment Motion With Court in Timely Fashion

A party serving a motion or notice of motion for summary judgment on an opposing party also must file the motion or notice, and supporting papers and documents, with the court within a reasonable time after service. *See Fed. R. Civ. P. 5(d)(1)*, *56(c)*. The movant must also file a certificate of service with the court. *See Fed. R. Civ. P. 5(d)(1)*. Generally, filing with the court is accomplished by filing the motion papers with the court clerk, but because many district courts require electronic filing, it is imperative that counsel consult the local rules in the district where the case is filed to determine specific e-filing guidelines and deadlines. *See Fed. R. Civ. P. 5(e)*.

Warning:

The deadline for filing motions for summary judgment is often set by the district court in its initial case management order, or a subsequent order. Thus, counsel should take notice of and abide by the filing deadline in the most recent case management order issued by the judge.

[3] Meeting and Conferring With Opposing Counsel Before Filing Summary Judgment Motion

Some district court local rules require counsel to confer with the opposing party before serving and filing a motion for summary judgment. *See, e.g.,* C.D. Cal. L.R. 7-3. Counsel should therefore become familiar with and should follow the local rules for the relevant district pertaining to mandatory conferences with opposing counsel. Even if not required by

local rule, it is rarely disadvantageous, and often beneficial, to consult with opposing counsel before filing a summary judgment motion. Such a consultation may eliminate certain issues that take up space in the motion, offer a sneak preview of the opponent's case, or even spark settlement discussions.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 56.60, 56.61.*
- *Fed. R. Civ. P. 56(b).*

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Chapter 9 SUMMARY JUDGMENT
PART E: MOVING FOR PARTIAL SUMMARY JUDGMENT

1-9 Moore's AnswerGuide: Fed Civil Motion Practice § 9.10

§ 9.10 Understanding Strategic Importance of Partial Adjudication

Former versions of Rule 56 did not contain the term "partial summary judgment." However, 2010 amendments to Rule 56 adopted the commonly used phrase to describe disposition of less than the whole action, whether or not the order grants all the relief requested by the motion. *See Fed. R. Civ. P. 56(a)*, 2010 advisory committee note. The rule provides that a party may move for summary judgment, identifying each claim or defense, or the part of each claim or defense, on which summary judgment is sought. *Fed. R. Civ. P. 56(a)*.

The term "partial summary judgment" is slightly misleading because if a judge issues a summary judgment on only some of the claims, and not the entire case, it is not a true judgment because it is not an appealable final order. *See § 9.16, below*.

Partial adjudication can play an important role in shaping the course and outcome of litigation, however. The court's grant of partial summary judgment may establish the existence or nonexistence of certain facts that will be binding on the parties. *See Fed. R. Civ. P. 56(g)*. For example, summary adjudication is available and may be particularly useful to decide the following:

1. Issues that are central to the litigation, but do not comprise the entire case. *See Fed. R. Civ. P. 56(g)*;

2. The issue of liability alone, even when there is a genuine issue as to the amount of damages. *See Fed. R. Civ. P. 56(g)*; and

3. Determining some, but not all, of the relief requested. *See Fed. R. Civ. P. 56(g)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 56.122*.
- *Fed. R. Civ. P. 56(g)*.

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1-9 Moore's AnswerGuide: Fed Civil Motion Practice § 9.11

§ 9.11 Moving for Partial Summary Judgment; Procedural Requirements

The procedure for moving for a partial summary judgment is the same as moving for a summary judgment on the whole case, and the checklists for preparing a motion for summary judgment and opposing a motion for summary judgment should be followed. *See § 9.06 above* and *§ 9.17 below* .

A party may seek or be granted a summary "judgment" that, in fact, disposes only one of several claims or only discrete issues within a single claim. *Fed. R. Civ. P. 56* states that a "party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought." *Fed. R. Civ. P. 56(a)*. The rule specifically provides that the court may grant less than all the relief requested in a summary judgment motion. In that regard, the court may enter an order stating any material fact that is not genuinely in dispute as established in the case. This may include an item of damage or other relief. *Fed. R. Civ. P. 56(g)*. By using *Fed. R. Civ. P. 56* to issue orders that resolve significant questions even though they do not resolve the entire litigation, a court can focus the litigation on the true matters in controversy. *See Minority Police Officers Asso. v. South Bend, 721 F.2d 197, 201-202 (7th Cir. 1983)* (by ruling on issue of standing, court was able to clarify remaining issues of discrimination in hiring and promotion).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 56.122.*
- *Bender's Federal Practice Forms* Form Nos. 56:200-56:213.
- *Fed. R. Civ. P. 56(g).*

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1-9 Moore's AnswerGuide: Fed Civil Motion Practice § 9.12

§ 9.12 Ruling on a Motion for Partial Adjudication; Standards Applied by Court

In making partial summary adjudication rulings as well as rulings establishing that certain facts are not in dispute, normal summary judgment standards apply. In other words, to avoid a partial summary judgment on an issue or claim or to avoid a ruling that certain facts are not in dispute, the affected party must demonstrate that there is a "genuine" issue of material fact. Thus, the affected party must point to substantial evidence that would permit the trier of fact to find either way. *See Aurelio v. Rhode Island Dep't of Admin., Div. of Motor Vehicles, 985 F. Supp. 48, 53 (D.R.I. 1997)* .

A court may not go beyond the limits of a motion for partial summary judgment without giving prior notice to the adversely affected party. If a party brings a motion and seeks only a partial summary judgment on a particular claim or a particular issue in a claim, the court should not address any remaining matters. *See Fed. R. Civ. P. 56(f)*. It is improper for the court to act on remaining claims or issues without this notice. *See Evans v. United Air Lines, Inc., 986 F.2d 942, 945 (5th Cir. 1993)* (in case involving trademark infringement and tortious interference with contract, district court erred in granting summary judgment when plaintiff was given notice).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 56.122.*

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1-9 Moore's AnswerGuide: Fed Civil Motion Practice § 9.13

§ 9.13 Recognizing Judicial Reluctance to Grant Summary Judgment on Certain Claims

A few courts have indicated a reluctance to grant partial summary judgment motions. *See, e.g., Bruschini v. Board of Education of the Arlington Cent. Sch. Dist., 911 F. Supp. 104, 106 (S.D.N.Y. 1995)* ; *Tilcon Minerals, v. Orange & Rockland Utils., 851 F. Supp 529, 531 (S.D.N.Y. 1994)* .

There also appears to be uncertainty among districts within the Ninth Circuit and disagreement between other federal circuit courts on the question whether a party may move for summary adjudication on less than the whole claim, despite the language of *Fed. R. Civ. P. 56(a). See Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc., 178 F. Supp. 2d 1099, 1122-1123 (C.D. Cal. 2001)* (recognizing conflict between districts); *Cal. Dep't of Toxic Substances Control v. Interstate Non-Ferrous Corp., 298 F. Supp. 2d 930, 939 (E.D. Cal. 2003)* . This reluctance to grant partial summary judgment appears to be based on former versions of Rule 56, which were not as specific as to the actions the court might take if it fails to grant all the requested relief. The current version of the rule makes clear that a court may grant summary judgment on a "part of each claim or defense." *See Fed. R. Civ. P. 56(a)*. Furthermore, in declining to grant all the requested relief, the court may enter an order stating any material fact "as established in the case." This includes "an item of damage or other relief." *See Fed. R. Civ. P. 56(g)*.

Another factor contributing to "judicial reluctance" to grant summary judgment is the court's discretion to refrain from ruling on a summary judgment motion even if it believes that a fact is not genuinely in dispute. The court may conclude that it is better to leave open for trial facts and issues that may be better illuminated by the trial of related facts that must be tried in any event. *See Fed. R. Civ. P. 56(g)*, 2010 advisory committee note.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 56.07.*

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1-9 Moore's AnswerGuide: Fed Civil Motion Practice § 9.14

§ 9.14 Using Partial Summary Judgment as Tool for Parties and Courts to Shape Litigation

[1] Partial Summary Judgment Rulings May Affect Presentation of Evidence at Trial

A partial summary judgment ruling may not be final in the sense of being appealable, but, unless the court agrees to revisit and alter its ruling, it is sufficiently final to be binding on the conduct of the trial in the action. For example, when a partial summary judgment disposes of a single issue relevant to a claim, evidence as to that issue is no longer relevant. Thus, the ruling may have the effect of precluding testimony from a witness. *See Deimer v. Cincinnati Sub-Zero Prods., 990 F.2d 342, 344 (7th Cir. 1993)* (declining to hear expert testimony because issue had already been determined on motion). Similarly, if the court rejects a particular legal theory for a claim when ruling on a motion for partial summary judgment, it may restrict the evidence accordingly. *See Evans v. United Air Lines, Inc., 986 F.2d 942, 944 (5th Cir. 1993)* (court found no breach of fiduciary duty in contract action).

[2] Court May Make Ruling That Certain Factual Matters Are Not in Dispute

Whenever a party moves for summary judgment, if the court does not dispose of the entire case on the motion, it will usually not waste its effort in reviewing the factual record presented on the motion. The court will generally review the evidence before it, including the pleadings, and will question counsel as to the most economical and expeditious way to proceed with the case. Thereafter, the court must issue an order specifying the facts appearing without substantial controversy, including the extent to which damages or other relief is not in controversy. The order must deem facts so specified as established on trial of the action, and may direct any further proceedings in the action as just. The court must then conduct the trial accordingly. *See Fed. R. Civ. P. 56(g).*

In the subsequent trial, the parties must tailor their presentation of evidence with the court's prior rulings in mind. As with any form of partial summary judgment ruling, these rulings will limit and affect the ability of a party to offer proof on certain factual issues. *See Calpetco 1981 v. Marshall Exploration, Inc., 989 F.2d 1408, 1415 (5th Cir. 1993)* (court had ability to refuse to consider belatedly offered evidence on motion to reconsider partial summary judgment decision).

[3] Situations Where Partial Adjudication Has Been Used to Shape Litigation

A court may use partial adjudication pursuant to *Fed. R. Civ. P. 56* in a variety of ways to accelerate or narrow the

scope of litigation by eliminating matters for which there is no genuine issue. *See Monge v. Cortes, 413 F. Supp. 2d 54, 59 (D.P.R. 2006)* (*Fed. R. Civ. P. 56(d)(1)* (now *Fed. R. Civ. P. 56(g)*) may be used to narrow scope of lawsuit and speed up lawsuit by pre-trial elimination of matters for which there is no genuine controversy).

As one court noted, a partial summary judgment ruling should have an economical effect in that "the length and complexity of trial on the remaining issues are lessened, all to the advantage of the litigants, the courts, those waiting in line for trial, and the American public in general." *See Calpetco 1981 v. Marshall Exploration, Inc., 989 F.2d 1408, 1415 (5th Cir. 1993)* (court must have discretion to determine when it has heard enough evidence and need not consider every offer of belated evidence on motion for reconsideration).

Examples of the ways in which a court may use partial adjudication to shape or streamline litigation include the following:

1. **Limiting types of proof after partial summary judgment pursuant to *Fed. R. Civ. P. 56(g)*.** *See Calpetco 1981 v. Marshall Exploration, Inc., 989 F.2d 1408, 1415 (5th Cir. 1993)* (court had ability to refuse to consider belatedly offered evidence on motion to reconsider partial summary judgment decision, when no explanation as to why those documents had not been timely introduced).

2. **Eliminating issues for trial if no genuine factual dispute over the issues.** *See Deimer v. Cincinnati Sub-Zero Prods., 990 F.2d 342, 345 (7th Cir. 1993)* (no genuine issue of fact that defendant-manufactured cord was cause of injury).

3. **Partial summary judgment may preclude certain testimony.** *See Deimer v. Cincinnati Sub-Zero Prods., 990 F.2d 342, 344 (7th Cir. 1993)* (declining expert testimony because issue had already been determined on motion).

4. **Partial summary judgment as to particular legal theory.** *See Evans v. United Air Lines, Inc., 986 F.2d 942, 944 (5th Cir. 1993)* (court found no breach of fiduciary duty in contract action); *see also Indiana H. B. R. Co. v. American Cyanamid Co., 860 F.2d 1441, 1444-1446 (7th Cir. 1988)* (in case to recover costs of chemical clean-up on strict liability and negligence theories, partial summary judgment granted for plaintiff on basis of strict liability without ruling on negligence theory).

5. **Partial summary judgment as to affirmative defense.** *See Rubin v. Islamic Republic of Iran, 408 F. Supp. 2d 549, 552 (N.D. Ill. 2005)* (although partial summary judgment should not be used to partition single claim for relief into parts, motion for partial summary judgment as to complete affirmative defense permitted).

6. **Partial summary judgment on both factual and legal issues.** *See Gillette v. Delmore, 886 F.2d 1194, 1197-1199 (9th Cir. 1989)* (court determined that phone call did not constitute protected speech).

7. **Partial summary judgment to focus litigation.** *See Minority Police Officers Asso. v. South Bend, 721 F.2d 197, 201-202 (7th Cir. 1983)* (by ruling on issue of standing, district court was able to clarify remaining issues of discrimination in hiring and promotion); *First Nat'l Ins. Co. v. FDIC, 977 F. Supp. 1051, 1055 (S.D. Cal. 1997)* (although plaintiff might not prevail on all its claims at trial, summary adjudication was appropriate to narrow issues for trial).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 56.122.*

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§ 9.15 Rulings on Partial Summary Judgment Can Be Modified by Court

[1] Court Can Revisit Ruling on Partial Summary Judgment

A court may reexamine its *Fed. R. Civ. P. 56(g)* rulings if sufficient cause is shown; this must be done on notice to the other parties. *See Algie v. RCA Global Comm., Inc., 891 F. Supp. 875, 883 (S.D.N.Y. 1994)* .

Because all forms of partial summary judgment are interlocutory, the court has power to change its mind at any time before final judgment. Evidence that comes into the case at a later time may raise questions as to the propriety of the court's initial ruling. For example, a court may find no dispute as to the legal status of an entity, but a witness appearing for the first time at trial may introduce evidence calling the previously determined status into question. *See Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 369-370, 98 S. Ct. 2396, 57 L. Ed. 2d 274 (1978)* (parties and court initially perceived undisputed diversity jurisdiction but later discovered that defendant company was really located in Iowa rather than in Nebraska; when other defendant was removed from case by grant of summary judgment, ancillary jurisdiction was absent, and lack of diversity required dismissal of case). However, the court should not act precipitously in revising or altering a prior partial summary judgment order.

[2] Court Must Notify All Parties of Modifications to Partial Adjudication Order

Because partial adjudication orders have an effect on evidence at trial, they affect the parties' trial preparation and conduct at trial. Therefore, if the court is considering a change of its prior ruling, the court must give reasonable notice of this fact to the parties so that they may proceed without prejudice. *See Alberty-Velez v. Corporacion de P. R. Para la Diffusion Publica, 242 F.3d 418, 422 (1st Cir. 2001)* (trial court retains jurisdiction to modify order granting partial summary judgment at any time; however, if judge subsequently changes initial ruling and broadens scope of trial, judge must inform parties and give them opportunity to present evidence relating to newly revived issue).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 56.124[1].*

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§ 9.16 Rulings on Motions for Partial Summary Judgment Are Not Normally Appealable

Although often called a "judgment" by practitioners, this is technically a misnomer; partial summary adjudication is usually merely an interlocutory order that is not appealable until there is final judgment in the case. *See 28 U.S.C. § 1291*. In some cases, it might be possible for a court to certify an order for immediate appeal under *Fed. R. Civ. P. 54(b)*. Generally, courts interpret *Fed. R. Civ. P. 54(b)* to mean that partial summary judgment orders should not be certified for immediate appeal unless there is a complete disposition of a severable claim or complete disposition of all claims as to one party. *See Landry v. G.B.A., 762 F.2d 462, 464 (5th Cir. 1985)* (district court judgment that did not entirely dispose of any one claim was not appealable order under *Fed. R. Civ. P. 54(b)*, and appellate court lacked jurisdiction).

As an alternative to certification under *Fed. R. Civ. P. 54(b)*, the court might certify a partial summary judgment order under *28 U.S.C. § 1292(b)* if it finds the partial summary judgment to involve a close and controlling legal question, and if early appeal may advance disposition of the matter. However, this approach would only give the appellate court discretion to determine whether it wants to hear an interlocutory appeal. The district court's determination to certify the question does not bind the appellate court. *See 28 U.S.C. § 1292(b)*; *McFarlin v. Conseco Servs., 381 F.3d 1251, 1264 (11th Cir. 2004)* ("as a rule an appellate court ought to grant permission for appeal under § 1292(b) only on (1) pure questions of law, (2) which are controlling of at least a substantial part of the case, (3) and which are specified by the district court in its order, (4) and about which there are substantial grounds for difference of opinion, (5) and whose resolution may well substantially reduce the amount of litigation necessary on remand. Even in those circumstances, whether to grant permission for an interlocutory appeal lies in the discretion of the appellate court, which in exercising its discretion should keep in mind that the great bulk of its review must be conducted after final judgment, with § 1292(b) interlocutory review being a rare exception.").

For additional discussion of appeal from summary judgment and partial adjudication orders *see §§ 9.41 -9.44 below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 56.130[2].*

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§ 9.17 Checklists for Opposing Summary Judgment

In preparing a response to a motion for summary judgment, it is essential to track closely three processes:

1. Gathering, organizing and preparing evidence and opposition papers;

2. Preparing objections to moving party's evidence; and

3. Timely filing and serving opposition papers.

The checklists that follow are designed to help track those processes.

In addition, it may be necessary to track three other processes, depending upon the facts of the case:

1. Preparing motion for continuance to permit discovery;

2. Preparing cross-motion for summary judgment; and

3. Preparing a *Fed. R. Civ. P. 56* motion for sanctions.

For a detailed discussion of these motions, *see §§ 9.24 -9.25, 9.29, 9.46 below*.

[1] Checklist for Preparing Opposition to Summary Judgment Motion

☐ Carefully consult local district court rules and individual judge's rules pertaining to filing, timing, and hearing requirements for summary judgment motions.

☐ Organize opposition to motion for summary judgment.

- Gather evidence establishing specific facts on which there is a genuine issue for trial.

- Ensure that evidence is of sufficient caliber or quantity to allow rational trier of fact to produce a verdict in non-movant's favor.

☐ Draft opposition to motion for summary judgment. *See § 9.18 below*.

- Go beyond the pleadings in opposing summary judgment and respond with affidavits or other evidence setting forth specific facts showing genuine issue for trial.

- Include in opposition papers evidentiary materials, such as: (1) pleadings; (2) depositions; (3) answers to interrogatories; (4) admissions on file; and (5) affidavits.

- Submit evidence of sufficient caliber or quantity to allow rational trier of fact to produce a verdict in nonmovant's favor.

- Ensure that material establishing genuine issue of fact appears in both opposition to motion and court file.

- Focus court's attention on specific admissible facts in pleadings and other evidentiary records demonstrating genuine issues of material fact by: (1) filing statement of genuine, disputed facts with court, if permitted, with cites to documentary sources for facts; (2) attaching sworn or certified copies of documents referred to in opposition; and (3) ensuring documents referred to in opposition are filed with court as part of record.

☐ Consider including the following documents in packet of opposition papers filed with the court:

- Affidavits, declarations, and other evidence in opposition.

- Any objections to movant's evidence. *See § 9.22 below*.

- Proposed order denying summary judgment.

- Motion for continuance to conduct further discovery if appropriate. *See §§ 9.25 -9.28, below*.

☐ Serve and file required documents according to applicable local rules governing the required content and format, as well as filing guidelines and filing deadlines. *See § 9.19 below*.

☐ Request oral argument or hearing on motion if desired by indicating request on title page of opposition papers.

☐ Draft and attach statement of genuine issues, or statement of disputed or controverted facts, if required by local rules.

☐ Draft and attach brief or memorandum of points and authorities, as required by local rules.

☐ Properly format brief or memorandum.

- ○ Follow rules applicable to opposition papers generally.
- ○ Consult local rules for additional requirements.

☐ Determine whether it is necessary and desirable to draft and attach proposed order.

☐ Compile and attach admissible evidence in opposition to motion demonstrating the following:

- ○ The facts in contention are material in that they may affect the outcome of suit under governing law; and
- ○ The dispute is genuine, in that a reasonable jury, when considering the evidence, could return verdict for the non-moving party.

☐ Draft and attach affidavits or declarations in opposition to motion that:

- ○ Are made on personal knowledge;
- ○ Set forth facts that would be admissible in evidence; and
- ○ Affirmatively show affiant is competent to testify to matters stated in affidavit.

☐ Attach for service sworn or certified copies of all papers referred to in affidavit.

- ○ Make timely motion for continuance or other just order when lacking evidence to oppose motion. *See § 9.25 below*.

☐ Attach other evidence supporting opposition to summary judgment, including: (1) pleadings; (2) depositions; (3) answers to interrogatories; (4) admissions on file; and (5) documentary evidence obtained through discovery.

☐ **Search by Topic:**

- Civil Procedure > Summary Judgment > Burdens of Production & Proof > Nonmovants
- Civil Procedure > Summary Judgment > Opposition > Supporting Materials

[2] Checklist for Preparing Objections to Movant's Evidence

- ☐ File written objections to admissibility of movant's evidence submitted in support of summary judgment.
- ☐ Prepare motion to strike, if time permits.
- ☐ Include in written objections:
  - Specific ground for objection;
  - Locations of evidence objected to, including page and line numbers when possible, in movant's documents or in court's records; and
  - Brief argument supporting each objection, with citation of relevant authority.
- ☐ Object to evidence submitted in support of summary judgment;
  - Preferably before hearing on motion.
  - If unavoidable, at hearing on motion, but be sure to ask court for permission to file memorandum supporting objections after hearing.

[3] Checklist for Timely Filing and Serving Opposition to Motion for Summary Judgment

- ☐ Consult local rules governing time and manner of filing and serving opposition papers.
- ☐ Timely file opposition papers with court as required by applicable local rule.
- ☐ Properly serve opposition papers on opposing party.
  - Serve opposition materials on moving party prior to hearing on motion.
  - Serve opposition materials in manner required by federal rules generally.
- ☐ Properly file opposition papers with court.

- ○ File within reasonable time after service.
- ○ File with court by filing opposition papers with court clerk.
- ○ File certificate of service with court.

☐ Consult local rules for additional service or filing requirements.

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§ 9.18 Understanding Requirements and Strategy for Opposing Summary Judgment Motions

When a party has filed a properly supported motion for summary judgment, the non-moving party must go beyond the pleadings to designate specific facts showing there is a genuine issue for trial. *See Celotex Corp. v. Catrett, 477 U.S. 317, 322-324, 106 S. Ct 2548, 91 L. Ed. 2d 265 (1986)* . A non-movant must respond to the summary judgment motion by filing with the court a written opposition to the motion. Opposition papers may include: (1) a brief or memorandum of points and authorities; (2) a statement of genuine issues or of disputed or controverted facts; and (3) documentary evidence supporting the opposition to the motion. *See Fed. R. Civ. P. 56(c), (e).*

To avoid summary judgment, the evidence presented by the non-movant must be such that a reasonable trier of fact could return a verdict in the nonmovant's favor. *See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* . To make this showing, the non-movant may rely on all available evidence, such as depositions, answers to interrogatories, admissions on file, documents, electronically stored information, and affidavits or declarations. *See Fed. R. Civ. P. 56(c)(1)(A).* The evidence submitted must be of a quality that could be admissible at trial.

Warning:

The opposing party cannot defeat the motion by merely relying on any of the following: (1) allegations in the pleadings; (2) conclusory statements; and (3) assertions that affidavits supporting the motion are not credible.

Although not required by the Federal Rules, local rules commonly require a party opposing summary judgment to file a statement of genuine issues or of disputed or controverted facts. *See, e.g.,* C.D. Cal. L.R. 56-2. Even when not required, it is advisable to prepare and submit such a statement of genuine issues, which provides an important organizational framework for evidence, and a persuasive tool for argument before the court. A thorough, well-supported statement of genuine issues, or of disputed or controverted facts, will assist the party opposing summary judgment in making the required showing that the case presents genuine issues of material fact requiring a trial.

Opposition papers may also include objections to the evidence relied on by the movant in support of the motion. In addition, if the party opposing summary judgment lacks sufficient information to respond to the motion, it may request a continuance to permit further discovery before the court rules on the motion, although it is more prudent to separately

bring a motion for continuance. *See Fed. R. Civ. P. 56(d)(2)*. For further discussion of continuance motions, *see §§ 9.20, 9.24 -9.26, below*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 56.81*.
- *Fed. R. Civ. P. 56(c)(1)*.

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§ 9.19 Filing Timely Opposition to Motion for Summary Judgment

The current version of Rule 56, adopted in 2010, does not provide a specific time for filing opposition papers. Local rules generally impose specific service or filing requirements for summary judgment motions and opposition to such motions.

Warning:

This version of the rule deleted timing provisions enacted in 2009, which required a party opposing a summary judgment motion to file a response within 21 days after the motion was served, and gave the movant 14 days after the response was served to file a reply. *See* former *Fed. R. Civ. P. 56(c)*. The 2009 timing amendments had replaced a long-standing version of Rule 56, which simply provided that a motion for summary judgment had to be served at least 10 days before the date set for hearing. That version of the Rule also stated that an opposing party could serve opposing affidavits before the hearing day, but did not identify specific response and reply times. *See former Fed. R. Civ. P. 56(c)*; *see also Fed. R. Civ. P. 56(c)(1)*, advisory committee's note (2009). Because Rule 56 contained so little guidance, most federal district courts had adopted local rules of civil procedure specifying notice and response times. Although it seemed awkward to adopt time provisions in 2009 and then abandon them in a rule proposed to take effect in 2010, the Committee felt that this concern was overcome by the consideration that the completely rewritten 2010 version of Rule 56 be the "best rule that can be devised." In that regard, the Committee recommended that the new rule "honor local autonomy" on time limits by leaving it to local rule or court orders to establish response and reply times. *See* Report of the Civil Rules Advisory Committee (Agenda E-19, Appendix C, September 2009).

Local rules may require a party to submit materials in opposition to a motion several weeks before the hearing date or set a limit on when a response must be filed after service of the motion. *See, e.g.,* N.D. Cal. L.R. 7-3(a) (at least 21 days before the hearing date); N.D. Tex. L.R. 7.1(e) (21 days after service of the motion).

Warning:

Local district court rules may impose additional service or filing requirements. Counsel should be particularly alert to local rules in federal districts that require a party to submit materials in opposition to

a motion several weeks before the hearing. Relying on the Federal Rules to contravene local rules or a judge's standing orders is risky and, even when permitted by law, will not be viewed favorably by the judge from whom one is seeking a favorable ruling.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 56.82.*

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§ 9.20 Moving for Continuance to Permit Further Discovery

If a nonmovant shows by affidavit or declarations that it cannot present facts essential to justify its opposition, the court may, among other things, allow time to take discovery before deciding the motion. *See Fed. R. Civ. P. 56(d)(2).*

For a detailed discussion of motions for continuance to permit further discovery, *see §§ 9.24 -9.26 below*.

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§ 9.21 Preparing Opposition to Motion for Summary Judgment

Prior versions of Rule 56 provided that a party opposing a motion for summary judgment could not simply rely on allegations or denials in its own pleadings. Rather, an opposing party was obligated to respond by setting out specific facts showing a genuine issue for trial. *See former Fed. R. Civ. P. 56(e)(2)* (2009). Although the rule no longer specifies an obligation to respond, it would be unwise to fail to formally oppose a summary judgment motion. For example, if a party fails to properly address another party's assertion of fact, the court may consider the fact undisputed for purposes of the motion, or may grant summary judgment if the motion and supporting materials show that the movant is entitled to it. *See Fed. R. Civ. P. 56(e).*

A party asserting that a fact is genuinely disputed, and therefore, summary judgment is not proper, must support the assertion by citing to particular parts of materials in the record. The opposing party also may show that the materials cited do not establish the absence of a genuine dispute, or that the moving party cannot produce admissible evidence to support the fact. *See Fed. R. Civ. P. 56(c)(1)*; *see also § 9.21[1][a], below.*

A party opposing summary judgment may also object that the material cited to support a fact cannot be presented in a form that would be admissible in evidence. *Fed. R. Civ. P. 56(c)(2).*

A party challenging summary judgment must prepare and present opposition papers that clearly and concisely illustrate the exact issue or issues presented by the case and detail the support within the record that supports the non-movant's position that a trial is necessary to resolve these material issues. *See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)* .

Conclusory allegations in legal memoranda are not evidence and cannot by themselves create a genuine issue of material fact. *See Project Release v. Prevost, 722 F.2d 960, 969 (2d Cir. 1983)* . Simply stating the existence of a disputed fact alone without proving materiality will not defeat a motion for summary judgment. *See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* . Moreover, a party cannot create a disputed issue where none exists by submission of conflicting or contradictory statements in an attempt to defeat a summary judgment motion. *See Mack v. United States, 814 F.2d 120, 124-125 (2d Cir. 1987)* .

A party may not rely on mere speculation or conjuncture to overcome a motion for summary judgment. *See Knight v.*

U.S. Fire Ins. Co., 804 F.2d 9, 12 (2d Cir. 1986) . Opposition papers should focus the court's attention on specific, admissible facts that demonstrate a genuine issue of material fact. A well-drafted and supported statement of genuine issues or of disputed or controverted facts is essential in making the required showing that the case presents genuine issues of material fact requiring litigation.

[1] Preparing Written Opposition to Summary Judgment Motion and Supporting Papers

[a] Opposition Papers Should Include Evidentiary Materials Beyond Pleadings

When opposing a summary judgment motion, a party may use any of the evidentiary materials listed in *Fed. R. Civ. P. 56(c)*, except the pleadings alone. *See Celotex Corp. v. Catrett, 477 U.S 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* . Thus, typical opposition papers may include:

1. Affidavits, declarations, and other evidence in opposition to the motion;

2. Brief or memorandum of points and authorities in opposition;

3. Objections to the movant's evidence;

4. Proposed order; and

5. *Fed. R. Civ. P. 56(d)* motion for continuance to conduct further discovery, if appropriate.

Strategic Point:

Opposition papers should focus the court's attention on specific, admissible facts in the pleadings and evidentiary record that demonstrate a genuine issue of material fact. One way to accomplish this, if permitted by local rules, is to file a statement of genuine, disputed, or controverted facts with the court, with citations to the documentary sources for those facts. A party may also wish to consider attaching sworn or certified copies of the documents referred to in the opposition motion, and should ensure that these documents are filed with the court so that they will be included as part of the record.

[b] Complying With Additional Requirements Set Forth by Local Rules

Local district court rules often impose a variety of additional requirements for filing an opposition to a motion for summary judgment. Counsel must therefore become familiar with the local rules in the district court where the case is pending.

[c] Including Statement of Disputed Material Facts With Opposition to Summary Judgment Motion

Although not required by the Federal Rules, many local district court rules require a party opposing a summary judgment motion to file and serve a statement of genuine issues, or of disputed or controverted facts, in response to the movant's statement of undisputed facts. *See, e.g.,* C.D. Cal. L.R. 56-2.

If permitted by local court rules, it is often advantageous for a party opposing a summary judgment motion to prepare and submit to the court a well-drafted and supported statement of genuine issues or of disputed or controverted facts. These statements serve as an effective tool in making the required showing that the case presents genuine issues of material fact requiring a trial. A carefully crafted statement will:

1. Respond to each factual allegation in the movant's statement of undisputed or uncontroverted facts by

admitting or denying the facts as stated by the movant, with explanations of any partial denials or admissions;

2. Set forth in detail any additional material facts in dispute; and

3. Provide the court with helpful citations to the evidentiary record, which support the factual contentions set forth in the opposition motion.

[d] Drafting and Attaching Memorandum of Points and Authorities to Opposition to Summary Judgment Motion

Although not explicitly required by the Federal Rules, local district court rules usually require or permit a party to file a brief or memorandum of points and authorities opposing a summary judgment motion. Whether required or not, a party should always, if at all possible, attempt to provide the court with a well researched and written statement of why the case is not appropriate for summary judgment.

[2] Offering Evidence in Opposition to Summary Judgment

In response to a summary judgment motion, the opposing party may rely on affidavits or declarations, and on other materials in the record. *See Fed. R. Civ. P. 56(c).* A party asserting that a fact is genuinely disputed must support the assertion by citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, interrogatory answers, or other materials. *Fed. R. Civ. P. 56(c)(1)(A).* In addition, a party may show that the materials cited by the opposition do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact. *Fed. R. Civ. P. 56(c)(1)(B).*

Papers attached to oppositions to motions for summary judgment do not need to be in a form that is admissible in evidence. *Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* . However, the underlying evidence must be admissible in order for the court to consider the facts presented in determining the summary judgment motion. *See Fed. R. Civ. P. 56(c)(1)(B).*

If an opposing party shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may defer considering the motion or deny it. *Fed. R. Civ. P. 56(d)(1).* In additional, the court has the option of ordering a continuance to allow the opposing party time to obtain affidavits or declarations or to take discovery. *Fed. R. Civ. P. 56(d)(2)*; *see § 9.26, below*. The court also may issue any other appropriate order. *Fed. R. Civ. P. 56(d)(3).*

[a] Presenting Evidence That Sets Forth Specific Facts Showing Genuine Issue for Trial

To show the existence of a genuine issue, a party opposing a summary judgment motion must present some evidence establishing each element of the claims on which the party opposing the motion bears the burden of proof at trial. In addition, the opposing party must produce at least some significant probative evidence tending to support its pleadings. A mere scintilla of evidence supporting the opposing party's position is insufficient; there must be evidence on which a jury could reasonably find for the opposing party. *See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* .

The evidence tendered by the party opposing summary judgment must demonstrate that:

1. The fact in contention is material, in that it may affect the outcome of the suit under governing law; and

2. The dispute is genuine, in that a reasonable jury considering the evidence could return a verdict for the nonmoving party.

See Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 248-249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) .

[b] Including Admissible Evidence in Opposition to Summary Judgment Motion

The trial court may only consider admissible evidence in ruling on a motion for summary judgment. *See Orr v. Bank of Am., NT & SA, 285 F.3d 764, 773 (9th Cir. 2002)* ; *see also Fed. R. Civ. P. 56(c)(2)*. Thus, evidence opposing summary judgment must be admissible under the rules governing admission of evidence *See Fed. R. Evid. 101* (Federal Rules of Evidence apply in all proceedings before United States courts). Although a party opposing summary judgment need not produce evidence in a form that would be admissible at trial, the evidence itself must be admissible for the court to consider it in deciding the motion. *See Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* .

[c] Drafting and Attaching Affidavits to Opposition to Summary Judgment

A party opposing a summary judgment motion may attach affidavits or declarations in opposition to the motion. *See 28 U.S.C. § 1746*; *see also Fed. R. Civ. P. 56(c)(4)*. Affidavits or declarations are not required if the opposition raises only legal arguments, but that is rarely the case. Usually, the relevance of legal arguments depends upon successfully establishing the facts of the case. Similarly, affidavits or declarations might not be required if it is clear that the moving party failed to establish even a prima facie case for granting summary judgment. However, pointing out that weakness without reference to specific factual contentions may be extremely difficult, if not impossible. Parties should bear in mind that any factual contention raised in opposition to a summary judgment motion must be supported by an affidavit or declaration.

The rules applicable to affidavits supporting motions for summary judgment apply with equal force to affidavits submitted in opposition to summary judgment. Thus, opposing affidavits or declarations must:

1. Be made on personal knowledge;

2. Set forth facts that would be admissible in evidence; and

3. Affirmatively show that the affiant is competent to testify to the matters stated in the affidavit.

See Fed. R. Civ. P. 56(c)(4). Also, a party opposing summary judgment must attach to and serve with the affidavits any sworn or certified copies of documents referred to in the affidavits. *See Fed. R. Civ. P. 56(c)(1)(A)*.

[d] Attaching Other Evidence Supporting Opposition to Summary Judgment Motion

In addition to affidavits and declaration, a party may include in its opposition to summary judgment any depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, interrogatory answers, or other materials. *Fed. R. Civ. P. 56(c)(1)(A)*. The opposing party may also attach for the court's consideration other documentary evidence obtained through discovery. *See Fraser v. Goodale, 342 F.3d 1032, 1036 (9th Cir. 2003)* (diary attached to nonmoving party's deposition).

[3] Requesting Oral Argument in Opposition to Summary Judgment Motion

District courts may provide by local rule that a party desiring oral argument on a motion for summary judgment must request such argument. *See Mahon v. Credit Bureau, Inc. 171 F.3d 1197, 1200 (9th Cir. 1999)* (construing former

version of E.D. Cal. local rule). Strategically, it may be important to request oral argument in the opposition motion. In some districts, if a party opposing summary judgment requests oral argument, the trial court will not grant summary judgment without first holding a hearing. *See Dredge Corp. v. Penny, 338 F.2d 456, 460-461 (9th Cir. 1964)* .

[4] Drafting and Attaching Proposed Order to Opposition to Summary Judgment Motion

The Federal Rules do not require parties to include a proposed order in their opposition papers. However, local district court rules may permit a party opposing summary judgment to attach a proposed order, which the party may wish to do in order to set forth which facts are in dispute, thereby justifying a trial. *See* N.D. Cal. L.R. 7-3(a).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 56.81, 56.82, 56.90 -56.99.*
- *Federal Litigation Guide PP 5.30 -5.33.*
- *Bender's Federal Practice Forms* Form Nos. 56:50-56:54, 56:160-56:180.

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Chapter 9 SUMMARY JUDGMENT
PART F: OPPOSING MOTION FOR SUMMARY JUDGMENT

1-9 Moore's AnswerGuide: Fed Civil Motion Practice § 9.22

§ 9.22 Drafting and Attaching Objections to Evidence Offered by Party Moving for Summary Judgment

A trial court may only consider admissible evidence in ruling on a motion for summary judgment. *See Orr v. Bank of America, NT & SA, 285 F.3d 764, 773 (9th Cir. 2002)* ; *Fed. R. Civ. P. 56(c)(2)* (party may object that material cited cannot be presented in form that would be admissible evidence). A party objecting to evidence must file written objections or a motion to strike the evidence as part of its opposition papers. *See Pfingston v. Ronan Eng'g Co., 284 F.3d 999, 1003 (9th Cir. 2002)* . Failure to object or to move to strike the evidence may result in waiver of the evidentiary defects. *See Federal Deposit Ins. Corp. v. New Hampshire Ins. Co., 953 F.2d 478, 484 (9th Cir. 1991)* .

Written objections to evidence offered by a party moving for summary judgment should include the following:

1. The specific ground for the objection;

2. The exact location, in the movant's documents or in the court's records, of the evidence objected to, including page and line numbers when possible; and

3. A brief argument supporting each objection, with an accompanying citation to relevant authority.

See Fed. R. Evid. 103(a)(1).

Counsel may object to evidence submitted in support of summary judgment before or at a hearing on the motion. However, the safest approach is to make written objections before the hearing by including them with the opposition papers. This approach permits the court to review the objections before the hearing, and preserves objections for appeal. However, counsel must be sure to consult each judge's standing orders first. Some judges might impose a meet and confer requirement before the filing of objections. Counsel making an oral objection at the hearing should consider asking the court for permission to file a memorandum supporting the objection after the hearing.

Strategic Point:

Either moving to strike or objecting to the evidence preserves objections to inadmissible evidence offered by the moving party in support of a summary judgment motion. However, filing objections with

the opposition to the motion may be more practical than filing a motion to strike, because a motion to strike may require several weeks' notice before the court may hear the motion. *See, e.g.*, S.D. Cal. L.R. 7.1(e)(1) (motion requiring court's ruling requires minimum filing date of 28 calendar days before date on which matter is noticed).

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Chapter 9 SUMMARY JUDGMENT
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1-9 Moore's AnswerGuide: Fed Civil Motion Practice § 9.23

§ 9.23 Serving and Filing Opposition to Summary Judgment Motion

The current version of Rule 56, adopted in 2010, does not provide a specific time for filing opposition papers. Local rules generally impose specific service or filing requirements for summary judgment motions and opposition to such motions. Service should be accomplished in the manner dictated by *Fed. R. Civ. P. 5(b). See §§ 1.12 -1.13 above.*

In general, a party opposing a motion must file opposition papers with the court within a reasonable time after service on the movant and any other parties. *See Fed. R. Civ. P. 5(d).* The opposing party must also file a certificate of service with the court. *See Fed. R. Civ. P. 5(d).* Filing with the court is generally accomplished by filing the opposition papers with the court clerk. *See Fed. R. Civ. P. 5(d)(2).* Local rules may impose additional service or filing requirements, however, particularly those districts that require all documents must be filed electronically. Counsel must, therefore, become familiar with and adhere to the rules in the district in which the case is located.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 56.81, 56.82.*

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Chapter 9 SUMMARY JUDGMENT
PART G: MOVING FOR CONTINUANCE FOR FURTHER DISCOVERY

1-9 Moore's AnswerGuide: Fed Civil Motion Practice § 9.24

§ 9.24 Checklist for Motion for Continuance for Further Discovery

☐ When drafting motion, consider including the following:

- ○ Point to specific information that would be revealed by further discovery;
- ○ Show that evidence being sought actually exists;
- ○ Explain relevance of evidence to case;
- ○ Explain how discovery of evidence would counter summary judgment motion; and
- ○ Detail nonmovant's efforts to pursue discovery diligently before seeking continuance.

☐ Set forth facts supporting motion in accompanying affidavit.

☐ Timely file and serve motion for continuance before summary judgment hearing, as directed by rules governing filing and service of motions generally. *See §§ 1.09 -1.13 above*.

☐ Satisfy movant's burden by offering sufficient facts showing that evidence sought exists and that it would prevent summary judgment.

☐ **Search by Topic:**

- ○ Civil Procedure > Summary Judgment > Opposition > Motions for Additional

Discovery

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Chapter 9 SUMMARY JUDGMENT
PART G: MOVING FOR CONTINUANCE FOR FURTHER DISCOVERY

1-9 Moore's AnswerGuide: Fed Civil Motion Practice § 9.25

§ 9.25 Moving for Continuance to Permit Further Discovery

[1] Availability of Continuance Under Certain Circumstances

Fed. R. Civ. P. 56 does not require that any discovery take place before a court may grant a motion for summary judgment. *See Temporomandibular Joint (TMJ) Implant Recipients v. Dow Chem. Co. (In re Temporomandibular Joint (TMJ) Implant Prods. Liab. Litig.), 113 F.3d 1484, 1489-1490 (8th Cir. 1997)* (discovery need not be completed before summary judgment, but summary judgment is proper only after non-movant has had adequate time for discovery).

On the other hand, particularly for those motions in which a non-claimant points to the record and claims that the claimant lacks evidence as to an essential element of the claim, it may be unfair to require the claimant to rebut a prima facie showing with specific facts establishing a triable issue of fact at a very early stage in the litigation, before the claimant has had a fair opportunity to discover the evidence. For this reason, a number of courts have made the right to obtain a summary judgment conditional on some showing that the party opposing the motion had a reasonable opportunity to discover the necessary evidence. *See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n.5, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* ; *Azhar Ali Khan v. Parsons Global Servs., Ltd., 428 F.3d 1079, 1087 (D.C. Cir. 2005)* .

Strategic Point:

When a moving party files a summary judgment motion early in the litigation, before the opposing party has had any realistic opportunity to pursue discovery, a court will generally grant a *Fed. R. Civ. P. 56(d)* motion. *See Hellstrom v. United States Dep't of Veterans Affairs, 201 F.3d 94, 97 (2d Cir. 2000)* ("Only in the rarest of cases may summary judgment be granted against a plaintiff who has not been afforded the opportunity to conduct discovery").

If the party opposing the motion claims that it had inadequate time to complete discovery, it may move for an extension of time pursuant to *Fed. R. Civ. P. 56(d)*. The keys to success in a *Fed. R. Civ. P. 56(d)* motion are: (1) timeliness; (2) due diligence; and (3) specificity in describing what evidence is sought, why it is relevant to the issues before the court, why it has not been obtained, and what plans there are to obtain it.

Warning:

In 2010, Rule 56 was completely revised and reordered. Under previous versions of Rule 56, subsection (f) provided the authority for a motion for additional time to conduct discovery. *Fed. R. Civ. P. 56(d)* now contains the relevant provisions. Thus, case law preceding this amendment will refer to Rule 56(f) motions, and there is a great deal of case law because the courts have developed specific requirements for a successful motion to obtain additional time to conduct discovery. The 2010 amendments did not alter the substance of the requirements for bringing such motions. Thus, prior case law on this issue will continue to be valid. The practitioner should simply be aware of the renumbering when searching for relevant case law.

If a party opposing a motion for summary judgment is unable to provide a specific, factual opposition to the motion for summary judgment because there has been an inadequate opportunity for discovery, the party opposing the motion may move for a continuance, or an extension of time, to obtain the information needed to oppose the motion. The court has the power to order a continuance to permit the party opposing the motion to obtain affidavits or to take depositions, or to permit the party opposing the motion to complete some other form of discovery. Furthermore, the court has the authority to make whatever order is "appropriate" under the circumstances. *See Fed. R. Civ. P. 56(d).*

Because parties should have a reasonable opportunity to conduct discovery before being faced with a summary judgment motion, courts tend to grant extensions of time freely, but not in every case. *See Stearns Airport Equip. Co. v. FMC Corp., 170 F.3d 518, 534 (5th Cir. 1999)* (while *Fed. R. Civ. P. 56(d)* motions are generally favored, denial of motion affirmed on appeal because plaintiff failed to make required showing for grant of time for further discovery).

[2] Showing Required in Order to Obtain Continuance

Motions for extensions of time have strict and detailed procedural requirements. Continuances or extensions of time are not automatic. A court may grant a continuance or an extension of time only if the party seeking the motion satisfies all of the specific requirements of *Fed. R. Civ. P. 56(d)*. The principal requirement is that the motion be supported by affidavit or declaration showing that, "specified reasons," the party cannot present facts essential to justify its opposition. *See Fed. R. Civ. P. 56(d)*; *see also Stanback v. Best Diversified Prods., Inc., 180 F.3d 903, 911 (8th Cir. 1999)* (motion properly denied because plaintiff failed to file affidavit showing specific facts that further discovery might unveil).

A party must file and serve a *Fed. R. Civ. P. 56(d)* motion as provided by the rules governing filing and service of motions generally. *See Fed. R. Civ. P. 5, 6*; *see also §§ 1.09 -1.13 above*.

[a] Attaching Affidavit in Support of Motion for Continuance

[i] Complying With Requirement of Filing Affidavit in Support of Motion for Continuance

A party seeking a continuance must submit an affidavit or declaration in order to be entitled to a determination under Rule 56(d), a requirement that courts strictly enforce. *See, e.g., Rivera-Flores v. Bristol-Myers Squibb Caribbean, 112 F.3d 9, 14 (1st Cir. 1997)* (rejecting plaintiff's argument that he was denied discovery because he never filed *Fed. R. Civ. P. 56(d)* affidavit); *Pauling v. Secretary of the DOI, 960 F. Supp. 793, 805 (S.D.N.Y. 1997)* (Second Circuit requires party to file affidavit); *Cacevic v. City of Hazel Park, 226 F.3d 483, 488-489 (6th Cir. 2000)* (acknowledging that it has in past cases intimated that *Fed. R. Civ. P. 56(d)* affidavit may not be required under certain circumstances, court emphasized that proper method for requesting extension for further discovery is to file affidavit explaining what material facts party hopes to uncover, and why it has not previously discovered information); *Miles v. Ramsey, 31 F. Supp. 2d 869, 874 (D. Colo. 1998)* (sworn affidavit is prerequisite to *Fed. R. Civ. P. 56(d)* motion, and unverified statements of attorneys are insufficient to meet affidavit requirement).

The purpose of a *Fed. R. Civ. P. 56(d)* affidavit is to ensure that the affiant is invoking the protections of *Fed. R. Civ. P. 56* in good faith and to afford the trial court the showing necessary to assess the merits of a party's opposition to summary judgment. *See Mendoza v. City of Rome, 70 F. Supp. 2d 137, 142 (N.D.N.Y. 1999)* (denying *Fed. R. Civ. P. 56(d)* motion). Some courts have suggested that this affidavit need not be filed with a formal *Fed. R. Civ. P. 56(d)* motion for continuance, but may be attached to the party's memorandum in opposition to a motion for summary judgment. *See Theotokatos v. Sara Lee Personal Prods., 971 F. Supp. 332, 344 (N.D. Ill. 1997)* (specifically ruling that *Fed. R. Civ. P. 56(d)* request need not be made in separate motion, as long as affidavit sufficiently meets Rule's requirements). This approach is not advised, however; the best practice is to submit a formal *Fed. R. Civ. P. 56(d)* affidavit in conjunction with a motion for continuance. *See Price v. Western Resources, Inc., 232 F.3d 779, 783 (10th Cir. 2000)* (district court properly found that plaintiffs were not entitled to *Fed. R. Civ. P. 56(d)* relief because they requested continuance and further discovery in body of their memorandum opposing summary judgment rather than filing formal *Fed. R. Civ. P. 56(d)* affidavit).

[ii] Drafting Sufficient Affidavit Accompanying Motion for Continuance

Courts have developed detailed requirements for affidavits in support of a *Fed. R. Civ. P. 56(d)* motion. Some circuits require that the affidavit meets the following four-part test:

1. The nature of the uncompleted discovery, such as what facts are reasonably expected to create a genuine issue of material fact;

2. The manner by which those facts are reasonably expected to create a genuine issue of material fact;

3. The efforts affiant has made to obtain those facts; and

4. The reasons these efforts were unsuccessful.

See, e.g., Massachusetts Sch. of Law v. ABA, 142 F.3d 26, 44-45 (1st Cir. 1998) ; *Gurary v. Winehouse, 190 F.3d 37, 43-44 (2d Cir. 1999)* ; *see also City of Rome v. Glanton, 958 F. Supp. 1026, 1039 (E.D. Pa. 1997)* , *aff'd without op., 133 F.3d 909 (3d Cir. 1997)* (applies similar three-part requirement; affidavit must specify: (1) what particular information is sought; (2) how, if uncovered, it would preclude summary judgment; and (3) why it has not previously been obtained).

Thus, a party seeking a continuance should ensure that the affidavit clearly establishes the following:

1. **Facts indicating why it is unable to oppose the motion at present.** Only specific facts, not mere conclusions, will suffice to meet the required showing. *See Keebler Co. v. Murray Bakery Products, 866 F.2d 1386, 1389 (Fed. Cir. 1989)* (non-moving party must show more than mere claim that moving party has "certain information" and "other evidence").

2. **Facts showing due diligence in pursuing discovery prior to summary judgment motion.** A party seeking a continuance to conduct additional discovery is required to demonstrate due diligence both in pursuing discovery before making the summary judgment motion and in pursuing the extension of time after making the motion. *See Nidds v. Schindler Elevator Corp., 113 F.3d 912, 921 (9th Cir. 1997)* (district court did not abuse its discretion by denying further discovery if movant has failed to pursue discovery diligently in past)

Courts may consider several factors in determining whether a party has been diligent in pursuing discovery, including:

1. Length of the pendency of the case prior to the request for a continuance;

2. Whether and when the party could have anticipated its need for the requested discovery;

3. Previous efforts, if any, made to obtain the needed information through formal discovery or otherwise;

4. Degree and nature of discovery already taken;

5. Any limitations placed on discovery by the trial court;

6. Any prior solicitations of or provisions for discovery by the trial court;

7. Any warning that, absent a speedier request, discovery might be denied; and

8. Whether the requested information was inaccessible to the requesting party.

See Paul Kadair, Inc. v. Sony Corp. of America, 694 F.2d 1017, 1031 (5th Cir. 1983) (one-year delay in pursuing discovery was dilatory).

In its affidavit, the party requesting a continuance should set forth facts showing that its request was made promptly after being served with the adverse party's motion for summary judgment. A request for additional time for discovery must be made within a reasonable time following receipt of the motion for summary judgment. Generally, this means that a party's request for continuance should precede or accompany its opposition to the summary judgment motion. Although courts have acknowledged that there may be extenuating circumstances under which a party opposing a summary judgment motion may not realize until the initial round of oral argument that additional discovery is required, this is an outer limit; thus, it would be highly unlikely for a court to grant a party's request for a continuance after the conclusion of oral argument. *See Massachusetts Sch. of Law v. ABA, 142 F.3d 26, 44 (1st Cir. 1998)* (request for additional discovery, filed three weeks after oral argument on summary judgment motion, was too late).

Moreover, a party requesting a continuance should include in its affidavit specific facts showing why additional discovery is needed. A court may reject a request for an extension of 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. *See Baker v. Am. Airlines, Inc., 430 F.3d 750, 756 (5th Cir. 2005)* (for relief under *Fed. R. Civ. P. 56(d)*, party must show both why it is currently unable to present evidence creating genuine issue of fact and how continuance would enable party to present that evidence; vague assertions that additional discovery will produce needed, but unspecified, facts is insufficient). If the discovery sought pertains to information already available to the party opposing the summary judgment motion, the court is likely to deny the party's request. *See Mason Tenders Dist. Council Pension Fund v. Messera, 958 F. Supp. 869, 894 (S.D.N.Y. 1997)* (denying continuance seeking discovery as to contract because plaintiff was party alleging contractual relationship, and it thus should already have had evidence of contract).

Likewise, a party moving for a continuance should include in its affidavit specific facts showing why the evidence that it hopes to obtain during discovery will likely create a genuine issue of material fact. In doing so, the movant may not simply rely on vague assertions that additional discovery will produce needed but unspecified facts. Rather, the movant is required to state with some precision the material sought, and exactly how those materials will help in opposing summary judgment. *See Baker v. Am. Airlines, Inc., 430 F.3d 750, 756 (5th Cir. 2005)* ; *Lewis v. ACB Bus. Servs., 135 F.3d 389, 409 (6th Cir. 1998)* (motion properly denied when plaintiff's affidavit failed to show how postponement would enable him to rebut summary judgment motion).

[b] Demonstrating That Further Specified Discovery Will Defeat Summary Judgment Motion

A party moving for relief under *Fed. R. Civ. P. 56(d)* must demonstrate specifically how a continuance for further

discovery will enable it to rebut the assertions contained in the pending summary judgment motion. *See Promuto v. Waste Mgmt., Inc., 44 F. Supp. 2d 628, 650 (S.D.N.Y. 1999)* (refusing to grant defendant's request for further discovery because defendant failed to provide factual basis for assertion that further discovery would alter outcome of summary judgment motion); *Allen v. CSX Transp., Inc., 325 F.3d 768, 775-776 (6th Cir. 2003)* (district court properly denied plaintiffs' *Fed. R. Civ. P. 56(d)* motion because information sought had no bearing on legal question at issue in summary judgment motion).

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1-9 Moore's AnswerGuide: Fed Civil Motion Practice § 9.26

§ 9.26 Trial Court's Duties on Motion for Additional Discovery

If a party opposing summary judgment shows by affidavit that it cannot present facts essential to justify its opposition, the court may:

1. Defer or deny the motion;

2. Allow time to obtain affidavits or declarations or to take discovery; or

3. Issue any other appropriate order.

See Fed. R. Civ. P. 56(d).

Although the court may simply deny the summary judgment motion, or may issue any other appropriate order, the most common remedy sought by the movant and provided by the court under *Fed. R. Civ. P. 56(d)* is a continuance to permit further discovery by the party opposing summary judgment.

Because a district court is under a duty to ensure that an opposing party has been given a reasonable opportunity to compile an evidentiary record before ruling on a motion for summary judgment, *Fed. R. Civ. P. 56(d)* is generally liberally construed, provided the moving party has made the requisite showing. *See Gonzalez v. K-Mart Corp., 940 F. Supp. 429, 431 (D.P.R. 1996)* ("[c]ourts should generally grant Rule. 56(f) (now Rule 56(d)) requests" unless movant has been dilatory in conducting discovery or is attempting to delay case); *In re Deep Vein Thrombosis, 356 F. Supp. 2d 1055, 1060 (N.D. Cal. 2005)* (district court should grant *Fed. R. Civ. P. 56(d)* application when moving party files summary judgment before opposing party has had any realistic opportunity to pursue discovery).

Exception:
In cases involving the qualified immunity of a government official, a court must exercise its discretion in a *Fed. R. Civ. P. 56(d)* motion in a way that protects the substance of the qualified immunity defense. Determining whether to grant or deny a *Fed. R. Civ. P. 56(d)* motion for discovery always requires the court to balance the movant's need for discovery against the burden discovery will place on the government official. In qualified immunity cases, the *Fed. R. Civ. P. 56(d)* balancing is "done with a

thumb on the side of the scale weighing against discovery." *See Harbert Int'l, Inc. v. James, 157 F.3d 1271, 1280 (11th Cir. 1998)* (court must exercise its discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings).

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Chapter 9 SUMMARY JUDGMENT
PART G: MOVING FOR CONTINUANCE FOR FURTHER DISCOVERY

1-9 Moore's AnswerGuide: Fed Civil Motion Practice § 9.27

§ 9.27 Avoiding Situations Where Court Is Likely to Deny Rule 56(d) Motion

Although this list is not exhaustive, the most common situations in which courts have declined to grant a continuance pursuant to *Fed. R. Civ. P. 56(d)* include:

1. **Failure to exercise due diligence.** Factors considered in determining whether a party has been diligent in pursuing discovery include: (1) the length of the pendency of the case prior to the *Fed. R. Civ. P. 56(d)* request; (2) whether and when the party could have anticipated its need for the requested discovery; (3) the previous efforts, if any, made to obtain the needed information through formal discovery or otherwise; (4) the degree and nature of discovery already taken; (5) any limitations placed on discovery by the trial court; (6) any prior solicitations of or provisions for discovery by the trial court; (7) any warning that, absent a speedier request, discovery might be denied; and (8) whether the requested information was inaccessible to the requesting party. *See Paul Kadair, Inc. v. Sony Corp. of America, 694 F.2d 1017, 1031 (5th Cir. 1983)* (one-year delay in pursuing discovery was dilatory).

2. **Motion based on claim that opposing party has not cooperated with discovery requests**. The remedy for failure to comply with discovery requests is a motion to compel, and *Fed. R. Civ. P. 56(d)* is not the equivalent of a motion to compel. *See Reyes v. Wilson Mem. Hosp., 102 F. Supp. 2d 798, 826 (S.D. Ohio 1998)* (plaintiff had not been diligent in pursuing discovery in four years since complaint had been filed, and plaintiff never sought any order from court compelling defendants to turn over supposedly withheld documents).

3. **Existence of cross-motions for summary judgment.** Courts have held that the filing of a cross-motion for summary judgment almost always indicates that the moving party was not prejudiced by a lack of discovery. *See Filiatrault v. Comverse Tech., Inc. 275 F.3d 131, 138 (1st Cir. 2001)* (plaintiff's filing of cross-motion for summary judgment in response to defendant's motion constituted acknowledgment by plaintiff that it had sufficient knowledge such that lack of discovery did not constitute prejudice).

4. **Request for continuance based on speculation.** A court may reject a *Fed. R. Civ. P. 56(d)* motion if it deems the request to have been based on speculation about what potentially could be discovered. *See*

Mason Tenders Dist. Council Pension Fund v. Messera, 958 F. Supp. 869, 894 (S.D.N.Y. 1997) (party failed to identify specifically what information was sought and how it could be obtained).

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§ 9.28 Failing to Bring Rule 56(d) Motion Is Waiver of Right to Conduct Further Discovery

To preserve the right to further discovery, the party opposing the summary judgment motion is required to move for a continuance under *Fed. R. Civ. P. 56(d)* before the district court's ruling on the summary judgment motion. In the absence of the filing of a *Fed. R. Civ. P. 56(d)* affidavit in the district court, the appellate court will not entertain the argument that the losing party lacked adequate time to perform the discovery needed to oppose the motion for summary judgment. *See Plott v. General Motors Corp, Packard Elec. Div., 71 F.3d 1190, 1196 (6th Cir. 1995)* (unless it is first advanced in district court, party's argument that it needed to conduct additional discovery was not preserved for appeal); *Boling v. Romer, 101 F.3d 1336, 1339 n.3 (10th Cir. 1996)* (plaintiff's argument on appeal that district court erred in granting summary judgment before discovery was foreclosed by plaintiff's failure to file *Fed. R. Civ. P. 56(d)* affidavit in district court).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 56.100 -56.103.*
- *Bender's Federal Practice Forms* Form Nos. 56:301-56:304.
- *Fed. R. Civ. P. 56(d).*

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Chapter 9 SUMMARY JUDGMENT
PART H: FILING CROSS-MOTION FOR SUMMARY JUDGMENT

1-9 Moore's AnswerGuide: Fed Civil Motion Practice § 9.29

§ 9.29 Filing Cross-Motion for Summary Judgment

A party opposing a motion for summary judgment may respond by filing a cross-motion for summary judgment. *See Fed. R. Civ. P. 56(b)* (motion for summary judgment may be filed at any time until 30 days after the close of all discovery).

The fact that a cross-motion for summary judgment has been filed does not change the procedural posture of the two motions. In practice, a cross-motion for summary judgment operates exactly like a single summary judgment motion. Therefore, the checklist for preparing a cross-motion is the same as would be followed for preparation of a motion for summary judgment. *See § 9.06 above*.

A court must evaluate both the original motion and the cross-motion independently to determine whether there exists a genuine dispute of material fact and whether each movant is entitled to judgment as a matter of law. *See, e.g., Wightman v. Springfield Terminal Ry., 100 F.3d 228, 230 (1st Cir. 1996)* ; *Burlington Ins. Co. v. Okie Dokie, Inc., 398 F. Supp. 2d 147, 155 n.3 (D.D.C. 2005)* ("each individual summary judgment motion must be evaluated independently," and "cross-motions for summary judgment are no different than a solitary summary judgment motion").

As detailed in *§§ 9.38-9.40 below*, a party moving for summary judgment, including a party bringing a cross-motion, has the burden of establishing the absence of a genuine factual dispute and its entitlement to judgment as a matter of law. Even if the facts are stipulated in connection with two cross-motions, each movant must present a legally persuasive case in order to prevail. *See Johnson v. Sullivan, 764 F. Supp. 1053, 1064 (D. Md. 1991)* (usual summary judgment standards apply and movant must show entitlement to judgment as matter of law even if presence of cross-motions reveals essential agreement on facts by litigants); *see also Besso v. Cummins Intermountain, 885 F. Supp. 1516, 1520 (D. Wyo. 1995)* .

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§ 9.30 Responding to Cross-Motion for Summary Judgment

A party opposing a cross-motion for summary judgment must establish that there are triable issues of fact in the same manner as if it were responding to an original motion for summary judgment. Although, in its original motion for summary judgment, it may have argued that no material facts are in dispute according to its theory of the case, it is not estopped from arguing that certain facts are disputed under the legal theory propounded in the cross-motion. *See, e.g., Zook v. Brown, 748 F.2d 1161, 1166 (7th Cir. 1984)* (movant may contend that facts are not in dispute under its theory of case but that factual issues remain open if case decided according to opponent's view of law); *McKenzie v. Sawyer, 684 F.2d 62, 68 n.3 (D.C. Cir. 1982)* (parties cross-moving for summary judgment admit settled nature of facts only for purposes of deciding motion; no establishment of facts by estoppel from making motion); *A. Brod, Inc. v. SK&I Co., L.L.C., 998 F. Supp. 314, 320 (S.D.N.Y. 1998)* (when both sides move for summary judgment, neither side is barred from asserting that there are issues of fact sufficient to prevent entry of summary judgment against it).

Timing:

Parties should be sure to consult local district court rules, which may specify the timeframe within which the party originally moving for summary judgment must respond to a cross-motion. *See, e.g.,* W.D.N.Y. L.R. 7(b)(2)(A) (if court doesn't set deadlines by order, original moving party has 28 days after service of cross-motion, unless otherwise ordered by the court, to serve and file responding papers in opposition to cross-motion; party that filed cross-motion has 14 days after service of responding papers, unless otherwise ordered by the court, to serve and file reply papers in support of cross-motion).

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Chapter 9 SUMMARY JUDGMENT
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§ 9.31 Ruling on Cross-Motions for Summary Judgment; Role of Court

In ruling on cross-motions for summary judgment, the court must evaluate each motion separately to determine whether either party has presented genuine issues of material fact for trial. *See ACLU of Nev. v. City of Las Vegas 333 F.3d 1092, 1097 (9th Cir. 2003)* ; *Buckley v. Gomez, 36 F. Supp. 2d 1216, 1220 (S.D. Cal. 1997)* , *aff'd without op., 168 F.3d 498 (9th Cir. 1999)* . Moreover, the burden of demonstrating the absence of a genuine issue of fact does not shift when cross motions are before the court. *See Eastman Mach. Co. v. United States, 841 F.2d 469, 473 (2d Cir. 1988)* .

The denial of one motion by the court does not imply that the opponent's cross-motion will be granted, because each individual motion stands on its own and must be evaluated independently to determine whether there exists a genuine dispute of material fact and whether the movant is entitled to judgment as a matter of law. *See, e.g., Wightman v. Springfield Terminal Ry., 100 F.3d 228, 230 (1st Cir. 1996)* (cross-motions for summary judgment neither alter basic *Fed. R. Civ. P. 56* standard, nor warrant grant of summary judgment per se); *Otis Elevator Co. v. Civil Factory Mut. Ins. Co., 353 F. Supp. 2d 274, 279 (D. Conn. 2005)* (when faced with cross-motions for summary judgment, district court is not required to grant judgment for one side or the other, but must evaluate each party's motion on its own merit, and in each instance, draw all reasonable inferences against movant); *Creech v. N.D.T. Indus., Inc., 815 F. Supp. 165, 165-166 (D.S.C. 1993)* (court must view cross-motions independently on own merits; parties may not stipulate to absence of genuine dispute of fact); *Benion v. Bank One, N.A., 967 F. Supp. 1031, 1034-1035 (N.D. Ill. 1997)* (on cross-motions for summary judgment, court is not obligated to grant summary judgment for one side or the other, but must evaluate each party's motion on its own merits).

Furthermore, although courts generally accept the express or implied stipulations of the parties, the court is under no obligation to do so. Before granting summary judgment, the court must be satisfied that under the governing legal standard, the facts are not genuinely in dispute. Whether a factual dispute exists is a legal inquiry for the court and is not subject to the power of the parties to conclusively consent. *See, e.g., Griffis v. Delta Family-Care Disability, 723 F.2d 822, 824 (11th Cir. 1984)* (parties may not conclusively establish absence of genuine factual dispute through stipulation or making of cross-motions); *Greer v. United States, 207 F.3d 322, 326 (6th Cir. 2000)* (even when parties have stipulated to facts in cross-motions for summary judgment, court is not required to rule that no fact issue exists because there may be evidence other than that to which parties have stipulated, which raises material issue of fact and precludes summary judgment); *Central States, Southeast & Southwest Areas Pension Fund v. Ekco Prods., Inc., 581 F. Supp. 374, 377 (N.D. Ill. 1984)* (parties may not conclusively establish absence of genuine factual dispute through stipulation

or making of cross-motions).

If the parties filing cross-motions agree that all underlying material facts are reflected in the written record, the trial judge may decide factual issues and essentially convert the cross-motions for summary judgment into submission of the case for trial on the written record. *See Chevron USA, Inc. v. Cayetano, 224 F.3d 1030, 1038 n.6, (9th Cir. 2000)* . However, such fact-finding is not appropriate on an undeveloped factual record. Accordingly, the trial court should exercise great caution when considering converting cross-motions into submission of the case for trial on the written record. Parties who object to this procedure should clearly state their objections on the record. This conversion procedure is, in practice, very rare. It is generally used only when there is a single dispositive issue, such as the statute of limitations or the interpretation of a contract clause. It is also crucial that both sides have conceded that no material facts pertaining to the dispositive issue are in dispute, and that they have both been given adequate notice of the conversion.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 56.120.*

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Chapter 9 SUMMARY JUDGMENT
PART I: REPLYING TO OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

1-9 Moore's AnswerGuide: Fed Civil Motion Practice § 9.32

§ 9.32 Checklist for Replying to Opposition to Motion for Summary Judgment

☐ Carefully examine local district court rules and individual judge's rules to determine whether a reply to a motion opposing summary judgment is allowed, and be sure to comply with any applicable filing deadlines. *See § 9.33[4] below*.

☐ Draft reply to opposition to motion for summary judgment in accordance with local rules. *See § 9.33[4] below*.

- ○ Only include new material that was not raised in original motion under limited circumstances, such as to rebut a potentially dispositive argument made by the adverse party in its opposition motion. *See § 9.33[3] below*.

☐ File written objections to opposing party's evidence or motion to strike evidence to preserve objections on appeal. *See § 9.33[2] below*. The objections should include:

- ○ Specific ground for objection;
- ○ Cites to location of evidence in opposing party's documents or in court records;
- ○ Brief argument supporting each objection; and
- ○ Citations to relevant authority.

☐ Timely serve and file reply motion, in accordance with filing deadlines and service requirements set forth in the Federal Rules as well as local district court rules and individual judge's rules.

- Keep in mind that after reply is filed, no additional memoranda, papers, or letters may be filed without court's approval.

☐ Before noticed hearing date, counsel may serve and file statement of recent decision, which cites and provides copies of relevant judicial opinions published after filing of opposition or reply.

☐ **Search by Topic:**

- Civil Procedure > Summary Judgment > Motions for Summary Judgment > Written Motions
- Civil Procedure > Summary Judgment > Opposition > Memoranda in Opposition

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Chapter 9 SUMMARY JUDGMENT
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§ 9.33 Preparing Reply to Opposition to Motion for Summary Judgment

The current version of Rule 56 makes no mention of a reply to opposition papers. Local district court rules and individual judge's rules, standing orders, or orders set forth in a case management order may impose specific requirements regarding the content and format of replies, and the timeframe within which they must be served and filed. Federal Rules governing computation of time generally also apply in computing the time within which to file and serve a reply. *See Fed. R. Civ. P. 6*; *see also §§ 1.12. 1.13 above*.

[1] Considering Strategy When Preparing Reply to Opposition to Summary Judgment Motion

The moving party's goal in filing a reply brief is to convince the court that no material issue of genuine fact exists for trial, notwithstanding the opponent's attempts to suggest otherwise in its opposition. Thus, the reply brief should adequately address each of the arguments raised in the opposition.

The contents of the reply depend largely on what is contained in the opposition to the motion. For example, if the adverse party files an opposition to the movant's statement of undisputed facts, the movant's reply should respond to each of the opposition points, with an explanation of how the opposition is incorrect on each point. If the opposing party files his or her own statement of disputed facts, the reply brief should respond by identifying how each fact listed is not relevant or material to a genuine issue in the case. Likewise, if the opposition includes evidence that is inadmissible, the moving party should include objections to the evidence or a motion to strike the evidence with its reply papers. *See Pfingston v. Ronan Eng'g Co., 284 F.3d 999, 1003 (9th Cir. 2002)* .

Strategic Point:

Although filing reply papers is permissive, a party moving for summary judgment should almost always file a reply, thereby taking advantage of the opportunity to rebut the arguments and contradict the evidence raised by the adverse party in its opposition, as well as further develop some of the lines of argument raised in its original motion.

[2] Objecting to Evidence Relied on in Opposition to Motion for Summary Judgment

A reply may include the moving party's objections, if any, to the admissibility of evidence submitted by the adverse party in its opposition. *See Fraser v. Goodale, 342 F.3d 1032, 1036 (9th Cir. 2003)* . A trial court may only consider admissible evidence in ruling on a motion for summary judgment. *See Orr v. Bank of Am., NT & SA, 285 F.3d 764, 773 (9th Cir. 2002)* . If the moving party objects to evidence set forth in the adverse party's opposition, it should file written objections or a motion to strike the evidence. *Pfingston v. Ronan Eng'g Co., 284 F.3d 999, 1003 (9th Cir. 2002)* . The moving party should be forewarned that if it fails to object or to move to strike the evidence, it may waive the right to object to evidentiary defects. *See Federal Deposit Ins. Corp. v. New Hampshire Ins. Co., 953 F.2d 478, 484 (9th Cir. 1991)* .

Written objections to evidence relied on by the adverse party in its opposition should include the following:

1. The specific ground for the objection;

2. The location, in the movant's documents or in the court's records, of the evidence objected to, including page and line numbers when possible; and

3. A brief argument supporting each objection, with accompanying citations of relevant authority.

See Fed. R. Evid. 103(a)(1).

[3] Reply Generally Should Not Present New Material

In general, a reply brief or memorandum should not contain new issues, evidence, or argument that the movant could have raised in its original moving papers. Accordingly, a district court may properly strike new material included in a reply that the movant did not include in its original statement of facts. *See Chale v. Allstate Life Ins. Co., 353 F.3d 742, 750 (9th Cir. 2003)* . A court does have the discretion to consider issues newly raised in a reply. *See Glenn K. Jackson Inc. v. Roe, 273 F.3d 1192, 1202 (9th Cir. 2001)* . However, a court should not consider new evidence presented in a reply without giving the nonmovant an opportunity to respond. *See Provenz v. Miller, 102 F.3d 1478, 1483 (9th Cir. 1996)* .

Exception:

A trial court would not abuse its discretion if it were to consider new information raised for the first time in a reply brief in response to a potentially dispositive argument raised in the opposition, especially if denying the movant the opportunity to counter the argument would effectively strip the movant of the right to counter the adverse party's opposition to the summary judgment motion. *See El Pollo Loco, Inc. v. Hashim, 316 F.3d 1032, 1040 (9th Cir. 2003)* ; *see also Beaird v. Seagate Tech., 145 F.3d 1159, 1164 (10th Cir. 1998)* .

[4] Drafting, Serving, and Filing Reply to Opposition to Summary Judgment Motion

Although not expressly permitted under the Federal Rules, local rules in many districts permit a party moving for summary judgment to file and serve a reply to the adverse party's opposition motion. Local rules may impose specific requirements regarding the content and format of replies, and the time within which they must be filed and served.

Strategic Point:

To facilitate an effective reply to the adverse party's statement of undisputed facts, counsel may wish to employ a three-column format. The first column would list the undisputed facts set forth in the movant's original statement of undisputed facts, the second column would lay out the points made in the opposition, and the third column would demonstrate how each issue or fact remains undisputed, and

should cite to the appropriate evidence in the record in support of each statement.

[5] No Further Filings Generally Allowed After Reply Is Filed

Local rules may restrict a party from responding to a reply brief or memorandum unless ordered to do so by the trial court. *See, e.g.,* C.D. Cal. L.R. 7-10. Local rules may provide, however, that counsel may serve and file a Statement of Recent Decision before the noticed hearing date, which would cite to and provide copies of any relevant judicial opinions published since the filing of the opposition or reply. *See, e.g.,* N.D. Cal. L.R. 7-3(d)(2).

PRACTICE RESOURCES:

- *Fed. R. Civ. P. 6.*
- *Fed. R. Evid. 103(a)(1).*

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Chapter 9 SUMMARY JUDGMENT
PART J: UNDERSTANDING ROLE OF COURT IN RULING ON SUMMARY JUDGMENT MOTIONS

1-9 Moore's AnswerGuide: Fed Civil Motion Practice § 9.34

§ 9.34 Checklist for Understanding Court's Role in Determining Summary Judgment Motions

☐ Trial court may or may not hold hearing before determining summary judgment motion. *See § 9.36[1] below*.

- ○ Trial courts may issue local rules permitting determination of motions without oral hearing, but rather upon brief written statements of reasons in support and opposition.
- ○ Many federal districts permit trial courts to determine motions without oral argument. Trial courts in these districts have the discretion to decide whether oral argument would be of material assistance in determining summary judgment motions.

☐ If court orders hearing on summary judgment motion, it may permit brief oral argument from counsel for parties, during which counsel should consider doing the following:

- ○ Be prepared to respond to court's questions;
- ○ Rather than repeat facts or argument presented in briefs or memoranda, counsel should highlight main points and critical evidence;
- ○ Object to evidence relied on by adverse party, when appropriate; and
- ○ Keep in mind that court may accept oral testimony on summary judgment motion.

☐ Court must apply proper burdens of proof when ruling on motion and at trial. *See § 9.37 below*.

○ Moving party bears initial burden of proof on motion to show absence of any genuine issue of material fact.

○ Showing required to meet initial burden depends upon which party has burden of proof at trial. If moving party does not have burden of proof at trial, present evidence negating essential element of nonmovant's claim, or demonstrating that nonmovant cannot meet its burden at trial. If moving party has burden of proof at trial, establish all essential elements of claim or defense to warrant summary judgment in its favor.

○ If movant meets initial burden on motion, then burden shifts to nonmovant to present specific facts showing genuine issue of material fact for trial.

☐ Parties should bear in mind that the court may only consider admissible evidence in ruling on motion.

☐ In determining whether case presents questions of material fact under applicable substantive law, the court must view evidence in light most favorable to non-moving party.

☐ If the case is not fully adjudicated on motion, it may be tried on the remaining issues. In ruling on the summary judgment motion:

○ Court's order must specify which facts are not in dispute, including extent to which damages or other relief is not in controversy.

○ Court's order must deem facts specified as established on trial of action.

○ Court's order may permit court to conduct further proceedings in action as are just, in which case, the court must then conduct trial accordingly.

☐ If court grants motion for summary judgment:

○ Counsel may request that court enter separate judgment. In this situation, it would be prudent for counsel to check with court clerk to ensure that judge signs and enters separate judgment.

☐ Court must state reasons for granting summary judgment somewhere in record if:

○ Underlying holdings would otherwise be ambiguous or unascertainable; or

○ Movant presents multiple grounds for summary judgment, and reasons for court's decision are not otherwise clear from the record.

☐ If the court denies motion for summary judgment, court generally must issue order specifying facts

appearing without substantial controversy to narrow issues for trial.

☐ Generally, the moving party should submit to court and serve on non-movant proposed judgment consistent with court's order.

- ○ Court may require parties to agree on proposed judgment to be submitted.
- ○ If parties cannot agree, court may require non-movant to file and serve written opposition to proposed judgment.

☐ Appellate court may vacate summary judgment and remand case for statement of reasons if movant presents multiple grounds for summary judgment and underlying reasons for court's decision are not clear from its order.

☐ **Search by Topic:**

- ○ Civil Procedure > Summary Judgment > Motions for Summary Judgment > Written Motions
- ○ Civil Procedure > Summary Judgment > Hearings > Requests for Hearings
- ○ Civil Procedure > Summary Judgment > Hearings > Oral Arguments

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§ 9.35 Reviewing Key Inquiry Prior to Hearing on Motion for Summary Judgment

Before a hearing on a motion for summary judgment, parties should conduct the following key inquiry:

1. Determine which party bears the burden of production and proof on each issue in the summary judgment motion; and

2. Determine what each party must prove in order to discharge its respective burdens.

Given the respective allocation of burdens of proof, the key inquiry for the trial court is determining whether there is no genuine dispute as to any material fact, thereby entitling the moving party to judgment as a matter of law. *See Fed. R. Civ. P. 56(a)*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* .

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§ 9.36 Preparing for Hearing on Motion for Summary Judgment

[1] Court May Rule on Summary Judgment Motion Without Holding Hearing

A trial court may decide to hold a hearing on a summary judgment motion before ruling on the motion. However, a court may also decide to rule on the motion without an oral hearing. Thus, parties should bear in mind that district courts are empowered to issue local rules permitting determination of motions without oral hearing, on brief written statements of reasons in support and opposition. *See Fed. R. Civ. P. 78, 83.*

Strategic Point:

During oral argument, rather than repeat facts or argument presented in its memorandum of points and authorities, counsel should focus on highlighting the main points and the evidence (or lack of evidence) in the record supporting those points, and on responding succinctly to the court's questions.

Warning:

Counsel wishing to object to evidence the adverse party relied on in its motion may certainly do so at the hearing on the motion. *See Strand v. GE, 945 F. Supp. 1334, 1342-1343 & n.5 (D. Haw. 1996)* . If counsel has not filed and served written objections or a motion to strike the evidence prior to the hearing, failure to object at the hearing could result in waiver of the objections to the evidence. *See Federal Deposit Ins. Corp. v. New Hampshire Ins. Co., 953 F.2d 478, 484 (9th Cir. 1991)* (waiver occurred when movant failed to object to evidence submitted in opposition to summary judgment motion until oral argument on appeal).

[2] Court Is Not Required to Grant Hearing on Summary Judgment Motion

Rule 56 makes no mention of the right to a hearing before the court rules on a summary judgment motion. Earlier versions of the rule mentioned a hearing in connection with the giving of notice. *See, e.g., former Fed. R. Civ. P. 56(c)* (providing for notice to be given before the day set for the hearing). Even under these prior versions of the rule, the court interpreted "hearing" to refer the final submission of summary judgment motion papers, rather than implying a full

fledged hearing with the right to oral argument. In fact, courts frequently determine a summary judgment motion on the basis of the parties' submissions and refuse to take oral argument. *See, e.g., Langham-Hill Petroleum, Inc. v. Southern Fuels Co., 813 F.2d 1327, 1330 (4th Cir. 1987)* ("[t]here is no absolute requirement that a ruling on a summary judgment motion be preceded by a hearing"); *Donaldson v. Clark, 819 F.2d 1551, 1555 (11th Cir. 1987)* (*Fed. R. Civ. P. 56* does not require oral hearing for summary judgment motion).

[3] Oral Testimony Not Usually Presented in Hearing on Summary Judgment Motion

The court has discretionary authority under *Fed. R. Civ. P. 43(c)* to direct any portion of a motion to be heard on oral testimony or deposition. After it has had an opportunity to determine if the submissions warrant a hearing, the court will decide whether to hold a hearing at which oral testimony will be presented. *See Waskovich v. Morgano, 2 F.3d 1292, 1296 (3d Cir. 1993)* (court may consider oral testimony at hearing as well as documents submitted relating to pending motion for summary judgment); *see also County of Oakland v. City of Berkley, 742 F.2d 289, 297-298 (6th Cir. 1984)* (court properly took testimony in evidentiary hearing to determine whether there was genuine issue for trial in context of ruling on motion for summary judgment).

As a general rule, oral testimony is not favored in summary judgment proceedings due to the well-founded reluctance to turn a summary judgment hearing into a trial. *See, e.g., Waskovich v. Morgano, 2 F.3d 1292, 1296 (3d Cir. 1993)* (court may consider oral testimony as well as documents submitted relating to pending motion for summary judgment in ascertaining existence of genuine issue of material fact to decide motion, but court may not use testimony to resolve genuine issues of material fact); *Seamons v. Snow, 206 F.3d 1021, 1025-1026 (10th Cir. 2000)* (Tenth Circuit aligned itself with courts holding that oral testimony hearings on motions for summary judgment should be rare because of possibility that hearing will become preliminary trial at which judge will make inappropriate factual findings, or that judge will give in to temptation to improperly assess witnesses' credibility).

[4] Evidentiary Hearings Are Appropriate Under Certain Circumstances

Courts have held that if the determination of the existence of a genuine issue of material fact would require the review of expert evidence, the most efficient way to evaluate that evidence may be to hold a hearing where that expert testimony may be elicited. By holding a hearing, a court would be able to examine the underlying assumptions of the expert, as well as the inferences and conclusions drawn by the expert in order to decide whether the expert would be helpful in determining a fact at issue or clarifying the evidence to be presented. *See Argus, Inc. v. Eastman Kodak Co., 612 F. Supp. 904, 909 (S.D.N.Y. 1985)* , *aff'd on other grounds*, *801 F.2d 38 (2d Cir. 1986)* (court used oral testimony to consider full context of other documents previously offered in summary judgment motion in antitrust litigation).

Complex factual determinations also present situations where oral testimony may be helpful in determining the existence of a factual dispute. *See County of Oakland v. City of Berkley, 742 F.2d 289, 297-298 (6th Cir. 1984)* (court ordered evidentiary hearing to learn more details of agreement between two parties which formed basis of litigation); *Utah by Division of Parks & Recreation v. Marsh, 740 F.2d 799, 801 (10th Cir. 1984)* , *aff'd on other grounds, Hoffman Homes, Inc. v. Administrator, United States EPA, 961 F.2d 1310 (7th Cir. 1992)* , *vacated*, *975 F.2d 1554 (7th Cir. 1992)* (court used oral testimony at evidentiary hearing to determine whether Utah Lake affected interstate commerce).

[5] Requesting Oral Argument Governed by Local Rules

The procedure by which a party may request oral argument on a motion for summary judgment is governed by applicable local rules for the district in which the case is pending. *See Lake at Las Vegas Investors Group v. Pacific Malibu Dev. Corp., 933 F.2d 724, 729 (9th Cir. 1991)* (under local rules, oral argument requested by party opposing summary judgment was required unless motion denied; however, there is no prejudice if party has had opportunity to apprise court of evidence and argument; therefore there was no reversible error).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 56.110.*
- *Federal Litigation Guide P 5.16.*

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Chapter 9 SUMMARY JUDGMENT
PART J: UNDERSTANDING ROLE OF COURT IN RULING ON SUMMARY JUDGMENT MOTIONS

1-9 Moore's AnswerGuide: Fed Civil Motion Practice § 9.37

§ 9.37 Ruling on Motion for Summary Judgment; Standards Applied by Court

[1] Meeting Two-Pronged Test in Order to Prevail on Summary Judgment Motion

Summary judgment is proper only if the summary judgment record establishes the following:

1. There is no genuine dispute as to any material fact; and

2. The moving party is entitled to judgment as a matter of law.

In order for a party to obtain summary judgment, the record usually establishes one of the following situations:

1. **A formal or constructive stipulation as to controlling facts.** Summary judgment is proper when the facts of a claim or the facts that determine some controlling issue of law are formally stipulated to or constructively agreed on by the parties. *See Miller v. State Farm Mut. Auto. Ins. Co., 87 F.3d 822, 824 (6th Cir. 1996)* .

2. **There is some controlling form of resolution of facts.** Summary judgment is proper when the facts determining a controlling legal issue have been determined in a manner that the court is not free to disregard. *See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* (if factual matters are clear because of strength of movant's evidence or weakness of non-movant's evidence, purported factual dispute can be decided only one way as matter of law, and summary judgment may be granted).

3. **Claimant unable to produce sufficient evidence to support claim or essential element of claim.** Summary judgment is proper where a claimant has produced no evidence or insufficient evidence concerning an essential element of a claim. These types of summary judgment motions are sometime referred to as "*Celotex*" motions, after the Supreme Court case that affirmed the propriety of this type of summary judgment motion. *See Celotex Corp. v. Catrett, 477 U.S. 317, 323-324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* (summary judgment for defendant movant is proper if movant draws court's attention to absence in record of any substantial evidence in support of essential element of claimant's case).

4. **Claimant's evidence is insufficient as a matter of law.** In a variant of the "*Celotex*" type of motion, a movant may obtain summary judgment if it shows that, even though the claimant purports to have some evidence on an essential element of the claim, this evidence is actually sham evidence, weak evidence, or evidence insufficient as a matter of law. In other words, using the same standard that would be appropriate to grant a judgment as a matter of law under *Fed. R. Civ. P. 50*, a claimant may not prevail with a mere scintilla of evidence. Rather, the claimant must have substantial, probative evidence of all essential elements of its case, or summary judgment is appropriate. *See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* (scintilla of evidence insufficient to satisfy claimant's burden).

5. **Defendant's evidence insufficient to establish sole defense to claim asserted.** Just as when a claimant fails to prove an essential element of a claim, a defendant may fail in its attempt to prove a defense. If there is clear evidence of all of the elements of a claim but no evidence or insufficient evidence of an essential element of the defense asserted to rebut that claim, the claimant may be entitled to summary judgment.

[2] Recognizing That Disputed Facts Do Not Automatically Preclude Summary Judgment

[a] Factual Dispute Must Be "Genuine" to Preclude Summary Judgment

As stated above, a court may grant summary judgment only when there is no "genuine" issue of material fact and the movant has established that it is entitled to judgment as a matter of law. A factual dispute is not "genuine" unless it requires a trial to resolve competing reasonable factual contentions. *See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* . This means, in essence, that there is a "genuine" dispute only as to those facts that are supported or opposed by "substantial" evidence, rather than a mere scintilla of evidence. Thus, the test for the existence of a genuine issue of fact--the "need for trial" standard--is the functional equivalent of the standard for a court applies in determining whether to grant judgment as a matter of law under *Fed. R. Civ. P. 50*.

[b] Facts in Dispute Must Be "Material" to Preclude Summary Judgment

Facts are "material" for the purpose of summary judgment if a dispute over those facts will affect the outcome of the case. If the moving party shows that there is no dispute over the facts that the substantive law shows are controlling, the opposing party may not defeat a summary judgment motion by showing a dispute over other facts that will not control the outcome of the case. Factual disputes that are irrelevant or unnecessary will not be counted in the court's analysis.

Practically speaking, a claimant's failure of proof regarding a single, essential element of a claim renders all other facts immaterial and, therefore, permits the court to enter summary judgment in favor of the non-claimant. *See Tademe v. St. Cloud State Univ., 328 F.3d 982, 987 (8th Cir. 2003)* (if plaintiff cannot adequately support each essential element of claim, "summary judgment is appropriate because "a complete failure of proof regarding an essential element of the nonmoving party's case necessarily renders all other facts immaterial").

[c] Court May Determine Whether Genuine Issue of Fact Exists, but May Not Resolve Disputed Factual Issues on Summary Judgment Motion

In ruling on a summary judgment motion, a court may determine whether a factual dispute of sufficient magnitude exists that would warrant a trial for the purpose of resolving a dispute. However, in its ruling, a court may not resolve factual disputes or make credibility determinations. *See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge").

[3] Reviewing Evidence in Light Most Favorable to Non-Moving Party

In determining whether a factual dispute warranting trial exists, a court must review the record and the parties' motion papers in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* . This does not mean that a summary judgment motion is like a *Fed. R. Civ. P. 12* motion, in which the court must presume that the allegations in the pleadings are true. The non-moving party may not rest on its pleadings, but instead must rebut any factual showing made by the moving party in order to prevent the court from granting summary judgment. Nonetheless, the court should presume that the non-moving party's version of the evidence is correct. *See Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 456, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 56.20 -56.24.*
- *Fed. R. Civ. P. 56(a).*

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1-9 Moore's AnswerGuide: Fed Civil Motion Practice § 9.38

§ 9.38 Meeting Burdens of Production and Persuasion When Moving for Summary Judgment

It is essential for parties to understand how the burdens of production and persuasion apply to motions for summary judgment. The moving party does not always bear the full burden of persuasion on motion for summary judgment, and there is a degree of burden shifting between the movant and the opposing party.

Before a court will consider granting summary judgment, the movant must make a prima facie showing that the standard for obtaining summary judgment has been satisfied, that is, that there is no genuine issue of material fact and that movant is entitled to judgment as a matter of law. The movant's required prima facie showing is relatively higher if the movant also bears the burden of persuasion at trial. *See United Mo. Bank, N.A. v. Gagel, 815 F. Supp. 387, 391 (D. Kan. 1993)* (movant with burden of persuasion at trial must make prima facie case of each essential element of its claim, as well as negating any affirmative defenses of nonmovant, in order to obtain summary judgment).

For example, if a claimant moves for summary judgment, arguing that there is evidence supporting all of the elements of the claim and no sufficient evidence supporting a defense, it also has the burden of persuasion. The claimant must show not only a lack of a material factual dispute, but also that, under the undisputed facts, no reasonable judge or jury could find against the claimant as a matter of law. *See Edison v. Reliable Life Ins. Co., 664 F.2d 1130, 1131 (9th Cir. 1981)* (to obtain summary judgment, insurer bringing declaratory judgment claim must demonstrate no realistic possibility that fact-finder will find policy language in dispute and that its legal interpretation is correct).

If the movant does not bear the burden of persuasion at trial, its burden is easier to meet. A defending party making a "*Celotex*" type of summary judgment motion need only prove a shortcoming of a necessary element of claimant's claim. *See Celotex Corp. v. Catrett, 477 U.S. 317, 324-326, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* (if defendant movant draws attention to absence of support for essential element of plaintiff nonmovant's claim, summary judgment may be granted unless plaintiff sets forth facts requiring trial); *see also Adler v. Wal-Mart Stores, 144 F.3d 664, 671 (10th Cir. 1998)* .

To defeat a motion brought by a defending party that does not bear the burden of persuasion on an issue at trial, the claimant must show that it has more than a scintilla of evidence on all of the elements of its claims, i.e., that it has substantial probative evidence on all essential elements of its claim. *See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* (party with burden of persuasion must set forth sufficient material to

support trial determination that burden of persuasion satisfied). Thus, even as the non-moving party, to defeat this type of summary judgment motion, the claimant must make a prima facie showing of all essential elements of its case, and provide substantial evidence sufficient to avoid a judgment as a matter of law. *See Morris v. Dixon, 2005 U.S. Dist. LEXIS 7059, at *14 (E.D. Pa. 2005)* (non-movant plaintiff cannot defeat a summary judgment motion by merely restating the allegations in complaint but instead, must "point to concrete evidence in the record that supports each and every essential element" in its case).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 56.40 -56.42.*
- *Fed. R. Civ. P. 56.*

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1-9 Moore's AnswerGuide: Fed Civil Motion Practice § 9.39

§ 9.39 Acknowledging Court's Discretion in Entering Summary Judgment

In considering whether to pursue a motion for summary judgment, a party should keep in mind that the court has the discretion not to grant summary judgment even if the moving party does meet its burden of establishing that there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law.

Thus, a court may exercise its discretion and deny summary judgment when the court believes further pretrial activity or trial adjudication will sharpen the facts and law at issue and lead to a more accurate or just decision, or when further development of the facts may enhance the court's legal analysis. *See Kennedy v. Silas Mason Co., 334 U.S. 249, 68 S. Ct. 1031, 92 L. Ed. 1347 (1948)* (court exercised discretion to deny summary judgment in case of statutory interpretation because of importance of case and view that trial would better illuminate murky issue of law and policy).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 56.07[3].*

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1-9 Moore's AnswerGuide: Fed Civil Motion Practice § 9.40

§ 9.40 Entering Summary Judgment

A trial court's order granting a summary judgment motion is not really a judgment; the actual judgment is set forth in a separate document and properly entered on the civil docket by the court clerk. *See Fed. R. Civ. P. 58, 79(a)*; *Radio TV Espanola S.A. v. New World Entertainment, Ltd., 183 F.3d 922, 930 (9th Cir. 1999)* .

Usually, a trial court granting summary judgment will require the moving party to submit to the court and to serve on the opposing party a proposed judgment consistent with the court's order. The court may require the parties to agree on the proposed judgment to be submitted, but if they do not agree, the court may require that the non-movant file and serve a written opposition to the proposed judgment within a certain time period after the court signs the order. The court may also require the movant to submit a reply after being served with the opposition. *See Gibson v. County of Riverside, 181 F. Supp. 2d 1057, 1099 (C.D. Cal. 2002)* .

Strategic Point:

The moving party should submit a proposed judgment to the court with the moving papers, or provide the court with the proposed judgment at the hearing on the motion. In addition, check with the court clerk to ensure that the judge has signed and entered a separate judgment in the action. If necessary, request that the court enter a separate judgment. *See Fed. R. Civ. P. 58(d).*

Generally, the district court need not make findings of fact and conclusions of law when deciding a summary judgment motion. *See Hanson v. Aetna Life and Casualty, 625 F.2d 573, 575 (5th Cir. 1980)* ; *Fed. R. Civ. P. 52(a)(3).* However, when its underlying holdings would otherwise be ambiguous or unascertainable, the court should state its reasons for granting summary judgment somewhere in the record. *Hanson v. Aetna Life and Casualty, 625 F.2d 573, 575 (5th Cir. 1980)* . In fact, Rule 56 provides that the court "should state on the record the reasons for granting or denying the motion." *Fed. R. Civ. P. 56(a).*

Moreover, some circuits have adopted a fair notice rule, which requires that, before granting a summary judgment against a pro se prisoner, the district court must provide the prisoner with "fair notice" of the requirements of the summary judgment rule. The purpose of the fair notice rule is to protect prisoners' access to the courts by making them aware of the requirements and consequences of *Fed. R. Civ. P. 56. See Hudson v. Hardy, 412 F.2d 1091, 1094 (D.C.*

Cir. 1968) (seminal case).

If the court does not grant all the relief requested by a summary judgment motion, it may enter an order stating any material fact that is not genuinely in dispute and treating the fact as established in the case. This may include an item of damage or other relief. *Fed. R. Civ. P. 56(g)*. Similarly, upon the court's denial of a motion for summary adjudication on particular claims or defenses, a party may request that the court find particular facts to be established without controversy. *See Williams v. Sinclair, 529 F.2d 1383, 1390 (9th Cir. 1975)* .

Strategic Point:

If the case presents multiple grounds for summary judgment, or the reasons for the district court's decision may not be clear from the record, counsel should draft a proposed judgment or order that includes a concise statement of the reasons for granting summary judgment.

Warning:

Local district court rules may provide that statements made by the court in an order denying summary judgment or summary adjudication do not constitute issues deemed established for purposes of trial unless the court so specifies. Counsel should therefore become familiar with the local rules in the relevant district, and should be prepared to request that the court explicitly state that it deems its statements to constitute issues deemed established for purposes of trial.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 56.72, 56.131[3].*
- *Bender's Federal Practice Forms* Form Nos. 56:260, 56:269.
- *Fed. R. Civ. P. 56(a), (g), 58(d).*

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Chapter 9 SUMMARY JUDGMENT
PART K: SEEKING APPELLATE REVIEW OF SUMMARY JUDGMENT

1-9 Moore's AnswerGuide: Fed Civil Motion Practice § 9.41

§ 9.41 Understanding When Summary Judgment May Be Appealed

A judgment is considered final when the court has conclusively adjudicated all issues before it and there remains nothing left for it to do but execute an order. *See Petereit v. S.B. Thomas, Inc., 63 F.3d 1169, 1175 (2d Cir. 1995)* . An order granting summary judgment as to all pending claims represents complete disposition of the case at the district court level and is appealable. *See § 9.42 below*. This is also true when a summary judgment ruling disposes entirely of a case that had been consolidated with other cases. *See Beil v. Lakewood Eng'g & Mfg. Co., 15 F.3d 546, 551 (6th Cir. 1994)* .

An order granting summary judgment as to less than the entire case does not dispose of the entire case on the merits and is ordinarily not appealable. *See § 9.43 below*; *see also Johnson v. Jones, 515 U.S. 304, 310-311, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995)* . Under certain limited circumstances, however, an order granting partial summary judgment may present an interlocutory appeal that may be heard by an appellate court. *See § 9.43[3], below*.

Likewise, denials of summary judgment motions are non-final orders, in that they do not dispose of the entire case on the merits, and are ordinarily not appealable. However, a decision denying summary judgment remains open for reconsideration by the trial court. Moreover, a party may also renew a motion for summary judgment, notwithstanding denial of an earlier motion, by showing a different set of facts or some other reason justifying renewal of the motion. *See § 9.44 below*; *see also Whitford v. Boglino, 63 F.3d 527, 530 (7th Cir. 1995)* .

Finally, a party may appeal an order denying summary judgment when it is coupled with a grant of summary judgment to the opposing party. *See Am. & Foreign Ins. Co. v. Sequatchie Concrete Servs., 441 F.3d 341, 344 (6th Cir. 2006)* (although denial of summary judgment generally is not appealable, when appeal from denial is presented together with appeal from a grant of opponent's motion for summary judgment, appellate court has jurisdiction to review district court's denial).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 56.130.*

- *Fed. R. Civ. P. 54(b), 56.*

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Chapter 9 SUMMARY JUDGMENT
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1-9 Moore's AnswerGuide: Fed Civil Motion Practice § 9.42

§ 9.42 Reviewing Order Granting Summary Judgment as to Entire Case

[1] Asking Trial Court to Reconsider Order Granting Summary Judgment

Although motions for reconsideration are generally disfavored by the courts, and courts rarely change their initial rulings, counsel may sometimes file a motion asking the district court to reconsider its summary judgment order. *See Fed. R. Civ. P. 59(e)*. Parties should keep in mind, however, that some district courts do not permit parties to file motions for reconsideration. Thus, it is critical for parties to consult local district court rules and individual judge's rules and orders to ensure that motions for reconsideration are permitted before investing time and effort in preparing the motion. *See § 1.17 above*.

A trial court's prior summary judgment rulings may also be called to the court's attention as part of a motion for judgment as a matter of law after the verdict, or within the context of a new trial motion challenging the weight of the evidence. *See Fed. R. Civ. P. 50*; *see also* Ch. 12, *Post-Trial Motions*. Although it may be possible to review a summary judgment decision as part of a *Fed. R. Civ. P. 60(b)* motion to vacate or modify a judgment, *Fed. R. Civ. P. 60* relief is usually difficult to obtain, as is a post-verdict judgment as a matter of law or a new trial. A party losing a summary judgment motion on the basis of what appears to be clear judicial error ordinarily is most likely to obtain review by immediately seeking reconsideration pursuant to *Fed. R. Civ. P. 59(e)* and briefing the motion to illustrate the alleged error. *See Fed. R. Civ. P. 60*.

[a] Setting Forth Legitimate Grounds for Seeking Reconsideration of Summary Judgment Motion

Reconsideration of an order granting summary judgment is only appropriate when: (1) the court is presented with newly discovered evidence; (2) the court committed clear error; (3) there is an intervening change in controlling law; or (4) other highly unusual circumstances exist. *See Nail v. Brazoria County Drainage Dist., 992 F. Supp. 921, 925 (S.D. Tex. 1998) , aff'd, 176 F.3d 480 (5th Cir. 1999)* (denying motion for reconsideration). In addition, a district court must reconsider a grant of summary judgment in light of the record existing at the time of the motion for reconsideration, not just as it existed at the time of the initial ruling. However, evidence that was available at the time of the challenged order, but not timely submitted, does not warrant reconsideration on grounds of newly discovered evidence, although one of the other bases for reconsideration would not be precluded by this failure to previously submit the evidence. *See Nail v. Brazoria County Drainage Dist., 992 F. Supp. 921, 927 (S.D. Tex. 1998) , aff'd, 176 F.3d 480 (5th Cir. 1999) .*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 56.124.*
- *Federal Litigation Guide P 44.46[2].*
- *Fed. R. Civ. P. 59(e)* (motion to alter or amend judgment).
- *Fed. R. Civ. P. 60(b)* (grounds for relief from final judgment, order, or proceeding).

[b] Complying With Timing Requirements for Seeking Reconsideration of Summary Judgment Motion

To be timely, a *Fed. R. Civ. P. 59(e)* motion for reconsideration must be filed within 28 days after entry of the judgment at issue. *See Fed. R. Civ. P. 59(e)*. Filing a timely motion for reconsideration under *Fed. R. Civ. P. 59(e)* tolls the time for filing a notice of appeal on a grant of summary judgment until the district court rules on the motion for reconsideration. *See Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61, 103 S. Ct. 400, 74 L. Ed. 2d 225 (1982)* (*Fed. R. Civ. P. 59* motion to alter or amend judgment destroys appealability until motion decided by court; no final judgment until *Fed. R. Civ. P. 59* motion decided by trial court). *See also Fed. R. App. P. 4(a)(4)(A)(iv).*

Timing:

Reconsideration motions, as a species of new trial motions pursuant to *Fed. R. Civ. P. 59*, must be made within 28 days of entry of judgment or are considered untimely. The court has no discretion to extend the time for making a *Fed. R. Civ. P. 59* motion.

[2] Seeking Appellate Review of Summary Judgment Motion

When a trial court grants a motion for summary judgment and enters judgment as required under the federal rules, the judgment is a final decision for purposes of appeal, providing it disposes of all claims against all parties. *See 28 U.S.C § 1291*; *Fed. R. Civ. P. 58, 79(a).*

Generally, a party must file a notice of appeal with the district clerk within 30 days after the trial court enters the judgment or order. *See Fed. R. App. P. 4(a)(1)(A).* After expiration of the 30-day time for appeal, a summary judgment cannot be disturbed. *See Fed. R. App. P. 4(a)(1).* A district court may extend the time to file a notice of appeal for up to 30 days if the motion is made within 30 days after the time for appeal has expired and the moving party shows excusable neglect or good cause. *See Fed. R. App. P. 4(a)(5).*

Exception:

Filing a timely motion for reconsideration under *Fed. R. Civ. P. 59(e)* tolls the time for filing a notice of appeal on a grant of summary judgment until the district court rules on the motion for reconsideration. By comparison, filing a premature post-judgment motion under *Fed. R. Civ. P. 59* does not accelerate the deadline for a notice of appeal before a separate judgment has been entered. *See ABF Capital Corp. v. Osley, 414 F.3d 1061, 1064-1065 (9th Cir. 2005)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 56.124, 56.130.*
- *Federal Litigation Guide P 48.11.*

- *Fed. R. Civ. P. 59(e)* (reconsideration).

- *Fed. R. App. P. 4(a)* (appeal in civil case).

[3] Standard Applied by Appellate Court Upon Review of Summary Judgment Motion

[a] Appellate Court's Standard of Review Is De Novo Using Same Standard Employed by District Court

In reviewing a decision granting summary judgment, the appellate court must determine whether there existed a genuine issue of material fact and whether the moving party was entitled to a judgment as a matter of law. *See Fed. R. Civ. P. 56(a)*; *see also Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* .

If a disputed fact presents a genuine issue of material fact, then summary judgment is precluded and the case is appropriately referred to trial. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* .

The appellate court will review the evidence and all factual inferences in the light most favorable to the non-moving party in its determination of whether a genuine issue of material fact exists, and whether the moving party is entitled to judgment as a matter of law. *See, e.g., Consarc Corp. v. Marine Midland Bank, N.A., 996 F.2d 568, 572 (2d Cir. 1993)* (reversing grant of summary judgment that found no contract between parties due to district court's failure to view evidence in light most favorable to non-moving party); *Evans v. Marlin, 986 F.2d 104, 107 (5th Cir. 1993)* (reversing and remanding entry of summary judgment dismissing plaintiff's claims that decedent's constitutional rights were violated because court found issues of material fact present in record); *Barlow v. Ground, 943 F.2d 1132, 1134 (9th Cir. 1991)* (reversing and remanding summary judgment for defendants, concluding that plaintiff's participation in gay rights parade during which inadvertent contact between plaintiff and police occurred did not constitute probable cause to detain plaintiff, and further concluding that determination of whether police used excessive force was not appropriate for summary judgment, because it was question for jury).

[b] Appellate Court May Affirm Grant of Summary Judgment on Any Ground Supported by Record

The court is free to affirm a grant of summary judgment on any ground fairly presented by the record. *See, e.g., Cox v. Hainey, 391 F.3d 25, 29 (1st Cir. 2004)* (decision to affirm may be grounded on any rationale revealed in record, regardless of whether lower court employed that rationale); *Stewart v. Happy Herman's Cheshire Bridge, 117 F.3d 1278, 1285 (11th Cir. 1997)* (circuit court may affirm on any adequate ground, even if it is ground other than one relied on by district court).

[c] Appellate Court Has Discretion to Allow New Evidence If Limited to Issues of Law or in Interests of Justice

As a general rule, arguments and evidence not presented in the district court in connection with a summary judgment motion are waived on appeal and the appellate court will be unable to consider these materials in its review of the district court's decision. *See Fields v. South Houston, 922 F.2d 1183, 1188-1189 (5th Cir. 1991)* (appellant may not raise new issue on appeal). However, the rule that an argument not raised in the lower court is waived on appeal is one of discretion, rather than appellate jurisdiction. *See Donovan v. Crisostomo, 689 F.2d 869, 874 (9th Cir. 1982)* (appellate courts will use discretion to consider untimely claim in interests of justice; court considered issue of statute of limitations).

Exceptions:

There are two commonly used exceptions to the general rule stated above. An appellate court may accept new evidence when reviewing a grant of summary judgment: (1) if the issues solely involve questions of

law, *see Lewis v. Younger, 653 F.2d 1258, 1259-1260 (9th Cir. 1980)* (limited question of appropriate state law to be applied in diversity action is issue of law that may be considered by appellate courts even if these arguments were not raised in court below); or (2) if injustice would result from refusal to accept new evidence. *See Roberts v. Hollandsworth, 582 F.2d 496, 499-500 (9th Cir. 1978)* (although federal courts do not ordinarily consider matters on appeal if not raised below, they will do so to prevent injustice; plaintiff may have valid claim not pleaded and case remanded to trial court for consideration of issue).

[d] Appellate Court Will Remand If Unable to Discern Reason for Grant of Summary Judgment

Rule 56 provides that the court "should state on the record the reasons for granting or denying the motion." *Fed. R. Civ. P. 56(a)*. Appellate courts have repeatedly emphasized the importance of the district's court inclusion of such a statement in its order granting summary judgment. *See, e.g., McIncrow v. Harris County, 878 F.2d 835, 836 (5th Cir. 1989)* (appellate court could not discern reason for district court's decision when plaintiff asserted multiple charges of discrimination under various theories and defendant offered nine different defenses, and remanded case to district court to state reasons for grant of summary judgment). Accordingly, as a practical matter, a party that has successfully obtained summary judgment should attempt to ensure that the district court has stated adequate reasons for its decision in its order.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 56.130.*

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Chapter 9 SUMMARY JUDGMENT
PART K: SEEKING APPELLATE REVIEW OF SUMMARY JUDGMENT

1-9 Moore's AnswerGuide: Fed Civil Motion Practice § 9.43

§ 9.43 Reviewing Order Granting Partial Summary Judgment

[1] Understanding Significance of Obtaining Reconsideration or Review of Partial Summary Judgment Motion

Although a partial summary judgment ruling is not a final judgment, it may have a great impact on the conduct of the case if it is left unchallenged. Unless the court agrees to revisit and alter its ruling, it is sufficiently final to be binding on the conduct of the trial in the action. For example, when a partial summary judgment disposes of a single issue relevant to a claim, evidence as to that issue is no longer relevant. *See Monge v. Cortes, 413 F. Supp. 2d 54, 59 (D.P.R. 2006)* (*Fed. R. Civ. P. 56(g)* may be used to narrow scope of litigation by pre-trial elimination of matters for which there is not genuine controversy). Thus, the ruling may have the effect of precluding testimony from a witness. *See Deimer v. Cincinnati Sub-Zero Prods., 990 F.2d 342, 344 (7th Cir. 1993)* (expert testimony offered was declined by court as issue had already been determined on motion). Likewise, if in ruling on a motion for partial summary judgment the court rejects a particular legal theory for a claim, it may restrict the evidence accordingly. *See Evans v. United Air Lines, Inc., 986 F.2d 942, 944 (5th Cir. 1993)* (court found no breach of fiduciary duty in contract action).

If the court does not grant all the relief requested by a summary judgment motion, it may enter an order stating any material fact that is not genuinely in dispute and treating the fact as established in the case. This may include an item of damage or other relief. *Fed. R. Civ. P. 56(g)*. If the case does proceed to trial, the parties should present evidence with these rulings in mind, and appropriate limitations will affect the ability of a party to offer particular types of proof or in subsequent motions for reconsideration. *See Calpetco 1981 v. Marshall Exploration, Inc., 989 F.2d 1408, 1415 (5th Cir. 1993)* (court had ability to refuse to consider belatedly offered evidence on motion to reconsider partial summary judgment decision, when there was no explanation why those documents had not been timely introduced).

[2] Requesting District Court to Reconsider Summary Judgment Ruling

Because all forms of partial summary judgment are interlocutory, the court has the power to change its mind at any time before final judgment, and it may revise its order later in the litigation. Evidence that comes into the case at a later time may raise questions as to the propriety of the court's initial ruling. For example, a court may find no dispute as to the legal status of an entity, but a witness appearing for the first time at trial may introduce evidence calling the previously determined status into question. *See Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 369-370, 98 S. Ct. 2396, 57 L. Ed. 2d 274 (1978)* (parties and court initially perceived undisputed diversity jurisdiction but later discovered

that defendant company was really located in Iowa rather than in Nebraska; when other defendant was removed from case by grant of summary judgment, ancillary jurisdiction was absent, and lack of diversity required dismissal of case).

In seeking reconsideration of a summary judgment decision, counsel should proceed in the same manner as when seeking reconsideration of any trial court decision, making sure to emphasize facts overlooked by the court or gaps in the evidence submitted by the opposing party, particularly if the opposing party bears the burden of persuasion. If the court alters its original decision, its initial order is modified accordingly and the case is controlled by the decision rendered in response to the motion to reconsider. If the court denies reconsideration, or reconsiders but rules that its initial order was correct, the case remains subject to the initial order.

[a] Stating Appropriate Grounds for Reconsideration of Partial Summary Judgment Ruling

Reconsideration of an order granting summary judgment is appropriate when:

1. The court is presented with newly discovered evidence;

2. The court committed clear error;

3. There is an intervening change in controlling law; or

4. Other highly unusual circumstances exist.

See Nail v. Brazoria County Drainage Dist., 992 F. Supp. 921, 925 (S.D. Tex. 1998) , aff'd, 176 F.3d 480 (5th Cir. 1999) (denying motion for reconsideration). In addition, a district court must reconsider a grant of summary judgment in light of the record existing at the time of the motion for reconsideration, not just as it existed at the time of the initial ruling. However, evidence that was available at the time of the challenged order, but not timely submitted, does not warrant reconsideration on grounds of newly discovered evidence, although one of the other bases for reconsideration would not be precluded by this failure to previously submit the evidence. *See Nail v. Brazoria County Drainage Dist., 992 F. Supp. 921, 927 (S.D. Tex. 1998) , aff'd, 176 F.3d 480 (5th Cir. 1999) .*

[b] If Considering Changing Its Partial Summary Judgment Ruling, Court Must Notify Parties

Because prior partial summary judgment orders have an effect on evidence at trial, they affect the parties' trial preparation and conduct at trial. Therefore, if the court is considering changing its prior ruling on a dispositive motion, the court must give reasonable notice of this fact to the parties so that they may proceed without prejudice. *See Alberty-Velez v. Corporacion de P. R. Para la Diffusion Publica, 242 F.3d 418, 422 (1st Cir. 2001)* (trial court retains jurisdiction to modify order granting partial summary judgment at any time; however, if judge subsequently changes initial ruling and broadens scope of trial, judge must inform parties and give them opportunity to present evidence relating to newly revived issue).

Warning:

Motions for reconsideration are generally disfavored by the courts, because judges do not like to revisit the same issues they have already decided. Thus, some district courts may impose additional requirements on motions for reconsideration, and others may not accept them at all. Therefore, counsel should take care to consult local district court rules and individual judge's orders, not just for motion practice in general, but for motions for reconsideration, in particular.

[3] Appellate Review of Order Granting Partial Summary Judgment Rarely Permitted

The final order rule provides that a trial court decision generally is a final decision subject to appeal only if it ends the

litigation on the merits and leaves nothing for the court to do but execute the judgment. Therefore, partial grants of summary judgment may not be reviewed on appeal absent an exception to the final order rule.

Exceptions:

In limited circumstances, counsel can request certification for appeal under *Fed. R. Civ. P. 54(b)*. 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. *See Fed. R. Civ. P. 54(b)* A court should grant certification under *Fed. R. Civ. P. 54(b)* only if there exists some danger of hardship or injustice through delay, which would be alleviated by immediate appeal. *See O'Bert v. Vargo, 331 F.3d 29, 41 (2d Cir. 2003)* . Other limited exceptions to the final order rule allow for certification of the court under *28 U.S.C. § 1292*.

Warning:

A party adversely impacted by a summary adjudication order does not necessarily render the order appealable by voluntarily dismissing the remaining claims without prejudice. Although dismissal without prejudice can be a final, appealable order, there must not be evidence that one or both of the parties attempted to manipulate appellate jurisdiction by artificially manufacturing finality. *See Orion Fin. Corp. v. American Foods Group, Inc., 201 F.3d 1047, 1049 (8th Cir. 2000)* .

[a] Interlocutory Appeals Disfavored

The Supreme Court has expressly stated that appeals from interlocutory orders are to be the exception, not the rule, because interlocutory appeals can make it more difficult for trial judges to do their basic job of supervising trial proceedings. *See Johnson v. Jones, 515 U.S. 304, 308-312, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995)* (permitting too many interlocutory appeals threatens trial proceedings with delay, adding costs, and diminishing coherence). Because of this judicial reluctance to support interlocutory appeals, courts carefully scrutinize parties' efforts to manufacture exceptions for partial summary judgment adjudications

However, the *Johnson* Court did note that certain federal statutes and rules have authorized immediate appeals in specific situations, including:

1. Immediate appeal of orders granting or denying injunctions (*see 28 U.S.C. § 1291*).

2. Authority to "certify" certain important legal questions (*see 28 U.S.C. § 1292(b)*).

3. Authority of district courts to direct entry of a final judgment as to one or more, but fewer than all, claims or parties (*see Fed. R. Civ. P. 54(b)*).

4. Authority of the Supreme Court to promulgate rules designating certain kinds of orders as immediately appealable (*see 28 U.S.C. §§ 1292(e), 2072(c)*).

5. Authority of federal courts to "issue all writs necessary or appropriate," including writs of mandamus (*see 28 U.S.C. § 1651*).

6. Certain "collateral orders" that amount to a 'final decision' are immediately appealable (*see 28 U.S.C. § 1291*).

[b] Common Grounds for Interlocutory Appeal of Partial Summary Judgment

The most common bases for permitting interlocutory appeals within the context of an order granting partial summary judgment are: (1) directed entry of final judgment as to fewer than all claims or parties; (2) discretionary certification of controlling and doubtful questions of law to facilitate efficient resolution of the case; and (3) the collateral order doctrine. Orders granting injunctions are rarely the subject of summary judgment motions because they usually occur after a court makes findings regarding disputed issues of fact. Mandamus is rare, although it could be appropriate if, for example, a court exceeded the scope of its authority or the boundaries of the controversy by granting summary judgment *sua sponte* on issues not properly before the court.

[i] Judgment as to Fewer Than All Claims or Parties May Be Grounds for Interlocutory Appeal of Partial Summary Judgment

In a case involving multiple claims or parties, a district court may certify for appeal a summary judgment ruling as to less than the entire case if it resolves one of the claims against one or more of the parties through an express determination pursuant to *Fed. R. Civ. P. 54(b)* that there is no reason to delay the entry of a final judgment on its decision. *See Fed. R. Civ. P. 54(b)*; *see also Martin v. Consultants & Admrs., 966 F.2d 1078, 1083 (7th Cir. 1992)* (district court acted correctly in certifying for appeal ruling on statute of limitations issue because allowing case to proceed to trial before final resolution of statute of limitations issues might necessitate second trial after a appeal). The requirements that must be met in order for the district court's express determination to be a proper exercise of its discretion are that: (1) the action involved separate claims; (2) there was a final decision as to at least one claim; and (3) that there was no just reason to delay the appeal.

Moreover, a summary judgment ruling made under *Fed. R. Civ. P. 56(a)* that completely disposes of one claim out of multiple claims, or of the entire interest of one or more parties, may be eligible for an express determination and entry of judgment under *Fed. R. Civ. P. 54(b)*. This should be distinguished from an order made under *Fed. R. Civ. P. 56(d)(1)*, which permits the court to make legal or evidentiary rulings that affect further proceedings in the case, but generally will not fully adjudicate an entire claim or the interest of a party.

In the event that a case involves more than two parties, it is foreseeable that a court could enter a summary judgment ruling that fully adjudicates the claims between less than all of the parties, and *Fed. R. Civ. P. 54(b)* would control whether the ruling is ripe for appeal. *See Fed. R. Civ. P. 54(b)*; *see also Banque Paribas v. Hamilton Indus. Int'l, 767 F.2d 380, 383 (7th Cir. 1985)* (certification for appeal in multiple party case was proper because district court's ruling disposed of entire dispute between two parties). Parties should bear in mind, however, that if the court declines to make an express determination that the ruling as to less than all of the parties is final, an appeal is not appropriate.

[ii] Close and Controlling Question of Law May Be Grounds for Interlocutory Appeal of Partial Summary Judgment

Discretionary interlocutory appeal may be available pursuant to *28 U.S.C. § 1292(b)* if the court determines that the decision rendered involves a close and controlling question of law and that immediate appeal is likely to expedite ultimate resolution of the case. For example, a court faced with uncontested or stipulated facts may deny summary judgment based on its own view of the law but acknowledge that the question is close. If the competing legal view would result in the grant of summary judgment rather than a long trial, such a case could satisfy the *28 U.S.C. § 1292(b)* certification standard. However, the district court's determination would not be binding on the appellate court, which may reject the certification and refuse to hear the interlocutory appeal. *See In re Convertible Rowing Exerciser Patent Litig., 903 F.2d 822, 822 (Fed. Cir. 1990)* (both district and appellate courts have complete discretion regarding issue of interlocutory appeal under statute).

[iii] Collateral Order Doctrine Exception May Be Grounds for Interlocutory Appeal of Partial Summary

Judgment

Under the collateral order doctrine, immediate appeal of an interlocutory order may occur when the court, although not disposing of the entire case, makes other conclusive decisions that:

1. Conclusively determines the disputed question;

2. Resolves an important issue completely separate from the merits of the action;

3. Will be effectively unreviewable on appeal from the final judgment.

See Johnson v. Jones, 515 U.S. 304, 310-311, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995) . For example, a defendant who has asserted the defense of qualified immunity and whose motion for summary judgment has been denied may be able to bring an appeal under the collateral order doctrine. *See Mitchell v. Forsyth, 472 U.S. 511, 528, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 56.130.*
- *Fed. R. Civ. P. 56.*
- *28 U.S.C. §§ 1291, 1292(b).*

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Chapter 9 SUMMARY JUDGMENT
PART K: SEEKING APPELLATE REVIEW OF SUMMARY JUDGMENT

1-9 Moore's AnswerGuide: Fed Civil Motion Practice § 9.44

§ 9.44 Seeking Review of Order Denying Summary Judgment

[1] Order Denying Summary Judgment Is Interlocutory and Generally May Not Be Appealed

As a general rule, an order denying summary judgment generally is a non-appealable interlocutory decree. *See Pacific Union Conference of Seventh-Day Adventists v. Marshall, 434 U.S. 1305, 1306, 98 S. Ct. 2, 54 L. Ed. 2d 17 (1977)* .

Exception:

Courts do permit interlocutory appeals under limited circumstances, including interlocutory appeals permitted by statute (*see, e.g., 28 U.S.C. § 1292*), or when the court denies a motion for summary judgment or summary adjudication based on the defense of qualified immunity. *See Mitchell v. Forsyth, 472 U.S. 511, 525, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)* .

[2] Court Has Discretion to Deny Motion for Summary Judgment

Fed. R. Civ. P. 56 provides only that summary judgment "should be rendered" if the movant carries its burden to show an absence of a material factual dispute. Thus, the Rule. does not require the court to grant summary judgment, and the court has the discretion to deny summary judgment even in circumstances where the moving party has met all the requirements set forth in *Fed. R. Civ. P. 56*. *See Fed. R. Civ. P. 56*, advisory committee note of 2007; *see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* (district court may deny summary judgment in case "where there is reason to believe that the better course would be to proceed to a full trial").

Because the district court has discretion to deny summary judgment even when it might be warranted, upon review, unless an appellate court concludes that a district court abused its discretion when it denied summary judgment, it will not disturb the district court's ruling. *See Suntiger v. Scientific Research Funding Group, 189 F.3d 1327, 1333 (Fed. Cir. 1999)* (when district court denies summary judgment, appellate court reviews decisions with considerable deference to district court and reverses only for abuse of discretion).

A party may not appeal a denial of summary judgment after a district court has conducted a full trial on the merits. Once the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary judgment motion. A qualified immunity defense, however, does not vanish when a district court declines to rule on the

plea summarily. The plea remains available to the defending officials at trial; but at that stage, the defense must be evaluated in light of the character and quality of the evidence received in court. *See Ortiz v. Jordan*, 2011 U.S. LEXIS 915, at *7-*8 (Jan. 24, 2011).

[3] Renewing Motion for Summary Judgment or Filing Subsequent Motion

A court's decision on a matter generally is considered the "law of the case" and will not be re-examined by the court during the course of the litigation. Consequently, after denial of summary judgment, courts generally refuse to hear or quickly deny a second or repeated summary judgment motion raising the same issues presented in the first motion. *See, e.g., Talarico v. Marathon Shoe Co., 221 F. Supp. 2d 35, 39 (D. Me. 2002)* (plaintiff's second motion for summary judgment "fatally flawed" because it offered statement of facts virtually identical to statement submitted for first motion); *Jackson v. Norris, 748 F. Supp. 570, 571, 574-575 (M.D. Tenn. 1990)* , *aff'd without op., 928 F.2d 1132 (6th Cir. 1991)* (repetitive summary judgment motions generally barred by law of case doctrine, but additional summary judgment motions on different issues permitted).

However, an earlier trial court decision that has not been affirmed on appeal remains open to reconsideration by the trial court, and a party may renew a motion for summary judgment, notwithstanding denial of an earlier motion under the following circumstances:

1. **Subsequent summary judgment motion raises different issues, including grounds different from those raised in the first motion**. *See Wechsler v. Hunt Health Sys., 198 F. Supp. 2d 508, 514 (S.D.N.Y. 2002)* (party may renew motion for summary judgment as long as it is supported by new material, but issues decided in first decision comprise law of the case for summary judgment purposes, and may not be "revisited").

2. **Additional facts were developed during litigation.** *See Lindsey v. Dayton-Hudson Corp., 592 F.2d 1118, 1120 (10th Cir. 1979)* (granting defendant's second summary judgment motion made after gathering additional material during discovery); *Curran v. Ho Sung Kwon, 153 F.3d 481, 487 (7th Cir. 1998)* (although denial of summary judgment is generally treated as law of case, when district judge is presented with additional evidence, court may revisit denial of summary judgment).

3. **New precedent raises the possibility of a change in the court's ruling.** *See Lavespere v. Niagara Mach. & Tool Works, 910 F.2d 167, 171 (5th Cir. 1990)* (new decision clarifying substantive law in case supports renewed motion for summary judgment on similar or same grounds notwithstanding earlier denial of summary judgment in product liability litigation).

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Chapter 9 SUMMARY JUDGMENT
PART L: MOVING FOR SANCTIONS FOR FILING SUMMARY JUDGMENT AFFIDAVIT IN BAD FAITH

1-9 Moore's AnswerGuide: Fed Civil Motion Practice § 9.45

§ 9.45 Moving for Sanctions Under Rule 11 for Frivolous Summary Judgment Motion

A court may impose *Fed. R. Civ. P. 11* sanctions upon a party that files a summary judgment motion for an improper purpose, or files a summary judgment motion that lacks a sufficient legal basis or evidentiary support. *Fed. R. Civ. P. 11* authorizes a court to impose sanctions when a party presents a pleading, written motion, or other paper:

1. For an improper purpose. *See Fed. R. Civ. P. 11(b)(1).*

2. That contains claims, defenses, or other legal contentions that are not warranted by existing law or by a non-frivolous argument to change existing law or establish new law. *See Fed. R. Civ. P. 11(b)(2).*

3. That contains allegations or factual contentions that do not have or are unlikely to have evidentiary support. *See Fed. R. Civ. P. 11(b)(3).*

4. That contains denials of factual contentions that are not warranted on the evidence. *See Fed. R. Civ. P. 11(b)(4).*

Since the 1993 amendment to *Fed. R. Civ. P. 11*, the frequency and availability of sanctions motions has been reduced, principally because the subject of a *Fed. R. Civ. P. 11* motion now has a 21 day "safe harbor" in which it may withdraw or correct the offending paper, thereby precluding an award of sanctions. *See Fed. R. Civ. P. 11(c)(2).* However, stubborn adherence to a frivolous motion for summary judgment may still subject a party and its counsel to *Fed. R. Civ. P. 11* sanctions. For more discussion on *Fed. R. Civ. P. 11* sanctions, *see* Ch. 7, *above*.

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Chapter 9 SUMMARY JUDGMENT
PART L: MOVING FOR SANCTIONS FOR FILING SUMMARY JUDGMENT AFFIDAVIT IN BAD FAITH

1-9 Moore's AnswerGuide: Fed Civil Motion Practice § 9.46

§ 9.46 Moving for Sanctions Under Rule 56(h) for Summary Judgment Motion Filed in Bad Faith

A party that submits affidavits in bad faith in connection with a summary judgment motion may be subject to sanctions under *Fed. R. Civ. P. 56(h)*. If a party submits an affidavit in bad faith or for the sole purpose of delay, the opposing party may move for sanctions and the court may order the offending party to pay expenses incurred by its opponent as a result of the improper affidavit and may also cite the offending party or its counsel for contempt. *See Fed. R. Civ. P. 56(h)*.

In the few reported appellate decisions reviewing district court orders imposing sanctions under *Fed. R. Civ. P. 56(h)*, the offensive conduct has been particularly egregious. *See, e.g., Alart Associates, Inc. v. Aptaker, 402 F.2d 779 (2d. Cir. 1968)* (reasserting substantially the same grounds for summary judgment after the court had already twice rejected theory); *Acrotube, Inc. v. J.K. Financial Group, Inc., 653 F. Supp. 470 (N.D. Ga. 1987)* (affidavit clearly at odds with facts indisputably within affiant's knowledge). Parties should keep in mind that although *Fed. R. Civ. P. 56(h)* has seldom been invoked in the past, its application could increase in light of the decline in the imposition of *Fed. R. Civ. P. 11* sanctions.

[1] Rule 56(h) Sanctions May Apply to Any Affidavit Filed in Summary Judgment Proceeding

Fed. R. Civ. P. 56(h) sanctions may apply to any affidavit in connection with a summary judgment motion that a party submitted in bad faith or for the sole purpose of delay, including affidavits submitted in support of a motion for summary judgment, those submitted in opposition to summary judgment (*see Fed. R. Civ. P. 56(c)(4)*), and affidavits seeking deferral of the summary judgment decision by stating that an opposition cannot currently be submitted (*see Fed. R. Civ. P. 56(d)*).

[2] Defining "Bad Faith" Submission of Affidavit Under Rule 56(h)

An affidavit is submitted in bad faith within the meaning of Rule 56(h) if the party submitting it knows that the affidavit contains false or misleading information, or if the party submits the affidavit with reckless disregard of its accuracy, or solely for the purpose of delaying adverse disposition of a summary judgment motion. *See Clark v. Hancock, 45 F.R.D. 512, 514-515 (S.D. Ga. 1968)* (ordering defendant to pay all costs plaintiff incurred as result of defendant's dilatory tactic of filing motion on eve of trial).

The bad-faith standard for *Fed. R. Civ. P. 56(h)* is subjective, requiring that the offending party knew that its affidavit was false, or that it intentionally submitted the affidavit as a delay tactic, or recklessly threw the affidavit together and submitted it without bothering to ensure its factual accuracy. *See Warshay v. Guinness PLC, 750 F. Supp. 628, 640-641 (S.D.N.Y. 1990) , aff'd without op., 935 F.2d 1278 (2d Cir. 1991)* (defendant that intentionally submitted affidavits solely to delay resolution of case liable for *Fed. R. Civ. P. 56(g)* sanction of $10,000).

However, a court should not impose *Fed. R. Civ. P. 56(h)* sanctions merely because an affidavit is inaccurate. Rather, the court must find that the party affirmatively attempted to act in bad faith by submitting the erroneous affidavit. For example, a court should not impose *Fed. R. Civ. P. 56(h)* sanctions in situations where a party unknowingly submits an affidavit containing factual inaccuracies caused by counsel's innocent mistake, or caused by the affiant's inability to correctly recall events. *See, e.g., Stewart v. RCA Corp., 790 F.2d 624, 632 (7th Cir. 1986)* (if erroneous affidavit resulted from inadequate preparation by counsel rather than bad faith of plaintiff, *Fed. R. Civ. P. 56* sanctions not appropriate); *United Energy Corp., v. United States, 622 F. Supp. 43, 46-47 (N.D. Cal. 1985)* (erroneous affidavit resulting from affiant's failure to recall events accurately not bad faith).

[3] Understanding Types of Sanctions Available Under Rule 56(h)

Unlike *Fed. R. Civ. P. 11*, which permits sanctions against a party or an attorney, *Fed. R. Civ. P. 56(h)* is specifically limited by its language to a compensatory order of sanctions against "the submitting party," not against counsel. However, an "offending party or attorney may also be held in contempt" for affidavits submitted in violation of the rule. In addition, *Fed. R. Civ. P. 56(h)* limits the amount of sanctions that can be awarded to reasonable costs, including attorney's fees, incurred as a result of the bad faith submission.

Several courts have held that a district may exercise its discretion and decline to impose sanctions. *See, e.g., Hadley v. Gerrie, 124 B.R. 679, 686 (Bankr. D. V.I. 1991) , aff'd without op., Gas House, Inc. v. Unicorp American Corp., 952 F.2d 1392 (3d Cir. 1992)* (declining to impose sanctions because there was no showing of prejudice to opposing party, even if affidavit was made in bad faith); *Clark v. Hancock, 45 F.R.D. 512, 514-515 (S.D. Ga. 1968)* (properly within court's discretion to hold defendant responsible for paying all expenses plaintiff incurred as result of defendant's dilatory tactic). Accordingly, an appellate court would apply the abuse of discretion standard when reviewing a district court's determination of whether to impose *Fed. R. Civ. P. 56(h)* sanctions. *Turner v. Baylor Richardson Med. Ctr., 476 F.3d 337, 349 (5th Cir. 2007)* (district court's decision whether to award sanctions is reviewed for abuse of discretion).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 56.94[6].*
- *Fed. R. Civ. P. 11, 56(h).*

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Chapter 10 DEFAULT JUDGMENT

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§ 10.05 Precluding Default; Defendant's Options

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§ 10.06 Applying for Entry of Default Judgment and Effect of Default Judgment

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[a] Asserting Claim for "Sum Certain" Required for Obtaining Entry of Default Judgment From Clerk

[b] Clerk May Enter Judgment Only If Defaulting Party Failed to Appear in Action

[c] Clerk May Not Enter Default Judgment Against Minors or Incompetents, the United States, or Uniformed Servicemembers

[2] Applying to Court for Entry of Default Judgment

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§ 10.07 Moving to Set Aside Entry of Default and Default Judgment

[1] Moving to Set Aside Entry of Default

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[ii] Determining Whether to Set Aside Default Due to Prejudice to Plaintiff

[iii] Determining Whether to Set Aside Default When No Meritorious Defense Is Asserted

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Chapter 10 DEFAULT JUDGMENT
PART A: PROCEDURAL CONTEXT

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§ 10.01 Procedural Context--Default Judgments

When attorneys fail to meet crucial litigation deadlines, it can result in severe consequences for their clients, including dismissal of claims or defenses, or even adverse judgment. To avoid these negative consequences (and avoid committing malpractice), it is imperative that attorneys calendar and adhere to all filing deadlines imposed by the Federal Rules, local district court rules, and any rules or specific orders issued by the judge presiding over the case.

In the event that defense counsel determines that it will be extremely difficult or impossible to meet a critical deadline, such as the deadline for filing an answer to the plaintiff's complaint, defense counsel may consider filing a motion asking the court for an extension of time to file an answer or filing a motion under *Fed. R. Civ. P. 12*, which would also extend the timeframe for filing a responsive pleading while simultaneously forcing the plaintiff to further define and clarify its allegations. *See § 10.05[2] below*.

If a defendant fails to plead or assert defenses against the claims alleged in the complaint within the timeframe permitted by the Federal Rules, default will occur and the defendant will be vulnerable to a default judgment, which can be entered either by the clerk or the court, upon plaintiff's request. *See §§ 10.03* and *10.06 below*. After a default or default judgment has been entered, the defendant may file a motion to set it aside. *See § 10.07 below*. If this tactic proves unsuccessful and the district court denies relief from either the entry of default or the default judgment, the defendant's final recourse is to appeal the district court's decision. *See § 10.07 below*.

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Chapter 10 DEFAULT JUDGMENT
PART B: APPLYING FOR ENTRY OF DEFAULT

1-10 Moore's AnswerGuide: Fed Civil Motion Practice § 10.02

§ 10.02 Checklist for Seeking Entry of Default, Applying for Default Judgment, and Opposing Default Judgment

☐ Ascertain whether defendant is in default. *See § 10.03 below*.

○ Generally, the defendant must file a responsive pleading within 60 days after the date when the request for waiver was sent (90 days if the defendant resided outside any judicial district of the United States). *See § 10.05[1] below*.

○ If defendant is the U.S., an agency of the U.S., or an officer or employee of the U.S. sued in an official capacity, it must serve a responsive pleading within 60 days after the U.S. attorney has been served with a pleading asserting a claim. *See § 10.05[1] below*.

○ If defendant is a U.S. officer or employee who is sued in an individual capacity for acts or omissions in connection with duties performed on behalf of the U.S., it must serve a responsive pleading within 60 days after service on the officer or employee, or service on the U.S. Attorney, whichever is later. *See § 10.05[1] below*.

○ **Caution:** If the defendant has not filed a responsive pleading within the time frame allotted by the Federal Rules, but it has "otherwise defended" against plaintiff's claims within the meaning of *Fed. R. Civ. P. 55*, then it is not in default. *See §§ 10.03* and *10.05 below*.

☐ If defendant is in default, prepare and file application to clerk for entry of default, which must state the relief being sought based on the defendant's failure to plead or otherwise defend, and include supporting affidavits showing that:

○ Defendant has been properly served with process;

○ Defendant has failed to plead or otherwise defend within the meaning of *Fed. R. Civ. P. 55*; and

○ Defendant's time to respond has expired. *See § 10.04 below*.

☐ If entering the judgment is merely a ministerial act, and thus, plaintiff is applying for default judgment from the clerk, the following prerequisites must be met:

○ Plaintiff's claim is for a "sum certain or for a sum which can by computation be made certain;"

○ Defendant's default resulted from a "failure to appear;"

○ Defendant is not an infant or incompetent person;

○ Defendant is not a member of the military service; and

○ Defendant is not the United States government, or an officer or agency of the United States government. *See § 10.06[1] below*.

☐ If applying for default judgment from the clerk, plaintiff must file application, proposed form of judgment, and supporting affidavits as required by *Fed. R. Civ. P. 55(b)(1)*. *See § 10.06[1] below*.

☐ If applying for default judgment from the court, however, plaintiff must file the same application and supporting documents that it would need to file with the court, plus additional affidavits establishing:

○ Existence of facts and underlying equitable factors that weigh in favor of entering a default judgment. *See § 10.06[2][a] below*.

○ Notice has been served upon defendant, if defendant has appeared in the action, as required by *Fed. R. Civ. P. 55(b)(2)*. *See § 10.06[2][a] below*.

☐ **Search by Topic:** Civil Procedure > Pretrial Judgments > Default

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Chapter 10 DEFAULT JUDGMENT
PART B: APPLYING FOR ENTRY OF DEFAULT

1-10 Moore's AnswerGuide: Fed Civil Motion Practice § 10.03

§ 10.03 Understanding Entry of Default

A default will occur if a defendant fails to plead or otherwise defend against a claim within the time permitted by the Federal Rules. *Fed. R. Civ. P. 55(a)*; *Fed. R. Civ. P. 12(a)*; *New York Life Ins. Co. v. Brown, 84 F.3d 137, 141 (5th Cir. 1996)* . The term "otherwise defend" incorporates:

(1) Asserting defenses challenging jurisdiction (subject matter or personal), venue, sufficiency of process or service of process pursuant to *Fed. R. Civ. P. 12(b)*;

(2) Asserting that plaintiff failed to state a claim on which relief may be granted pursuant to *Fed. R. Civ. P. 12(b)(6)*;

(3) Asserting that plaintiff failed to join a required party under *Fed. R. Civ. P. 19*.

Thus, even if a party has not filed a timely responsive pleading, it will not be in default as long as it asserts one or more of the above defenses within the time period allotted by the Federal Rules.

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Chapter 10 DEFAULT JUDGMENT
PART B: APPLYING FOR ENTRY OF DEFAULT

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§ 10.04 Entry of Default First Step in Two-Step Process to Obtain Default Judgment

An entry of default occurs when the court clerk enters a record of a party's default in a action. An entry of default is the first step in a two-step process to obtain a default judgment. *See United States v. $23,000 in United States Currency, 356 F.3d 157, 163 (1st Cir. 2004)* . Entry of default is distinguishable from default judgment in that it is an interlocutory action and thus by itself is not a judgment and has limited, if any, appealability. *Dow Chem. Pacific, Ltd. v. Rascator Mar. S.A., 782 F.2d 329, 335 (2d Cir. 1986)* . Default judgment, on other hand, is a determination by the clerk or the court after the submission of evidence and results in a final judgment. *See § 10.05* below.

In applying to the clerk for entry of default, a plaintiff must state the relief being sought based on the defaulting party's failure to plead or otherwise defend within the meaning of *Fed. R. Civ. P. 55* and include supporting affidavits and showing that:

1. Defaulting party has been properly served with process;

2. Defaulting party has failed to plead or otherwise defend; and

3. Defaulting party's time period to respond to has expired.

A plaintiff that has applied for an entry of default is not required to notify the defaulting party. *See Fed. R. Civ. P. 55(a)*; *Hawaii Carpenters' Trust Funds v. Stone, 794 F.2d 508, 512 (9th Cir. 1986)* .

Once a default has been entered, the defaulting party forfeits its right to serve a pleading or motion denying the claims asserted against the party and waives its affirmative defenses. *Greyhound Exhibitgroup v. E.L.U.L. Realty Corp., 973 F.2d 155, 158-159 (2d Cir. 1992)* . However, the court may set aside an entry of default for good cause, and allow the defaulting party to plead so that the case may continue on the merits. *See* § 10.08[1][a] *below*.

Warning:

Default only applies to defending parties. If a plaintiff fails to prosecute a claim, a defendant may file a motion to dismiss the action for failure to prosecute under *Fed. R. Civ. P. 41(b)*; *see* §§ *3.18*, *3.19 above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 55.10 -55.13.*
- *Bender's Federal Practice Forms* Form Nos. 55:1, 55:2.
- *Fed. R. Civ. P. 55(a).*

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Chapter 10 DEFAULT JUDGMENT
PART B: APPLYING FOR ENTRY OF DEFAULT

1-10 Moore's AnswerGuide: Fed Civil Motion Practice § 10.05

§ 10.05 Precluding Default; Defendant's Options

[1] Precluding Default by Filing Responsive Pleading

A party may preclude default by filing with the court any of the following responsive pleadings listed in *Fed. R. Civ. P. 7* within the allotted timeframe:

1. An answer to the complaint;

2. An answer to a counterclaim;

3. An answer to a crossclaim; or

4. A third-party answer to a third-party complaint.

Fed. R. Civ. P. 7(a).

Generally, a defending party must serve a responsive pleading within 21 days after the party has been served with a pleading stating a claim. Thus, a defendant's prompt and timely response will avert an entry of default or default judgment on the claim.

Exceptions:
There are several exceptions to the 21-day rule stated above. For example:

1. If the defendant timely waives service of the summons, its responsive pleading is due within 60 days after the date the request for waiver was sent, or within 90 days after that date if the defendant resides in a judicial district outside of the United States. *Fed. R. Civ. P. 4(d).*

2. If the defending party is the United States, or an agency, officer or employee of the United States sued in an official capacity. The above parties must serve a responsive pleading within 60 days after the United States attorney has been served with a pleading asserting a claim; and

3. If a United States officer or employee is sued in an individual capacity for acts or omissions occurring in connection with his or her duties, the party must serve a responsive pleading within 60 days after service on the officer/employee or the United States attorney, whichever is later.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 55.11.*
- *Fed. R. Civ. P. 7(a)* (pleadings).
- *Fed. R. Civ. P. 55(a).*

[2] Precluding Default by Extending Time to Plead

[a] Precluding Default by Filing Rule 12 Motion

Unless otherwise ordered by the court, a defendant's filing of a motion under *Fed. R. Civ. P. 12* will extend the time period for a defendant to file and serve a responsive pleading. Motions permitted under *Fed. R. Civ. P. 12* include:

1. a motion challenging subject matter jurisdiction;

2. a motion challenging personal jurisdiction;

3. a motion challenging venue;

4. a motion raising insufficiency of process or insufficiency of service of process;

5. a motion to dismiss for failure to state a claim on which relief may be granted;

6. a motion raising the issue of failure to join a party under *Fed. R. Civ. P. 19*;

7. a motion for judgment on the pleadings;

8. a motion for more definite statement; and

9. a motion to strike.

Fed. R. Civ. P. 12. See §§ 2.07, 2.08, 3.02-3.11 above.

If the court denies the defendant's Rule 12 motion or postpones its disposition until the trial on the merits, the defendant must file and serve its responsive pleading within 14 days after notice of the court's action. Moreover, if the court grants defendant's motion for a more definite statement, the defendant must file and serve its responsive pleading within 10 days after the service of plaintiff's amended claims.

Strategic Point:

Although local rules may vary, most district courts treat summary judgment motions the same way as Rule 12 motions in that they extend the timeframe permitted for the defendant to plead. Thus, if the

defendant were to file a summary judgment motion within the time period permitted to file a responsive pleading, the time period for filing the responsive pleading would automatically extend until after the court has ruled on the summary judgment motion. *Fed. R. Civ. P. 56. See § 9.07[1][c] above.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 55.11.*
- *Fed. R. Civ. P. 12.*
- *Fed. R. Civ. P. 55(a).*

[b] Requesting Extension of Time to Plead and Obtaining Court Order

In addition to filing a Rule 12 motion or in the alternative, a defending party may request an extension from the court for more time to file a responsive pleading with or without a formal motion or notice. When a defending party requests an extension, the court has the discretion to grant it for "good cause." *Fed. R. Civ. P. 6(b)(1)(A).* The court may also extend the time allowed for a responsive pleading if the parties have agreed to the extension of time.

If a defending party requests an extension after the original time for filing a responsive pleading has elapsed, however, the defending party must file a formal motion and serve it upon the plaintiff. Under these circumstances, the court may only grant an extension if the defending party's failure to act was the result of "excusable neglect." *Fed. R. Civ. P. 6(b)(1)(B).* Moreover, if a defending party has received an extension on the time allowed to plead and fails to plead by the expiration date of the extension, the clerk may enter a default against that party.

Warning:

An agreement or stipulation alone is not sufficient to extend the time to plead. There must be a court order. *Orange Theatre Corp. v. Rayherstz Amusement Corp., 130 F.2d 185, 187 (3d Cir. 1942)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 55.11.*
- *Fed. R. Civ. P. 6(b).*
- *Fed. R. Civ. P. 55(a).*

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Chapter 10 DEFAULT JUDGMENT
PART C: APPLYING FOR ENTRY OF DEFAULT JUDGMENT

1-10 Moore's AnswerGuide: Fed Civil Motion Practice § 10.06

§ 10.06 Applying for Entry of Default Judgment and Effect of Default Judgment

Depending on the factual circumstances of the case, a plaintiff may either apply to the clerk or the court in order to obtain a default judgment after a default has been entered on a defending party. An initial determination the plaintiff must make is where to file the application, since a different set of prerequisites must be met when seeking entry of default judgment from the clerk than those required by the court. *See § 10.06[1] below* for prerequisites to filing an application with the clerk. *See § 10.06[2] below* for requirements for filing an application with the court.

Parties should bear in mind that a default judgment is a final, appealable judgment and, therefore, res judicata applies to the parties and those in privity with them. In theory, collateral estoppel would extend to any issues that were actually litigated in the action. However, as a practical matter, liability issues are rarely litigated in a case of default, so ordinarily, a default judgment will not preclude litigation of liability issues in a subsequent case. *See Klingman v. Levinson, 831 F.2d 1292, 1296 (7th Cir. 1987)* (citing **Moore's**).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 55.83.*
- *Bender's Federal Practice Forms* Form Nos. 60:10-60:102.
- *Fed. R. Civ. P. 60(b).*

[1] Applying for Entry of Default Judgment With Clerk; Prerequisites

Subsequent to an entry of default, the clerk of court may enter a default judgment. However, the clerk's authority to enter a default judgment is restricted to those instances where the judgment is a purely ministerial act. In all other cases, default judgment may be rendered only by the court. *See Combs v. Coal & Mineral Mgmt. Services, Inc., 105 F.R.D. 472, 474 (D.D.C. 1984)* . Before a clerk can enter a judgment of default, the following prerequisites must be met:

1. Plaintiff's damages are for a sum certain or a sum that can be made certain by computation;

2. Defendant's default is based on a failure to appear;

3. Defendant is not a minor or an incompetent person;

4. Defendant is not the United States or an officer or agency of the United States; and

5. Plaintiff requests the clerk to enter judgment, and provides an affidavit of the amount due.

When a plaintiff properly requests default judgment and all the requirements listed above have been met, the clerk is required to enter the judgment for damages and costs in a determined amount.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 55.20 -55.25.*
- *Bender's Federal Practice Forms* Form Nos. 55:10-55:15.
- *Fed. R. Civ. P. 55(b).*

[a] Asserting Claim for "Sum Certain" Required for Obtaining Entry of Default Judgment From Clerk

A clerk may enter default judgment only if the asserted claim is for a sum certain or for a sum that can be made certain by computation. Accordingly, a claim must be liquidated for a fixed and indisputable amount or discernible from some method of calculation. There must be no doubt as to the amount to which a plaintiff is entitled. Moreover, a default judgment must not differ from or exceed the amount demanded in the pleadings. If it does, the clerk should not enter a default. *Fed. R.Civ. P. 54(c).*

In most cases, judicial determination is necessary to decide the extent of injury or the valuation of the plaintiff's loss. Whenever there is uncertainty or a need for an evidentiary showing to ascertain the amount of damages, the clerk should not enter a default judgment. Rather, the court should hold a hearing to determine the correct amount of damages. The following are examples of claims in which the amount was for a sum certain, or could be made certain by computation:

1. A claim based on a loan, when the unpaid amount of the loan could be calculated based on loan documents and other information provided by the plaintiff (*Franchise Holding II, LLC v. Huntington Rest.'s Group, 375 F.3d 922, 928-929 (9th Cir. 2004))* ;

2. A claim to collect on an unpaid certificate of deposit, where it was the exact amount of the plaintiff's total losses including prejudgment interest (*Brockton Sav. Bank v. Peat, Marwick, Mitchell & Co., 771 F.2d 5, 13 (1st Cir. 1985))* ; and

3. A claim for recovery of a deposit (*Thorpe v. Thorpe, 364 F.2d 692, 693-694 (D.C. Cir. 1966))* .

Warning:

A claim for attorney's fees will seldom be considered a "sum certain" because a judicial determination is usually required in deciding whether to award fees and, if so, in what amount. Likewise, punitive damages are generally considered uncertain because they must be decided by the court. Similarly, where the amount of prejudgment interest is discretionary, and the court must make a determination, prejudgment interest will not be considered a "sum certain."

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.)* §§ 54.152, 55.20,*55.71*.
- *Bender's Federal Practice Forms* Form Nos. 55:10-55:15.
- *Fed. R. Civ. P. 55(a)*.

[b] Clerk May Enter Judgment Only If Defaulting Party Failed to Appear in Action

The clerk may enter a default judgment only when the defendant has defaulted as a result of failing to appear in the action. *Fed. R. Civ. P. 55(b)(1)*. Any other entry of default by the clerk is void. Therefore, if a party makes any kind of appearance in the action, the court must be the one to enter the default judgment.

Courts have further limited the entry of default judgments by clerks by broadly interpreting the concept of "appearance." Any formal submission to the court, with respect to a case, thus may be viewed as an appearance. *Franchise Holding II, LLC v. Huntington Rest.'s. Group, 375 F.3d 922, 927 (9th Cir. 2004)* . An informal action, such as communication between the parties, may also be deemed an appearance if the defendant displays a clear purpose to defend the action.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 55.21*.
- *Bender's Federal Practice Forms* Form Nos. 55:10-55:15.
- *Fed. R. Civ. P. 55(b)(1)*.

[c] Clerk May Not Enter Default Judgment Against Minors or Incompetents, the United States, or Uniformed Servicemembers

The clerk is not authorized to enter default judgment against a minor or incompetent person. A district court judge can render a decision in this circumstance, however, but only if the defendant is represented by a general guardian, conservator, or other fiduciary. *See Fed. R. Civ. P. 55(b)(1)*.

Moreover, the clerk may not enter default judgment against the United States government, its officers or its agencies. In addition to filing an application seeking entry of default judgment with the court, the plaintiff must establish a claim or right to relief by submitting supporting evidence that satisfies the court. *Fed. R. Civ. P. 55(d)*.

Similarly, if the defendant is a member of the uniformed services, the Servicemembers Civil Relief Act (*50 U.S.C. App. § 521*) provides that a court, not the clerk, must enter a default judgment. Furthermore, before a default judgment can be entered against a member of the uniformed services by the court, the movant must file an affidavit stating that the defendant is a member of the uniformed services.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 55.22 -55.25, 55.90 -55.91*.

- *Bender's Federal Practice Forms* Form Nos. 55:10- 55:15, 55:60-55:70.
- *50 U.S.C. App. § 521.*
- *Fed. R. Civ. P. 55(b)* and *(d).*

[2] Applying to Court for Entry of Default Judgment

In all cases where the clerk cannot enter judgment of default, a party must apply to the court. Unlike the clerk, the court may grant default judgment when:

1. Plaintiff's claim is not for a sum that is certain or that can be computed with certainty (*see § 10.07[1][a] above*);

2. Defendant has appeared in the action (*see § 10.07[1][b] above*);

3. Defendant is a minor or incompetent person (*see § 10.07[1][c] above*);

4. Defendant is the United States or an agency or officer of the United States (*see § 10.07[1][c] above*).

[a] Filing Application for Entry of Default Judgment and Supporting Affidavits

Generally, a plaintiff seeking default judgment from the court should file the same application and supporting documents that it would file in order to obtain a default judgment from the clerk, but specific requirements may vary according to jurisdiction. Therefore, counsel should consult local district court rules and individual judge's rules before submitting an application. As a general rule, the application and supporting affidavits should:

1. State the date the clerk entered default against the defendant;

2. State facts and equitable factors establishing that plaintiff is entitled to default judgment against the defendant under *Fed. R. Civ. P. 55(b)(2)*;

3. Request relief that is within the scope of the plaintiff's pleadings; and

4. Indicate whether the defendant has appeared and is, thus, entitled to notice of the application and hearing under *Fed. R. Civ. P. 55(b)(2)*; establish that notice has been served on the defendant, if required.

Circuit Split:

Fed. R. Civ. P. 55(b)(2) expressly states that the plaintiff must serve written notice upon all parties that have appeared in the action, at least 7 days before the hearing on the application. However, circuits are split on the issue of whether a formal appearance is necessary to satisfy the notice requirement. According to most of the circuits, a defendant that failed to file responsive pleadings with the court within the 21-day period but otherwise indicated to the plaintiff its intention to defend the action, is still entitled to notice under *Fed. R. Civ. P. 55. See, e.g., Rogers v. Hartford Life & Accident Ins. Co., 167 F.3d 933, 936-937 (5th Cir. 1999)* ; *Civic Ctr. Square v. Ford (In re Roxford Foods, Inc.), 12 F.3d 875, 881 (9th Cir. 1993)* . By contrast, the Seventh Circuit has strictly construed the term "appearance" to require the defendant to have made some sort of "presentation or submission" to the district court. *Zuelzke Tool & Eng'g Co. v. Anderson Die Castings, Inc., 925 F.2d 226, 230 (7th Cir. 1991)* .

[b] Determining Default Judgment Damages; Court May Hold Evidentiary Hearing

Fed. R. Civ. P. 55 authorizes the district court to conduct hearings when necessary to enter or effectuate judgment. Although the court may hold a hearing to: (1) conduct an accounting; (2) determine the amount of damages; (3) establish the truth of any allegation by evidence; or (4) investigate any other matter, as a practical matter, the court rarely needs to hold a hearing on issues other than damages. *See Fed. R. Civ. P. 55(b)(2)*. If, in its application and supporting documentation, a plaintiff did not submit a computation of damages, the district court is likely to request the plaintiff to establish the damages it seeks in an evidentiary hearing. *Dundee Cement Co. v. Howard Pipe & Concrete Products, Inc., 722 F.2d 1319, 1323 (7th Cir. 1983)* (citing **Moore's**). Furthermore, *Fed. R. Civ. P. 55* authorizes the court to refer inquiries into the amount of damages or other matters to a magistrate judge or master.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 55.20 -55.35.*
- *Fed. R. Civ. P. 55(b)(2).*

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Chapter 10 DEFAULT JUDGMENT
PART D: MOVING TO SET ASIDE ENTRY OF DEFAULT AND DEFAULT JUDGMENT

1-10 Moore's AnswerGuide: Fed Civil Motion Practice § 10.07

§ 10.07 Moving to Set Aside Entry of Default and Default Judgment

Although it does not provide specific procedural requirements, *Fed. R. Civ. P. 55* authorizes a party to ask the court to set aside a default and default judgment entered against it. *See § 10.07[1] below*. Parties should be aware of the fact that, as a matter of public policy, default judgment is disfavored by the courts because it does not resolve the dispute on the merits. Thus, *Fed. R. Civ. P. 60(b)* expressly states six grounds upon which the district court may relieve a party from default judgment. *See § 10.07[2] below*.

[1] Moving to Set Aside Entry of Default

[a] Asking Court to Set Aside Entry Of Default for "Good Cause"

A district court may set aside an entry of default for "good cause," thereby excusing the party's default, permitting it to file a responsive pleading, and allowing the case to proceed on the merits. *Fed R. Civ. P. 55*. The phrase "good cause" is not defined by *Fed. R. Civ. P. 55*, but rather, it depends upon the factual circumstances of each case and the discretion of the court. As a general rule, courts construe "good cause" liberally in favor of relief from default. Thus, they are more likely to grant relief than to proceed to a default judgment. In determining whether or not good cause exists, the court will often consider the following factors:

1. Whether the default was willful or culpable;

2. Whether granting relief from the default would prejudice the opposing party; and

3. Whether the defaulting party has a meritorious defense.

The factors listed above are not intended to be used as a mechanical formula or *per se* rule. Rather, the district court generally considers them in determining whether to grant relief from default judgment because of mistake, inadvertence, surprise, or excusable neglect. The moving party bears the burden of showing that the above factors favor the setting aside of the default or default judgment. Moreover, courts will often consider whether a party acted promptly to correct the default after learning of the entry of default or default judgment.

Warning:

If a party has not been served with process, it is entitled to have a default or default judgment set aside without having to show "good cause" because the district court lacks jurisdiction to grant the default or default judgment.

Although *Fed. R. Civ. P. 55* provides that a court may set aside an entry of default, it does not impose procedural requirements for filing motions with the court. Thus, a party seeking relief from an entry of default should follow the requirements for motions requesting court orders set forth in *Fed. R. Civ. P. 7*, and file a written motion asking the court to set aside the default and stating the grounds for the relief in terms of the "good cause" factors listed above, as well as any other reasons why relief should be granted. *See § 1.05 above*.

If a court decides not to set aside the default, the plaintiff may move for default judgment, if it has not already done so. The district court's decision to grant or deny a motion to set aside an entry of default is not an appealable final order, but may be reviewed on appeal of a default judgment or any other final judgment in the action.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 55.70 -55.71.*
- *Bender's Federal Practice Forms* Form Nos. 55:40-55:70.
- *Fed. R. Civ. P. 55(a).*

[i] Determining Whether to Set Aside Default Due to Defaulting Party's Willful Acts

In determining whether to set aside an entry of default (or default judgment), a court must consider whether a party acted willfully in defaulting. If a party's default is the result of inadvertence or neglect, the defaulting party should include in its motion a reasonable explanation for the default, and the court will consider whether the action is reasonable or excusable. Brief delays in filing, when the defending party is ready to answer and proceed, are typically considered excusable. In addition, the court is generally lenient in evaluating whether negligent and even culpable conduct should be excused, especially when the plaintiff has suffered no prejudice and a meritorious defense is shown.

On the other hand, if a party's default involves a deliberate strategy, such as a concerted attempt to avoid being served with process, then the court will most likely deny relief and is not required to make a finding of bad faith before it denies the defaulting party's motion. Counsel should also take note that a court may not always attribute an attorney's conduct to his or her client. Therefore, a court is not required to set aside a default or default judgment if the default was the result of the attorney's neglect. Nonetheless, courts tend not to attribute an attorney's gross negligence to his or her client, because to do so would not be in the interests of justice.

[ii] Determining Whether to Set Aside Default Due to Prejudice to Plaintiff

When deciding whether to set aside a default (or default judgment), a court will also consider whether the plaintiff would suffer undue prejudice if the default or default judgment were set aside. A district court is not obligated to set aside an entry of default or default judgment on the basis of minor prejudice. Thus, prejudice is not considered a significant factor unless it is greater than what would be experienced by the ordinary litigant. For instance delay, by itself, would not result in undue prejudice, but undue prejudice may occur if the delay causes or results in: (1) loss of

evidence; (2) increased difficulty of conducting discovery; or (3) increased opportunity for fraud and collusion.

If the district court does grant the defaulting party's motion, and sets aside the entry of default, it has the authority to enforce conditions that will ameliorate prejudice, such as requiring the defaulting party to post security or even to pay the plaintiff's attorney's fees incurred in obtaining the default.

[iii] Determining Whether to Set Aside Default When No Meritorious Defense Is Asserted

Unlike the prejudice factor, the absence of a meritorious defense to the plaintiff's claims is, by itself, a sufficient reason for the district court to deny a motion to set aside an entry of default or default judgment. The test for deciding whether a meritorious defense has been asserted is to determine whether the defaulting party's proposed defense is legally cognizable and, if proven at trial, would constitute a complete defense to the plaintiff's claims. While the defaulting party's burden of setting forth a meritorious defense is not high, mere denials or conclusory allegations are not sufficient.

If it determines that the defaulting party has asserted a meritorious defense, the district court will most likely grant relief from an entry of default or default judgment so that the case can proceed on the merits.

[b] Filing Motion to Set Aside Default; Timing Requirements

Fed. R. Civ. P. 55 does not provide a time limit for bringing a motion to set aside an entry of default. Nevertheless, a party should file a motion to set aside any entry of default as soon as possible after the default because it would not be considered an abuse of the district court's discretion to deny a motion that was filed after an unreasonable delay.

Furthermore, the timeliness of a party's motion to set aside a default factors into the court's determination of whether reopening the default will prejudice the plaintiff. The longer the delay before reopening the default, the more likely the court will find that the delay caused undue prejudice to the plaintiff.

Warning:

Fed. R. Civ. P. 60 imposes a time limit placed on motions to set aside default judgment. If a party acts promptly to seek relief from default before entry of default judgment, courts will apply the more lenient "good cause" standard in deciding whether to grant relief, rather than the more stringent standard of *Fed. R. Civ. P. 60(b)* for reopening default judgments.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 55.70 -55.71.*
- *Bender's Federal Practice Forms* Form Nos. 55:40-55:70.
- *Fed. R. Civ. P. 55.*
- *Fed. R. Civ. P. 60(b).*

[c] Granting Motion to Set Aside Default; Court May Impose Conditions on Defaulting Party to Avoid Prejudicing Plaintiff

Even if it does grant a party's motion to set aside a default, a district court has the authority to impose reasonable conditions upon the defaulting party to avoid unduly prejudicing the plaintiff. For example, a court may use its power to

require the defaulting party to post security for payment of all or part of an eventual judgment. Similarly, the court may impose payment of reasonable attorney's fees and costs incurred by the plaintiff in obtaining the default or default judgment.

In considering whether to impose punitive conditions upon the defaulting party, the court will consider whether a party acted willfully or in bad faith in defaulting. Accordingly, the district court must make a factual finding sufficient to permit appellate review of the reasonableness of any conditions it imposes upon the defaulting party.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 55.70 -55.71.*
- *Bender's Federal Practice Forms* Form Nos. 55:40-55:70.
- *Fed. R. Civ. P. 55.*
- *Fed. R. Civ. P. 60(b).*

[2] Motion to Vacate Default Judgment

Fed. R. Civ. P. 55 gives district courts the authority to vacate default judgments. Appellate courts have traditionally disfavored default judgments because of the strong policy in favor of resolution of disputes on the merits. Thus, even though the standard of review for default judgment is abuse of discretion, appellate courts are more willing to find abuse when the district court has denied relief from a default judgment rather than if it granted relief.

The district court has inherent power and discretion to relieve a party from a default judgment on "just terms" so as to avoid any prejudice to the non-defaulting party. *Fed. R. Civ. P. 60(b)*, which governs judgments, sets out the following six grounds the court may consider for relieving a party from a judgment of default:

1. Mistake, inadvertence, surprise, or excusable neglect;

2. Newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under *Fed. R. Civ. P. 59(b)*;

3. Fraud, misrepresentation, or other misconduct of an adverse party;

4. The judgment is void;

5. The judgment has been satisfied, released, or discharged, or is based on an earlier judgment that has been reversed or vacated, or it is no longer equitable to apply the judgment prospectively; and

6. Any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b).

If a motion for relief from default judgment is based on mistake, inadvertence, surprise, or excusable neglect, which is the ground most commonly argued by the defaulting party, the court will apply the factors for "good cause" discussed in *§ 10.07[1] above* (i.e., whether the party's conduct that led to the default was willful or culpable; whether reopening the judgment will prejudice the adverse party; and whether the defaulting party has a meritorious defense). *See §*

10.07[1][a][iii] above. As a general rule, courts do not construe the sixth catch-all factor broadly, and a party bringing a motion on this ground must show extraordinary circumstances indicating the party's lack of willful misconduct, particularly if there was any delay in bringing the motion.

Furthermore, a district court must vacate a default judgment that has been entered by a court lacking subject matter or personal jurisdiction, because any judgment issued by a court lacking jurisdiction is void. When a party moves to vacate a default judgment against it by challenging personal jurisdiction, the original plaintiff normally retains the burden of proving jurisdiction. *General Contracting & Trading Co., LLC v. Interpole, Inc., 899 F.2d 109, 114-116 (1st Cir. 1990)* . However, the Seventh Circuit has held that, in cases where the defaulting party had notice of the action in which the default judgment was rendered, the defaulting party bears the burden of proving that the court lacked jurisdiction in a subsequent Rule 60(b) motion for relief. *Bally Export Corp. v. Balicar, Ltd., 804 F.2d 398, 401 (7th Cir. 1986)* .

Timing:

A motion to vacate a default judgment must be brought within a reasonable time after the court grants the judgment. *Fed. R. Civ. P. 55(c)*, *60(c)(1)*. Depending on the facts and circumstances of the case, some delay may be considered reasonable. A defaulting party should be forewarned, however, that if it is basing its motion to vacate a default judgment on any of the first three of the six grounds set forth in *Fed. R. Civ. P. 60(b)*, the party must bring the motion no later than one year after the judgment has been entered. Conversely, a party may collaterally attack at any time a default judgment that is void due to lack of jurisdiction. *Fed. R. Civ. P. 60(b)(4)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 55.80 -55.84*.
- *Bender's Federal Practice Forms* Form Nos. 60:10-60:102.
- *Fed. R. Civ. P. 55*.
- *Fed. R. Civ. P. 60(b)*.

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Chapter 11 TRIAL MOTIONS

1-11 Moore's AnswerGuide: Fed Civil Motion Practice 11.syn

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Chapter 11 TRIAL MOTIONS
PART A: PROCEDURAL CONTEXT

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§ 11.01 Procedural Context--Trial Motions

So as not to be caught off guard by critical issues that are likely to arise shortly before and during trials, civil trial attorneys must familiarize themselves with the various motions that are available under the Federal Rules of Civil Procedure, particularly *Fed. R. Civ. P. 39 through 53*, as well as the local rules of the district courts where they practice. Clearly, motions involving the admission of evidence have the potential to shape the course and the eventual outcome of a trial. A trial attorney's skilled use of motions in limine will preclude parties, their counsel, and witnesses from communicating or disclosing to jurors or prospective jurors inadmissible and prejudicial matters.

Not surprisingly, in every case, issues regarding witnesses will undoubtedly arise--from witness unavailability which sparks the need for a continuance, to the quashing or enforcing of a trial subpoena, to the necessity of using an interpreter, to the desire to exclude witness testimony--all of these situations can be managed through motion practice in accordance with the Federal Rules.

However, attorneys may wish to consider bringing motions on procedural issues as well. Motions to consolidate cases or bifurcate issues within the same case may facilitate efficient and expedient adjudications of claims, thereby saving lawyers' time and clients' money. Furthermore, under certain circumstances, an attorney may decide to try a case before an advisory jury or refer the case to a master. Motions for judgment as a matter of law and dismissal of parties during trial bring finality to a case.

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PART B: MOTIONS TO CONSOLIDATE, SEVER, OR BIFURCATE

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§ 11.02 Motions for Consolidation, Severance, or Bifurcation

Although attorneys generally bring motions to consolidate at an early stage in the litigation, occasionally these motions need to be reconsidered shortly before or even during a trial. The discovery process will often lead to a change in circumstances that could justify a motion to consolidate cases for trial, or to consolidate cases which were previously consolidated for discovery only, or to sever those previously consolidated for trial. On the other hand, motions to bifurcate, whether brought by a party or raised sua sponte by the court, are generally addressed shortly before trial.

The court may order a joint trial of any or all the matters in the actions when two or more actions involve a common question of law or fact. *Fed. R. Civ. P. 42* authorizes the court to conduct two distinct procedures, consolidation under *Fed. R. Civ. P. 42(a)* and bifurcation under *Fed. R. Civ. P. 42(b)*, that attempt to reach the same goal--the most economical, efficient, and expedient disposition of claims.

The standard for consolidating cases is simply that they involve "a common question of law or fact." The presence of overlapping parties increases the chances of consolidation. Claims with similar interests, tangible or intangible, property interests, or accidents are all candidates for consolidation for trial.

Consolidation is used in a broad range of cases brought in federal courts including cases originating in other forums such as the U.S. Bankruptcy Court, Admiralty Court, Court of Claims, and cases involving securities litigation, asbestos cases, and air crash cases. in mass litigation cases, a court may utilize a bellwether trial in order to achieve a more efficient and expedient adjudication of plaintiffs' claims by consolidating a smaller group of representative plaintiffs of sufficient size to achieve statistical significance. *In re Chevron U.S.A., 109 F.3d 1016 (5th Cir. 1997)* .

Bifurcation is distinguished from consolidation in that it segregates the introduction of evidence for distinct issues within a single action. Bifurcation is considered the exception rather than the rule. The district court, however, does have broad discretion to bifurcate a trial. *Exxon Co. v. Sofec, Inc., 54 F.3d 570, 575 (9th Cir 1995)* , *aff'd, 517 U.S. 830 (1996)* .

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§ 11.03 Checklist for Motion to Consolidate or Opposing Motion to Consolidate

☐ If seeking to consolidate, first determine if motion for consolidation is appropriate under *Fed. R. Civ. P. 42(a)* by asking the following questions:

- ○ Are the cases pending before same court or district? *See § 11.04[1] below*.
- ○ Are there common questions of law or fact? *See § 11.04[2] below*.
- ○ Will consolidation avoid inconsistent results? *See § 11.04[3] below*.
- ○ What are the risks of prejudice, undue advantage, or possible jury confusion? *See § 11.04[4] below*.
- ○ Will consolidation conserve judicial resources? *See §§ 11.04[5]* and *11.06[3] below*.
- ○ Will consolidation delay or reduce the time to resolve the cases? *See § 11.06[4] below*.

☐ If opposing motion for consolidation:

- ○ Review grounds for opposing consolidation. *See §§ 11.05 -11.06 below*.
- ○ Determine whether objection can be based on procedural posture of cases.

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§ 11.04 Reviewing Grounds for Consolidation

[1] Cases to Be Consolidated Must Be Properly Before Same Court

Attorneys should file motions to consolidate in all of the pending cases. The cases to be consolidated must be properly before the same court. *Fed. R. Civ. P. 42*; *In re Air Crash Disaster at Detroit Metro. Airport, 737 F. Supp. 391, 392-393 (E.D. Mich. 1989)* . The district court has broad discretion to consolidate actions pending in the same district, even if those actions are pending before different judges. *Investors Research Co. v. United States District Court for Cent. Dist., 877 F.2d 777 (9th Cir. 1989)* ; *Mills v. Beech Aircraft Corp., 886 F.2d 758 (5th Cir. 1989)* .

Local rules may require that a notice of related cases be filed with the filing of a lawsuit indicating whether there are any other actions that were previously filed or are currently pending with substantially similar questions of law or fact. Generally, they are consolidated into the case with the lowest number, but local rules may vary. Thus, the movant should check the local district rules and individual judges' rules to determine which judge will be assigned the consolidated matters.

Strategic Point:

Actions filed in another forum may be transferred to a court that may then consolidate them. A district court, in the interest of justice and for the convenience of the parties and witnesses, may transfer any civil action to any other district or division where it originally might have been brought. *28 U.S.C. § 1404(a).*

[2] Common Questions of Law or Fact Must Exist in Cases to Be Consolidated

The landmark Supreme Court case on consolidation emphasizes the factor that the cases to be consolidated must involve a common question of law or fact. *See, e.g.*, *Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 292, 12 S. Ct. 909, 36 L. Ed. 706 (1892)* (consolidating two cases with a common question of insurance coverage).

[3] Avoiding Inconsistent Results by Consolidating Cases

A significant factor the court may consider is whether consolidation will avoid inconsistent results. For example, a single jury's determination of the relative fault between parties involving comparative fault/contribution claims or the amount of damages attributable to separate accidents involving an alleged single indivisible injury to a same party could prevent the injustice of inconsistent results. *See International Paving Systems, Inc. v. Van-Tulco, Inc., 806 F. Supp. 17, 22 (E.D.N.Y. 1992)* (consolidating construction litigation with same factual issues of defective condition); *Waste Distillation Technology, Inc. v. Pan Am. Resources, Inc., 775 F. Supp. 759, 761 (D. Del. 1991)* (consolidating two lawsuits alleging various business torts, including fraudulent acquisition of trade secrets, shared the same plaintiff, identity of facts, same witnesses and evidence).

[4] Risk of Juror Confusion or Prejudice by Consolidating Cases

The risk of jury confusion is greater when consolidation produces too large of a body of evidence or the parties' situations are too diverse. *See Debruyne v. National Semiconductor Corp. (In re Repetitive Stress Injury Litig.), 11 F.3d 368, 373 (2d Cir. 1993)* ; *Johnson v. Celotex Corp., 899 F.2d 1281, 1285 (2d Cir. 1990)* . However, the risk of prejudice and juror confusion from consolidating separate cases must be weighed against the risk of inconsistent adjudications if they are not consolidated. *Johnson v. Manhattan R. Co., 289 U.S. 479, 496-497, 53 S. Ct. 721, 77 L. Ed. 1331 (1933)* (landmark case); *Zacky Farms v. FMC Corp.*, 2001 U.S. Dist. LEXIS 24255, at *14 (E.D. Cal. 2001) ; *Johnson v. Celotex Corp., 899 F.2d 1281, 1285 (2d Cir. 1990)* (risks of prejudice and confusion may be reduced by the use of cautionary instructions to the jury and verdict sheets outlining the claims of each plaintiff).

[5] Burden on Parties, Witnesses, and Judicial Resources by Consolidating Cases

Generally, when ruling on a motion for consolidation, the court will consider whether consolidating cases will economize the resources of the parties and the court. *Katz v. Realty Equities Corp., 521 F.2d 1354, 1359 (2d Cir. 1975)* ; *In re Repetitive Stress Injury Litig., 11 F.3d 368, 373 (2d Cir. 1993)* ; *Frazier v. Garrison I.S.D., 980 F.2d 1514, 1532 (5th Cir. 1993)* ; *Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1495-1497 (11th Cir. 1985)* ; *Certified/LVI Envtl. Servs. v. PI Constr. Corp., 2003 U.S. Dist. LEXIS 5474 (W.D. Tex. 2003)* .

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§ 11.05 Opposing Consolidation; Motion May Be Brought by Any Party

Any party in an action proposed for consolidation may oppose a motion to consolidate. *See, e.g., Zacky Farms v. FMC Corp., 2001 U.S. Dist. LEXIS 24255, at *12 (E.D. Cal. 2001)* (defendant in first action opposed consolidation, as did plaintiff in the second action).

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§ 11.06 Reviewing Grounds for Opposing Motion for Consolidation

[1] Common Issues of Law or Fact Do Not Require Consolidation

The existence of common issues of law or fact in two or more cases does not necessarily require consolidation of those cases. The court must evaluate each case on its own facts to determine whether the anticipated benefits of a consolidated complaint outweigh potential prejudice to the parties. *See Zacky Farms v. FMC Corp., 2001 U.S. Dist. LEXIS 24255, at *11 (E.D. Cal. 2001)* ; *Servants of the Paraclete v. Great Am. Ins. Co., 866 F. Supp. 1560, 1572-1573 (D.N.M. 1994)*.

[2] Consolidating Cases Will Cause Prejudice

The court must ensure that parties' rights are not adversely affected by consolidation of cases. *Johnson v. Manhattan R. Co., 289 U.S. 479, 496-497, 53 S. Ct. 721, 77 L. Ed. 1331 (1933)* (landmark case). A party may be prejudiced if its claims or defenses are substantially different from the other consolidated parties. This is especially true when the management of the consolidated case is vested in a lead counsel who is likely to focus on the interests of the majority to the detriment of the minority. *Garber v. Randell, 477 F.2d 711, 714-716 (2d Cir. 1973)* .

[3] Consolidating Cases Will Cause Jury Confusion

When ruling on a motion for consolidation, the court may consider weighing the likelihood of jury confusion against the potential improvement in efficiency to be achieved through consolidation. *See Molever v. Levenson, 539 F.2d 996, 1003 (4th Cir. 1976)* (declining consolidation because 4500 pages of transcript for 15 day jury trial in complex consolidated cases would overwhelm jury); *In re Consolidated Parlodel Litig., 182 F.R.D. 441, 447 (D.N.J. 1998)* (consolidation would be unfair to jury and parties when it requires jurors to assimilate and analyze complicated testimony in each case and apply factual findings to a host of complex legal principles within each issue and each case).

[4] Consolidating Cases Will Cause Delay

The court may also decline to consolidate cases when there is a considerable difference in trial readiness among the parties. *Mills v. Beech Aircraft Corp., 886 F.2d 758, 762 (5th Cir. 1989)* (declining consolidation when only one party ready for trial).

[5] Consolidating Cases Will Cause Burden on Parties, Witnesses, and Judicial Resources

In deciding whether to consolidate cases, the court will often consider whether additional time will be required to try multiple lawsuits consolidated for trial or will there be greater inconvenience and expense to all concerned. *See Zacky Farms v. FMC Corp.*, 2001 U.S. Dist. LEXIS 24255, at *14-*15 (E.D. Cal. 2001) ; *Debruyne v. National Semiconductor Corp. (In re Repetitive Stress Injury Litig.), 11 F.3d 368, 371-373 (2d Cir. 1993)* (declining consolidation when it would likely increase administrative difficulties).

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§ 11.07 Understanding Consequences of Consolidation

[1] Consolidated Cases Remain Separate

Cases do not lose their separate identity merely because of consolidation. *International Soc. for Krishna Consciousness, Inc. v. Los Angeles, 611 F. Supp. 315, 319 (C.D. Cal. 1984)* . Consolidation is permitted as a matter of convenience and economy in administration of justice, but it does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit, parties in another. *Johnson v. Manhattan R. Co., 289 U.S. 479, 496-497, 53 S. Ct. 721, 77 L. Ed. 1331 (1933)* (landmark case); *Katz v. Realty Equities Corp., 521 F.2d 1354, 1359 (2d Cir. 1975)* (consolidation avoids merging of rights or defenses of various parties).

Moreover, consolidation does not affect diversity jurisdiction because consolidation does not make parties in one suit parties in the other. *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co., 819 F.2d 1519, 1523 (9th Cir 1987)* .

[2] Determining Choice of Law Issues in Consolidated Cases

In diversity cases, the forum's choice of law rules apply. *See Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)* . When choice of law rules conflict in consolidated cases, the court applies a balancing test to determine whether the forum state's interest outweighs the transferor state's interest. *Boardman Petroleum v. Federated Mut. Ins. Co., 135 F.3d 750 (11th Cir. 1998)* .

[3] Right to Jury Trial Not Affected by Consolidation

Consolidation under *Fed. R. Civ. P. 42* does not alter a party's right to a jury trial. *In re U.S. Financial Sec. Litig., 609 F.2d 411, 428 n.58 (9th Cir. 1979)* . When two cases are consolidated for trial, the right to jury trial attaches to all claims, even those in the lawsuit in which a jury trial was waived. *Cedars-Sinai Med. Ctr. v. Revlon, Inc., 111 F.R.D. 24, 31-32 (D. Del. 1986)* ("[w]here a jury is the trier of fact on common issues of fact, it should be the sole determiner of those issues").

Strategic Point:

Generally, in consolidated cases, the number of peremptory challenges allotted to each party is the same number they would have had if there had been no consolidation. *Fedorchick v. Massey-Ferguson, Inc., 577 F.2d 856 (3d Cir. 1978)* .

[4] Court May Appoint Lead Counsel When Consolidating Cases

When consolidating two or more cases, the court may need to appoint lead counsel for the consolidated cases. *See In re Wirebound Boxes Antitrust Litigation, 128 F.R.D. 256, 258 (D. Minn. 1989)* (plaintiffs' lead counsel should play a vital role in assuring that the litigation is conducted efficiently and effectively); *In re Ivan F. Boesky Sec., 948 F.2d 1358, 1364-1368 (2d Cir. 1991)* (broad powers of lead counsel examined).

[5] Only One Set of Witness Fees Allowed as Costs in Consolidated Cases

When cases are consolidated under *Fed. R. Civ. P. 42(a)*, the prevailing party or parties can recover only one set of witness fees as costs, because the witnesses testify only once. *Reynolds Metals Co. v. Yturbide, 258 F.2d 321, 335 (9th Cir. 1958)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 42.10 -42.14.*
- *Bender's Federal Practice Forms* Form Nos. 42:1-42:6, 42:10- 42:14.
- *Federal Litigation Guide PP 28.01 -28.12, 28.100.*
- *Federal Trial Guide* §§ 5.10, 5.11.
- *Fed. R. Civ. P. 21* (severance).
- *Fed. R. Civ. P. 42(a)* (consolidation).

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§ 11.08 Motion for Bifurcation

A district court may separate an issue from others on its own motion and segregate the introduction of evidence as to that issue if the court determines that bifurcation would save trial time or effort or make the trial of other issues unnecessary. *Fed. R. Civ. P. 42(b)*; *see In re Beverly Hills Fire Litig., 695 F.2d 207, 216 (6th Cir. 1982)* (causation bifurcated for separate trial); *Treece v. Hochstetler, 213 F.3d 360, 365 (7th Cir. 2000)* (upholding separate trials in § 1983 case). Whether to bifurcate a trial rests with the sound discretion of the trial court. *Rodin Properties-Shore Mall, N.V. v. Cushman & Wakefield, Inc., 49 F. Supp. 2d 709, 721 (D.N.J. 1999)* .

Severance under *Fed. R. Civ. P. 21*, which divides a single suit into two or more independent actions, is distinguishable from the concept of bifurcation as authorized by *Fed. R. Civ. P. 42(b)*. Severed cases are completely distinct from one another, as if the complaints had originally been filed separately. Thus, each of the severed actions proceeds independently of the other and separate judgments must be entered to dispose of each case. On the other hand, bifurcation under *Fed. R. Civ. P. 42(b)* leaves the lawsuit intact as a single action, but allows the court to hear and determine one or more issues without trying all of the issues at the same hearing. Moreover, a single final judgment is entered in a bifurcated action.

Severance is appropriate when the suit involves two or more separate and distinct causes of action, each of which might properly be tried and determined if it were the only claim in controversy and which are logically separable. Severance, for example, might involve a counterclaim or multiple claims that had been consolidated under *Fed. R. Civ. P. 42(a)* with one or more other cases. Bifurcation, for example, might involve separate trials for the issues of liability and damages, or different types of damages, such as compensatory versus punitive damages.

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§ 11.09 Checklist for Motion for Bifurcation

☐ Determine whether there are separate claims with separate issues. *Fed. R. Civ. P. 42(b).*

- ○ Determine whether separate trials will further convenience and economy. *See § 11.10 below.*
- ○ Determine whether separate trials will cause prejudice. *See § 11.10 below.*

☐ If opposing motion to bifurcate under *Fed. R. Civ. P. 42(b)*, consider the following:

- ○ Review grounds for objecting to opponent's motion for separate trial. *See § 11.11 below.*
- ○ Check local rules for timing and case management requirements.
- ○ Timely respond to bifurcation motion.

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§ 11.10 Complying With Rule 42(b) Requirements for Bifurcation

[1] Determining Whether Action Is Amenable to Bifurcation

Before moving for separate trials, counsel should evaluate the case carefully to determine whether it is appropriate for bifurcation. When ruling on a motion for separate trials, the court will consider the following factors per *Fed. R. Civ. P. 42(b)*:

1. Judicial efficiency;

2. Possibility of needless delay;

3. The risk of jury confusion;

4. Prejudice to each party; and

5. The overlap of evidence and witnesses between the two trials.

[2] Complying With Rule 42(b); Only One Factor Must Be Satisfied

Only one of *Fed. R. Civ. P. 42(b)*'s requirements (convenience, avoidance of prejudice, or expediting and economizing) must be satisfied for the court to bifurcate a trial. *See Pinal Creek Group v. Newmont Mining Corp., 218 F.R.D. 652, 654 (D. Ariz. 2003)* .

[3] Moving Party Bears Burden of Proving Why Bifurcation Is Justified

The moving party bears the burden of establishing that separate trials are justified. *Cordero v. AT&T, 190 F.R.D. 26, 29 (D.P.R. 1999)* (declining bifurcation because movant failed to show risk of jury confusion or prejudice); *Spectra-Physics Lasers, Inc. v. Uniphase Corp., 144 F.R.D. 99, 101 (N.D. Cal. 1992)* (when moving party failed to meet burden of proving otherwise, court found that bifurcation would result in prejudice, given that two trials would inevitably cause delay in resolution of case); *Buscemi v. Pepsico, Inc., 736 F. Supp. 1267, 1271 (S.D.N.Y. 1990)* .

[4] Bifurcating Certain Types of Cases May Be Beneficial

[a] Tort Actions

In tort actions, it often is more efficient to separate the liability trial from the damages trial. *See, e.g., Sanford v. Johns-Manville Sales Corp., 923 F.2d 1142, 1145-1146 (5th Cir. 1991)* (asbestosis cases); *Lis v. Robert Packer Hosp., 579 F.2d 819, 824 (3d Cir. 1978)* (medical malpractice case); *Pinal Creek Group v. Newmont Mining Corp., 218 F.R.D. 652, 654 (D. Ariz. 2003)* (CERCLA); *Bates v. UPS, 204 F.R.D. 440, 448-449 (N.D. Cal. 2001)* (civil rights action).

[b] Punitive Damages

Bifurcation of punitive damages is favored in some cases. *Mattison v. Dallas Carrier Corp., 947 F.2d 95, 110 (4th Cir. 1991)* (bifurcation is proper where punitive damages evidence would be prejudicial to jury's consideration of the issues of liability or compensatory damages because calculating damages would require consideration of many factual issues not relevant to the underlying liability determination.

[c] Patent Cases

Patent cases provide good illustrations of using bifurcation to promote judicial efficiency and simplify the issues. *See, e.g., ASM Am., Inc. v. Genus, Inc., 2002 U.S. Dist. LEXIS 1351, at *18-*19 (N.D. Cal. 2002)* (bifurcation of antitrust counterclaims until after the trial of the invalidity issue); *Novopharm Ltd. v. Torpharm, Inc., 181 F.R.D. 308, 310 (E.D.N.C. 1998)* (patent cases uniquely amenable to bifurcation due to complex nature of damages); *Robotic Vision Sys. v. View Eng'g, 1997 U.S. Dist. LEXIS 19157, at *6-*7 (C.D. Cal. 1997)* (bifurcation of willfulness from infringement).

[d] Title VII Cases

In Title VII employment discrimination cases, bifurcating liability from questions of individual relief during the pretrial phase can avoid unnecessary expenditure of judicial time and labor, as well as attorney time, labor, and client expenses incurred in the process of determining, reviewing, and discovering damages issues prior to determining liability. *See EEOC v. Lucky Stores, Inc.,* 1982 U.S. Dist. LEXIS 16864, at *3 (E.D. Cal. 1982) .

[5] Preserving Right to Jury Trial When Case Is Bifurcated

In deciding whether to grant separate trials, the court must always preserve the right of trial by jury as declared by the*Seventh Amendment of the United States Constitution* or as granted by federal statute. *Fed. R. Civ. P. 42(b).* However, there is no *Seventh Amendment* requirement that all evidence be presented to the trier of fact during a single hearing. As long as the form of trial adopted by the trial court affords the opportunity provided at common law for consideration by the jury, there is no violation of the right to a jury trial. *See Arthur Young & Co. v. United States Dist. Court, 549 F.2d 686, 692 (9th Cir. 1977) .*

The Federal Tort Claims Act requires claims against the United States to be tried without a jury while the *Seventh Amendment* preserves to private individuals their right of trial by jury on negligence claims against non-governmental defendants in a federal court. In cases in which the plaintiffs sued private defendants for personal injuries, the defendants could bring third-party claims against the United States rather than bringing separate actions. To preserve the parties' rights to a jury, should they desire one, the court may order separate trials under *Fed. R. Civ. P. 42(b). United States v. Yellow Cab Co., 340 U.S. 543, 555-556, 71 S. Ct. 399, 95 L. Ed. 523 (1951) .*

There is a right to jury trial on legal claims generally, but no jury trial right on equitable claims. Bifurcation causes no constitutional problems, so long as the legal and equitable issues are distinct, i.e., they do not involve common issues.

See, e.g., Danjaq LLC v. Sony Corp., 263 F.3d 942, 962 (9th Cir. 2001) ; *Bates v. UPS, 204 F.R.D. 440, 448 (N.D. Cal. 2001)* .

[6] Power to Bifurcate Includes Power to Stay Proceedings

Fed. R. Civ. P. 42(b) provides the court with the power to stay proceedings, including discovery, on the deferred issues until the end of the first trial. *Ellingson Timber Co. v. Great Northern R. Co., 424 F.2d 497, 499 (9th Cir. 1970)* .

[7] Orders to Bifurcate Are Not Appealable

Orders separating issues for trial under *Fed. R. Civ. P. 42(b)* are interlocutory and unappealable in the absence of certification and permission under *28 U.S.C. § 1292(b)*, or unless they come within the collateral order doctrine. *Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949)* ; *Helene Curtis Industries, Inc. v. Church & Dwight Co., 560 F.2d 1325 (7th Cir. 1977)* ; *In re Master Key Antitrust Litigation, 528 F.2d 5 (2d Cir. 1975)* .

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§ 11.11 Opposing Motion for Bifurcation

[1] Opposing Party Will Be Prejudiced by Bifurcation

Courts should not order separate trials when bifurcation would result in unnecessary delay or some other form of prejudice to a party. *Fuji Mach. Mfg. Co. v. Hover-Davis, Inc., 982 F. Supp. 923, 924 (W.D.N.Y. 1997)* .

[2] Separating Trials Would Result in Exclusion of Crucial Evidence From the Jury

A court may decline to bifurcate a case in instances where separate trials on the issues of liability and causation could prevent introduction of important evidence to the jury. However, the decision of whether or not to bifurcate is largely fact-dependent and fits squarely within the discretion of the district court judge. Therefore, appellate courts are unlikely to overturn bifurcation orders due to an abuse of discretion. *See In re Bendectin Litig., 857 F.2d 290, 309 (6th Cir. 1988)* (affirming district court's decision to separate trials, despite plaintiffs' argument that separate trials prevented them from challenging validity of various studies defendant relied on to support its position that Bendectin did not cause birth defects).

[3] Bifurcation Would Result in Presenting the Same Evidence Multiple Times

The court can deny a bifurcation motion because a considerable overlap in testimonial and documentary evidence on liability and damages issues is likely. If the evidence is "inextricably intertwined," bifurcation might not bring about any efficiency gains but instead, might merely create confusion. *See L-3 Communs. Corp. v. OSI Sys., 418 F. Supp. 2d 380, 382 (S.D.N.Y. 2005)* ; *Willemijn Houdstermaatschaapij BV v. Apollo Computer, Inc., 707 F. Supp. 1429, 1433-1434 (D. Del. 1989)* (the overlap of issues is a significant factor in decision not to bifurcate); *Tharpe v. Illinois Nat'l Ins. Co., 199 F.R.D. 213, 214 (W.D. Ky. 2001)* (although bifurcation is usually warranted in third-party actions where plaintiff asserts claim for liability against tortfeasor and also claim for bad faith against insurer, in a first party action, both claims are against insurance company and bifurcation is not warranted when issues in both claims are inextricably intertwined); *FDIC v. Refco Group, LTD, 184 F.R.D. 623, 629 (D. Colo. 1999)* (bifurcation would have no effect on evidence offered at trial because claims and evidence against defaulting party were inextricably linked, in that employer would be liable under respondeat superior for acts committed by defaulting employee).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 16.77[4][iv], 42.20 -42.24.*
- *Bender's Federal Practice Forms* Form Nos. 42:20-42:44.
- *Federal Litigation Guide PP 28.20 -28.28, 28.101.*
- *Federal Trial Guide §§ 5.20, 5.21.*
- *Fed. R. Civ. P. 21* (severance).
- *Fed. R. Civ. P. 42(b)* (bifurcation).

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§ 11.12 Motions for Continuance; Procedural Context

The trial court's authority to control its trial schedule, and the right to grant or deny a motion to continue a trial, arises from its responsibility, as mandated *Fed. R. Civ. P. 40*, to establish local rules for the placement of cases on its trial calendars. Local rules are established pursuant to *Fed. R. Civ. P. 83(a)*, which provides that local rules governing practice before the district courts are to be enacted by a majority vote of the district judges.

Most local rules of the district courts do not specifically address the manner in which a trial date can be continued. Most of the local rules simply provide that such a motion will be granted for "good cause" only. Some local rules, however, provide that a continuance will be granted only in "exceptional circumstances."

The district court also has a substantial inherent power to control and to manage its docket. *Strandell v. Jackson County, 838 F.2d 884, 886 (7th Cir. 1987)* , citing *Link v. Wabash R. Co., 370 U.S. 626, 629-630, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962)* . In exercising that power, the district court should strike a balance between the needs for judicial efficiency and the rights of the litigants. *Strandell v. Jackson County, 838 F.2d 884, 886-887 (7th Cir. 1987)* . However, the decision of a district court to deny a motion to continue may be reversed only for an abuse of discretion. It is only on the rare occasion that a district court's scheduling decision will be overturned as an abuse of discretion. *Arthur Pierson & Co. v. Provimi Veal Corp., 887 F.2d 837, 839 (7th Cir. 1989)* (clearly erroneous standard).

Discussed below are the most common reasons for a motion to continue: (1) the need for additional discovery to obtain evidence, (2) the unavailability of a witness, and (3) a new counsel.

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§ 11.13 Checklist for Motions for Continuance

☐ For continuance motions, generally:

- ○ Review factors the court is likely to consider. *See § 11.14[1] -[4] below*.
- ○ Consult local rules for filing deadlines and guidelines for continuance motions.
- ○ Determine the grounds for continuance and supporting facts.
- ○ Contact opposing counsel to find out if they will agree to postpone case.

☐ If the reason for the continuance is the illness of a party or material witness, determine:

- ○ Nature of illness.
- ○ Probable duration of illness.
- ○ Name and address of attending physician.
- ○ Effect of illness on ability of witness to appear and testify.
- ○ Reasons why it is necessary for witness to appear at trial.

☐ If the reason for the continuance is the absence of testimony of a material witness, determine:

- ○ Efforts made to obtain presence or deposition of witness.
- ○ Cause and necessity of witness' absence.
- ○ Expected duration of witness' absence.
- ○ Materiality and admissibility of evidence witness is expected to present.
- ○ Necessity of presence of witness to the just adjudication of action.

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§ 11.14 Ruling on Motions for Continuance; Factors Considered by Court

[1] Diligence of Moving Party

In as diplomatic a manner as possible, the movant should attempt to demonstrate that the cause for the continuance was the fault of the opponent or even the court. *Fenner v. Dependable Trucking Co., 716 F.2d 598, 602 (9th Cir. 1983)* (granting continuance when movant lulled into false sense of security by court's promise that witness scheduling would be worked out).

[2] Continuance Will Cure Problem

If the motion to continue is based on the unavailability of a witness, the movant should try to show when the witness will be able to testify. *See Command-Aire Corp. v. Ontario Mechanical Sales & Service, Inc., 963 F.2d 90, 96 (5th Cir. 1992)* .

[3] Outcome of Case Will Be Prejudiced if Continuance Not Granted

The movant must be able to demonstrate that the evidence or witness that the movant seeks to obtain during a continuance will likely change the outcome of the case. *See Brooks v. United States, 64 F.3d 251, 257 (7th Cir. 1995)* (no prejudice since evidence movant sought to obtain during continuance would not have likely changed outcome of case); *Marti v. City of Maplewood, 57 F.3d 680, 684 (8th Cir. 1995)* (continuance was not warranted given relative unimportance of testimony sought to be introduced); *Martel v. County of Los Angeles, 56 F.3d 993, 995 (9th Cir. 1995)* (movant has burden of making "clearest showing" of actual and substantial prejudice).

[4] Convenience to the Court, Opposing Party, and Witnesses

The district court must consider the rights of other litigants, their witnesses, and its own calendar when deciding whether to grant a motion for continuance. *See Real v. Hogan, 828 F.2d 58, 62-63 (1st Cir. 1987)* ; *Molthan v. Temple University of Commonwealth System of Higher Education, 778 F.2d 955, 959 (3d Cir. 1985)* .

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§ 11.15 Seeking Continuance Based on Need for Additional Discovery or Trial Preparation

[1] Moving Party Has Been Diligent and Additional Evidence Is Material

The courts can and will expect the parties to have completed all discovery and trial preparation by the time the trial is scheduled to begin. Deadlines for completion of discovery and pretrial motions are most often set by a pretrial scheduling order entered under *Fed. R. Civ. P. 16(b)* in conjunction with disclosure requirements under *Fed. R. Civ. P. 26(a)* and *26(e)(1)*. However, it is all too common that the trial attorney will discover on the eve of trial or even during the trial, a need for additional evidence. To obtain such relief, it is critical that the moving party demonstrates to the court that it is not responsible for this lack of evidence due to its failure to prepare diligently for trial. Furthermore, counsel should explain to the court how the additional information or preparation is important to the presentation of the merits.

A party seeking additional discovery or preparation time may argue that its lack of crucial evidence is either the fault of the opposing party or that new issues have arisen in the case that could not have been anticipated previously. When the opposing party introduces evidence over the objection that it is not within the issues as framed by the pleadings, and the pleadings are amended to conform to the evidence thus presented at the trial, pursuant to *Fed. R. Civ. P. 15(b)*, "[t]he court may grant a continuance to enable the objecting party to meet such evidence." *Menendez v. Perishable Distributors, Inc., 763 F.2d 1374, 1379-1380 (11th Cir. 1985)* (personal injury case, abuse of discretion to allow defendant to introduce the affirmative defense of release for the first time at trial, without giving the plaintiff a continuance to obtain and present evidence to rebut this defense).

[2] Continuance Will Not Prejudice Opposing Party or Inconvenience Court

Counsel should argue that the delay will not unduly inconvenience the trial court or prejudice the opposing party. The court of appeals in *Taylor v. Combustion Engineering, Inc., 782 F.2d 525, 528 (5th Cir. 1986)* , held that the trial court abused its discretion in dismissing a case instead of continuing it until the following day to enable plaintiff to secure the attendance of a vital witness, stating that "the application of the draconian sanction of dismissal is only appropriate in egregious cases where there is a clear record of contumacious conduct and the record reflects that lesser sanctions would not be adequate ..."

[3] Denial of Continuance Will Prejudice Moving Party

The primary theory underlying a persuasive motion for continuance is that the moving party will be unfairly deprived of the opportunity to present its side of the case without delaying the date of the trial. This argument is especially compelling when the opposing party has in effect been given a break in being permitted to introduce newly discovered evidence or additional issues. In fairness, the trial court should give counsel a chance to prepare an adequate response, if possible, and this will often take the form of a continuance. *Menendez v. Perishable Distributors, Inc., 763 F.2d 1374, 1379-1380 (11th Cir. 1985)* .

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§ 11.16 Opposing Motion for Continuance for Additional Evidence

[1] Moving Party Has Not Been Diligent

If possible, counsel should argue that the motion for a continuance is part of a pattern of delay on the part of the moving party, and be sure to cite any prior continuances in support of this argument. *Amarin Plastics, Inc. v. Maryland Cup Corp., 946 F.2d 147, 151-152 (1st Cir. 1991)* ; *Communications Maintenance, Inc. v. Motorola, Inc., 761 F.2d 1202, 1207 (7th Cir. 1985)* ; *Watson v. Miears, 772 F.2d 433, 437 (8th Cir. 1985)* .

Strategic Point:

A compelling argument to make is that the moving party's need for further preparation merely reflects a lack of preparation and diligence on its part. Had the moving party been diligent in developing its case, the question of a delay would not even arise. One of the strengths of this line of argument is that it is likely to prevail even if the additional discovery seems to be important. *See McKenzie Constr., Inc. v. Maynard, 823 F.2d 43 (3d Cir. 1987)* .

A party's lack of diligence will defeat a motion for even the most nominal continuance. *FDIC v. Houde, 90 F.3d 600 (1st Cir. 1996)* . Even if the court allows a late amendment of the pleadings, a motion to continue can be denied on the basis that the movant should have anticipated the inclusion issue and should have been prepared to litigate it.

[2] Additional Evidence Is Irrelevant or Cumulative

The court will deny a motion for a continuance unless the moving party has shown that the additional discovery will yield significant or relevant evidence. *Communications Maintenance, Inc. v. Motorola, Inc., 761 F.2d 1202, 1207 (7th Cir. 1985)* .

[3] Continuance Will Prejudice Opposing Party or Inconvenience Court

In opposing a motion for a continuance, counsel should stress that he or she is fully prepared to try the case as scheduled, and that the client will be prejudiced by a delay. The district court is entitled to take its own scheduling

requirements into account when determining whether to grant or deny a motion for continuance. *See Molthan v. Temple University-of Commonweath System of Higher Education, 778 F.2d 955, 959 (3d Cir. 1985)* .

[4] Denial of Continuance Will Not Prejudice Moving Party

In addition, counsel should make the argument that the moving party will not be prejudiced by preceding to trial. This argument may follow from counsel's demonstration that further discovery or fact preparation would not develop useful information for the moving party.

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Chapter 11 TRIAL MOTIONS
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1-11 Moore's AnswerGuide: Fed Civil Motion Practice § 11.17

§ 11.17 Seeking Continuance Due to Absent Witness

[1] Moving Party Must Demonstrate Diligence

A party seeking a continuance in order to secure the attendance of an absent witness must show that it cannot be faulted for the resulting delay. Normally, a party will be expected to secure the testimony of the witnesses that will be necessary for the presentation of its case, either by compelling the physical presence of the witness at the trial by means of a subpoena, or by obtaining the witness' testimony in advance through a pretrial deposition. A district court is unlikely to grant a continuance because of the absence of a witness unless the moving party can demonstrate either that the witness' absence was unexpected and/or unavoidable, or that the need for the witness' testimony could not have been anticipated earlier.

[2] Missing Witness' Testimony Is Material and Prejudicial to Movant

When deciding to grant a motion for continuance, courts tend to emphasize the point that the denial of a continuance would deprive the moving party of a fair opportunity to present its side of the case on the merits. *See, e.g., Fenner v. Dependable Trucking Co., 716 F.2d 598, 602 (9th Cir. 1983)* (district court denied defendants/appellants a fair trial by refusing to continue the trial because of the unavailability of a material expert witness).

The court can find that the missing witness' presence at the trial material if the moving party can persuasively demonstrate the need to confront the witness before the jury. Under some circumstances, a non-video deposition could be an inadequate substitute for the personal presence of the witness, which would enable the jury to evaluate the witness' response to and demeanor during the confrontation. *See Wells v. Rushing, 755 F.2d 376, 378-381 (5th Cir. 1985)* ; *Taylor v. Combustion Engineering, Inc., 782 F.2d 525, 528 (5th Cir. 1986)* .

[3] Continuance Will Not Prejudice Opposing Party or Inconvenience Court

The trial court is entitled to consider the effect on its own calendar of delaying a trial, as well as the inconvenience to the opposing party and its counsel. However, if the party seeking the continuance can show that it has been diligent, and that denial of a continuance would deny it a fair opportunity to present its case, these factors should outweigh considerations of inconvenience to the court and the opponent.

This standard even applies to motions made after the trial has commenced. In *Taylor v. Combustion Engineering, Inc., 782 F.2d 525, 528 (5th Cir. 1986)* , an employment discrimination case, the court of appeals held that the trial court abused its discretion in dismissing a case instead of continuing it until the following day to enable plaintiff to secure the attendance of plaintiff's supervisor, a vital witness, stating that "the application of the draconian sanction of dismissal is only appropriate in egregious cases where there is a clear record of contumacious conduct and the record reflects that lesser sanctions would not be adequate ..."

An argument for a continuance is especially compelling when the actions of the trial court or the opposing party are responsible for the moving party's predicament. *See Fenner v. Dependable Trucking Co., 716 F.2d 598, 602 (9th Cir. 1983)* ("the district court's statement to counsel that it would work out the problem faced by the defendants [that] their expert would be unavailable ... lulled [them] into a false sense of security that the absent witness would be allowed to testify.").

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§ 11.18 Opposing Motion for Continuance Due to Absent Witness

[1] Moving Party Has Not Been Diligent

The movant must show reasonable attempts to schedule a witness after a firm trial date is set. *Mraovic v. Elgin, J. & E.R. Co., 897 F.2d 268, 270-271 (7th Cir. 1990)* (three month delay in attempt to arrange attendance of medical expert).

The courts often consider whether the movant has a history of delaying matters or using dilatory tactics in the case. *Real v. Hogan, 828 F.2d 58, 63-64 (1st Cir. 1987)* (plaintiff avoided physical examination at beginning of litigation but then complained that it has not been performed); *Amarin Plastics, Inc. v. Maryland Cup Corp., 946 F.2d 147, 151 (1st Cir. 1991)* (14 months of discovery but no deposition to preserve witness' testimony); *Arabian Am. Oil Co. v. Scarfone, 939 F.2d 1472, 1479 (11th Cir. 1991)* (egregious pattern of dilatory tactics by movant warranted denial).

[2] Missing Witness' Testimony Is Irrelevant or Cumulative

The court may deny a motion for continuance when the testimony of the missing witness will not affect the outcome of the trial or the testimony is immaterial or cumulative. *See Marti v. City of Maplewood, 57 F.3d 680 (8th Cir. 1995)* (testimony of nondisclosed witness was not critical to case); *Amarin Plastics, Inc. v. Maryland Cup Corp., 946 F.2d 147 (1st Cir. 1991)* (testimony would have duplicated other witness' testimony and would have covered uncontroverted matters).

[3] Continuance Will Prejudice Opposing Party or Inconvenience Court

In opposing a motion for continuance, counsel should stress that he or she is fully prepared to try the case as scheduled, and that the client will be prejudiced by a delay. The trial court is entitled to also consider its own scheduling requirements in denying a continuance. *Molthan v. Temple University-of Commonwealth System of Higher Education, 778 F.2d 955, 959 (3d Cir. 1985)* .

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§ 11.19 Seeking Continuance Due to Unavailability of Counsel or Substitute Counsel

[1] Moving Party Has Been Diligent

In some cases, parties have successfully argued that a continuance should be granted because the party lacks an attorney ready to try the case. As with other reasons for seeking a delay in the trial, the moving party must show that the situation is not his or her fault and could not have been anticipated. *See Lowe v. East Chicago, 897 F.2d 272, 273-274 (7th Cir. 1990)* .

Under appropriate circumstances, a party may argue that the trial delay is the result of counsel's dereliction rather than the party's recalcitrance. *Clofer v. Perego, 106 F.3d 678 (5th Cir. 1997)* (appointed counsel repeatedly failed to meet pretrial obligations).

The court's refusal to grant continuance to allow replacement counsel to prepare case can be an abuse of discretion, especially if the court expresses antipathy towards the merits of the case. *Santa Maria v. Metro-North Commuter R.R., 81 F.3d 265, 275 (2d Cir. 1996)* .

[2] Moving Party Will Be Prejudiced Without Assistance of Counsel

In all but the most simple cases, the movant usually will have little difficulty in convincing the court that it will be prejudiced by having to proceed to trial without legal representation. *Anderson v. Sheppard, 856 F.2d 741, 748-749 (6th Cir. 1988)* (abuse of discretion to permit trial counsel to withdraw two days before trial date and deny request for a continuance to obtain substitute counsel).

[3] Continuance Will Not Prejudice Opposing Party or Inconvenience Court

Once the moving party has shown that the need for a delay to obtain substitute counsel is not caused by its own lack of diligence, and that it will be prejudiced by having to try the case without effective representation, the continuance is likely to be granted unless the delay would seriously prejudice the opposing party or inconvenience the trial court.

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§ 11.20 Opposing Motion for Continuance Due to New Counsel

While a party's right to be represented by counsel is certainly important, courts are reluctant to delay a scheduled trial for lack of counsel if the situation appears to be due to the fault or lack of diligence of the moving party. *See United States v. McKneely, 69 F.3d 1067, 1077 (10th Cir. 1995)* (client failed to give new attorney relevant information that might have avoided need for continuance). Courts may treat corporate parties differently than individuals because they are considered to be more sophisticated litigants. *Pyramid Energy, Ltd. v. Heyl & Patterson, Inc., 869 F.2d 1058, 1059-1062 (7th Cir. 1989)* ; *Scandia Down Corp. v. Euroquilt, Inc., 772 F.2d 1423, 1427 (7th Cir. 1985)* (trademark dispute, the Seventh Circuit upheld a lower court decision refusing to postpone trial for longer than a month). However, individual defendants who, through their own inaction, willfully fail to defend, may fare no better. *Ackra Direct Marketing Corp. v. Fingerhut Corp., 86 F.3d 852 (8th Cir. 1996)* (defendants did not seek new counsel until plaintiff moved for default judgment). Furthermore, a defendant's failure to secure new representation is sufficient grounds to support a district court's entry of a default judgment. *Powerserve Int'l Inc. v. Lavi, 239 F.3d 508, 514 (2d Cir. 2001)* .

PRACTICE RESOURCES

- *Bender's Federal Practice Forms* Form Nos. 40:1-40:21.
- *Federal Trial Guide* §§ 2.01-2.04.
- *Fed. R. Civ. P. 40* (court schedule).
- *Fed. R. Civ. P. 83(a)* (local rulemaking).

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§ 11.21 Motion to Try Case Before Advisory Jury; Procedural Context

The court, upon a motion by a party or on its own initiative, may try any issue before an advisory jury. The district court's power to use a jury to act in an advisory capacity is traceable to the English Chancery Court. *See NAACP v. Acusport Corp., 226 F. Supp. 2d 391, 397 (E.D.N.Y. 2002)* . The chancellor in equity had the power to use an advisory jury to assist in deciding cases. *Reliance Life Ins. Co. v. Everglades Discount Co., 204 F.2d 937, 942 (5th Cir. 1953)* . This authority is now specifically set forth in *Fed. R. Civ. P. 39(c)*.

Advisory juries are most commonly used in cases involving multiple theories against a single defendant and claims against multiple parties where a jury as a matter of right does not exist for one of the theories (Admiralty claims) or against one of the multiple defendants (Federal Tort Claim Act claims).

A district court's authority to impanel an advisory jury is discretionary and is not a matter of right. *See Kramer v. Banc of Am. Sec., LLC, 355 F.3d 961, 967 (7th Cir. 2004)* ; *United States v. Ellis Research Laboratories, Inc., 300 F.2d 550, 554 (7th Cir. 1962)* ; *McKinney v. Gannett Co., 817 F.2d 659, 674 (10th Cir. 1987)* . Thus, mandamus will generally not apply to review the district court judge's exercise of discretion, which should give the movant extra incentive to present a compelling and thorough motion.

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§ 11.22 Checklist for Motion to Try Case Before Advisory Jury Under Rule 39(c)

☐ Determine whether trial by advisory jury could be beneficial. *See § 11.23 below*.

- ○ Are there multiple parties involving both jury and nonjury claims? *See § 11.23[1] below*.
- ○ Are there multiple theories involving both jury and nonjury claims? *See § 11.23[2] below*.
- ○ Is the right to trial by jury unclear. *See § 11.23[3] below*.
- ○ Do peculiar, unique or extraordinary circumstances exist? *See § 11.23[4] below*.

☐ Consider the potential effect of an advisory jury verdict on the outcome of the case. *See § 11.25 below*.

☐ If opposing motion for trial by advisory jury, consider making the following arguments, if possible:

- ○ Bench trial will result in saving courts' and parties' time and expenses. *See § 11.24[1] below*.
- ○ The issues are too complex for a jury. *See § 11.24[2] below*.
- ○ Trial by advisory jury would not promote efficiency and judicial economy. *See § 11.24[1] below*.
- ○ No unusual or extraordinary circumstances exist that warrant the use of an advisory jury. *See § 11.24[3] below*.

○ The use of advisory juries in cases brought under the Federal Tort Claims Act (FTCA) is discouraged. *See § 11.24[4] below*.

☐ **Search by Topic:** Trials > Bench Trials

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§ 11.23 Seeking Trial by Advisory Jury May Be Beneficial in Certain Cases

[1] Advisory Jury May Be Beneficial in Cases Involving Multiple Parties and Both Jury and Nonjury Claims

An advisory jury may be particularly useful in situations when a plaintiff has been granted a jury trial by right in a claim against one party but not against another party. For example, the Federal Tort Claims Act does not permit a jury trial in an action brought against the U.S. government. When such an action is joined with a claim against another defendant in which a jury trial is available, plaintiff's counsel may wish to request that the jury sit as an advisory jury as to the claim against the United States so that the jury will not perceive that it is deciding only half of the case or that its verdict is not important. *See Banks v. Hanover S.S. Corp., 43 F.R.D. 374, 382 (D. Md. 1967)* (third-party defendant entitled to jury trial but original parties not so entitled, thus, jury deemed advisory as to claims of original parties); *Poston v. United States, 262 F. Supp. 22, 24 (D. Haw. 1966)* (jury trial as of right as to defendants other than United States, but verdict deemed advisory as to issue of liability of United States under Federal Tort Claims Act).

Moreover, parties have used advisory juries in other FTCA claims. *See Poston v. United States, 262 F. Supp. 22 (D. Haw. 1966) , aff'd on other grounds, 396 F.2d 103 (9th Cir. 1968)* ; *Schetter v. Housing Authority, 132 F. Supp. 149 (W.D. Pa. 1955)* (court reserved right to empanel advisory jury in wrongful death action should a factual clash arise and assistance of jury be "invaluable in expediting a fair determination"); *Birnbaum v. United States, 436 F. Supp. 967, 988 (E.D.N.Y. 1977)* (verdict of advisory panel only part of the data taken into consideration in arriving at the independent conclusion); *Coffland v. United States, 57 F.R.D. 209, 210 (N.D. W. Va. 1972)* .

[2] Advisory Jury May Be Beneficial in Cases Involving Multiple Theories in Admiralty/Jones Act Claims

Generally, an injured seaman has two overlapping remedies. The seaman may bring an admiralty claim that is not triable by jury. An injured seaman might also have a separate theory of recovery under the Jones Act which is triable by jury. In *Fitzgerald v. United States Lines Co., 374 U.S. 16, 21, 83 S. Ct. 1646, 10 L. Ed. 2d 720 (1963)* , the U. S. Supreme Court held that a seaman, suing in negligence under the Jones Act for injuries sustained on board a vessel (triable by a jury), and for unseaworthiness and maintenance and cure under admiralty law (triable by the court only), was entitled to a jury trial on all claims, even the admiralty claims. The Court stated that "[o]nly one trier of fact should be used for the trial of what is essentially one lawsuit to settle one claim split conceptually into separate parts because of historical developments." The *Fitzgerald* doctrine has been expanded to the combination of negligence and

admiralty-based indemnity claims. *Blake v. Farrell Lines, Inc., 417 F.2d 264, 266-267 (3d Cir. 1969)* ; *Simko v. C & C Marine Maintenance Co., 594 F.2d 960, 964-965 (3d Cir. 1979)* .

[3] Advisory Jury May Be Beneficial in Cases Where Right to Jury Trial Is Unclear

Courts frequently use advisory juries in situations where a party's right to a jury trial is unclear. Courts also may use advisory juries after a party has waived its right to a trial by jury. *(American) Lumbermens Mut. Casualty Co. v. Timms & Howard Inc., 108 F.2d 497, 500 (2d Cir. 1939)* . If the court improperly uses an advisory jury, there is no prejudice; the case will simply be considered a bench trial. *Allen v. Tobacco Superstore, Inc., 475 F.3d 931, 935, 941 (8th Cir. 2007)* .

Strategic Point:

When the court denies a Rule 39(b) motion for a jury trial, counsel should consider filing a Rule 39(c) motion because the court will sometimes order a trial with an advisory jury as a compromise decision. *See Ligouri v. New York, N. H. & H.R. Co., 26 F.R.D. 565, 568 (D. Conn. 1961)* .

[4] Advisory Jury May Be Beneficial in Cases Involving Peculiar, Unique, or Extraordinary Circumstances

In determining whether to grant a party's Rule 39(c) motion, the court will often consider whether unique factual circumstances exist that would warrant trial before an advisory jury. *Moss v. Lane Co., 471 F.2d 853, 855 (4th Cir. 1973)* (use of advisory jury disfavored in discrimination cases except the "exceptional case where there are peculiar and unique circumstances"); *Wirtz v. Gregg, Gibson & Gregg, Inc., 1964 U.S. Dist. LEXIS 7540 (S.D. Fla. 1964)* (advisory juries should be used in minimum wage actions in court of equity only under extraordinary circumstances).

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§ 11.24 Opposing Motion to Try Case Before Advisory Jury

[1] Avoiding Advisory Jury Would Promote Judicial Economy

The resources saved dispensing with jury trial selection, payment of jurors, and the additional time requirements of openings, summations, jury instructions will be eliminated if an advisory jury is not empaneled. *See Skoldberg v. Villani, 601 F. Supp. 981, 982 (S.D.N.Y. 1985)* .

[2] Issues Too Complex for Advisory Jury to Decide

The complexity of the issues to be resolved at trial sometimes factors into the district court's determination of whether the use of an advisory jury is appropriate in a particular case. The court may decline to exercise its discretion to impanel an advisory jury if the factual issues are so complex that it would likely prejudice the parties or otherwise negatively impact the just resolution of the case. *Rosen v. Dick, 83 F.R.D. 540, 544 (S.D.N.Y. 1979)* , *modified on other grounds*, *639 F.2d 82 (2d Cir. 1980)* (declining to use advisory jury in case involving complex issues of accounting practice).

[3] No Unique Factual Circumstances Exist That Would Justify Use of Advisory Jury

A party opposing a Rule 39(c) motion should argue that there are no unique or peculiar facts or extraordinary circumstances that would justify trying the case before an advisory jury. *See Dixon v. Universal Atlas Cement Div., 437 F. Supp. 1071, 1074 (W.D. Pa. 1977)* ; *Skoldberg v. Villani, 601 F. Supp. 981, 982 (S.D.N.Y. 1985)* (amount of damages in wrongful death claim not so unique as to require trial by advisory jury).

[4] Use of Advisory Juries in FTCA Cases Is Discouraged

The Federal Tort Claims Act (FTCA) requires that cases be tried by the court without a jury. Although an advisory jury in these cases is permissible and has been used (*see § 11.23[1] above*), several courts have frowned on using advisory juries in these types of cases, stating that an advisory jury "creates more problems than it solves." *In re Air Crash Disaster at Metropolitan Airport, Detroit, 619 F. Supp. 13, 16-17 (E.D. Mich. 1984)* , *aff'd*, *782 F.2d 1041 (7th Cir. 1985)* . Thus, a party opposing a Rule 39(c) motion could cite to the piquant language of the trial judge in *Wright v. United States, 80 F.R.D. 478, 480 (D. Mt. 1978)* , which characterized the use of an advisory jury when the statute clearly mandates a bench trial as "an abdication of judicial responsibilities."

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§ 11.25 Understanding Effect of Advisory Jury Verdict

[1] Judge Is Still the Trier of Fact and Responsible for Rendering a Decision

The function of an advisory jury is solely to enlighten the conscience of the court. An advisory jury does not replace the court as trier of fact in the case. The responsibility for rendering a decision as the trier of fact remains with the judge, even though an advisory jury is used. An advisory verdict has no binding effect upon the court; in fact, whether the court accepts or rejects an advisory verdict, the court is required by *Fed. R. Civ. P. 52(a)* to make its own findings of fact and conclusions of law, which alone form the basis of appeal. *See Mallory v. Citizens Utilities Co., 342 F.2d 796, 797 (2d Cir. 1965)* ; *(American) Lumbermens Mutual Casualty Co. v. Timms & Howard, Inc., 108 F.2d 497, 500 (2d Cir. 1939)* .

[2] Court Is Free to Accept or Reject Advisory Verdict

The verdict of the advisory jury has no binding effect on the court. Thus, 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. *Gragg v. City of Omaha, 20 F.3d 357, 358-359 (8th Cir. 1994)* ; *Greenwood v. Greenwood, 234 F.2d 276, 278 (3d Cir. 1956)* ; *Newmann v. United States, 938 F.2d 1258, 1259 (11th Cir. 1991)* ; *Armco, Inc. v. Armco Burglar Alarm Co., 693 F.2d 1155, 1158 (5th Cir. 1982)* . The court may adopt some findings and reject others, but all must be treated as merely advisory. *Aetna Ins. Co. v. Paddock, 301 F.2d 807, 811 (5th Cir. 1962)* .

[3] Court Must Make Factual Findings

Regardless of whether the court accepts or rejects the advisory verdict, *Fed. R. Civ. P. 52(a)(1)* requires the court, as the true trier of fact, to make its own, independent findings of fact and conclusions of law. The court may not simply enter judgment on the jury's verdict as if the case had been tried to a nonadvisory jury. *Fed. R. Civ. P. 52(a)(1)*; *see also Aetna Ins. Co. v. Stanford, 273 F.2d 150, 153 (5th Cir. 1959)* ; *Troy v. Hampton, 756 F.2d 1000, 1003 (4th Cir. 1985)* . When a court fails to provide its own findings of fact and conclusions of law case where an advisory jury used, the case will be remanded for such findings. *Morelock v. NCR Corp., 546 F.2d 682, 689 (6th Cir. 1976)* .

Warning:

Even if the court's findings are identical to the verdict of the advisory jury, a motion for judgment as a matter of law is not the appropriate motion to challenge the court's findings. A motion to amend the findings of the court or to make additional findings, pursuant to *Fed. R. Civ. P. 52* is the only motion that will test the accuracy or sufficiency of the findings. *See Aetna Ins. Co. v. Paddock, 301 F.2d 807, 811 (5th Cir. 1962)* .

PRACTICE RESOURCES

- *Moore's Federal Practice (3d ed.) §§ 39.40 -39.43.*
- *Federal Litigation Guide P 30.18.*
- *Fed. R. Civ. P. 39(c)* (advisory jury).

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§ 11.26 Motion to Refer Case to a Master; Procedural Context

Fed. R. Civ. P. 53 provides the authority for district courts to appoint masters. A "master" is an individual whom the court appoints to assist it in performing specific functions in a pending action. *Fed. R. Civ. P. 53* formerly defined the word "master" as including a referee, an auditor, an examiner, and an assessor, but those designations were dropped in the 2003 amendment to the rule. There is no distinction between special masters and masters. The court may appoint a master to perform duties consented to by the parties. Prior to the 2003 amendments, the Federal Rules did not contain any provisions allowing the appointment of a master with the parties' consent. Regardless, courts consistently permitted masters to perform almost any function of the trial court so long as the parties unanimously consented to doing so. The 2003 amendments remedied that deficiency.

The central function of a trial master is to preside over an evidentiary hearing on the merits of the claims or defenses in the action. This function distinguishes the trial master from most functions of pretrial and post-trial masters. If any master is to be used for such matters as a preliminary injunction hearing or a determination of complex damages issues, for example, the master should be a trial master. The dividing line, however, is not distinct. A pretrial master might well conduct an evidentiary hearing on a discovery dispute, and a post-trial master might conduct evidentiary hearings on questions of compliance. Because the exceptional condition requirement is retained in amended *Fed. R. Civ. P. 53* for the appointment of some trial masters, the "exception and not the rule" restriction is also applied. Its net effect has been primarily to emphasize the undesirability of appointing masters to perform trial functions.

Use of masters for the core functions of trial has been progressively limited over time. These limits are reflected in the provisions of subparagraph (a)(1)(B) that restrict appointments to exercise trial functions. The U.S. Supreme Court gave clear direction to this trend in *La Buy v. Howes Leather Co., 352 U.S. 249, 77 S. Ct. 309, 1 L. Ed. 2d 290 (1957)* . As to nonjury trials, this trend has developed through elaboration of the "exceptional condition" requirement set forth in the current *Fed. R. Civ. P. 53(b)*. This phrase is retained and will continue to have the same force as it has developed. Although the provision that a reference "shall be the exception and not the rule" has been deleted, its meaning is embraced by the exceptional condition requirement.

Parties should be aware that *Fed. R. Civ. P. 53* does not require a district court to appoint a master, even when the parties have unanimously consented to the appointment. The court retains "unfettered discretion to refuse appointment." *See Fed. R. Civ. P. 53(a)(1)(A)*, advisory committee note of 2003.

A special master appointed by court assumes duties and obligations of a judicial officer, and is generally subject to the Code of Conduct for United States Judges. *See Hofmann v. EMI Resorts, Inc., 689 F. Supp. 2d 1361, 1374 (S.D. Fla. 2010)* .

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§ 11.27 Checklist for Referring Case to Master

☐ Review *Fed. R. Civ. P. 53* to determine whether it is appropriate to refer case to master. *See § 11.28* below.

- ○ Is there a need to obtain or interpret specialized evidence? *See § 11.28[3][e] below.*

☐ Attempt to obtain opposing party's consent to appointment of master.

☐ If opposing the use of a master in the trial:

- ○ Timely file objection to the master's appointment. *See § 11.28[4] below.*
- ○ Timely file objection to the master's report or move to modify the master's report. *See § 11.29 below.*

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§ 11.28 Seeking Appointment of Master; Circumstances Where Trial Master Is Appropriate

[1] Duties Masters May Perform With Parties' Consent

Fed. R. Civ. P. 53 contains no explicit restrictions on the authority of the parties to designate the duties they wish a consensual master to perform. However, a party's right to designate duties does not limit the court's implicit authority to refuse to appoint a master even if the parties have unanimously consented to the appointment. *See Fed. R. Civ. P. 53(a)(1)(A)*, advisory committee note of 2003.

[2] Notifying Parties of Appointment of Master Is Trial Court's Responsibility

The trial court must give all parties notice of its intent to appoint a master and an opportunity to be heard. The notice must include information concerning the terms of the proposed master's appointment, and should include a description of the master's proposed duties, the amount of time the master will have to complete those duties, the standards of review to be applied to the master's orders, reports, or recommendations, and the amount of the master's compensation. *Fed. R. Civ. P. 53(b)(2)*.

[3] Cases in Which Court May Appoint Trial Master Without Consent of Parties

[a] Nonjury Cases

The district court does not need to obtain the consent of the parties in order to appoint a master to hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury. In this respect, the 2003 amendment to *Fed. R. Civ. P. 53* continues the practice under the former rule that was applicable to the appointment of masters for all purposes. The district court can appoint a trial master in a jury case only with consent of the parties and only if the parties waive jury trial with respect to the issues submitted to the master or if the master's findings are to be submitted to the jury as evidence in the manner provided by former Rule 53(e)(3).

[b] "Exceptional Condition" Generally Required for Appointment of Trial Master

As a general rule, the district court will appoint a master to hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury only if some exceptional condition warrants the appointment, or

unless the master is solely to perform an accounting or to resolve a difficult computation of damages.

[c] Appointment of Master Must Be Exception, Not Rule

Although *Fed. R. Civ. P. 53* no longer includes the explicit requirement that an appointment of a master is the "exception and not the rule," the requirement is implicit due to the retention of the exceptional condition requirement for certain appointments of trial masters. Subparagraph (a)(1)(B)(ii) carries forward the approach of present *Fed. R. Civ. P. 53(b)*, which exempts from the "exceptional condition" requirement "matters of account and of difficult computation of damages." *See § 11.28[3][b] above.*

[d] Appointment of Master May Be Appropriate to Determine Accounting Issues and Compute Damages in Nonjury Trials

A district court may appoint a master to hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury when the appointment is warranted by the need "to perform an accounting or resolve a difficult computation of damages" even in the absence of an exceptional condition. The appointment of a master for matters of accounting and difficult computation of damages in the absence of an exceptional condition, however, is warranted only with respect to essentially ministerial determinations that require mastery of a substantial amount of detailed information and that do not require determinations of witness credibility. If a master is to be appointed to address damages issues that are more complex and that may require the determination of the credibility of witnesses, the court should appoint a trial master, and the appointment should be justified by an exceptional condition.

[e] Appointment of Master May Be Appropriate to Obtain and Interpret Specialized Evidence

A district court may decide to appoint a master in order to obtain and interpret evidence. This type of reference is most commonly used in cases involving claims in which specific scientific or technological expertise is required. When specific expertise is required, the court may appoint a master who possesses that expertise, or appoint additional experts to report to the master and the court. *See Daubert v. Merrell Dow Pharms., 509 U.S. 579, 590, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)* (scientifically based expert testimony must be reliable to be admissible); *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147-150, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)* (*Daubert* gatekeeping function extends to all proffered expert testimony); *Cummins v. Lyle Indus., 93 F.3d 362, 365-370 (7th Cir. 1996)* (trial court properly excluded expert testimony it found unreliable after evidentiary hearing conducted during trial).

[4] Obtaining Parties' Consent to Appointment of Master

A party's consent to the appointment of a master can be formal and in writing or oral and on the record. When express consent is relied on to validate the appointment of a master, the trial court should take special precautions to assure that the parties' consent is knowing and voluntary. For guidance, the court can turn to the procedures it must follow in assuring the voluntariness of the parties' consent to a magistrate judge's conduct of all district court proceedings in civil matters.

Warning:

If a party fails to object in a timely fashion to the appointment of a master, the court will consider the party to have consented to the appointment. *Fajardo Shopping Ctr. of P. R., Inc. v. Sun Alliance Ins. Co., 167 F.3d 1, 6 (1st Cir. 1999)* ; *Madrigal Audio Laboratories, Inc. v. Cello, Ltd., 799 F.2d 814, 818 (2d Cir. 1986)* ; *Hayes v. Foodmaker, Inc., 634 F.2d 802, 803 (5th Cir. 1981)* ; *Kobrin v. University of Minnesota, 121 F.3d 408, 413 (8th Cir. 1997)* ; *Adriana Int'l Corp. v. Thoeren, 913 F.2d 1406, 1410 (9th Cir. 1990)* ; *Clark v. Poulton, 963 F.2d 1361, 1367 (10th Cir. 1992)* ; *Regents of the Univ. of N.M. v. Knight, 321 F.3d 1111, 1127-1128 (Fed. Cir. 2003)* .

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Chapter 11 TRIAL MOTIONS
PART E: MOTION TO REFER CASE TO A MASTER

1-11 Moore's AnswerGuide: Fed Civil Motion Practice § 11.29

§ 11.29 Objecting to Master's Determinations

After a master files a report or recommendation, or enters and files an order, counsel representing a party that is displeased with the master's determinations should immediately object to them, or promptly file a motion with the court to adapt or modify the master's determinations. *See Fed. R. Civ. P. 53(f)(2)*; *Sea Coast Foods, Inc. v. Lu-Mar Lobster & Shrimp, Inc., 260 F.3d 1054, 1058 (9th Cir. 2001)* . Before the district court acts upon the master's report or recommendations, it must afford the parties an opportunity to be heard, which may include the presentation of evidence, and then the court can: (1) adopt or affirm the master's findings; (2) modify the master's findings; (3) wholly or partly reject or reverse the master's findings; or (4) resubmit the case to the master with specific instructions. *See Fed. R. Civ. P. 53(f)(1)*.

Timing:

A party must file objections to or a motion to adopt or modify the master's order, report, or recommendations no later than 21 days after a copy of the report, order, or recommendations is served, unless the court sets a different time. *Fed. R. Civ. P. 53(f)(2)*.

The trial court ordinarily must decide *de novo* any party's timely objections to findings of fact made or recommended by the master. *Fed. R. Civ. P. 53(f)(3)*. However, the parties may stipulate, with the trial court's approval, that the master's findings: (1) will be reviewed for clear error; or (2) will be final respecting matters that were referred to the master with the consent of all of the parties or matters relating to pretrial or post-trial proceedings. *Fed. R. Civ. P. 53(f)(3)*. The court must decide *de novo* all objections to conclusions of law made or recommended by a master. *Fed. R. Civ. P. 53(f)(4)*.

The court may set aside a master's ruling on a procedural matter only for an abuse of discretion, unless the appointing order establishes a different standard of review. *Fed. R. Civ. P. 53(f)(5)*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.)* §§ 53.01 -53.63.

- *Bender's Federal Practice Forms* Form Nos. 53:1-53:121.
- *Fed. R. Civ. P. 53* (masters).

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Chapter 11 TRIAL MOTIONS
PART F: MOTION TO APPOINT INTERPRETER

1-11 Moore's AnswerGuide: Fed Civil Motion Practice § 11.30

§ 11.30 Procedural Context for Motion to Appoint Interpreter

Fed. R. Civ. P. 43(d) authorizes the courts to appoint interpreters for the deaf, as well as language interpreters, as needed, and to fix and provide for such interpreter's reasonable compensation, including the power to tax such a fee as a cost to the party. Similar provisions are found in the Federal Rules of Evidence. *See Fed. R. Evid. 604*.

Interpreters may be required for three classes of persons: (1) persons unable to speak words, and obliged to communicate by ordinary gestures or by a systematic sign language; (2) persons speaking exclusively or more naturally a language alien to that used by the court; and (3) persons unable to speak loudly enough to be heard distinctly by the court.

The Court Interpreters Act (*see 28 U.S.C. § 1827*) is designed to accommodate the need for the use of interpreters in federal courts. Among other things, it requires the use of an interpreter when the presiding judicial officer determines that a witness speaks a foreign language, or a witness suffers from a hearing impairment that inhibits their comprehension.

The district court's discretion to appoint an interpreter is broad, as the rule speaks in general terms and in no way circumscribes this power. For example, interpreters have been allowed for deaf jurors and may be appointed by the court.

An interpreter is subject to the rules of civil evidence relating to qualification as an expert and the administration of an oath or affirmation to make a true translation. *Fed. R. Evid. 604*. As is the case with other experts, when an interpreter's accuracy is questioned, his or her ability and competency as affecting the accuracy of the translation becomes an issue for the trier of fact. *See* advisory committee note to *Fed. R. Evid. 702*.

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§ 11.31 Checklist for Motion to Appoint Interpreter

☐ Determine if motion for interpreter is appropriate. *See Fed. R. Civ. P. 43(d).*

- ○ Is the interpreter competent? *See § 11.32[1] below.*
- ○ Can a family member be the interpreter? *See § 11.32[2] below.*
- ○ Can an interpreter be appointed for a juror? *See § 11.33 below.*

☐ If opposing motion to appoint interpreter.

- ○ Is the interpreter competent? *See § 11.32[1] below.*
- ○ Determine which party to compensate interpreter. *See § 11.34 below.*

☐ **Search by Topic:** Civil Procedure > Remedies > Costs > Witnesses

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§ 11.32 Motion to Appoint Interpreter for Trial Witnesses

The district court should consider the unique circumstances of each case including the interpreter's interest and involvement in the case; the central question is whether the use of the interpreter will make the trial fundamentally unfair. The nature of the witness' handicap may make it necessary for the trial court to appoint someone familiar with the witness, thus preventing the court from obtaining a wholly disinterested person.

[1] Determining Competency of Interpreter

Fed. R. Evid. 604 specifically provides that interpreters must be qualified as experts in the skill of translating and that they must make an oath or affirmation to translate truthfully, that is, to communicate to the court exactly the thoughts that the witness conveys by his or her testimony. In some circumstances, the interpreter's oath or affirmation may be made after the translation if it was not made before. *Fed. R. Evid. 604*.

Counsel can look to the Court Interpreters Act (*28 U.S.C. § 1827*), for guidelines on determining competency of interpreters and a list of all certified and "otherwise" qualified interpreters provides for certified court interpreters for the hearing impaired (whether or not also speech impaired), and for persons who speak only a language other than English. The services of "otherwise" qualified interpreters should be used only when no certified interpreter is reasonably available, including those cases in which certification of interpreters is not provided in a particular foreign language. *28 U.S.C. § 1827(b)(2)*. Moreover, the Fifth Circuit has provided some guidelines for compliance with the Court Interpreters Act. *See United States v. Tapia, 631 F.2d 1207, 1209-1210 (5th Cir. 1980)* .

The Director of the Administrative Office of the U.S. Courts has established programs to facilitate the use of certified and otherwise qualified interpreters in judicial proceedings instituted by the United States. The Director maintains a current master list of all certified interpreters and otherwise qualified interpreters and reports on the use and performance of interpreters.

At times, the court will require a sound recording of trial testimony when an interpreter is used. Although the Court Interpreters Act generally requires continuous word for word translation, the use of summaries is not plain error and deviations from the ideal do not automatically require reversal.

When reviewing a district court's decision to appoint an interpreter, the ultimate question for the appellate court is whether a translator's performance has rendered a trial fundamentally unfair. *United States v. Huang, 960 F.2d 1128, 1136-1137 (2d Cir. 1992)* . Generally, appeals courts give great deference to the discretion of the trial judge because, although interpreters tend to present numerous difficulties at trial, it is the trial judge who is in direct contact with the witnesses and the parties, and who is in the best position to determine whether the trial proceedings were conducted fairly. *United States v. Bell, 367 F.3d 452, 464 (5th Cir. 2004)* .

[2] Choosing Family Member to Serve as Interpreter

An interpreter need not always be an impartial professional and the interpretation need not always be word for word. *United States v. Bell, 367 F.3d 452, 463-464 (5th Cir. 2004)* . In *Bell*, the court appointed as interpreter the sister of a deaf-mute rape victim, notwithstanding the interpreter's family connection to the victim, because the victim had an idiosyncratic communication system of grunts and gestures that only a family member or close friend could understand.

In *United States v. Ball, 988 F.2d 7 (5th Cir. 1993)* , the prosecution called a witness who was deaf and whose speech was unintelligible to the trial judge and jury. The trial court permitted the witness' wife to serve as an interpreter. The obvious concern with such an appointment is that the interpreter will have a suspect motivation. In *Ball*, the Fifth Circuit found no abuse of discretion by the trial court noting that the wife's only connection to the case was that she was married to a witness who had no stake in the outcome. It was also important that the nature of the witness' disability made it necessary to appoint someone familiar with the witness. Obviously, the appointment of a family member would not be justified if the witness merely spoke a foreign language; in such a case, counsel should seek appointment of an unaffiliated translator.

Strategic Point:

It can be helpful to have a family member who is reasonably fluent in both English and the other language present with or near counsel during the witness' testimony, to catch possibly damaging inaccuracies in the translation by the interpreter due to differing dialects or regional variations in spoken language. For example, an interpreter who is certified in Cantonese may have difficulty interpreting Mandarin. Furthermore, even a person certified to interpret a widely spoken language, such as Spanish, may not accurately translate regional or topical slang from a particular country.

Warning:

A party's failure to object to the district court's decision to use an interpreter or raise any issue concerning the interpreter's certification or qualifications constitutes a waiver of these issues. *United States v. Haywood, 363 F.3d 200, 213 (3d Cir. 2004)* .

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§ 11.33 Motion to Appoint Interpreter for Jurors

It is the policy of the United States, as reflected in the Jury Selection and Service Act of 1968 (*28 U.S.C. § 1861 et seq.*), that all citizens have the opportunity to be considered for service on juries in the district courts, and that they have an obligation to serve as jurors when summoned. *28 U.S.C. § 1861*; *United States v. Dempsey, 830 F.2d 1084, 1087-1088 (10th Cir. 1987)* (district court did not abuse its discretion in allowing deaf person to serve on jury with interpreter present at trial and during deliberations, when interpreter was sworn to translate accurately, was instructed before deliberations not to express any original ideas, and was questioned after verdict to ensure that she had not participated in deliberations).

For the proper procedure for interpreters for deaf jurors, *see Greater Los Angeles Council on Deafness v. Zolin, 812 F.2d 1103 (9th Cir. 1987)*; *Arneson v Sullivan, 946 F.2d 90, 92-93 (10th Cir. 1996)*; *United States v. Dempsey, 830 F.2d 1084 (10th Cir. 1987)*.

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§ 11.34 Compensating Interpreters; Costs Are Taxable

The fees of a trial interpreter may be taxed against the losing party. *Fed. R. Civ. P. 43(d). See Cruz v. Local Union No. 3 of the IBEW, 150 F.R.D. 29, 37 (S.D.N.Y. 1993)* ; *BDT Prods. v. Lexmark Int'l, Inc., 405 F.3d 415, 419 (6th Cir. 2005)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 43.06.*
- *Bender's Federal Practice Forms* Form Nos. 43:30-43:42.
- *Federal Trial Guide § 20.13.*
- *Fed. R. Civ. P. 43(d)* (interpreters).
- *Fed. R. Evid. 604* (interpreters).
- *28 U.S.C. § 1827* (Court Interpreter's Act).
- *28 U.S.C. § 1861 et seq.* (Jury Selection and Service Act).

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Chapter 11 TRIAL MOTIONS
PART G: MOTIONS TO EXCLUDE WITNESSES

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§ 11.35 Motions to Exclude Witnesses; Procedural Context

The court, at the request of either party, or on its own motion, can order the exclusion of witnesses so they cannot hear the testimony of any other witnesses in the case. *Fed. R. Evid. 615*. The purpose of this rule is "to prevent the shaping of testimony by one witness to match that of another, and to discourage fabrication and collusion." *Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1372 (5th Cir. 1981)* ; *Queen v. Washington Metropolitan Area Transit Authority, 842 F.2d 476, 481-482 (D.C. Cir. 1988)* .

The burden is on the party opposing sequestration to persuade the court to exercise its discretion and except a certain witness or witnesses from the sequestration order. The standard for review of an order of exclusion is whether there was an abuse of discretion of court. *Polythane Sys. v. Marina Ventures Int'l, Ltd., 993 F.2d 1201, 1209 (5th Cir. 1993)* ; *Lewis v. Owen, 395 F.2d 537, 541 (10th Cir. 1968)* .

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§ 11.36 Checklist for Motions to Exclude Witnesses

☐ If seeking an exclusion order from the court:

○ Be sure to check local district court rules and individual judge's rules for filing deadlines and guidelines for motions to exclude witnesses. *See § 11.37[1] below*.

○ Determine which witness or witnesses should be subject to the exclusion order and why. Because the moving party bears the burden of proving why sequestration is necessary, be prepared to submit factual evidence to the court in support of the motion to exclude witnesses. *See § 11.38[1] -[5] below*.

☐ If opposing motion to exclude witnesses:

○ If representing a corporate party, be sure to designate a representative of the corporate party, which will automatically exempt this witness from sequestration order at the time the opposing party files a motion to exclude under *Fed. R. Evid. 615*. *See § 11.38[2] below*.

○ Argue that the witness to be excluded is an "essential person," and should therefore be exempt from the sequestration order. *See § 11.38[3] below*.

○ Be sure to object to the exclusion order on the record. *See § 11.37[2] below*.

☐ **Search by Topic:** Evidence > Testimony > Sequestration

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§ 11.37 Motions to Exclude Witnesses

[1] Complying With Timing Requirements When Seeking Sequestration Order

Fed. R. Evid. 615 does not specify when a request for exclusion of testimony, evidence, or argument must be made. Counsel must consult all local rules and the court's individual general orders to determine if the court requires that all motions to exclude be presented at pretrial conferences so that the court's rulings may be set forth in the final pretrial order. In any event, to be effective, a motion to exclude should be made early as possible in the trial, and at least before the testimony begins.

As a practical matter, motions to exclude are often made during the trial. Counsel must continuously evaluate whether to move to exclude any potential witnesses for the opposing party during the course of the trial as the record is being made. On the other hand, too much delay can sometimes constitute a waiver. *See Blackmon v. Johnson, 145 F.3d 205, 211 (5th Cir. 1998)* (sequestration request denied when made on second day of testimony and witness had been present in courtroom during preceding day's testimony; insufficient demonstration of prejudice from failure to sequester); *Marathon Pipe Line Co. v. Drilling Rig Rowan/Odessa, 699 F.2d 240, 241-242 (5th Cir. 1983)* .

[2] Objecting to Motion to Exclude Witnesses on the Record

An objection to the order of exclusion must be made on the record. A party's failure to object to an erroneous sequestration will result in a waiver. *Hull v. Merck and Co., 758 F.2d 1474, 1478 (11th Cir. 1985)* .

Strategic Point:

A trial attorney can take advantage of a sequestration order in a bench trial to give his party's witnesses more credibility since the court in a bench trial may discount a witness' testimony if that witness has sat in the courtroom listening to other witnesses. *See Bucheit v. PLO, 388 F.3d 346, 351 (D.C. Cir. 2004)* .

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§ 11.38 Exempting Certain Witnesses From Exclusion Order

Fed. R. Evid. 615 does not authorize the exclusion of: (1) a party who is a natural person; (2) an officer or employee of a corporate party designated as the corporation's representative; (3) a person authorized by statute to be present; and (4) "essential persons."

[1] Natural Person Party Exempt from Exclusion Order

A party who is a natural person may not be excluded from the courtroom. This provision, which operates automatically, is designed to eliminate problems of confrontation and due process violations. In a wrongful death action, relatives of the deceased who are properly bringing the action may qualify as parties who are entitled to remain in the courtroom. *Johnson v. United States, 780 F.2d 902, 909 (11th Cir. 1986)* (district court did not err in refusing to exclude mother from courtroom in medical malpractice action under state wrongful death statute).

[2] Designated Representative of Corporate Party Exempt From Exclusion Order

A corporate party may designate an officer or employee as its representative to assist counsel during the trial. *Fed. R. Evid. 615* specifically prohibits the exclusion of "an officer or employee of a party which is not a natural person designated as its representative by its attorney." The exemption from sequestration should be automatic if the party makes a request for designation at the time the opposing party moves for an exclusion order pursuant to *Fed. R. Evid. 615*. *Nanoski v. General Motors Acceptance Corp., 874 F.2d 529, 531 (8th Cir. 1989)* .

Courts have recognized that civil litigants as well as criminal defendants have a constitutional right to retain counsel, and that right includes the right of a litigant to consult with his attorney during breaks and recesses in the litigant's testimony. This rule applies to the designated agent of a corporate defendant, especially its officers. *Potashnick v. Port City Constr. Co., 609 F.2d 1101 (5th Cir. 1980)* .

A person who is not a current officer or employee of company should not be designated as its representative. *See Opus 3 Ltd. v. Heritage Park, 91 F.3d 625, 630 (4th Cir. 1996)* . However, the court can refuse to extend the class of "employees" to include former employees on the basis that exceptions to the rule should be narrowly construed. *See Bass v. Hardee's Food Sys., 229 F.3d 1141 (4th Cir. 2000)* (in premises liability action arising out of plaintiff's slip and fall in defendant restaurant's parking lot, court affirmed sequestration of restaurant manager at the time of plaintiff's

accident, who was no longer an employee of defendant at the time of trial).

Circuit Split:

Although *Fed. R. Evid. 615* is phrased in the singular, the Courts of Appeals are split on whether trial courts have discretion to allow more than one designated representative to remain in the courtroom. Some circuits interpret *Fed. R. Evid. 615* to allow more than one employee, for instance, when it is impossible to find one person within the structure of a large entity who has all the information needed to assist the attorney. *See, e.g., United States v. Causey, 609 F.2d 777, 777-778 (5th Cir. 1980)* ; *Hampton v. Kroger Co., 618 F.2d 498, 499 n.3 (8th Cir. 1980)* (in negligence action concerning falls in two of defendant's stores, court allowed one representative from each store to remain in courtroom); *Breneman v. Kennecott Corp., 799 F.2d 470, 474 (9th Cir. 1986)* (two representatives of defendant allowed).

On the other hand, some Circuits have strictly construed *Fed. R. Evid. 615*. In *Oliver B. Cannon and Son, Inc. v. Fid. & Cas. Co., 519 F. Supp. 668, 678 (D. Del. 1981)* , the court held that a party could not designate more than one person to be present as its representative because the exception codified in *Fed. R. Evid. 615(2)* is phrased in the singular. *See also United States v. Machor, 879 F.2d 945, 953-954 (1st Cir. 1989)* ; *United States v. Jackson, 60 F.3d 128, 134-135 (2d Cir. 1995)* ; *United States v. Farnham, 791 F.2d 331, 335 (4th Cir. 1986)* (error for trial court to refuse defendant's timely request to sequester one of two government agents, "if not during the entire trial, at least during the testimony of his colleague"); *United States v. Pulley, 922 F.2d 1283, 1285-1287 (6th Cir. 1991)* (error to permit two government agents to remain at trial table when both were scheduled to be witnesses).

Other courts use a hybrid procedure and allow multiple representatives to remain for most of the trial testimony but exclude the other representatives when one representative is testifying. *United States v. Ramirez, 963 F.2d 693, 703-704 (5th Cir. 1992)* (citing *Fed. R. Evid. 615*).

[3] Essential Persons Exempt From Exclusion Order

Also exempt from exclusion orders are persons whose presence is shown to be essential to the presentation of a party's case. This "essential person" exception is frequently applied to fact witnesses whose testimony will necessarily be based on other facts developed through testimony of other witnesses throughout the trial. *Hopkins v. Saunders, 199 F.3d 968, 980 (8th Cir. 1999)* . For example, this exception contemplates such persons as an agent who handled the transaction being litigated. *See Oliver B. Cannon & Son, Inc. v. Fid. & Cas. Co., 519 F. Supp. 668, 679 (D. Del. 1981)* (action to recover money from insurance carrier, plaintiff's attorney who handled the underlying claim against the insurer, citing *Fed. R. Evid. 615(1)*).

Trial courts use six factors in applying *Fed. R. Evid. 615* to "essential persons":

1. How critical is the sought-to-be-excluded witness' testimony;

2. Whether that testimony is ordinarily subject to tailoring;

3. Whether the testimony is likely to cover the same issues as other witnesses;

4. The order that the witnesses will be called;

5. Whether any potential for bias exists that could incline a person to tailor his testimony; and

6. Whether the witness' presence is essential or simply desirable.

See Bruneau v. South Kortright Cent. Sch. Dist., 163 F.3d 749 (2nd Cir 1998) ; *In re Omeprazole Patent Litig., 190*

F. Supp. 2d 582, 583-587 (S.D.N.Y. 2002) .

The "essential person" exception is typically invoked for expert witnesses. *See Malek v. Federal Insurance Co., 994 F.2d 49 (2d Cir. 1993)* ; *Morvant v. Construction Aggregates Corp., 570 F.2d 626, 629-630 (6th Cir. 1977)* . An expert who intends to base an opinion on "facts or data in the particular case" pursuant to *Fed. R. Evid. 703*, will be unable to testify if he or she has been excluded. *Lewis v. Owen, 395 F.2d 537, 541 (10th Cir. 1968)* ("[t]he general rule is that, notwithstanding a court order excluding witnesses from the court room during the presentation of evidence, it is within the sound discretion of the court to permit an expert witness to remain in the court room while other witnesses are testifying."). However, the trial court has the discretion to refuse to apply the exemption to expert witnesses. *Opus 3 Ltd. v. Heritage Park, 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"); *Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1373-1374 (5th Cir. 1981)* (*Fed. R. Evid. 615* does not require exemption for expert witnesses).

[4] Persons Authorized by Statutory Right Exempt From Exclusion Order

Persons authorized by statute to be present during trial testimony cannot be excluded. This provision to *Fed. R. Evid. 615* was added in 1998 to respond to the Victim's Rights and Restitution Act of 1990 (42 U.S.C. § 10606) (repealed) and the Victim Rights Clarification Act of 1997 (*18 U.S.C. § 3510*).

[5] Attorney for Party Exempt From Exclusion Order

The plain and unambiguous language of *Fed. R. Evid. 615* makes it clear that lawyers are not subject to the rule. The language relates only to "witnesses" and it serves only to exclude witnesses from the courtroom. *See Oliver B. Cannon & Son, Inc. v. Fid. & Cas. Co., 519 F. Supp. 668, 678 (D. Del. 1981)* (in action to recover money from insurance carrier, witness who had acted as plaintiff's counsel in dealings and underlying litigation with defendant was essential to conduct of case and was exempt from sequestration; citing *Fed. R. Evid. 615*); *see also United States v. Rhynes, 218 F.3d 310, 316 (4th Cir. 2000)* (*Fed. R. Evid. 615* did not prohibit lawyer from discussing one witness' testimony with other witnesses).

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§ 11.39 Imposing Sanctions for Violations of Exclusion Order

The decision on whether an exclusion order has been violated and, if so, the sanction to be imposed is left to the discretion of the trial court. *McKee v. McDonnell Douglas Technical Services Co., 700 F.2d 260, 262 (5th Cir. 1983)* .

Sanctions may include a contempt citation against the witness. *United States v. Smith, 578 F.2d 1227, 1235 (8th Cir. 1978)* , the refusal to allow the witness to testify, *Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1372-1374 (5th Cir. 1981)* ; *Reeves v. International Telephone and Telegraph Corp., 616 F.2d 1342, 1355 (5th Cir. 1980)* and the striking of previous testimony. *Jerry Parks Equip. Co. v. Southeast Equip. Co., 817 F.2d 340, 344 (5th Cir. 1987)* .

Strategic Point:

The specific language of the court's order is very important. The question whether a witness exclusion order has been violated depends very much on the wording of the court's order. For example, in *United States v. Rhynes, 196 F.3d 207, 226-227 (4th Cir. 1999)* , the trial court's order which included an instruction to the prospective witnesses that they should not "discuss one with the other their testimony and particularly that would apply to witnesses who have completed their testimony not to discuss testimony with prospective witnesses" was specific enough to warrant sanctions.

On the other hand, when the trial court's order simply excludes prospective witnesses from the courtroom, and does not explicitly prohibit a witness who has already testified from talking to other prospective witnesses about their testimony and what they might have heard during other witness' testimony, there may be no basis for claiming a violation of the court's sequestration order when one witness who has testified tells a prospective witness what he or she heard during the defendant's testimony. *See United States v. Sepulveda, 15 F.3d 1161, 1176 (1st Cir. 1993)* .

PRACTICE RESOURCES:

- *Weinstein's Federal Evidence §§ 615.01 -615.07.*
- *Federal Litigation Guide PP 31.01 -31.05.*

- *Federal Trial Guide § 20.12*.
- *Fed. R. Evid. 615* (witnesses).

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§ 11.40 Procedural Context; Motions Involving Trial Subpoenas

The district court may modify or quash a trial subpoena pursuant to 45(c)(3) on several grounds, ranging from technical requirements such as the amount of fees tendered, to substantive issues regarding disclosure of confidential or privileged information.

In addition, the district court has the authority to enforce trial subpoenas. If a subpoena recipient fails to respond to the subpoena or provides an inadequate response, the party serving the subpoena may request the court to exercise its enforcement power. Furthermore, a nonparty's failure to obey a subpoena without an adequate excuse may constitute contempt of the court from which the subpoena was issued. *See Fed. R. Civ. P. 45(e)*. Generally, the party serving the subpoena will file a motion that requests: (1) an order compelling compliance with the subpoena; and (2) a rule to show cause why the noncompliant subpoena recipient should not be held in contempt.

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§ 11.41 Checklist for Moving to Quash, Modify, or Enforce Trial Subpoena

☐ If moving to quash or modify trial subpoena, consider the following:

- ○ Does the subpoena comply with Rule 45 requirements? *See § 11.42 below*.
- ○ Does the subpoena comply with distance limitations or is there an "adequate excuse" not to obey the subpoena? *See § 11.49 below*.
- ○ Does the subpoena impose an undue hardship? *See § 11.44[3] below*.
- ○ Does the subpoena require disclosure of protected matter? *See § 11.45 below*.

☐ If moving to enforce a trial subpoena, consider the points stated above before doing the following:

- ○ Respond to any opposition filed by subpoenaed person. *See § 11.47 below*.
- ○ Move for order of compliance. *See §§ 11.47* and *11.49[2][b] below*.
- ○ Move for issuance of rule to show cause. *See §§ 11.48* and *11.49[2][c] below*.

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§ 11.42 Complying With Requirements of Rule 45(a)(1)

Every subpoena, whether issued for trial or for seeking testimony or production of documents, must contain the following elements:

1. The name of the issuing court;

2. The title, civil action number, and court in which the action is pending;

3. A command to each person subject to the subpoena to comply at a specified time and place by: (a) attending and testifying; and (b) producing designated documents, electronically stored information, or other tangible things. Specificity of the documents is required so that the subpoena will not be overbroad and therefore impose an "undue burden" on the person from whom production is sought; and

4. Include the text of *Fed. R. Civ. P. 45(c)* and *(d)*.

Strategic Point:

Counsel should consider serving a trial subpoena on the opposing party. It might not be in an opposing party's interest to be present at the trial and subject itself to cross examination, especially if insufficient admissions were obtained in the party's deposition, which would have been admissible at trial even if the party did not appear. Absent service of a subpoena, the court can refuse to compel attendance of a defendant. *See McGill v. Duckworth, 944 F.2d 344, 353 (7th Cir. 1991)* . A party has no independent obligation to appear at trial; however, attendance may be compelled by a subpoena. *See First City, Texas-Houston, N.A. v. Rafidain Bank, 197 F.R.D. 250, 254-255 & n.5 (S.D.N.Y. 2000)* .

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§ 11.43 Moving to Quash or Modify Subpoena; Raising Objections to Production

[1] Putting Objections in Writing and Serving Them on Party or Attorney

A person commanded by a subpoena to produce documents may object to the subpoena by serving a written objection on the party or attorney designated in the subpoena. If a timely objection is filed, the person subject to the subpoena is excused from compliance unless a court order enforcing the subpoena is obtained. This rule applies only to subpoenas seeking production of documents and does not apply to a subpoena to testify. If the subpoena commands both testimony and production, the party is excused only from complying with the portion of the subpoena seeking production of documents, and must thus timely file a separate motion to quash or modify the subpoena to testify.

Timing:

A party must serve objections to a subpoena within 14 days of service of the subpoena or before the compliance date, whichever is earlier. Since *Fed. R. Civ. P. 45* does not provide a specific time period for bringing a motion to quash or modify, courts have required that the motion be made before the date specified for compliance set forth in the subpoena. In fact, one of the available grounds for a motion to quash or modify is that the subpoena does not allow sufficient time for compliance.

[2] Complying With Standing Requirements; Party Generally May Not Seek to Quash Subpoena Directed to Nonparty

A party does not have standing to assert any rights of the nonparty as a basis for a motion to quash or modify a subpoena. If, however, a party claims a personal right or privilege regarding the production or testimony sought by a subpoena directed to a nonparty, the party has standing to move to quash or modify the subpoena. When the privileges or privacy interests of a third person are implicated by a subpoena, the third person may have a right to move to quash or modify the subpoena. *See § 6.09[2][b] above*.

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§ 11.44 Moving to Quash or Modify Subpoena on Grounds of Unreasonable Time, Distance, Burden, or Expense

A recipient of a trial subpoena may move the court to quash or modify the subpoena on one or more of the following grounds, and should be prepared to present evidence of unreasonable logistical difficulties presented by compliance:

1. **Unreasonable Time to Comply**. This objection usually leads the court to postpone the recipient's appearance date.

2. **Unreasonable Travel Distance.** A subpoena cannot require a person who is neither party nor the party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person. However, *Fed. R. Civ. P. 45(c)(3)(B)(iii)* authorizes the court to command a person to attend a trial by traveling:

(a) within the district of the issuing court;

(b) outside that district but within 100 miles of the place specified for the trial. It is common for a witness or evidence to be relatively close to the court, but outside the district where district or state boundaries intersect. For this reason, *Fed. R. Civ. P. 45* authorizes "bulge" service of a subpoena at any place that is outside the district but is also within 100 miles of the place specified by the subpoena for the trial;

(c) within the state of the issuing court even if more than 100 miles; and,

(d) a court may order the issuance of a subpoena requiring the appearance of a witness who is a national or resident of the United States who is in a foreign country pursuant to the Walsh Act (*28 U.S.C. § 1783*) if the court finds that it is not possible to obtain the testimony in admissible form without the personal appearance of the witness in any other manner.

3. **Undue Burden or Expense.** To determine whether a subpoena presents an "undue" burden or expense, the courts will consider a variety of factors, including:

(a) relevance of the information requested;

(b) need of the party for the production;

(c) breadth of the request for production;

(d) time period covered by the subpoena;

(e) specificity which the subpoena describes the requested production; and

(f) burden imposed by production.

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§ 11.45 Moving to Quash or Modify Subpoena That Seeks Disclosure of Trade Secrets or Other Confidential Information

The court may quash or modify a subpoena that requires the disclosure of trade secrets or confidential research, development, or commercial information. *Smith v. BIC Corp., 869 F.2d 194, 199-201 (3d Cir. 1989)* . The protection of trade secrets is not absolute, but requires balancing of commercial interests against the need for information to support claims or defenses. *See Mycogen Plant Science v. Monsanto Co., 164 F.R.D. 623, 626-628 (E.D. Pa. 1996)* .

Confidential commercial information is information or testimony that would cause "substantial economic harm" to the competitive position of the entity from whom it is obtained. *Micro Motion, Inc. v. Kane Steel Co., 894 F.2d 1318, 1322-1325 (Fed. Cir. 1990)* .

The party moving to quash the subpoena has the burden of establishing that the information sought is confidential, and that its disclosure will result in a clearly defined and serious injury to the moving party. If the moving party meets its burden, the burden then shifts to requesting party to establish that the information it seeks to obtain is both relevant and necessary. *Allen v. Howmedica Leibinger, Inc., 190 F.R.D. 518, 525 (W.D. Tenn. 1999)* .

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§ 11.46 Moving to Quash or Modify Subpoena That Seeks Unretained Expert's Opinion

The subpoena power of the court should not be used to obtain expert testimony without paying appropriate compensation. *Fed. R. Civ. P. 45(c)(3)(B)(ii)*; *see, e.g., Buchanan v. American Motors Corp., 697 F.2d 151, 152 (6th Cir. 1983)* ; *Mattel Inc. v. Walking Mountain Prods., 353 F.3d 792, 814 (9th Cir. 2003)* . This rule protects the "intellectual property" of an expert, who cannot be compelled by subpoena to offer expertise without reasonable compensation. *See Fed. R. Civ. P. 45* advisory committee note of 1991; *see also Karp v. Cooley, 349 F. Supp. 827, 836 (S.D. Tex. 1972)* (doctor could not be subpoenaed against his will to offer expert testimony in medical malpractice case).

Whether testimony or production sought by subpoena is indeed "expert" turns on the nature of the evidence, not the identity of the person subject to the subpoena. If the evidence sought derives from the person's participation in or knowledge of the "specific occurrences in dispute," the person is not an "expert" and may be compelled to provide the evidence by subpoena. The classic example is the plaintiff's treating physician, who derives knowledge of the facts of the case through personal involvement in the action. As long as the testimony or production sought from the physician is restricted to examination, diagnosis, and treatment of the plaintiff, the physician is not an "expert" and may be compelled by subpoena to provide the evidence, without being paid as an expert. *Fisher v. Ford Motor Co., 178 F.R.D. 195, 197-199 (S.D. Ohio 1998)* . The physician may not, however, be compelled by subpoena to testify about matters that require medical expertise and are outside the scope of examination, diagnosis, and treatment of the plaintiff. *Young v. United States, 181 F.R.D. 344, 347-348 (W.D. Tex. 1997)* .

The rule against issuing subpoenas to obtain uncompensated expert testimony applies only to unretained experts. *Wright v. Jeep Corp., 547 F. Supp. 871, 874-877 (E.D. Mich. 1982)* (in product liability suit over automobile, defendant manufacturer entitled to subpoena expert who had conducted research into accidents of type in dispute; both underlying data and conclusions reached by expert were highly relevant in action, and any burden on expert would be alleviated by requiring defendant to pay a reasonable fee to expert).

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§ 11.47 Court May Impose Conditions Rather Than Quash or Modify Subpoena

In lieu of quashing or modifying a subpoena, a court may order compliance with the subpoena under specified conditions if the serving party: (1) shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship; and (2) ensures that the subpoenaed person will be reasonably compensated. For example, if a subpoena seeks trade secrets or other confidential commercial information, the court can enter a protective order limiting the use or distribution of the information. Similarly, if a party seeks to compel by subpoena the testimony of an unretained expert witness, the court may enforce the subpoena if the serving party makes the requisite showing of need and arranges for reasonable compensation of the expert. A party seeking to enforce such a subpoena bears the burden of making the same showing of "substantial need" that is required to obtain another party's work product. *See Fed. R. Civ. P. 45* advisory committee note of 1991.

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§ 11.48 Enforcing Subpoena; Court May Order Compliance as Prerequisite to Contempt Sanction

If a subpoena recipient does not respond to the subpoena, or provides an inadequate response, the party serving the subpoena needs to file a motion that requests: (1) an order compelling compliance with the subpoena; or (2) the issuance of a rule to show cause why the noncompliant subpoena recipient should not be held in contempt.

Parties should be aware, however, that because counsel may issue a subpoena without obtaining prior approval from the court, courts tend to impose contempt sanctions "sparingly" because the command of an attorney-issued subpoena is effectively that of the attorney, and not that of a "judicial officer." *See Fed. R. Civ. P. 45* advisory committee note of 1991. Thus, some courts have refused to award contempt sanctions unless the party serving the subpoena has first obtained and served an order compelling compliance with the subpoena and the recipient still has not complied. *See James v. A.H. Marathon, 2005 U.S. Dist. LEXIS 28311, at *7 (N.D. Ohio 2005)* ("contempt should be very sparingly applied when the non-party witness has been overborne by a party or attorney.").

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§ 11.49 Failing to Obey Subpoena May Constitute Contempt of Court

[1] Person Subject to Subpoena Must Be Given Opportunity to Excuse Disobedience

If the person served with a subpoena fails to obey it "without adequate excuse," the issuing court may hold the person in contempt. The "adequate excuse" language is reflective of the strictures of due process, which require that notice and an opportunity to respond be provided before the court holds a person subject to a subpoena in contempt for failure to obey.

[2] Providing "Adequate Excuse" to Disobey Subpoena

[a] Defective Subpoena Excuses Compliance

Fed. R. Civ. P. 45(e) offers only one example of what constitutes an "adequate excuse" to disobey a subpoena--that it imposes an excessive travel burden on a nonparty witness. The maximum travel burden of a nonparty witness is expressly stated in the rule, and a subpoena that contravenes that maximum is fatally defective and need not be obeyed. If there is any doubt whether a subpoena is fatally defective, however, a prudent party will seek court protection in advance of the date set for compliance to avoid the possibility of contempt. Likewise, lack of proper service of the subpoena precludes the imposition of contempt sanctions.

[b] Filing Objection to Compliance with Subpoena

A timely filed objection to the production of documents or a motion to quash or for a protective order as to any subpoena, where the party serving the subpoena has not obtained a court order enforcing the subpoena, will be considered an "adequate excuse" for disobeying the subpoena. Even if the person's motion to quash the subpoena is denied, the mere denial may not be deemed sufficient to justify a contempt sanction. Instead, the party serving the subpoena must first obtain an order compelling compliance.

[c] Contempt Sanction as to Subpoena of Person in Foreign Country

If a subpoena has been issued and served on a United States national or resident in a foreign country under the Walsh Act (*28 U.S.C. § 1784*), any sanction for contempt of the subpoena is governed not by *Fed. R. Civ. P. 45* but by the

more specific contempt provision of the Walsh Act, which requires the issuance of an order to show cause why the subpoenaed person should not be held in contempt. The order may direct the seizure of the person's property to satisfy any contempt order, as long as the party serving the subpoena provides security in the event that the person should not have been held in contempt.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 45.01 -45.72*.
- *Fed. R. Civ. P. 45* (subpoenas).
- *28 U.S.C. § 1784* (Walsh Act).

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§ 11.50 Motions in Limine; Procedural Context

Neither the Federal Rules of Civil Procedure nor the Federal Rules of Evidence specifically authorize parties to bring motions in limine. Nevertheless, courts grant motions in limine regularly under the appropriate circumstances. Such rulings are within the inherent authority of the court to manage trials. *See G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F. 2d 648, 653 n.6 (7th Cir. 1989)* ; *In re Japanese Elec. Products Antitrust Litigation, 723 F.2d 238, 260 (3d Cir. 1983)* , *rev'd on other grounds*, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* .

A party may make a motion in limine prior to or during a trial, for the purpose of limiting the disclosure and use of evidence. It is used primarily to preclude parties, their counsel, and witnesses from disclosing to jurors or prospective jurors irrelevant or otherwise inadmissible matters that are either so prejudicial or confusing that their effect cannot be nullified by a subsequent admonition by the court. If the party bringing the motion is successful, the resulting court order to exclude covers voir dire, opening statements, and closing arguments, as well as the actual presentation of evidence during trial.

Pretrial motions in limine can save parties and their counsel considerable time and expense, precluding them from the need to prepare their responses to evidence to be presented at trial that is, in fact, inadmissible. Moreover, regardless of whether pretrial motions in limine are ultimately granted or denied, they often facilitate settlement by reducing the elements of uncertainty concerning what may affect the outcome of trial.

Most provisions for admission of evidence at trial are contained in the Federal Rules of Evidence and *28 U.S.C. §§ 1731-1745*. The Federal Rules of Evidence are generally applicable to civil actions and proceedings, including admiralty and maritime actions, to nonsummary contempt proceedings, and to bankruptcy actions and proceedings. *Fed. R. Evid. 1101(b)*. Proceedings in which the Federal Rules of Evidence are applicable in part are set forth in *Fed. R. Evid. 1101(e)*.

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§ 11.51 Checklist for Motions in Limine

☐ If seeking to exclude evidence:

- ○ Be sure to comply with timing requirements of local court and individual trial judge.
- ○ Before bringing motion, weigh strategic advantages and disadvantages. *See §§ 11.52*-11.53 *below*.
- ○ Argue for exclusion of evidence on as many grounds as possible. *See § 11.55 below*.
- ○ Consider requesting sanctions against opposing party for violations of order in limine. *See § 11.58 below*.

☐ If opposing exclusion of evidence:

- ○ File response objecting to motion in limine on as many grounds as possible. *See § 11.55 below*.
- ○ If no "definitive ruling," renew the objection at trial. *See § 11.57 below*.
- ○ Consider the effects of an erroneous ruling. *See § 11.56 below*.
- ○ Preserve the evidentiary issue for appeal. *See § 11.57 below*.
- ○ If necessary, advise witnesses of the content of order limiting testimony. *See §*

11.55 below.

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§ 11.52 Advantages of Motions in Limine

Motions and orders in limine have advantages and disadvantages. One advantage is that if certain evidence is excluded by an order in limine prior to trial, the parties may be spared the expense of extensive discovery and the costs of hiring experts concerning the issue. *Cipollone v. Liggett Group, Inc., 644 F. Supp. 283, 286 (D.N.J. 1986)* . A motion in limine also may lessen the risk of a mistrial. *Kociemba v. G.D. Searle and Co., 683 F. Supp. 1582, 1584 (D. Minn. 1988)* .

A motion in limine can circumvent a spur of the moment and pressured ruling. They also eliminate wasteful side bars or lengthy interruptions of a trial to decide a difficult evidentiary question. *In re Japanese Elec. Products Antitrust Litigation, 723 F.2d 238, 260 (3d Cir. 1983)* , *rev'd on other grounds*, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* .

A motion in limine prior to trial is likely to allow for a more thorough briefing of evidentiary issues than will be possible during trial, which may increase the chance of obtaining a favorable ruling. The opposite could be true if the briefs are merely reviewed by a law clerk. Thus, although a pre-trial hearing on a motion in limine could be more time consuming than a question raised by objection at trial, it may produce the most beneficial results. *See In re Korean Air Lines Disaster, 932 F.2d 1475, 1483 (D.C. Cir. 1991)* .

Although an order in limine issued before the start of a trial will ordinarily determine whether a piece of evidence is to be excluded, courts have pointed out that "a ruling on a motion in limine is basically an advisory opinion subject to change as events at trial unfold." *See Sales v. State Farm Fire and Casualty Co., 632 F. Supp. 435, 436 (N.D. Ga. 1986)* , *rev'd on other grounds*, *849 F.2d 1383 (11th Cir. 1988)* ; *see also Guillory v. Domtar Indus., 95 F.3d 1320, 1332 (5th Cir. 1996)* (district court properly reconsidered its prior ruling on motion in limine upon realizing it was made in error due to excessive confusion to jury); *McInnis v. A.M.F., Inc., 765 F.2d 240 (1st Cir. 1985)* (at trial, court reversed its original ruling excluding evidence that plaintiff was intoxicated at time of accident).

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§ 11.53 Disadvantages of Motions in Limine

One disadvantage of a motion in limine before trial is that the parties and the court may not receive the benefit of comprehending how a particular piece of evidence sought to be excluded fits into the pattern of evidence that is offered at trial. From the court's point of view, the chief problem with excluding evidence in advance of trial arises when unforeseen circumstances, such as the impact of other evidence or perhaps an opening of the door by the opponent of the evidence, may alter its admissibility. In these instances, the court will often reserve ruling on the motion.

If the risk of prejudicial impact of disputed evidence is great, but admissibility difficult to determine in advance of trial, the court may direct the party seeking to exclude the disputed evidence to raise the question of admissibility at the trial outside the hearing of a jury. For these reasons, some circuit courts have clearly communicated their general disfavor for motions in limine. *See, e.g., United States v. Buckner, 91 F.3d 34, 36 (7th Cir. 1996)* ("[M]otions in limine present serious problems because they ask for an evidentiary call before the judge really knows enough about the context of the case to make a reasonable ruling.").

Strategic Point:

Rather than bringing a pre-trial motion in limine, a better strategy for a party seeking to exclude evidence that is only slightly harmful may be to make an objection at trial. An unfavorable or reserved ruling of a motion in limine may be more damaging to the moving party's case if it reveals theories not previously considered by the opposing party.

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§ 11.54 Complying With Deadlines for Bringing Motions in Limine

If the court's pretrial orders or the local rules set a time limit for making motions in limine, counsel must be careful to comply with these deadlines. *See Pearl v. Keystone Consolidated Industries, Inc., 884 F.2d 1047, 1051-1052 (7th Cir. 1989)* . In addition, counsel should be sure to comply strictly with local district court rules and the individual trial judge's rules. On occasion, a trial judge may allow a departure from the local procedural rule for good cause. "[A] district court can depart from the strictures of its own local procedural rules where (1) it has a sound rationale for doing so, and (2) so doing does not unfairly prejudice a party who has relied on the local rule to his detriment." *See United States v. Eleven Vehicles, 200 F.3d 203, 215 (3d Cir. 2000)* (discussing cases from various circuit courts where trial judge's have deviated from local rules).

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§ 11.55 Common Subjects for Motions in Limine

[1] Evidence of Liability Insurance Coverage Should Be Excluded

Fed. R. Evid. 411 provides that evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. The mere mention of liability insurance at trial poses great prejudice, and revealing the existence of such coverage to the jury is grounds for mistrial. *See Rozark Farms, Inc. v. Ozark Border Elec. Coop., 849 F.2d 306 (8th Cir. 1988)* ; *Robertson v. White, 113 F.R.D. 20 (W.D. Ark. 1986)* . This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

[2] Evidence of Benefits Plaintiff Receives From Collateral Source Should Be Excluded

Under the collateral source rule, a plaintiff is entitled to recover from a defendant all damages proximately caused by defendant's wrongful conduct, even if plaintiff has already received payment from a collateral source independent of the defendant. Evidence of benefits that may have a tendency to mitigate the consequences of a plaintiff's injury may not be taken into consideration in assessing the damages, and such evidence generally is inadmissible, both in the liability and damages portions of the trial. *See, e.g., Sheehy v. Southern Pac. Transp. Co., 631 F.2d 649 (9th Cir. 1980)* ; *Vanskike v. Union P. R. Co., 725 F.2d 1146 (8th Cir. 1984)* (Social Security benefits); *Clausen v. SEA-3, Inc., 21 F.3d 1181 (1st Cir. 1994)* (disability benefits; *Eichel v. New York Cent. R. Co., 375 U.S. 253, 84 S. Ct. 316, 11 L. Ed. 2d 307 (1963)* (pension payments in action under FELA); *but see McGrath v. CONRAIL, 136 F.3d 838, 840-841 (1st Cir. 1998)* (evidence of collateral sources, including disability pension payments, was admissible on issue of malingering and lack of motivation to return to work).

Exception:

By contrast, in *Bradford v. Bruno's, Inc., 94 F.3d 621, 622-623 (11th Cir. 1996)* , the 11th Circuit reversed a district court's exclusion of evidence of third party insurance company's payment of plaintiff's medical bills. Applying the *Erie* doctrine, it held that the trial court should have applied Alabama statutory law, which allowed disclosure of collateral source payments.

[3] Evidence of Settlement Negotiations or Agreements Should Be Excluded

Fed. R. Evid. 408 provides generally that settlement offers are not admissible "to prove liability for or invalidity of the claim or its amount." The rule does not require exclusion "when the evidence is offered for another purpose, such as proving bias or prejudice of a witness ..." *See Fed. R. Evid. 408*; *see also Weinstein's Federal Evidence § 408.08*. A related rule is *Fed. R. Evid. 409*, which provides that evidence of paying or offering to pay medical expenses or similar costs is not admissible on the issue of liability.

In *Lucht v. Chesapeake & O. R. Co., 489 F. Supp. 189 (W.D. Mich. 1980)* , the court held that evidence of settlement of the plaintiff's claim against the driver of a truck that collided with the train on which the plaintiff was an engineer was inadmissible. On the other hand, the district court in *United States Aviation Underwriters, Inc. v. Olympia Wings, Inc., 896 F.2d 949 (5th Cir. 1990)* , allowed some testimony regarding a settlement between parties to the case for the limited purpose of impeaching a witness.

[4] Evidence of Prior Misconduct or Criminal Conviction Should Be Excluded

Fed. R. Evid. 609 recognizes the potential for unfair prejudice, even in civil cases, that may result from the introduction of evidence of prior felony convictions that are unrelated to a witness' dishonesty. The rule makes it clear that any witness may be impeached by evidence of prior felony convictions, subject to the requirement of *Fed. R. Evid. 403* that the probative value of the evidence must exceed the danger of prejudice, confusion, or misleading the jury. Thus, as a general rule, evidence of conviction of a crime involving dishonesty may be used for the purpose of impeachment.

Fed. R. Evid. 608 deals with evidence of character and conduct of witnesses. Motions in limine often involve an effort by a party to prevent the jury from hearing particular information about prospective witnesses. *Fed. R. Evid. 608* provides that the credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation but the evidence may refer only to character for truthfulness or untruthfulness and specific instances of conduct (other than conviction of crime as provided in *Fed. R. Evid. 609*) may not be proved by extrinsic evidence.

Under *Fed. R. Evid. 404*, circumstantial evidence of a person's character is not admissible in a civil case for the purpose of showing that the person behaved in conformity to it on a particular occasion. *See Reyes v. Missouri P. R. Co., 589 F.2d 791 (5th Cir. 1979)* (four prior convictions for public intoxication not relevant to the issue of whether the plaintiff was intoxicated at the time of the accident).

[5] Evidence of Subsequent Remedial Measures Should Be Excluded

Fed. R. Evid. 407 provides that evidence of subsequent remedial measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. Courts frequently exclude evidence of subsequent precautionary or remedial measures under the established theory that such evidence is irrelevant to the issue of negligence or liability, and is unduly prejudicial.

Fed. R. Evid. 407 is designed to protect the important policy of encouraging defendants to repair and improve their products and premises without the fear that such actions will be used later against them in a lawsuit. *See Werner v. Upjohn Co., 628 F.2d 848, 855 (4th Cir. 1980)* ; *Malone v. Microdyne Corp., 26 F.3d 471 (4th Cir. 1994)* (court excluded report filed with S.E.C. on ground that report was evidence of a subsequent remedial measure); *Radford v. Seaboard S. R., Inc., 828 F.2d 1552 (11th Cir. 1987)* (subsequent warning measures taken at railroad crossing); *Kociemba v. G.D. Searle & Co., 683 F. Supp. 1579, 1581 (D. Minn. 1988)* .

In addition, tests conducted in the aftermath of an accident are excluded by *Fed. R. Evid. 407* if the tests reveal defects that were subsequently remedied. *Fasanaro v. Mooney Aircraft Corp., 687 F. Supp. 482 (N.D. Cal. 1988)* .

Parties should take note that *Fed. R. Evid. 407* does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary

measures, if controverted, or impeachment.

[6] Evidence of Similar Acts Should Be Excluded

Evidence of similar acts must be examined by the trial court pursuant to *Fed. R. Evid. 403*, with the proffering party bearing the burden of demonstrating actual occurrence and similarity of circumstances. *Reddin v. Robinson Property Group, 239 F.3d 756, 760 (6th Cir. 2001)* . However, evidence of similar accidents occurring under substantially similar circumstances and involving substantially similar components may be probative of defective design. *Mitchell v. Fruehauf Corp., 568 F.2d 1139 (5th Cir. 1978)* .

[7] Evidence Constituting Inadmissible Hearsay Should Be Excluded

One of the most common subjects parties bring to the court's attention during motions in limine made prior to trial or during trial is that certain evidence constitutes hearsay and is therefore inadmissible. *See Gordon v. Lewistown Hosp., 423 F.3d 184, 215 n.26 (3rd Cir. 2005)* ; *Wilkinson v. Carnival Cruise Lines, Inc., 920 F.2d 1560 (11th Cir. 1991)* ; *French Am. Banking Corp v. Flota Mercante Grancolombiana, S.A., 693 F. Supp. 1421 (S.D.N.Y. 1987)* .

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§ 11.56 Effect of Erroneous Ruling on Motion in Limine

Generally, a court's denial of a motion in limine will not be reversible error because there is no error until the prejudicial evidence is offered at trial and admitted before the jury, and even then, the error may still be held harmless. *See Briggs v. Marshall, 93 F.3d 355, 362 (7th Cir. 1996)* . Thus, the grounds for appeal will be the admission of the evidence at trial, rather than the denial of the motion in limine.

The standard of review for motions in limine, as for other evidentiary rulings, is abuse of discretion. *See Countrywide Servs. Corp. v. SIA Ins. Co., 235 F.3d 390, 394 (8th Cir. 2000)* ; *United States v. Watts, 95 F.3d 617, 619 (7th Cir. 1996)* ; *EEOC v. Manville Sales Corp., 27 F.3d 1089 (5th Cir. 1994)* ; *Jones v. Automobile Ins Co., 917 F.2d 1528, 1537 (11th Cir. 1990)* .

Warning:

Counsel has the obligation to make sure that the reason for denying a motion in limine is made part of the record; otherwise, a review is not appropriate because there is no way to review the court's discretion. *See United States v. Sriyuth, 98 F.3d 739, 745 (3d Cir. 1996)* ; *Nelson v. Pilkington PLC (In re Flat Glass Antitrust Litig.), 385 F.3d 350, 374 (3d Cir. 2004)* (remanding to district court to consider evidentiary questions in first instance).

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§ 11.57 Preserving Evidentiary Issue, Raised in Motion in Limine, for Appeal

Fed. R. Evid. 103 eliminates the need for a party to make an objection or an offer of proof to preserve error if the court has made a definitive ruling on the evidence. Thus, making or opposing a motion in limine is sufficient to preserve any evidentiary error for appeal if the motion results in a definitive ruling. *See, e.g., Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768, 791-792 (6th Cir. 2002)* ; *American Home Assurance Co. v. Sunshine Supermarket, Inc., 753 F.2d 321, 324 (3d Cir. 1985)* ; *United States v. Harrison, 296 F.3d 994, 1002 (10th Cir. 2002)* .

Parties should take note, however, that merely bringing a motion in limine before the court is insufficient to preserve any error unless there has been an explicit and definitive ruling by the district court. *See United States v. Archdale, 229 F.3d 861, 864 (9th Cir. 2000)* . *Fed. R. Evid. 103* imposes the obligation upon counsel to clarify whether an in limine ruling is definitive in those instances where there some doubt may exist. *See Fed. R. Evid. 103*, advisory committee note of 2000.

Accordingly, the American Bar Association has encouraged trial courts to issue a ruling, before the presentation of opening statements, that will inform the parties whether its evidentiary decisions are final or if an objection or proffer at trial will be necessary to preserve the issues. *See* Civil Trial Practice Standard 18(c) (A.B.A. 1998). Nevertheless, if there is any doubt as to whether a trial judge's ruling on a motion in limine is definitive, it would be prudent for the aggrieved party to ask the court to state its ruling on the record.

If the trial court defers making a ruling on a motion in limine, a party must make an objection or offer of proof at trial to preserve any error in the court's handling of the evidence in question. *See Weinstein's Federal Evidence (2d ed.)* Ch. 103.

In the event that the trial court changes its initial ruling or the opposing party violates the initial ruling's terms, counsel must object when the evidence is offered to preserve the claim of error for appeal. *See Ohler v. United States, 529 U.S. 753, 758 n.3, 120 S. Ct. 1851, 146 L. Ed. 2d 826 (2000)* ("in limine rulings are not binding on the trial judge, and the judge may always change his mind during the course of a trial"). The error in this situation occurs only when the evidence is offered and admitted, not when the initial ruling has been changed or violated.

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§ 11.58 Imposing Sanctions for Violations of Order Excluding Evidence

When the trial court grants a motion in limine excluding specified evidence and the opponent attempts to introduce the evidence anyway, it is imperative that the movant object to the line of evidence as soon as possible; otherwise the movant risks waiving the objection. *See Wilson v. Vermont Castings, Inc., 170 F.3d 391, 395. n.7 (3d Cir. 1999)* ; *Kostelec v. State Farm Fire & Casualty Co., 64 F.3d 1220, 1229 (8th Cir. 1995)* ; *Collins v. Wayne Corp, 621 F.2d 777, 784 (5th Cir. 1980)* . This requirement is equally applicable when the court erroneously violates it own ruling in limine. *Kostelec v. State Farm Fire & Cas. Co., 64 F.3d 1220, 1229 (8th Cir. 1995)* .

A party's attempt to introduce evidence subject to an exclusion order may result in sanctions against that party ranging from barring defenses, to limiting instructions, and perhaps even an admonition to the attorney or witness. Moreover, a party may bring a motion for civil contempt for deliberate and repeated violations by opposing counsel. *See Livingston v. Isuzu Motors, 910 F. Supp. 1473 (D. Mont. 1995)* ; *see also § 7.24 above*.

Furthermore, a party may make a motion for mistrial in cases where seriously harmful evidence has reached the jury. The party moving for a mistrial should base its motion on the incurably prejudicial nature of the evidence, rather than the violation of the order in limine, and it should bring the motion as soon as possible after disclosure of the harmful information. Counsel should be forewarned, however, that a motion for a mistrial may involve a great expenditure of time and money. Therefore, it may be wiser for a party to submit its case to the jury and then move to set aside the verdict if it is favorable to the party that violated the motion in limine.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 16.77.*
- *Federal Trial Guide §§ 6.01-6.03.*

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§ 11.59 Motion for Mistrial; Procedural Context

Grounds for mistrial include any error or irregularity that occurs during a trial, deprives a party of a fair trial, and thereby constitutes grounds for reversal and a new trial.

The decision to grant a mistrial is vested in the sound discretion of the trial court. *See Sutkiewicz v. Monroe County Sheriff, 110 F.3d 352, 361 (6th Cir. 1997)* ; *Doty v. Sewall, 908 F.2d 1053 (1st Cir. 1990)* ; *Coursey v. Broadhurst, 888 F.2d 338 (5th Cir. 1989)* . Appellate courts consider the trial judge to be in the best position to consider the remarks in the context of the trial and the effect, if any, on the jurors. *See e.g., Testa v. Village of Mundelein, 89 F.3d 443, 445 (7th Cir. 1996)* ; *Coursey v. Broadhurst, 888 F.2d 338 (5th Cir. 1989)* ; *Allstate Ins. Co. v. James, 845 F.2d 315 (11th Cir. 1988)* ; *Kehr v. Smith Barney, Harris Upham & Co., 736 F.2d 1283 (9th Cir. 1984)* ; *Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749 (6th Cir. 1980)* .

When considering whether the court has abused its discretion, the appellate court will examine the totality of the circumstances, including the nature of the comments, their frequency, their possible relevancy to the real issues before the jury, the manner in which the parties and the court treated the comments, and the strength of the case.

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§ 11.60 Checklist for Moving for Mistrial

☐ If any of the following occur during a trial, grounds for a mistrial exist:

- ○ Juror misconduct. *See § 11.62[1] below*.
- ○ Deliberate withholding of evidence by a party. *See § 11.62[2] below*.
- ○ Improper or prejudicial comments made by counsel. *See § 11.62[3] below*.
- ○ References to financial status of parties. *See § 11.62[4] below*.
- ○ Appealing to jurors' self-interest. *See § 11.62[5] below*.
- ○ "Golden rule argument," i.e., counsel asking jury members to put themselves in a party's place. *See § 11.62[6] below*.
- ○ Unwarranted attack on integrity of counsel. *See § 11.62[7] below*.
- ○ Referring to availability of liability insurance coverage. *See § 11.62[8] below*.

☐ Be sure to bring motion for mistrial to the court's attention as promptly as possible. *See § 11.61 below*.

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§ 11.61 Moving for Mistrial; Prompt Motion Required

Counsel should move for a mistrial immediately after the grounds for a mistrial arise. Generally, a party will move the court for a mistrial outside the presence of the jury. The failure to bring a motion for mistrial promptly can result in waiver of the ground of objection. *See Computer Systems Engineering, Inc. v. Qantel Corp., 740 F.2d 59, 69 (1st Cir. 1984)* (motion made after the jury had returned its verdict); *American Universal Insurance Co. v. Falzone, 644 F.2d 65 (1st Cir. 1981)* (motion made the day after closing argument but before the jury retired to deliberate); *Wildman v. Lerner Stores Corp., 771 F.2d 605, 609 (1st Cir. 1985)* ("Counsel cannot play a waiting game and after an adverse verdict is rendered raise an objection to [closing] argument for the first time").

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§ 11.62 Arguing Motion for Mistrial; Common Grounds

[1] Juror Misconduct Is Grounds for Mistrial

Excusing a juror for good cause includes juror misconduct that might cause a mistrial. The appropriate method for inquiry into possible prejudice of a juror is voir dire of the juror. 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.

[2] Withholding Evidence by Party Is Grounds for Mistrial

A party's failure to produce requested evidence in a timely manner is subject to a wide array of sanctions depending on the circumstances of the discovery misconduct. If the evidence is not produced until the eve of or during trial, leaving the requesting party little time to consider it fully, the trial court may imposed severe sanctions, including a mistrial, or an adverse inference instruction. *See Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 101 (2d Cir. 2002)* .

[3] Improper or Prejudicial Comments of Counsel Are Grounds for Mistrial

Blatantly improper or prejudicial comments and arguments of counsel are common grounds for a mistrial. It is more likely the court will grant a mistrial in a situation in which an attorney makes improper comments at a time when opposing counsel does not have an opportunity to respond. *See Allstate Ins. Co. v. James, 845 F.2d 315 (11th Cir. 1988)* . Likewise, it is more likely the court will grant a mistrial when an attorney makes comments in violation of the court's order entered on a motion in limine on the issue. *See Adams Laboratories, Inc. v. Jacobs Engineering Co., 761 F.2d 1218 (7th Cir. 1985)* ; *see also § 11.58 above*.

[4] Referring to Financial Status of Parties Is Grounds for Mistrial

It is improper to appeal to the sympathies of the jury by referring to wealth or poverty of any party. *Draper v. Airco, Inc., 580 F.2d 91, 95 (3d Cir. 1978)* (repeated inappropriate references to the defendants' wealth in contrast to the relative poverty of the plaintiff); *Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749, 756 (6th Cir. 1980)* .

[5] Appealing to Jurors' Self-Interest Is Grounds for Mistrial

Inflammatory remarks made by counsel or a party that are designed to appeal to the jurors' self-interest could justify a mistrial. *Allstate Ins. Co. v. James, 845 F.2d 315, 318 (11th Cir. 1988)* (negative comments about paying high insurance premiums are grounds for mistrial); *Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749, 755-758 (6th Cir. 1980)* (remark that jurors are the real "party" since they are taxpayers of the plaintiff taxing body, is grounds for mistrial).

[6] "Golden Rule" Argument Is Grounds for Mistrial

It is improper for counsel to ask the jury members to put themselves in the place of any party. This argument, commonly known as the "Golden Rule," is impermissible because it encourages the jury to depart from its neutral role. *See Joan W. v. Chicago, 771 F.2d 1020, 1022 (7th Cir. 1985)* , *citing Spray-Rite Serv. Corp. v. Monsanto Co., 684 F.2d 1226, 1246 (7th Cir. 1982)* , *aff'd, Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)* ; *Leathers v. General Motors Corp., 546 F.2d 1083 (4th Cir. 1976)* .

Circuit Split:

The circuits are not in agreement with respect to whether a "Golden Rule" argument is forbidden with respect to liability or only with respect to damages. *See Edwards v. Philadelphia, 860 F.2d 568 (3d Cir. 1988)* ("golden rule" argument improper as to damages and liability); *McNely v. Ocala Star-Banner Corp., 99 F.3d 1068, 1071 n.3 (11th Cir. 1996)* ("golden rule" argument is prohibited only when made with respect to damages); *Burrage v. Harrell, 537 F.2d 837 (5th Cir. 1976)* ("golden rule" improper as it relates to damages, but not as to liability); *Shultz v. Rice, 809 F.2d 643, 651 (10th Cir. 1986)* ("golden rule" argument improper only when made with reference to damages).

[7] Unwarranted Attack on Integrity of Opposing Counsel Is Grounds for Mistrial

Impugning the integrity of opposing counsel could justify a mistrial. *Bufford v. Rowan Cos., 994 F.2d 155, 157 (5th Cir. 1993)* ; *Fireman v. Armstrong World Indus., 980 F.2d 171, 209 (3d Cir. 1992)* ("vituperative references to opposing counsel will not be tolerated"); *Kehr v. Smith Barney, Harris Upham & Co., 736 F.2d 1283, 1285-1286 (9th Cir. 1984)* (unsubstantiated accusations that opposing counsel tampered with evidence are grounds for mistrial).

[8] Referring to Insurance Coverage Is Grounds for Mistrial

Discussing a party's liability insurance at trial poses great prejudice, so much that revealing the existence of such coverage to the jury is grounds for mistrial. *See Robertson v. White, 113 F.R.D. 20 (W.D. Ark. 1986)* ; *Rozark Farms, Inc. v. Ozark Border Elec. Coop., 849 F.2d 306 (8th Cir. 1988)* ; *Lewis v. Holden, 821 F.2d 291, 294 (5th Cir. 1987)* ; *Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749 (6th Cir. 1980)* ; *Theriot v. Mercer, 262 F.2d 754, 758 (5th Cir. 1959)* .

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§ 11.63 Order Granting Motion for Mistrial Not Appealable

An order granting a motion for a mistrial is not appealable. *Esneault v. Waterman S.S. Corp, 449 F.2d 1296 (5th Cir. 1971)* . However, mandamus can be sought if the trial court's rulings are outrageous and their effect is irreparable. An order granting a motion for a new trial is interlocutory and generally not appealable until after entry of final judgment following the second trial. *Allied Chemical Corp v. Daiflon, Inc, 449 U.S. 33, 101 S. Ct. 188, 66 L. Ed. 2d 193 (1980)* .

PRACTICE RESOURCES:

- *Federal Trial Guide* §§ 5.40, 5.41.

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§ 11.64 Motions for Judgment as Matter of Law Before Verdict; Procedural Context

Fed. R. Civ. P. 50 provides the guidelines and standard for a motion for judgment as a matter of law. The term "judgment as a matter of law" replaces the former terms "directed verdict" and "judgment notwithstanding the verdict" (also known as judgment *non obstante verdicto*). Rule 50(a) motions, discussed below, are filed before the case is submitted to the jury. Rule 50(b) motions filed after the verdict is returned are discussed in Chapter 12.

Parties should take note that a motion for judgment as a matter of law under *Fed. R. Civ. P. 50* is available only in jury trials. If the case is being tried before the court or an advisory jury, the party should bring a motion for judgment on partial findings pursuant to *Fed. R. Civ. P. 52(c)*.

The standard for the granting of a motion for judgment as a matter of law is that if "the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the [opposing] party on that issue," then the court should grant the motion. *Fed. R. Civ. P. 50(a)(1)*.

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§ 11.65 Checklist for Motions for Judgment as Matter of Law Before Verdict

☐ If moving for judgment as matter of law, consider the following:

- ○ Is there substantial evidence for each element? *See § 11.67[1] below*.
- ○ Does any contrary factual evidence exist?
- ○ Determine which standard of review of the evidence applies. *See § 11.67[2] below*.
- ○ Be sure to specify all grounds providing the basis for the motion. *See § 11.67[3], [4] below*.
- ○ Determine when to file the motion, which includes complying with local district court and individual judge's rules. *See § 11.68 below*.

☐ If opposing motion for judgment as matter of law, consider the following:

- ○ Determine if motion specifies defects in evidence. *See § 11.67[5] below*.
- ○ Request full hearing on the record. *See § 11.68[3] below*.
- ○ Determine which standard of review of the evidence applies. *See § 11.67[2] below*.
- ○ Move to reopen case to cure any defects. *See § 11.67[5] below*.

○ Request court to reserve ruling until after the verdict is returned. *See § 11.67[5] below*.

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§ 11.66 Scope of Motion for Judgment as Matter of Law Before Verdict

[1] Rule 50 Applies Only to Binding Jury Trials

Courts have interpreted the language of *Fed. R. Civ. P. 50* to mean that a party may bring a motion for judgment as a matter of law only in a case tried by a jury with the power to return a binding verdict, and that a party may not bring such a motion in bench trials in which the trial court acts as the finder of fact, with or without an advisory jury. *See Schlitt v. Florida, 749 F.2d 1482, 1483 (11th Cir. 1985)* . Instead, during a bench trial, a party may make a motion for a judgment on partial findings pursuant to *Fed. R. Civ. P. 52(c)*. The differences between these two types of motions are significant. The trial court, as both judge and jury, when considering a Rule 52 motion, can weigh the evidence, evaluate witness credibility, and resolve any conflicts, none of which the court can do when considering a Rule 50 motion.

[2] Rule 50 Can Be Used by Both Plaintiffs and Defendants

The court may enter judgment as a matter of law against both plaintiffs and defendants. However, when the party with the burden of proof, which is usually the plaintiff, moves for a directed verdict, the evidence must be viewed from a different perspective. Rather than considering the evidence for its sufficiency to support a finding for the opposing party, the evidence is tested for its overwhelming effect. *See United California Bank v. THC Financial Corp., 557 F.2d 1351, 1356 (9th Cir. 1977)* ; *Fireman's Fund Ins. Co. v. Videfreeze Corp., 540 F.2d 1171, 1177 (3d Cir. 1976)* . The test is a strict one, and the court should grant a directed verdict for the party bearing the burden of proof only when a jury would not be at liberty to disbelieve any of the evidence.

[3] Entering Judgment as Matter of Law on Purely Legal Grounds

Fed. R. Civ. P. 50 clearly provides that a court may enter judgment as a matter of law on purely legal issues unrelated to the sufficiency of evidence at trial, as for example when the court needs merely to use undisputed facts to determine whether an immunity should be applied to case. A party may use *Fed. R. Civ. P. 50* during the trial to present a motion for summary judgment, which the court would not hear prior to trial because of its rules regarding the timing of such motions.

[4] Entering Judgment as Matter of Law on Individual Nondispositive Issues

A court may render judgment as a matter of law with respect to individual issues or defenses that do not dispose of the entire case. *See Fed. R. Civ. P. 50*, advisory committee note of 1993; *Hammond v. T.J. Litle & Co., 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"); *American & Foreign Ins. Co. v. GE, 45 F.3d 135, 139 (6th Cir. 1995)* (motion is proper after plaintiff's expert witness' testimony could not show any defect in the product); *Lasley v. Moss, 500 F.3d 586 (7th Cir. 2007)* (court directed a verdict on the affirmative defense of mitigation of damages in a medical malpractice case).

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§ 11.67 Ruling on Motions for Judgment as Matter of Law Before Verdict

[1] Avoiding Judgment by Presenting "Substantial Evidence"

Most federal courts construe the reasonableness test to mean that a party must present "substantial evidence" in support of its claim or defense in order to avoid judgment as a matter of law. The majority of courts reject the "scintilla rule," under which judgment as a matter of law is improper if any evidence exists supporting the proposition has been admitted. Substantial evidence has been defined as evidence of such quality and weight that reasonable and fair minded people in the exercise of impartial judgment might reach different conclusions. *See Krystek v. University of S. Mississippi., 164 F.3d 251, 255 (5th Cir. 1999)* . The fundamental premise of the substantial evidence test is that jurors are not allowed to speculate in finding for the nonmovant.

Exception:

The "scintilla rule" is still applied in cases brought under the Jones Act (*46 U.S.C. § 688*) and the Federal Employers' Liability Act (*45 U.S.C. § 51 et seq.*). *See, e.g., Smelser v. Norfolk S. Ry., 105 F.3d 299, 306 (6th Cir. 1997)* ; *Aparicio v. Norfolk & W. Ry., 84 F.3d 803, 807 (6th Cir. 1996)* ; *Springborn v. American Commercial Barge Lines, Inc., 767 F.2d 89 (5th Cir. 1985)* ; *Thornton v. Gulf Fleet Marine Corp., 752 F.2d 1074, 1076 (5th Cir. 1985)* (directed verdict is appropriate "[o]nly where there is a complete absence of probative facts to support the verdict ..."); *Rogers v. Missouri P. R. Co., 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957).*

[2] Determining Standard Applied by Court When Ruling on Rule 50 Motion

The standard for the determination of motions for directed verdicts was set forth by the U.S. Supreme Court in *Brady v. Southern R. Co., 320 U.S. 476, 64 S. Ct. 232, 88 L. Ed. 239 (1943)* , stating that when the evidence is such that, without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by directed verdict or otherwise, without submission to the jury.

In *Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)* , the Supreme Court reiterated the standard set forth in *Brady*. Although the exact language used by the different circuits varies, the federal appellate courts have been reasonably consistent in applying the *Brady* standard.

Circuit Split:

In diversity cases, the slight majority of Circuit Courts of Appeals apply the federal standard in ruling on motions for judgment as a matter of law. The minority apply the applicable standards of state law. The minority (6th and 8th Circuits) apply state-law standards in diversity cases based on the *Erie* doctrine, and have held that the standard to be applied is substantive and not procedural law. The majority (4th, 5th, 9th, 10th and 11th Circuits) have decided that state law merely provides the substantive elements of a claim or defense, while federal law "provides the scale by which we measure the sufficiency of the evidence to support the jury's findings"). *See Thrash v. State Farm Fire & Cas. Co., 992 F.2d 1354, 1356 (5th Cir. 1993)* ; *Ellis v. Weasler Eng'g, Inc., 258 F.3d 326, 336-337 (5th Cir. 2001)* . The 1st and 7th Circuits have taken different positions on different occasions. Meanwhile, the 2nd and 3rd Circuits and the Supreme Court (on two occasions) have avoided a decision by finding that state and federal standards were equivalent in language or application. *See Mercer v. Theriot, 377 U.S. 152, 156, 84 S. Ct. 1157, 12 L. Ed. 2d 206 (1964)* ; *Dick v. New York Life Ins. Co., 359 U.S. 437, 444-445, 79 S. Ct. 921, 3 L. Ed. 2d 935 (1959)* .

[3] Specifying Every Basis for Rule 50 Motion on the Record

The movant should be careful to specify every basis for a Rule 50 pre-verdict motion on the record. This requirement protects both parties. It protects the opponent's *Seventh Amendment* rights by preventing movants from gaining an unfair advantage through surprise. It also protects the movant because it will reduce the risk of reversal on appeal. The movant should make the motion on the record as a safeguard in case the court reserves ruling on the pre-verdict motion. At the close of all evidence, a movant can raise grounds in a post-verdict motion or a renewed motion only if it has already raised the same grounds in a pre-verdict motion. If the party does not make its Rule 50(a) motion on the record, the appellate court cannot compare the grounds originally argued by the movant in its Rule 50(a) motion with those cited by the trial court in granting a renewed motion for judgment as a matter of law, and will reverse the ruling. *See National Indus., Inc. v. Sharon Steel Corp., 781 F.2d 1545 (11th Cir. 1986)* ; *Sulmeyer v. Coca Cola Co., 515 F.2d 835, 845-846 (5th Cir. 1975)* . However, if the grounds argued in a pre-verdict motion are "closely related" to those argued in a post-verdict motion, then setting aside a jury's verdict will not be a surprise to the non-movant. *National Indus., Inc. v. Sharon Steel Corp., 781 F.2d 1545, 1549-1550 (11th Cir. 1986)* . If the new and old grounds vary greatly, then a trial judge may not rely on the new grounds to set aside the jury's verdict. *Sulmeyer v. Coca Cola Co., 515 F.2d 835, 845-846 (5th Cir. 1975)* .

[4] Specifying Law and Facts on Which Movant Is Entitled to Judgment

Fed. R. Civ. P. 50(a) merely requires the moving party to "specify ... the law and the facts on which [it] is entitled to judgment." The movant cannot meet its obligation unless the motion, at a minimum, identifies the specific element of the opponent's case that the movant contends lacks sufficient support. The more specific motion will reduce the risk of reversal by a reviewing court which could conclude that the opponent's *Seventh Amendment* rights were violated when the movant gained an unfair advantage through surprise.

[5] Curing Defects in Proof as Alleged in Rule 50 Motion

Once a party opposing a motion for judgment is alerted to any defects in the proof as alleged in the motion, it should attempt to cure any factual deficiencies. The trial court has an overlapping responsibility to inform the non-moving party of deficiencies in its proof, and the court should afford that party an opportunity to correct any such deficiency. *See Fed. R. Civ. P. 50*, advisory committee note of 1991.

The most common method of curing factual defects is to move the court for leave to reopen the plaintiff's case in chief. Regardless, the court will most likely reserve its ruling on the motion for judgment at the end of the plaintiff's case until a verdict is returned. The party opposing the motion should then attempt to introduce the additional facts during the

cross-examination of the defendant's witnesses, or by offering the evidence in rebuttal to the defendant's case. *See McKinnon v. Berwyn, 750 F.2d 1383, 1388 (7th Cir. 1984)* ; *McCarty v. Pheasant Run, Inc., 826 F.2d 1554, 1556 (7th Cir. 1987); Benson v. Allphin, 786 F.2d 268, 273-274 (7th Cir. 1986)* ; *Rocco v. Johns-Manville Corp., 754 F.2d 110 (3d Cir. 1985)* ; *Barber v. Nabors Drilling U.S.A., 130 F.3d 702, 710 (5th Cir. 1997)* .

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Chapter 11 TRIAL MOTIONS
PART K: MOTIONS FOR JUDGMENT AS MATTER OF LAW BEFORE VERDICT

1-11 Moore's AnswerGuide: Fed Civil Motion Practice § 11.68

§ 11.68 Timing of Bringing Motion for Judgment as Matter of Law Before Verdict

[1] Bringing Rule 50 Motion After Close of Opponent's Evidence

Fed. R. Civ. P. 50 does not designate a specific time for filing a motion for judgment as a matter of law before verdict. Courts may consider motions for judgment as a matter of law at any time during the trial, as soon as it becomes 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. If any doubt exists, the court should wait until after the parties have presented all of the evidence in the case. *United States v. Vahlco Corp., 720 F.2d 885, 889 (5th Cir. 1983)* (authority to render directed verdict should be exercised with great restraint).

[2] Bringing Rule 50 Motion After Close of All Evidence

A party may seek judgment as a matter of law following the close of all the evidence. However, courts have expressed strong reservations of its use prior to an actual verdict being returned. *See 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).

Most courts will decline to grant the motion at this point in time. Rather, the court will submit the case to the jury and await the jury's verdict. The court, after a verdict is returned, can then evaluate the sufficiency of the evidence supporting the jury's verdict in a post-verdict motion for judgment as a matter of law. This the preferred option; it alleviates the need for a retrial of the case because the original verdict may be reinstated without new trial if a reviewing court finds that the trial court erred in granting post-verdict motion for judgment. *See Therrell v. Georgia Marble Holdings Corp., 960 F.2d 1555, 1569 (11th Cir. 1992)* ; *Mattivi v. South African Marine Corp., "Huguenot", 618 F.2d 163, 166 n.2 (2d Cir. 1980)* (better, safer practice is to wait until jury renders verdict).

[3] Failing to Make Rule 50 Motion at Close of All Evidence No Longer Bars Right to Renew Motion After Verdict

The 2006 amendments to *Fed. R. Civ. P. 50(b)* deleted the phrase 'at the close of all the evidence" to clarify that it is not a requirement that the motion be made specifically at the close of all the evidence. The amendment was intended to reflect the fact that many district courts permitted post-verdict motions for judgment despite the movant's failure to reassert a previously made Rule 50(a) motion at the literal "close of all the evidence." Nevertheless, many judges

expressly invite motions at the close of all the evidence, and the amendment was not intended to "discourage this useful practice."

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 50.03*.
- *Federal Trial Guide §§ 80.01-80.50*.
- *Fed. R. Civ. P. 50* (motion for judgment as matter of law).
- *Fed. R. Civ. P. 52* (motion for partial judgment).

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Chapter 12 POST-TRIAL MOTIONS

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Chapter 12 POST-TRIAL MOTIONS
PART A: PROCEDURAL CONTEXT

1-12 Moore's AnswerGuide: Fed Civil Motion Practice § 12.01

§ 12.01 Procedural Context--Post-Trial Motions

Obtaining a verdict or judgment often does not conclude a case. To be thoroughly prepared to address critical issues that may arise after a verdict is returned, counsel should familiarize themselves with the post-trial motions authorized by the Federal Rules (in particular *Fed. R. Civ. P. 49-62*), local district court rules, and the rules and standing orders of individual judges. If used properly, those motions can significantly increase the likelihood that a verdict can be defended by plaintiff or attacked by defendant. Post-trial motions form a necessary first step on the pathway to the appellate courts.

Questions regarding special verdicts or written questions, judgments as a matter of law after a verdict, and the entry of a judgment, all are governed by the Federal Rules. Even after a judgment is entered pursuant to *Fed. R. Civ. P. 58*, parties may wish to bring motions to make corrections or for additional factual findings, motions for a new trial, or motions to alter or amend a judgment. Finally, a party may use the methods set forth by the Federal Rules to enforce a judgment pending the post-trial motions or any appeal as well as to suspend an injunctive order.

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Chapter 12 POST-TRIAL MOTIONS
PART B: MOVING FOR JUDGMENT ON A SPECIAL VERDICT OR QUESTIONS

1-12 Moore's AnswerGuide: Fed Civil Motion Practice § 12.02

§ 12.02 Moving for Judgment on a Special Verdict or Questions; Initial Considerations

Fed. R. Civ. P. 49 authorizes the court to use two distinct forms of verdicts as alternatives to the traditional general verdict: (1) a special verdict and; (2) a general verdict accompanied by answers to written questions. The different forms of those verdicts can avoid difficulties sometimes posed by a basic general verdict.

A party defending a general verdict may have a distinct disadvantage in a reviewing court. An appellate court may reverse a general verdict if it determines that one or more claims were improperly submitted to the jury, on the grounds that it is impossible to tell whether the verdict is based upon the erroneously submitted claim. *See Hay v. Irving, 893 F.2d 796, 799 (5th Cir. 1990)* . A special verdict under *Fed. R. Civ. P. 49(a)* may reduce the risk of reversal where one but not all theories submitted to a jury are found legally proper or supported by the evidence. *See Syufy Enterprises v. American Multicinema, Inc., 793 F.2d 990 (9th Cir. 1986)* . Furthermore, a special verdict is a useful device for focusing juror attention on disputed facts rather than the law. A special verdict is returned by the jury with answers to separate questions that contain factual findings on all of the material issues in the case. The trial court then applies the law to those answers and enters judgment accordingly. *See Lavoie v. Pacific Press & Shear Co., Div. of Canron Corp., 975 F.2d 48, 53 (2d Cir. 1992)* (citing **Moore's**).

Parties should take note that the terms "interrogatory" and "written question" are used interchangeably in the case law because prior to the 2007 rule amendments, the term "interrogatory" was included in *Fed. R. Civ. P. 49* as well as all case law interpreting the rule. Although the term was changed in 2007 to "written question," only the style, not the substance of the rule, was affected by the change.

Combining written questions with a general verdict under *Fed. R. Civ. P. 49(b)* provides a party with a method of testing a general verdict by focusing the jury's attention on the controlling points at issue. The answers provide a check on the propriety of the general verdict. The written questions do not need to cover all of the issues presented in a case but might instead focus on one or two, which would provide the court and party's insight into jury's reasoning in reaching its verdict. *See, e.g., Austin-Westshore Constr. Co., Inc. v. Federated Dep't Stores, Inc., 934 F.2d 1217, 1220 (11th Cir. 1991)* ; *Portage II v. Bryant Petroleum Corp., 899 F.2d 1514, 1520 (6th Cir. 1990)* .

The effect of inconsistent verdicts and written questions is the source of much litigation and disagreement among the circuit courts as to the prerequisites for preserving objections to inconsistencies. *See §§ 12.04* and *12.05 below*. It is

important for a party to understand the procedural law so that it can bring the appropriate motion after the verdict is returned to request that the court enter judgment pursuant to *Fed. R. Civ. P. 58*.

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§ 12.03 Checklist for Motions for Judgment on Special Verdict or Written Questions

☐ If moving for judgment on special verdict or written questions, consider the following:

- ○ Determine whether answers to questions are inconsistent with each other or the general verdict.
- ○ Can the inconsistencies be harmonized? *See § 12.05[1] below*.
- ○ Request that court resubmit questions to the jury. *See § 12.05[3] below*.
- ○ Request that court submit additional questions to the jury. *See § 12.05[3] below*.
- ○ Object to entry of judgment based on inconsistencies to preserve right to raise objections in post- trial motion. *See § 12.05[3] below*.
- ○ Request that court enter an order for a new trial. *See § 12.05[4] below*.
- ○ Request rulings before the jury is dismissed.

☐ If opposing motion for special verdict or written questions, consider the following:

- ○ Determine whether answers to questions are inconsistent with each other or the general verdict.
- ○ Can the inconsistencies be harmonized? *See § 12.05[2] below*.

- ○ Object to the resubmission of any questions to the jury. *See § 12.05[3] below*.
- ○ Object to the submission of additional questions to the jury. *See § 12.05[3] below*.
- ○ Oppose request that court enter an order for a new trial. *See § 12.05[4] below*.
- ○ Request ruling before the jury is dismissed.

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Chapter 12 POST-TRIAL MOTIONS
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§ 12.04 Distinguishing Between General Verdict, Special Verdict, and General Verdict With Answers to Written Questions

Fed. R. Civ. P. 49 authorizes a party to request a special verdict, which a more detailed alternative to the more commonly used general verdict. Plaintiffs often request a general verdict in the hope that the jury will find it easier to return a verdict for the plaintiff, while defendants tend to seek complexity, thereby increasing the likelihood that the jury will find it difficult to return a verdict for the plaintiff.

Although a general verdict does offer the advantage of simplicity, it suffers from the disadvantage of being either "all wrong or all right." The Supreme Court in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co., 370 U.S. 19, 30, 82 S. Ct. 1130, 8 L. Ed. 2d 305 (1962)* articulated this problem with a general verdict, when it noted "[i]f ... upon any one issue error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld"). Accordingly, the appellate court must often reverse a general verdict when it determines that one or more claims was improperly submitted to the jury, because it is not possible to tell whether the verdict is based upon the erroneously submitted claim.

Special verdicts or written questions are necessary in certain situations. For example, a court must use a special verdict in a diversity personal injury action in which state law requires itemization of damages or places limits on certain types of damages. Moreover, under the Age Discrimination in Employment Act, only a special verdict of wilfulness will entitle the plaintiff to liquidated damages in an amount equal to the plaintiff's award for back pay and benefits.

A party seeking a special verdict pursuant to *Fed. R. Civ. P. 49(a)* must present to the jury written questions to be answered as to separate questions concerning specific factual issues. The trial court must then apply the law to those answers and enter judgment accordingly. The jury does not need to consider or apply the law, as it must do when a general verdict is used.

Fed. R. Civ. P. 49(b) combines the two types of verdicts, the general verdict and the special verdict. The jury is given a general verdict together with answers to specific written questions to return. Written questions 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 hybrid between the general verdict and the Rule 49(a) special verdict because it focuses the jury's attention on the controlling points at issue, and the answers provide a check on the propriety of the general

verdict. If the answers to the written questions do not contradict the general verdict, the trial court enters judgment on the verdict. *See Lavoie v. Pacific Press & Shear Co., Div. of Canron Corp., 975 F.2d 48, 53 (2d Cir. 1992)* (citing **Moore's**).

One distinction between *Fed. R. Civ. P. 49(a)* and *Fed. R. Civ. P. 49(b)* is that Rule 49(a) contains no provisions regarding the effect of inconsistencies in the jury's special verdicts, while Rule 49(b) provides detailed options for the trial judge. However, the appellate courts have held that district court judges should attempt to resolve any inconsistencies among answers to the questions in a special verdict submitted pursuant to Rule 49(a), as courts are directed to do by Rule 49(b). *See Auwood v. Harry Brandt Booking Office, Inc., 850 F.2d 884, 890 (2d Cir. 1988)* (citing **Moore's**). The Ninth Circuit correctly reasoned that there is no logical or policy reason to distinguish between *Fed. R. Civ. P. 49(a)* and *Fed. R. Civ. P. 49(b). See Larson v. Neimi, 9 F.3d 1397, 1402 (9th Cir. 1993)* .

Strategic Point:

It would be wise to request that the court determine the form of the verdict that will be used before closing arguments so that counsel may guide the jury through the form during its closing arguments. *See Portage II v. Bryant Petroleum Corp., 899 F.2d 1514, 1520 (6th Cir. 1990)* .

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PART B: MOVING FOR JUDGMENT ON A SPECIAL VERDICT OR QUESTIONS

1-12 Moore's AnswerGuide: Fed Civil Motion Practice § 12.05

§ 12.05 Returning of a General Verdict With Written Questions; Court's Options

[1] Determining Whether to Apply Rule 49(b)(3) or Rule 49(b)(4)

Where the general verdict and the answers to special interrogatories or questions are harmonious, *Fed. R. Civ. P. 49(b)(2)* specifically provides that the court must approve an appropriate judgment on the verdict to be entered pursuant to *Fed. R. Civ. P. 58*. In that case, the court has no authority to make findings of fact that are inconsistent with the verdict.

Fed. R. Civ. P. 49 also provides for two other potential scenarios: (1) the answers are inconsistent with the verdict, in which case *Fed. R. Civ. P. 49(b)(3)* applies, and (2) the answers are inconsistent with each other, in which case *Fed. R. Civ. P. 49(b)(4)* applies.

In situations where answers to interrogatories are consistent with each other but inconsistent with the general verdict, *Fed. R. Civ. P. 49(b)(3)* provides three alternatives:

1. Judgment may be entered in accordance with the answers notwithstanding the general verdict;

2. Jury is directed to further consider its answers and the verdict; or

3. A new trial may be ordered.

In situations where answers to interrogatories are inconsistent with each other and one or more is also inconsistent with the general verdict, *Fed. R. Civ. P. 49(b)(4)* provides that the court cannot enter judgment and only two alternatives are available to the court:

1. Direct the jury to further consider its answers and the verdict; or

2. Order a new trial.

[2] Addressing Inconsistencies

A court may enter a judgment pursuant to *Fed. R. Civ. P. 49(b)* if it is not reasonably possible to resolve the apparent inconsistency presented by the verdict and the answer to a written question. However, pursuant to *Fed. R. Civ. P. 49(b)(4)*, the court may not enter a judgment when the answers are inconsistent with each other and one or more is also inconsistent with the general verdict.

A district court has the duty to reconcile and harmonize the jury's answers to written questions to support the judgment, if that is possible. *See Cool Light Co. v. GTE Prods. Corp., 973 F.2d 31, 34 (1st Cir. 1992)* ; *McAdam v. Dean Witter Reynolds, Inc., 896 F.2d 750, 763-764 (3d Cir. 1990)* ; *Jewell v. Holzer Hosp. Foundation, Inc., 899 F.2d 1507, 1510 (6th Cir. 1990)* ; *Wilks v. Reyes, 5 F.3d 412, 414-415 (9th Cir. 1993)* ; *Wilbur v. Corr. Servs. Corp., 393 F.3d 1192, 1200 (11th Cir. 2004)* . The test for reconciling inconsistencies is whether "the answers represent a logical and probable decision on the relevant issues as submitted." *See White v. Grinfas, 809 F.2d 1157, 1161 (5th Cir. 1987)* .

It is important to note that federal law pertaining to the submission of written questions to a jury is controlling in diversity actions. See *Bartak v. Bell-Galyardt & Wells, Inc., 629 F.2d 523, 531 (8th Cir. 1980)* . Although federal law governs most issues surrounding *use* of special interrogatories, in diversity cases courts look to state law to determine whether the verdict is internally inconsistent. *See Conte v. General Housewares Corp., 215 F.3d 628, 639 (6th Cir. 2000)* .

[3] Returning Written Questions to Jury for Further Deliberations

Under *Fed. R. Civ. P. 49(b)(3)*, the trial court has the power to allow the jury the opportunity to correct any mistakes in the verdict, and under *Fed. R. Civ. P. 49(b)(4)* it must give the jury an opportunity to make corrections before the verdict is discharged. *See McLaughlin v. Fellows Gear Shaper Co., 786 F.2d 592, 596 (3d Cir. 1986)* ; *Rowe International, Inc. v. J-B Enterprises, Inc., 647 F.2d 830, 835 (8th Cir. 1981)* ; *Abou-Khadra v. Mahshie, 4 F.3d 1071, 1083 (2d Cir. 1993)* (error not to resubmit); *Stern v. Shouldice, 706 F.2d 742, 750 (6th Cir. 1983)* ; *Beard v. Flying J., Inc., 116 F. Supp. 2d 1077, 1088 (S.D. Iowa 2000)* . The resubmission of inconsistent answers to written questions or the submission of supplemental questions is expressly authorized by *Fed. R. Civ. P. 49(b)(3)* and *(4)*. However, it is impermissible to resubmit written questions to a jury that has reached a decisive verdict. *See McCollum v. Stahl, 579 F.2d 869, 871 (4th Cir. 1978)* (jury found no liability on part of defendant but nevertheless assessed defendant with damages).

Warning:

A party may waive its right to a new trial if, before the jury is discharged, it does not object to an alleged inconsistency and it does not make a motion for resubmission of a verdict that is inconsistent with answers to written questions. *See Brode v. Cohn, 966 F.2d 1237, 1239 (8th Cir. 1992)* .

Circuit Split:

A majority of Circuits (including the First, Fourth, Fifth, Tenth and Eleventh Circuits) that have considered the issue of the effect of a party's failure to object to inconsistencies have held that a party waives all objections not timely made. However, it should be noted 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 bringing a post-trial motion. The Ninth Circuit has taken the opposite view and has held that a party may challenge the consistency of a verdict for the first time on a post-trial motion. *See Los Angeles Nut House v. Holiday Hardware Corp., 825 F.2d 1351, 1354 (9th Cir. 1987)* . 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. *See Schaafsma v. Morin Vermont Corp., 802 F.2d 629, 634 (2d Cir. 1986)* .

[4] Ordering New Trial if General Verdict and Answers Are Inconsistent

A district court must attempt to harmonize the jury's answers and verdict before ordering a new trial. *See § 12.05[2] above*. A new trial is the last option offered by *Fed. R. Civ. P. 49(b)* when there is an inconsistency between the answers to written questions and the general verdict. Trial courts have a wide discretion in considering whether to award a new trial. *See MacQuarrie v. Howard Johnson Co., 877 F.2d 126, 131 (1st Cir. 1989)* . This includes the power to refuse to accept a jury's inconsistent answers to written questions. *See Atlantic Tubing & Rubber Co. v. International Engraving Co., 528 F.2d 1272, 1276 (1st Cir. 1976)* .

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§ 12.06 Returning a Special Verdict; Court's Options

Fed. R. Civ. P. 49(a) provides that a court may require a jury to return a special verdict in the form of a special written finding upon each issue of fact. Because the jury's answers provide the basis for the ultimate resolution of the suit, these "findings must be consistent with each other." *Auwood v. Harry Brandt Booking Office, Inc., 850 F.2d 884, 890 (2d Cir. 1988)* (citing **Moore's**).

Although *Fed. R. Civ. P. 49(a)* itself does not give guidance as to the proper course of action when the answers returned by the jury are inconsistent with one another, it is clear from the case law that proper deference to the parties' *Seventh Amendment* rights to a jury trial precludes entry of a judgment that disregards any material jury finding. *See Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 364, 82 S. Ct. 780, 7 L. Ed. 2d 798 (1962)* ; *Fiacco v. Rensselaer, 783 F.2d 319, 325 (2d Cir. 1986)* ; *Crane v. Consolidated Rail Corp., 731 F.2d 1042, 1051 (2d Cir. 1984)* .

If the inconsistency among special verdict answers is noticed prior to the dismissal of the jury, the trial court has the discretion to resubmit the issues to the jury with a request for clarification, whether or not the parties themselves requested clarification. *See Guidry v. Kem Mfg, Co., 604 F.2d 320, 321 (5th Cir. 1979)* . Resubmission has several advantages. First, the submission of inconsistent verdicts to the jury preserves the jury's important role as fact-finder. In addition, to the extent the jury resolves the conflicting responses to the questions, resubmission promotes the efficient and fair resolution of inconsistent special verdicts and is preferable to the costly alternative of another trial. *See Santiago-Negron v. Castro-Davila, 865 F.2d 431, 444 (1st Cir. 1989)* .

The court also may submit additional or supplemental questions to aid the jury in reconciling inconsistencies or ambiguities. Such questions are submitted to the jury after the original questions have been answered. The submission of supplemental written questions has been upheld in the First and Fifth Circuit Court of Appeals. *See Skillin v. Kimball, 643 F.2d 19, 19-20 (1st Cir. 1981)* ; *Alverez v. J. Ray McDermott & Co., 674 F.2d 1037, 1040-1041 (5th Cir. 1982)*

Moreover, questions have been submitted after the jury has begun deliberating in situations when the jury is deadlocked. *See Thorpe v. Mutual of Omaha Ins. Co., 984 F.2d 541, 544-545 (1st Cir. 1993)* ; *Rivera v. La Porte, 896 F.2d 691, 694-695 (2d Cir. 1990)* . However, it is impermissible to submit written questions to a jury that has reached a decisive verdict. *See McCollum v. Stahl, 579 F.2d 869, 871 (4th Cir. 1978)* (jury found no liability on part of defendant

but nevertheless assessed defendant with damages).

The courts have recognized that even partially completed special verdict forms are sufficient, if the answered questions support the verdict and the unanswered questions, if answered in favor of the nonprevailing party, would not render the judgment erroneous. *See, e.g., Quaker City Gear Works, Inc. v. Skil Corp., 747 F.2d 1446, 1453 (Fed. Cir. 1984)* ; *Bridges v. Chemrex Specialty Coatings, Inc., 704 F.2d 175, 180 (5th Cir. 1983)* ; *Slade Gorton & Co. v. Millis, 794 F. Supp. 175, 177 (E.D.N.C. 1992)* ; *Kociemba v. G.D. Searle & Co., 707 F. Supp. 1517, 1533-1534 (D. Minn. 1989)* .

If the court elects not to seek clarification from the jury, or if the inconsistency is not noticed until after the jury has been dismissed, the court should take one of two actions to try to harmonize the answers. When the jury's findings appear to be inconsistent with each other but there is a view of the case that makes the jury's answers to special interrogatories consistent, the *Seventh Amendment* requires that the court adopt that view and enter judgment accordingly. *See Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 364, 82 S. Ct. 780, 7 L. Ed. 2d 798 (1962)* (citing **Moore's**). If there is no way to harmonize the jury's answers, the court must order a new trial. *See Auwood v. Harry Brandt Booking Office, Inc., 850 F.2d 884, 890 (2d Cir. 1988)* (citing **Moore's**).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 49.01 -49.20.*
- *Federal Litigation Guide PP 40.10 -40.36.*
- *Bender's Federal Practice Forms* Form Nos. 49:1-49:51.
- *Fed. R. Civ. P. 49.*

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1-12 Moore's AnswerGuide: Fed Civil Motion Practice § 12.07

§ 12.07 Moving for Judgment as Matter of Law After Verdict; Initial Considerations

Fed. R. Civ. P. 50 provides the standard governing a motion for judgment as a matter of law. The term "judgment as a matter of law" replaces the former terms "directed verdict" and "judgment notwithstanding the verdict" (also known as judgment *non obstante verdicto*). While this section discusses Rule 50(b) motions filed after the verdict is returned, Rule 50(a) motions filed before the case is submitted to the jury are discussed at *§§ 11.64*-11.68 *above*.

A motion for judgment as a matter of law under *Fed. R. Civ. P. 50(b)* applies only in jury trials. If the case is being tried before the court, with or without an advisory jury, a party should bring a motion for judgment on partial findings pursuant to *Fed. R. Civ. P. 52(c)*. *See § 12.09[1] below*.

The standard for granting of a motion for judgment as a matter of law is that if the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the opposing party on that issue, than the court should grant the motion. As a general rule, the standard for motions for new trial is broader and more lenient than the standard for motions for judgment as a matter of law; consequently, it is easier to get a new trial than a judgment as a matter of law.

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§ 12.08 Checklist for Moving for Judgment as Matter of Law After Verdict

☐ When considering moving for judgment as a matter of law after verdict, evaluate the following:

○ Was renewal of a prior motion required at the close of all evidence? *See § 12.09[5] below*.

○ Is there substantial evidence for each element of the claim or defense? *See § 12.12[1] below*.

○ Determine whether "scintilla rule" applies to the case. *See § 12.12[1] below*.

○ Determine which evidentiary standard of review applies. *See § 12.12[2] below*.

○ Specify every basis for bringing the motion. *See § 12.12[2] below*.

○ Be sure to file the motion in accordance with timing deadlines set forth in *Fed. R. Civ. P. 50* as well as local district court rules and individual judge's rules, if applicable. *See § 12.10 below*.

○ If necessary, determine whether to request the court to extend the time for filing the motion. *See § 12.10 below*.

☐ If opposing a motion for judgment as a matter of law after verdict, consider the following:

○ Was the motion timely filed? *See § 12.10 below*.

- Did the movant file a pre-verdict motion? *See § 12.11[1] below*.
- Determine if the post-verdict motion alleges the same defects. *See § 12.12[1] -[2] below*.
- Object to any issues not raised in original motion. *See § 12.11[1] below*.
- Determine which evidentiary standard applies. *See § 12.12[1] -[2] below*.
- Determine whether "scintilla rule" applies to the case. *See § 12.12[1] below*.

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§ 12.09 Availability of Moving for Judgment as Matter of Law After Verdict

[1] Rule 50 Only Applies to Binding Jury Trials

Courts have interpreted the language of *Fed. R. Civ. P. 50* to mean that motions for judgment as a matter of law are available only in cases tried by a jury with the power to return a binding verdict. *Fed. R. Civ. P. 50* is not to be used in bench trials in which the trial court acts as the finder of fact, with or without an advisory jury. *See Schlitt v. Florida, 749 F.2d 1482, 1483 (11th Cir. 1985)* . In a bench trial, *Fed. R. Civ. P. 52* governs motions for judgment. *See §§ 12.22-12.25 below*.

[2] Trial Judge May Not Issue Post-Verdict Judgment as Matter of Law Sua Sponte

A trial court is generally barred from rendering post-verdict judgments as a matter of law *sua sponte*. This issue usually arises when a judge attempts to grant judgment as a matter of law on an issue not raised in a pre-verdict motion. However, trial courts may not render *sua sponte* a post-verdict judgment on grounds not raised in a pre-verdict motion for judgment because *Fed. R. Civ. P. 50(b)* restricts the grounds that may be asserted in post-verdict motions to those asserted in pre-verdict motions. *See Doe v. Celebrity Cruises, Inc., 394 F.3d 891, 903 (11th Cir. 2004)* ; *Robles-Vazquez v. Garcia, 110 F.3d 204, 207 (1st Cir. 1997)* . Allowing trial judges to render such judgments sua sponte would defeat a primary purpose of *Fed. R. Civ. P. 50(b)*--to assure that both the court and the opposing party receive notice of the claimed deficiency in time to allow the nonmovant to attempt to cure the alleged deficiencies.

Exceptions:

Notwithstanding the general rule, circuits have permitted trial courts to grant post-verdict judgment on their own motion in the following circumstances:

1. The court expressly reserved ruling on a pre-verdict motion. *See Mosser v. Fruehauf Corp., 940 F.2d 77, 83 n.2 (4th Cir. 1991)* ; *Nichols Constr. Corp. v. Cessna Aircraft Co., 808 F.2d 340, 356 (5th Cir. 1985)* ;

2. The court acted within the time for filing a post-verdict motion. *First Safe Deposit Nat'l Bank v. Western Union Tel. Co., 337 F.2d 743, 746 (1st Cir. 1964)* ; and

3. The opposing party had an opportunity to request a new trial as an alternative to entry of judgment. *See Norton v. Snapper Power Equip., Div. of Fuqua Indus., 806 F.2d 1545, 1547 (11th Cir. 1987)* ; *Shaw v. Edward Hines Lumber Co., 249 F.2d 434, 439 (7th Cir. 1957)* .

[3] Legal Grounds as Basis for Judgment

Fed. R. Civ. P. 50(b) clearly provides that a judgment as a matter of law may be granted on purely legal issues unrelated to the sufficiency of evidence at trial.

The standard applicable to pretrial motions for summary judgment under *Fed. R. Civ. P. 56* is similar to the standard for motions for judgment as a matter of law under *Fed. R. Civ. P. 50*. *See Kresnak v. City of Muskegon Heights, 956 F. Supp. 1327, 1329 (W.D. Mich. 1997)* ; *see also* Ch. 9 *above*.

A prior denial of a summary judgment motion prior to trial is not a bar to the entry of a judgment as a matter of law because the denial of a summary judgment motion is an interlocutory order subject to modification before the entry of a final judgment. *See Williams v. County of Westchester, 171 F.3d 98, 102 (2d Cir. 1999)* ; *Abel v. Dubberly, 210 F.3d 1334, 1337 (11th Cir. 2000)* .

[4] Movant Must File Pre-Verdict Motion Before Case Was Submitted to Jury to Preserve Right to Make Renewed Motion

In general, a party must have made a timely and proper motion for judgment as a matter of law under *Fed. R. Civ. P. 50(a)* to preserve the ability to renew the motion for judgment under *Fed. R. Civ. P. 50(b)*. *See § 11.68 above*. Specifically, a pre-verdict motion for judgment as a matter of law is a prerequisite to a post-verdict motion on the same grounds because the movant must apprise the opponent and the trial judge of all alleged insufficiencies of opponent's suit before the case is submitted to the jury. *See, e.g., Desrosiers v. Flight Int'l, 156 F.3d 952, 956 (9th Cir. 1998)* ; *Doctor's Assocs. v. Weible, 92 F.3d 108, 112 (2d Cir. 1996)* ; *Mozingo v. Correct Mfg. Corp., 752 F.2d 168, 171-172 (5th Cir. 1985)* .

[5] Failure to Make Rule 50 Motion at Close of All Evidence No Longer Bars Right to Renew Motion After Verdict Is Returned

Prior to 2006, *Fed. R. Civ. P. 50(b)* stated that if the court did not "grant a motion for judgment as a matter of law made at the close of all the evidence," the court was considered to have submitted the action to the jury subject to the court's later deciding legal questions raised by the motion. Most courts interpreted this language 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 *Fed. R. Civ. P. 50(b)*.

The 2006 amendments to *Fed. R. Civ. P. 50(b)* deleted the phrase "at the close of all the evidence" to clarify that a party is not required to make a motion specifically at the close of all the evidence. This amendment was intended to reflect the fact that many courts permitted post-verdict motions for judgment despite the movant's failure to reassert a previously made Rule 50(a) motion at the literal "close of all the evidence." Nonetheless, counsel must make a pre-verdict motion at some point, whether at the close of the plaintiff's case in chief or after the defendant closes its case. *See § 12.09[4] above*.

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§ 12.10 Complying With Timing Requirements for Rule 50 Motion

[1] Filing Renewed Motion Within 28 Days of Entry of Judgment Required

A party renewing a motion for judgment as a matter of law must file the renewed motion no later than 28 days after entry of judgment. *Fed. R. Civ. P. 50(b)*. The entry of judgment occurs when the clerk makes notes of the judgment on the official court docket. *See Fed. R. Civ. P. 58(c)*.

In a multi-party or multi-claim case, *Fed. R. Civ. P. 54(b)* governs when a judgment is final for purposes of the 28-day period for filing a Rule 50(b) motion. *Fed. R. Civ. P. 54(b)* provides that if an order adjudicates fewer than all the parties' rights and claims, the decision is subject to revision, and therefore, the order is not a final judgment. *See McCroy v. Coastal Mart, Inc., 207 F. Supp. 2d 1265, 1269 (D. Kan. 2002)* , *rev'd on other grounds*, *2004 U.S. App. LEXIS 4216 (10th Cir. 2004)* (unpublished opinion; court's order reflecting the jury's apportionment of liability and damages that failed to resolve crossclaim for indemnity, was not a final judgment so as to start tolling of Rule 50(b) period).

If a movant joins a motion for new trial under *Fed. R. Civ. P. 59* with a renewed motion for judgment as permitted by *Fed. R. Civ. P. 50(b)*, it must also file its motion for a new trial no later than 10 days after entry of judgment.

Warning:

If a movant joins a motion for new trial under *Fed. R. Civ. P. 59* with a renewed motion for judgment as permitted by *Fed. R. Civ. P. 50(b)*, the motion for new trial also must be filed no later than 28 days after entry of judgment. However, the timely filing of one motion does not automatically satisfy the time requirements for the other. *See Rodick v. City of Schenectady, 1 F.3d 1341, 1347 (2d Cir. 1993)* ("Rule 50(b) and 59 time limitations are jurisdictional"); *GBS Meat Indus. Pty., Ltd. v. Kress-Dobkin Co., 474 F. Supp. 1357, 1360 (W.D. Pa. 1979)* , *aff'd, 622 F.2d 578 (3d Cir. 1980)* ; *Bass v. Spitz, 522 F. Supp. 1343, 1346 (E.D. Mich. 1981)* ; *see also § 12.21 below* (timing of Rule 59 motion).

[2] If Renewed Motion Addresses Issues Not Decided by Jury, Movant Must File Renewed Motion Within 28 Days After Jury Is Dismissed

If a renewed motion for judgment as a matter of law addresses a jury issue not decided by a verdict, the moving party must bring its renewed motion no later than 28 days after the jury was discharged. Alternatively, the movant may request a new trial or join a motion for a new trial under *Fed. R. Civ. P. 59*. *Fed. R. Civ. P. 50(b)*.

[3] Court May Not Extend Time to File Renewed Motion

Courts may not extend the 28-day period following entry of judgment within which movants must file renewed motions under *Fed. R. Civ. P. 50(b)*. *Fed. R. Civ. P. 6(b)(2)*. provides that courts may not extend the time to file a renewed motion for judgment under *Fed. R. Civ. P. 50(b)* or to file a motion for new trial under *Fed. R. Civ. P. 59(b)*, except as provided in those Rules. *See Browder v. Director, Dep't of Corrections, 434 U.S. 257, 262 n.5, 98 S. Ct. 556, 54 L. Ed. 2d 521 (1978)* .

Neither *Fed. R. Civ. P. 50* nor *Fed. R. Civ. P. 59* provides a mechanism for extending the prescribed 28-day filing deadline. Accordingly, requests for an extension of time to file a renewed motion under *Fed. R. Civ. P. 50(b)* or a new trial under *Fed. R. Civ. P. 59* are ineffective, even if there was no objection. *See Rodick v. City of Schenectady, 1 F.3d 1341, 1346 (2d Cir. 1993)* .

The failure to make a timely renewed motion divests a district court of the power to modify the trial verdict. Parties may not confer jurisdiction on the court by stipulating to an extension of the 28-day filing deadline. *See United States Leather v. H & W Partnership, 60 F.3d 222, 224 (5th Cir. 1995)* ; *Hulson v. Atchison, T. & S. F. R. Co., 289 F.2d 726, 730 (7th Cir. 1961)* .

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§ 12.11 Content of Renewed Motion for Judgment as Matter of Law After Verdict

[1] Motion Must Assert Same Grounds as Pre-Verdict Motion

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. *Doe v. Celebrity Cruises, Inc., 394 F.3d 891, 903-904 (11th Cir. 2004)* . A pre-verdict motion suffices as a predicate to a post-verdict motion only if the pre-verdict motion includes the specific grounds asserted in the second motion. *See Lifshitz v. Walter Drake & Sons, Inc., 806 F.2d 1426, 1429 (9th Cir. 1986)* .

Requiring a party to state its claim of error in the pre-verdict motion ensures that the opposition has sufficient notice of the alleged error to permit that party to cure the defect before resting his or her case as required by *Fed. R. Civ. P. 50(a)*. It further deters the trial courts from granting post-verdict renewed motions based on newly presented grounds and it prevents movants from ambushing the nonmoving party.

Renewed motions for judgment are subject to *Fed. R. Civ. P. 7(b)(1)(B)*, which requires that motions state with particularity the grounds upon which they are based. However, courts apply the particularity requirement flexibly. It is the substance of the motion rather than its linguistic form that determines its nature and legal effect. It follows that as long as the grounds for the renewed motion are "closely related" to those asserted in the pre-verdict motion, a trial court may consider those grounds in ruling on the renewed motion. *Ross v. Rhodes Furniture, 146 F.3d 1286, 1289 (11th Cir. 1998)* . Thus, although the practice may be risky, a "bare-bones" renewed motion may meet the particularity requirement when the motion is read together with a detailed pre-verdict motion for judgment.

Warning:

The party opposing a renewed motion for judgment as a matter of law should object to the insertion of a basis for granting the motion that was not raised in the pre-verdict Rule 50(a) motion. *See Whelan v. Abell, 48 F.3d 1247, 1251 (D.C. Cir. 1995)* .

Exception:

Erie principles may apply in the context of Rule 50 motions when a waiver for failure to raise an issue in a pre-verdict motion conflicts with state law concerning the right to raise an issue on appeal. In such a

case, state law may prevail if the issue is based on substantive law and, in effect, it will preempt the waiver rule under *Fed. R. Civ. P. 50(b)*. Under the rule of *Erie R.R. Co. v. Tompkins*, federal courts sitting in diversity jurisdiction apply state substantive law and federal procedural law. *See Simmons v. Philadelphia, 947 F.2d 1042, 1085-1086 (3d Cir. 1991)* (late sovereign immunity argument). However, the Ninth Circuit in *Freund v. Nycomed Amersham, 347 F.3d 752, 762 (9th Cir. 2003)* , ruled that when a defendant failed to raise the issue of whether punitive damages were appropriate in a pre-verdict motion, it waived the right to make the argument in a post-verdict Rule 50(b) motion even though, under California law, the issue of punitive damages cannot be waived. The court in *Freund* concluded that the California no-waiver rule did not create any substantive right, but instead, merely established when and how preexisting substantive rights to punitive damages may be reviewed. Furthermore, the court reasoned that *Fed. R. Civ. P. 50(b)* does not violate the *Erie* doctrine or run afoul of the Rules Enabling Act because its application "affects only the process of enforcing litigants' rights and not the rights themselves."

[2] Specifying Every Basis for the Motion on the Record

The movant must specify every basis for a Rule 50 post-verdict motion on the record. This requirement protects both parties. It protects the opponent's *Seventh Amendment* rights by preventing movants from gaining an unfair advantage through surprise. It also protects the movant because it will reduce the risk of reversal on appeal. At the close of all evidence, a movant can raise in a post-verdict motion or renewed motion only grounds that it also raised previously in a pre-verdict motion. Without a record specifying the grounds raised before the verdict, the reviewing court cannot compare the grounds originally argued by the movant in its Rule 50(a) motion with those cited by the trial court in granting a renewed motion for judgment as a matter of law and will reverse the ruling. *See National Industries, Inc. v. Sharon Steel Corp., 781 F.2d 1545 (11th Cir. 1986)* ; *Sulmeyer v. Coca Cola Co., 515 F.2d 835, 845-846 (5th Cir. 1975)* .

However, if the grounds argued in a pre-verdict motion are "closely related" to those argued in a post-verdict motion, then setting aside a jury's verdict based on those grounds will create unfair surprise to the non-movant. *National Industries, Inc. v. Sharon Steel Corp., 781 F.2d 1545, 1549-1550 (11th Cir. 1986)* . If the new and old grounds vary greatly, then a trial judge may not rely on the new grounds to set aside the jury's verdict. *See Sulmeyer v. Coca Cola Co., 515 F.2d 835, 845-846 (5th Cir. 1975)* .

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§ 12.12 Applying Standard for Renewed Motion for Judgment as Matter of Law After Verdict

[1] "Substantial Evidence" Must Be Presented to Avoid Judgment

Most federal courts construe the reasonableness test to mean that "substantial evidence" must be presented in support of a claim or defense in order to avoid judgment as a matter of law. Substantial evidence has been defined "as evidence of such quality and weight that reasonable and fair minded men in the exercise of impartial judgment might reach different conclusions." *See Krystek v. University of S. Mississippi, 164 F.3d 251, 255 (5th Cir. 1999)* .

In *Averbach v. Rival Mfg. Co., 879 F.2d 1196, 1200 (3d Cir. 1989)* , the court held that on an appeal of a decision granting a judgment as a matter of law after verdict, the court must review the record in the light most favorable to the appellant and could not sustain the lower court's order "unless the record is critically deficient of that minimum quantum of evidence from which the jury might reasonably afford relief."

The fundamental premise of the substantial evidence test is that jurors are not allowed to speculate in finding for the nonmovant. Thus, the majority of federal appellate courts reject the "scintilla rule," under which judgment as a matter of law is improper if any evidence supporting the proposition has been admitted. *See Carter v. Miami, 870 F.2d 578, 581 (11th Cir. 1989)* .

Exception:

The "scintilla rule" still applies in cases brought under the Jones Act (*46 U.S.C. § 688*) and the Federal Employers' Liability Act (*45 U.S.C. § 51 et seq.*). *See, e.g., Smelser v. Norfolk S. Ry. 105 F.3d 299, 306 (6th Cir. 1997)* ; *Aparicio v. Norfolk & W. Ry. Co., 84 F.3d 803, 807 (6th Cir. 1996)* ; *Springborn v. American Commercial Barge Lines, 767 F.2d 89 (5th Cir. 1985)* ; *Thornton v. Gulf Fleet Marine Corp., 752 F.2d 1074, 1076 (5th Cir. 1985)* (directed verdict is appropriate "[o]nly where there is a complete absence of probative facts to support the verdict ..."); *Rogers v. Missouri P. R. Co., 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957)* .

[2] Court Applies Identical Standard to Pre-Verdict and Post-Verdict Motions for Judgment as Matter of Law

The trial court must apply the same standard to pre-verdict and post-verdict motions for judgment as a matter of law.

See Gibson v. City of Cranston, 37 F.3d 731, 735 (1st Cir. 1994) . Judgment as a matter of law after verdict is proper where "there is no legally sufficient evidentiary basis for a reasonable jury to find for [the non-moving] party on that issue," and where the claim "cannot under the controlling law be maintained ... without a favorable finding on that issue." *Snyder v. AG Trucking, 57 F.3d 484, 490 (6th Cir. 1995)* . When considering a Rule 50 motion after the jury has returned its verdict, the trial court may set aside the verdict when 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, or such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded persons could not arrive at a verdict against the movant. *See Harris v. Niagara Mohawk Power Corp., 252 F.3d 592, 597 (2d Cir. 2001)* ; *Greene v. B.F. Goodrich Avionics Sys., 409 F.3d 784, 793 (6th Cir. 2005)* .

The standard for the determining motions for directed verdicts was set forth in *Brady v. Southern R. Co., 320 U.S. 476, 479-480 64 S. Ct. 232, 88 L. Ed. 239 (1943)* , in which the Supreme Court held that "[w]hen the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury".

In *Reeves v. Sanderson Plumbing Prods, Inc., 530 U.S. 133, 150, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)* , the Supreme Court reiterated that standard. The trial court is not to make credibility determinations or weigh the evidence, and should view all inferences in the light most favorable to the nonmoving party. *See Winarto v. Toshiba Am. Elecs. Components, Inc., 274 F.3d 1276, 1283 (9th Cir. 2001)* . Although the exact language employed in their opinions varies, the federal appellate courts have been reasonably consistent in applying this same standard.

Circuit Split:

In diversity cases, the majority of Circuits applies federal standards in ruling on motions for judgment as a matter of law. The minority (Sixth and Eighth Circuits) apply state-law standards in diversity cases based on the *Erie* doctrine, and have held that the standard to be applied is substantive and not procedural law. The majority (Fourth, Fifth, Ninth, Tenth and Eleventh Circuits) have decided that state law sets the substantive elements of a claim or defense, while federal law "provides the scale by which we measure the sufficiency of the evidence to support the jury's findings". *See Thrash v. State Farm Fire & Casualty Co., 992 F.2d 1354, 1356 (5th Cir. 1993)* ; *Ellis v. Weasler Eng'g, Inc., 258 F.3d 326, 336-337 (5th Cir. 2001)* .

The First and Seventh Circuits have taken different positions on different occasions. Meanwhile, the Second and Third Circuits and the Supreme Court (on two occasions) have avoided a decision by finding that state and federal standards were equivalent in language or application. *See Mercer v. Theriot, 377 U.S. 152, 156, 84 S. Ct. 1157, 12 L. Ed. 2d 206 (1964)* ; *Dick v. New York Life Ins. Co., 359 U.S. 437, 444-445, 79 S. Ct. 921, 3 L. Ed. 2d 935 (1959)* .

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§ 12.13 Ruling on a Renewed Motion for Judgment as Matter of Law After Verdict

The trial court, when ruling on a renewed motion for judgment as a matter of law, may exercise the following options, depending on the circumstances of case:

1. **Grant renewed motion and enter judgment as matter of law.** The trial court may grant judgment as a matter of law only if it finds that no reasonable juror could find for the nonmoving party on any permissible claim or theory. *See, e.g., St. Louis Convention & Visitors Comm'n v. NFL, 154 F.3d 851, 860 (8th Cir. 1998)* ; and cases cited in *§ 12.12[1], [2] above*.

2. **Deny the motion and enter judgment on the verdict.** In ruling on a renewed motion for judgment after the jury has returned a verdict and judgment has been entered, the trial court may deny the renewed motion and allow the judgment to stand if the movant does not establish entitlement to judgment as a matter of law.

3. **Order a New Trial:** A trial court considering a renewed motion for judgment may order a new trial.

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§ 12.14 Granting New Trial Instead of Judgment as Matter of Law

[1] Court Has Discretion to Grant New Trial Instead of Judgment as Matter of Law

Fed. R. Civ. P. 50(b) provides that in ruling on a renewed motion for judgment as a matter of law, the trial court may in its discretion direct entry of judgment or may order a new trial. *See Fed. R. Civ. P. 59(b)(2), (3).* 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. *See, e.g., Reyes v. Grace Line, Inc., 334 F. Supp. 1104, 1106-1107 (S.D.N.Y. 1971)* ; *Mercer v. New York Trap Rock Corp., 91 F. Supp. 434, 438 (E.D.N.Y. 1950)* ; *Network Publications, Inc. v. Ellis Graphics Corp., 959 F.2d 212, 214 (11th Cir. 1992)* .

However, the court's discretionary power to grant a new trial as an alternative to judgment as a matter of law is not absolute and can be exercised 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: (1) the movant has moved in the alternative for a new trial (*see § 12.14[3] below*); or (2) the court grants the new trial within 10 days sua sponte in compliance with *Fed. R. Civ. P. 59(d). See Goldsmith v. Diamond Shamrock Corp., 767 F.2d 411, 414 (8th Cir. 1985)* .

[2] Court May Grant Alternative Motion for New Trial

A party moving for judgment as a matter of law may move in the alternative for a new trial, either by requesting a new trial as alternative relief in the motion for judgment or by bringing a separate motion for a new trial. When a trial court grants a renewed motion for judgment as a matter of law, the court must rule on any pending motions for a new trial. *See Fed. R. Civ. P. 50(c)(1); In re Asbestos Litig., 986 F. Supp. 761, 765 (S.D.N.Y. 1997)* .

The trial court must specify the grounds for granting or denying a new trial. *See Fed. R. Civ. P. 50(c)(1); Mears v. Nationwide Mut. Ins. Co., 91 F.3d 1118, 1123-1124 (8th Cir. 1996)* ; *Acosta v. City & County of San Francisco, 83 F.3d 1143, 1148-1149 (9th Cir. 1996)* .

If the trial court denies a renewed motion for judgment, it need not rule on a pending motion for a new trial. *See Brown v. Missouri P. Railroad, 543 F. Supp. 348, 353 (W.D. Ark. 1982) , aff'd, 703 F.2d 1050 (8th Cir. 1983)* .

[3] Court May Issue a Conditional Ruling on the Alternative Motion for New Trial

In cases where a court grants a motion for judgment as a matter of law, a ruling on any motion for a new trial is necessarily "conditional." *Fed. R. Civ. P. 50(c)(1).* A ruling does not become operative unless an appellate court reverses or vacates the trial court's decision granting the motion for judgment. The trial court's order conditionally granting a new trial motion does not affect the finality of the judgment for purposes of appeal. *Fed. R. Civ. P. 50(c)(2).*

[4] Effect of Court's Failure to Make Conditional Ruling

Fed. R. Civ. P. 50(c)(1) does not specify the consequences of a trial court's decision not to issue a conditional ruling. However, the Rule contemplates that an appellate court will review both the trial court's grant of post-verdict judgment and, if necessary, its conditional disposition on the motion for a new trial. This review necessarily includes the power to grant or to deny a new trial when appropriate or to remand to the trial court for a decision on the motion for a new trial. *See Acosta v. City & County of San Francisco, 83 F.3d 1143, 1148-1149 (9th Cir. 1996)* .

The trial judge's decision not to explicitly rule on an alternative motion for a new trial does not deprive the circuit court of jurisdiction over an appeal. Instead, the grant of the renewed motion for judgment as a matter of law is the "final judgment" of the district court, and the alternative motion for a new trial is deemed implicitly denied. *See Vollrath Co. v. Sammi Corp., 9 F.3d 1455 (9th Cir. 1993)* ; *Normand v. Research Inst. of Am., 927 F.2d 857 (5th Cir. 1991)* ; *Kusens v. Pascal Co., 448 F.3d 349, 360 (6th Cir. 2006)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 50.01 -50.95.*
- *Federal Trial Guide* §§ 80.01-80.50.
- *Bender's Federal Practice Forms* Form Nos. 50:10-50:32.
- *Fed. R. Civ. P. 6(b)(2)* (extensions of time).
- *Fed. R. Civ. P. 50* (motion for judgment as matter of law).
- *Fed. R. Civ. P. 52* (motion for partial judgment).
- *Fed. R. Civ. P. 48* (entry of judgment).
- *Fed. R. Civ. P. 54* (cost).
- *Fed. R. Civ. P. 59* (motion for new trial).

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§ 12.15 Moving for New Trial, Altering, or Amending a Judgment; Initial Considerations

Fed. R. Civ. P. 59 provides the standard governing motions for a new trial, or to alter or amend a judgment. Although it may appear that the right to a new trial is a substantive issue, the courts have held that *Fed. R. Civ. P. 59* is a procedural device. *See Dawson v. Wal-Mart Stores, Inc., 978 F.2d 205, 206 (5th Cir. 1992)* ; *Womble v. J.C. Penney Co., Inc., 431 F.2d 985, 989 (6th Cir. 1970)* (citing **Moore's**); *Wiedemann v. Galiano, 722 F.2d 335, 337 (7th Cir. 1983)* . However, in diversity actions, certain issues that often arise in conjunction with Rule 59 motions, such as the excessiveness of damages and remittitur, may be governed by state law. *See Datskow v. Teledyne Continental Motors Aircraft Prods., 826 F. Supp. 677, 690 (W.D.N.Y 1993)* ; *T.D.S. Inc. v. Shelby Mut. Ins. Co., 760 F.2d 1520, 1530 (11th Cir. 1985)* .

A party may move in the alternative for a new trial when making a motion for a judgment as a matter of law pursuant to *Fed. R. Civ. P. 50(b)*. However, there are differences between Rule 50 and 59. The standard for deciding a motion for judgment as a matter of law under Rule 50(b) is stricter than under Rule 59. The court should grant a Rule 50 motion only when there is such an overwhelming amount of evidence in favor of the movant that a reasonable person could not arrive at a verdict against the movant. The standard for granting a new trial under Rule 59 is less strict, and a new trial may be granted even if there is substantial evidence to support the verdict.

A common argument advanced in opposition to a motion for new trial is the "harmless error" rule, which is set out in *Fed. R. Civ. P. 61*. *Fed. R. Civ. P. 61* provides that the court must disregard all errors and defects in admitting or excluding evidence or any other error by the court or a party that do not affect any party's substantial rights when deciding whether to grant a new trial, to set aside a verdict, or to vacate, modify, or otherwise disturb a judgment.

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§ 12.16 Checklist for Moving for New Trial

☐ If deciding whether to move for a new trial, consider the following:

- ○ Review grounds for a new trial. *See § 12.18 below*.
- ○ Is the general verdict consistent with the written answers? *See § 12.18[8] below*.
- ○ If offered, consider accepting a remittitur. *See § 12.18[10][b] below*.
- ○ Is an additur allowed? *See § 12.18[10][d] below*.
- ○ Review grounds for moving to amend or alter judgment. *See § 12.20 below*.
- ○ Timely file motion within 10 days of entry of the judgment. *See § 12.21[1] below*.
- ○ If necessary, request the court to extend time to file the motion. *See § 12.21[2] below*.
- ○ Can the motion be amended, if necessary? *See § 12.21[3] below*.

☐ If opposing motion for a new trial, consider the following:

- ○ Was the motion timely filed? *See § 12.21[1] below*.
- ○ Did the movant object during the trial? *See § 12.18[1][c] below*.

- Does the "harmless error" rule apply? *See § 12.19 below*.

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§ 12.17 Granting New Trial Instead of Judgment as Matter of Law; Court Has Discretion

Fed. R. Civ. P. 50(b) provides that in ruling on a renewed motion for judgment as a matter of law, the trial court may in its discretion direct entry of judgment or order a new trial. *See Fed. R. Civ. P. 50(b)(2),(3)*. 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. *See, e.g., Reyes v. Grace Line, Inc., 334 F. Supp. 1104, 1106-1107 (S.D.N.Y. 1971)* ; *Mercer v. New York Trap Rock Corp., 91 F. Supp. 434, 438 (E.D.N.Y. 1950)* ; *Network Publications, Inc. v. Ellis Graphics Corp., 959 F.2d 212, 214 (11th Cir. 1992)* .

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: (1) the movant has moved in the alternative for a new trial (*See § 12.14[2] above*); or (2) the court grants the new trial within 28 days sua sponte in compliance with *Fed. R. Civ. P. 59(d)*. *See Goldsmith v. Diamond Shamrock Corp., 767 F.2d 411, 414 (8th Cir. 1985)* .

A party moving for judgment as a matter of law may move in the alternative for new trial, either by requesting a new trial as alternative relief in the motion for judgment or by bringing a separate motion for new trial. When a trial court grants a renewed motion for judgment as a matter of law, the court must also rule on any pending motions for a new trial. *See Fed. R. Civ. P. 50(c)(1)*; *In re Asbestos Litig., 986 F. Supp. 761, 765 (S.D.N.Y. 1997)* .

The trial court must specify the grounds for granting or denying a new trial. *See Fed. R. Civ. P. 50(c)(1)*; *Mears v. Nationwide Mut. Ins. Co., 91 F.3d 1118, 1123-1124 (8th Cir. 1996)* ; *Acosta v. City & County of San Francisco, 83 F.3d 1143, 1148-1149 (9th Cir. 1996)* . If the trial court denies a renewed motion for judgment, however, it need not rule on a pending motion for a new trial. *See Brown v. Missouri Pac. R.R., 543 F. Supp. 348, 353 (W.D. Ark. 1982)* , *aff'd, 703 F.2d 1050 (8th Cir. 1983)* .

In cases where a court grants a party's motion for judgment as a matter of law, its rulings on any motions for a new trial necessarily are "conditional." *Fed. R. Civ. P. 50(c)(1)*. They do not become operative unless an appellate court reverses or vacates the trial court's decision granting the motion for judgment. The trial court's order conditionally granting a new trial motion does not affect the finality of the judgment for purposes of appeal. *Fed. R. Civ. P. 50(c)(2)*.

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§ 12.18 Understanding Grounds for Moving for New Trial

Common grounds for seeking a new trial are that the verdict is against the clear weight of the evidence, that the damages are excessive, that the trial was not fair, or that substantial errors occurred in the admission or rejection of evidence or the giving or refusal of instructions.

As a general rule, trial courts will not set aside a jury verdict based on a Rule 59 motion in the absence of extreme circumstances. The court should search the record for evidence that could reasonably have persuaded the jury to reach its verdict, drawing all reasonable inferences in favor of the verdict winner. *See Blum v. Witco Chem. Corp., 829 F.2d 367, 372 (3d Cir. 1987)* ; *Peterson v. Wilson, 141 F.3d 573, 577 (5th Cir. 1998)* .

[1] Judicial Errors May Be Grounds for Moving for New Trial

[a] Instructing Jury Incorrectly May Be Grounds for Moving for New Trial

When the court, in a jury trial, gives an incorrect instruction, a party may move for a new trial. However, in order to preserve the issue on appeal, the movant must have made an appropriate objection and have stated the grounds for its objection with particularity before the commencement of jury deliberations. *See Superior Form Builders v. Dan Chase Taxidermy Supply Co., 74 F.3d 488, 496 (4th Cir. 1996)* ; *Juneau Square Corp. v. First Wis. Nat'l Bank, 624 F.2d 798, 810 (7th Cir. 1980)* ; *Bateman v. Mnemonics, Inc. 79 F.3d 1532, 1543-1544 (11th Cir. 1996)* .

[b] Inadequate Findings and Conclusions May Be Grounds for Moving for New Trial

When the court, at a bench trial, fails to make adequate findings of fact or conclusions of law, a party may bring a motion for a new trial or a Rule 52 motion. If the trial judge improperly denies the motion, the appellate court should vacate the judgment and remand the case to give the trial judge an opportunity to make the necessary findings and conclusions. *See Campbell v. Hewitt, Coleman & Assocs., 21 F.3d 52, 55-56 (4th Cir. 1994)* .

[c] Incorrect Evidentiary Rulings May Be Grounds for Moving for New Trial

The improper admission of evidence at trial may justify a new trial. However, the movant must be able to demonstrate that the exclusion of the evidence or the testimony of a witness had a significant impact on the outcome of the trial. *See*

Dabney v. Montgomery Ward & Co., 692 F.2d 49, 51-53 (8th Cir. 1982) ; *Wood v. Morbark Indus., 70 F.3d 1201, 1209 (11th Cir. 1995)* .

Furthermore, counsel must object at trial. The basis for the motion for a new trial will be limited to the basis argued during the objection when the evidence was offered at trial. *See Green v. Parisi, 478 F.2d 313 (3d Cir. 1973)* ; *United States v. Chicago B. & Q. R. Co., 82 F.2d 131, 139 (8th Cir. 1936)* . For a thorough discussion about the standards for reviewing rulings regarding the admission or exclusion of evidence, *see Weinstein's Federal Evidence*, Ch. 103.

[d] Judicial Misconduct May Be Grounds for New Trial

Although the aggrieved party bears the burden of proving that judicial misconduct made a trial unfair, a new trial based on the judge's alleged misconduct should be granted if the conduct of the judge or other officer of the court is found to be prejudicial. *See Markovich v. Bell Helicopter Textron, Inc., 805 F. Supp. 1231, 1240 (E.D. Pa. 1992)* , *aff'd without op., 977 F.2d 568 (3d Cir. 1992)* (judge's comments regarding evidence grounds for mistrial); *Pollard v. Fennell, 400 F.2d 421, 424-426 (4th Cir. 1968)* (judge's improper interrogation of witnesses grounds for mistrial); *Lucas v. American Mfg. Co., 630 F.2d 291, 293-294 (5th Cir. 1980)* (trial judge's attempt to hasten or coerce verdict grounds for mistrial); *Agee v. Lofton, 287 F.2d 709, 709-710 (8th Cir. 1961)* (mistrial justified by judge's belittlement of plaintiff and plaintiff's witnesses in presence of jury).

Like other reasons for a new trial, an objection to the alleged misconduct is required, either at the time of the misconduct or at the next available opportunity outside the jury's presence. *See Fed. R. Evid. 614(c)*; *Datskow v. Teledyne Continental Motors Aircraft Prods., 826 F. Supp. 677, 691 (W.D.N.Y 1993)* (objection or request for clarification required).

[2] Misconduct of Counsel May Be Grounds for Moving for New Trial

Prejudicial misconduct of counsel, in contrast to aggressive advocacy, may be grounds for a new trial, such as remarks made by counsel that seem intentionally designed to raise questions in the minds of the jurors as to the character of opposing counsel. As with any motion for a new trial, the party moving for a new trial based on the misconduct of opposing counsel should have properly objected to the misconduct at trial. The motion is more likely to be granted if the record shows that the court issued instructions to opposing counsel at trial, upon the moving party's objection, that did not stop the misconduct.

[a] Improper Comments of Counsel May Be Grounds for Moving for New Trial

Improper comments and arguments of counsel are one of the most common arguments for a new trial. A court is likely to grant a party's motion for a new trial in situations where the offensive comments were made at a time when the moving party did not have an opportunity to respond. *See Allstate Ins. Co. v. James, 845 F.2d 315 (11th Cir. 1988)* . Likewise, courts tend to grant motions for a new trial when the improper comments violate a court order previously entered on a motion in limine. *See Adams Laboratories, Inc. v. Jacobs Engineering Co., 761 F.2d 1218 (7th Cir. 1985)* .

[b] Referring to Financial Status of Parties May Be Grounds for Moving for New Trial

It is improper for counsel to appeal to the sympathies of the jury by referring to the wealth or poverty of any party. *Draper v. Airco, Inc., 580 F.2d 91, 95 (3d Cir. 1978)* (repeated inappropriate references to the defendants' wealth in contrast to the relative poverty of the plaintiff); *Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749, 756 (6th Cir. 1980)* .

[c] Appealing to Jurors' Self-Interest May Be Grounds for Moving for New Trial

Counsel's inflammatory remarks designed to appeal to the jurors' self-interest can justify a new trial. *See, e.g., Allstate Ins. Co. v. James, 845 F.2d 315, 318 (11th Cir. 1988)* (counsel's disparaging comments about high insurance premiums was grounds for new trial); *Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749, 755-758 (6th Cir. 1980)* (counsel's remark that jurors are the "real party" because they are taxpayers of the plaintiff was grounds for new trial).

[d] "Golden Rule" Argument May Be Grounds for Moving for New Trial

It is improper for counsel to ask jurors to put themselves in the place of any party. This type of argument, commonly known as the "Golden Rule" is impermissible because it encourages the jury to depart from its neutral role. *See Leathers v. General Motors Corp., 546 F.2d 1083 (4th Cir. 1976)* ; *Loose v. Offshore Navigation, Inc., 670 F.2d 493, 496 (5th Cir. 1982)* ; *Moylan v. Meadow Club, Inc., 979 F.2d 1246, 1250-1251 (7th Cir. 1992)* .

Circuit Split:

The circuits are not in agreement with respect to whether a "Golden Rule" argument is forbidden with respect to the issue of liability or only with respect to damages. *See Edwards v. Philadelphia, 860 F.2d 568, 573-575 (3d Cir. 1988)* ("golden rule" argument improper as to damages and liability); *McNealy v. Ocala Star-Banner Corp., 99 F.3d 1068, 1071 n.3 (11th Cir. 1996)* ("golden rule" argument is prohibited only when made with respect to damages); *Stokes v. Delcambre, 710 F.2d 1120, 1128 (5th Cir. 1983)* ("golden rule" improper as it relates to damages, but not as to liability); *Shultz v. Rice, 809 F.2d 643, 651 (10th Cir. 1986)* ("golden rule" argument only improper when made with reference to damages).

[e] Unwarranted Attack on Integrity of Opposing Counsel May Be Grounds for Moving for New Trial

Comments of counsel that impugn the integrity of opposing counsel can justify a new trial. *Bufford v. Rowan Cos., 994 F.2d 155, 157 (5th Cir. 1993)* ; *Fineman v. Armstrong World Indus., 980 F.2d 171, 209 (3d Cir. 1992)* ("vituperative references to opposing counsel will not be tolerated."); *Kehr v. Smith Barney, Harris Upham & Co., 736 F.2d 1283, 1285-1286 (9th Cir. 1984)* (unsubstantiated accusations of tampering with evidence).

[f] Withholding of Evidence May Be Grounds for Moving for New Trial

A party's failure to produce requested evidence in a timely manner can lead to sanctions depending upon the circumstances. If evidence is not produced until the eve of or during trial, leaving the requesting party little time to consider it fully, the court may impose severe sanctions, including a new trial. *See Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 101 (2d Cir. 2002)* .

[g] Complying With Requirement to Timely Object Before Moving for New Trial

As a general rule, a party must object at trial to improper comments made by opposing counsel in order to succeed on a motion for a new trial. *See Greenway v. Buffalo Hilton Hotel, 951 F. Supp. 1039, 1053-1055 (W.D.N.Y. 1997) , aff'd, 143 F.3d 47 (2d Cir. 1998)* ; *Lacaze v. Olendorff, 526 F.2d 1213, 1223 (5th Cir. 1976)* ("Golden Rule" argument requires prompt objection); *Harrison v. Purdy Bros. Trucking Co., 312 F.3d 346, 351-353 (8th Cir. 2002)* (objection sufficient to preserve right to move for new trial if it is made as soon as district court allows); *Sanden v. Mayo Clinic, 495 F.2d 221, 226-227 (8th Cir. 1974)* ; *Wharf v. Burlington N. R.R., 60 F.3d 631, 637-638 (9th Cir. 1995)* .

[h] Court Instructions May Cure Harm, Thereby Avoiding New Trial

In situations in which counsel has made improper remarks in front of the jury, the court may find that an instruction given to the jury is sufficient to cure the misconduct, so that a new trial is not necessary. *See Moran v. Vermeer Mfg. Co., 742 F.2d 456, 458-459 (8th Cir. 1984)* ; *Smith v. Lightning Bolt Prods., 861 F.2d 363, 370-371 (2d Cir. 1988)* ; *Smith v. Travelers Ins. Co., 438 F.2d 373, 375 (6th Cir. 1971)* ; *Joan W. v. Chicago, 771 F.2d 1020, 1021-1022 (7th Cir. 1985)* .

[3] Misconduct of Party Rarely Deemed Adequate Grounds for New Trial

The misconduct of a party, as compared to counsel, rarely justifies a new trial. Courts have held that crying and other emotional outbursts do not automatically provide grounds for a new trial. *See Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 703 F.2d 1152, 1178-1179 (10th Cir. 1981)* ; *Garland Coal & Mining Co. v. Few, 267 F.2d 785, 791-792 (10th Cir. 1959)* ; *Franklin v. Shelton, 250 F.2d 92, 99 (10th Cir. 1985)* .

[4] Misconduct of Witnesses May Be Grounds for New Trial

A court may grant a motion for a new trial when a witness's remarks while testifying are both improper and prejudicial, if no curative measures by the court will eliminate the effect of the remarks on the jury. *See Beck v. Wings Field, Inc., 122 F.2d 114, 117 (3d Cir. 1941)* . Likewise, false testimony by a witness may be grounds for a new trial. *See Phillips v. Crown Cent. Petroleum Corp., 556 F.2d 702, 705 (4th Cir. 1977)* ; *Stamps v. United States, 406 F.2d 925, 928-929 (9th Cir. 1969)* .

[5] Juror Misconduct, Although Difficult to Prove, May Be Grounds for New Trial

Although it is a recognized ground for a motion for a new trial, juror misconduct is difficult to prove due to the rule prohibiting a juror from impeaching the verdict.

Fed. R. Evid. 606(b) severely restricts the testimony that can be obtained from a juror regarding the jury's deliberations and bars the use of a juror's affidavit on a matter about which the juror would be precluded from testifying.

A juror's ability to impeach a verdict has long been narrowly defined under the established common law rule. *See McDonald v. Pless, 238 U.S. 264, 267-268, 35 S. Ct. 783, 784, 59 L. Ed. 1300 (1915)* . The liberalization of the common law rule, the so-called "Iowa rule," is recognized in a limited number of jurisdictions. For a complete discussion, *see Weinstein's Federal Evidence*, Ch. 606.

Moreover, the movant must show that actual prejudice resulted from any alleged jury misconduct. *See McDonough Power Equip. v. Greenwood, 464 U.S. 548, 555-556, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984)* .

Federal law controls the determination of jury misconduct under *Fed. R. Civ. P. 59*. *See Thomas v. Peerless Mattress Co., 284 F.2d 721, 722 (4th Cir. 1960)* ; *Womble v. J.C. Penney Co., 431 F.2d 985, 989 (6th Cir. 1970)* (citing **Moore's**).

[6] Juror Compromise May Be Grounds for New Trial

The court has the discretion to order new trial on all issues if it appears that the jury's verdict is the result of a compromise. *See Diamond D Enterprises USA, Inc. v. Steinsvaag, 979 F.2d 14, 17-18 (2d Cir. 1992)* ; *Devine v. Patteson, 242 F.2d 828, 832-834 (6th Cir. 1957)* (verdict for less than undisputed amount grounds for new trial). However, inadequate damages alone are insufficient proof of compromise. *Jorgensen v. York Ice Machinery Corp., 160 F.2d 432, 435 (2d Cir. 1947)* .

[7] Newly Discovered Evidence May Be Grounds for New Trial

Both *Fed. R. Civ. P. 60(b)(2)* and *Fed. R. Civ. P. 59* permit a party to seek relief from a judgment on the ground of newly discovered evidence. *See Diaz v. Methodist Hosp., 46 F.3d 492, 495 (5th Cir. 1995)* . If the evidence comes to light after the expiration of the 10-day time limit of *Fed. R. Civ. P. 59* but within one year of entry of judgment, the party may seek relief under *Fed. R. Civ. P. 60(b)(2)*.

Fed. R. Civ. P. 59 allows the court to grant a new trial or amend a judgment, whereas *Fed. R. Civ. P. 60(b)* permits a

court only to set a judgment aside. The elements under both rules are so similar that several courts have noted that parties may cite to Rule 60(b)(2) cases in support of Rule 59 motions, and vice versa. *Jones v. Aero/Chem Corp., 921 F.2d 875, 878 (9th Cir. 1990)* (citing **Moore's**).

A four-element test is commonly used to determine whether newly discovered evidence necessitates a new trial:

1. The evidence must have been discovered after the trial;

2. The moving party must have exercised due diligence to try to discover the evidence earlier;

3. The newly discovered evidence must be material and not merely cumulative or impeaching; and

4. The evidence must be significant enough that it would probably produce a different result at trial.

The moving party cannot meet the "discovery" requirement if it knew the substance of the witness's potential testimony, but thought that the witness was not needed until after the party lost at trial.

In order for evidence to be "newly discovered," the moving party must have been completely unaware of the existence of the evidence before or during the trial. *See D. Federico Co. v. New Bedford Redevelopment Authority, 723 F.2d 122, 130 (1st Cir. 1983)* (citing **Moore's**); *Jay Edwards, Inc. v. New England Toyota Distributor, Inc., 708 F.2d 814, 825 (1st Cir. 1983)* ; *Music Research, Inc. v. Vanguard Recording Soc., 547 F.2d 192, 196 (2d Cir. 1976)* ; *Coastal Transfer Co. v. Toyota Motor Sales, 833 F.2d 208, 211-212 (9th Cir. 1987)* .

Perhaps the most difficult task for a party moving for a new trial on the basis of newly discovered evidence is convincing the trial court that the evidence likely would have changed the outcome of the case. *See Anderson v. Cryovac, Inc., 862 F.2d 910, 924 n.10 (1st Cir. 1988)* ; *Harris v. Owens-Corning Fiberglas Corp., 102 F.3d 1429, 1434 (7th Cir. 1996)* .

[8] Inconsistent General Verdict and Answers to Written Questions May Be Grounds for New Trial

When there is an inconsistency between answers to written questions and a general verdict, *Fed. R. Civ. P. 49(b)* authorizes the court to grant a new trial as a last resort. The written questions and the general verdict must be irreconcilable to justify the award of a new trial. *See Johnson v. ABLT Trucking Co., 412 F.3d 1138, 1143-1145 (10th Cir. 2005)* .

Trial courts have substantial discretion in determining whether to award a new trial, which includes the power to refuse to accept a jury's inconsistent answers to written questions. *See MacQuarrie v. Howard Johnson Co., 877 F.2d 126, 131 (1st Cir. 1989)* . When a jury that has returned a general verdict and written questions that are factually inconsistent already has been discharged, the only option available to the court is to award a new trial. *See Turyna v. Martam Constr. Co., 83 F.3d 178, 181 (7th Cir. 1996)* .

[9] Verdict Against Clear Weight of Evidence Is Grounds for New Trial

A trial judge may grant a motion for a new trial if it determines that the evidence presented at trial does not support the jury's verdict or that the verdict or the amount of damages awarded is against the clear weight of the evidence. *See Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 540, 78 S. Ct. 893, 2 L. Ed. 2d 953 (1958)* . The court may either order a new trial outright or condition the order on a party's refusal to accept a remittitur, or a reduction in the amount of damages. *See Gasperini v. Center for Humanities, 518 U.S. 415, 433, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996)* (citing **Moore's**).

The primary difference between a Rule 50 motion for judgment as a matter of law and a Rule 59 motion for a new trial is the evidentiary standard applied. The standard applied by trial courts in ruling on a Rule 59 motion for a new trial is less stringent than the standard for motions for judgment as a matter of law. A court may grant judgment as a matter of law only when a rational juror could not possibly find for the party with the burden of proof. Thus, when ruling on a Rule 50 motion, all issues of credibility must be resolved in favor of the party bearing the burden. By contrast, when considering a Rule 59 motion for a new trial, the court is free to make its own judgments as to credibility. *See Merrill v. United Air Lines, Inc., 25 F.R.D. 68, 70 (S.D.N.Y. 1960)* , *aff'd, 288 F.2d 218 (2d Cir. 1961)* (listing cases addressing distinction); *General Foam Fabricators, Inc. v. Tenneco Chemicals, Inc., 695 F.2d 281, 285 (7th Cir. 1982)* .

[10] Unreasonable Damages Awards May Be Grounds for New Trial

[a] Damages Disproportionate to Verdict May Be Grounds for New Trial

A court may grant a motion for a new trial when the verdict is entirely disproportionate to the amount of damages awarded to the plaintiff. In cases involving a federal question, the test for determining whether an award is excessive is whether it "shocks the judicial conscience." *See BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996)* ; *TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993)* . In diversity cases, however, the standard for determining excessiveness is governed by the applicable state law. *See Gasperini v. Center for Humanities, 518 U.S. 415, 426-431, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996)* ; *Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 279, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989)* .

[b] Conditioning Denial of Motion for New Trial on Acceptance of Remittitur

If the court finds that a verdict is excessive, it may order a new trial outright, or it may order a new trial conditioned on the verdict winner's refusal to accept a remittitur. *See Gasperini v. Center for Humanities, 518 U.S. 415, 433, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996)* . A 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. If the plaintiff rejects the specified reduction in the amount of damages, the court must grant a new trial.

Parties should take note that the court does not have the option of entering judgment for the reduced amount without the plaintiff's consent. *See Scott v. Plante, 641 F.2d 117, 135-136 (3d Cir. 1981)* , *vacated on other grounds, 458 U.S. 1101, 102 S. Ct. 3474, 73 L. Ed. 2d 1362 (1982)* ; *Cline v. Wal-Mart Stores, 144 F.3d 294, 305-306 (4th Cir. 1998)* .

[c] Excessive Punitive Damages Award May Be Grounds for New Trial

In determining whether a jury's award punitive damages of violates constitutional due process limits, the trial court should consider:

1. The degree of reprehensibility of the defendant's misconduct;

2. The disparity between the harm or potential harm suffered by the plaintiff and the punitive damages award; and

3. The difference between the punitive damages awarded by the jury and civil penalties authorized or imposed in comparable cases. *See State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003)* .

The Supreme Court in *Campbell* held that while "there are no rigid benchmarks that a punitive damages award may not surpass," generally few awards exceeding a single-digit ratio between punitive and compensatory damages to a significant degree will satisfy due process. The Court went on to suggest that "four times the amount of compensatory damages might be close to the line of constitutional impropriety." *State Farm Mut. Auto. Ins. Co. v. Campbell, 538*

U.S. 408, 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003) citing Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23-24, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991) , and *BMW of North Am., Inc. v. Gore, 517 U.S. 559, 581, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996)* . However, the Supreme Court recently articulated that, in maritime cases, punitive damages awards may not exceed the amount of compensatory damages. *Exxon Shipping Co. v. Baker, 554 U.S. 471, 512-515, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008)* .

[d] Additur Not Constitutionally Permissible; Instead, Court Must Order New Trial

If a court determines that a verdict is inadequate, a federal trial court may not constitutionally offer additur, or adding to the amount of damages awarded. In such situations, the court must order a new trial. *See Dimick v. Schiedt, 293 U.S. 474, 482-483, 55 S. Ct. 296, 79 L. Ed. 603 (1935)* ; *Hibma v. Odegaard, 769 F.2d 1147, 1154 (7th Cir. 1985)* ; *Estes v. Southern Pac. Transp. Co., 598 F.2d 1195, 1199 (10th Cir. 1979)* .

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Chapter 12 POST-TRIAL MOTIONS
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1-12 Moore's AnswerGuide: Fed Civil Motion Practice § 12.19

§ 12.19 Opposing Motion for New Trial; Complying With Harmless Error Rule

A common argument advanced in opposition to a motion for a new trial, is that any error was harmless. The "harmless error" rule is set out in *Fed. R. Civ. P. 61*, which provides that the court must disregard all errors and defects in admitting or excluding evidence or other errors made by the court or a party that does not affect any party's substantial rights as a ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment.

This means that even if an error occurred, the court must consider it harmless unless it resulted in substantial prejudice and had a substantial effect on the outcome of the case. *See Schaafsma v. Morin Vermont Corp., 802 F.2d 629, 637 (2d Cir. 1986)* ; *Smith v. Wal-Mart Stores (No. 471), 891 F.2d 1177, 1180 (5th Cir. 1990)* ; *General Leaseways v. Nat'l Truck Leasing Ass'n, 830 F.2d 716, 731 (7th Cir. 1987)* . In addition, *Fed. R. Evid. 103(a)* provides a basis for the harmless error rule.

Although this list is by no means exhaustive, courts have found harmless error to exist in the following situations:

1. **The complaining party initially introduced the improper evidence.** *McDonald v. Federal Laboratories, Inc., 724 F.2d 243, 245 (1st Cir. 1984)* (testimony from plaintiff's design expert regarding faulty design in products case);

2. **Sufficient curative instructions were given to the jury.** *See Fiataruolo v. United States, 8 F.3d 930, 942 (2d Cir. 1993)* ; *Sanford v. Johns-Manville Sales Corp., 923 F.2d 1142, 1149 (5th Cir. 1991)* ; *Doe, by & Through G.S. v. Johnson, 52 F.3d 1448, 1458 (7th Cir. 1995)* ; *Gilchrist v. Jim Slemons Imports, Inc., 803 F.2d 1488, 1500 (9th Cir. 1986)* ;

3. **Other evidence exists to support the jury verdict.** *See Hygh v. Jacobs, 961 F.2d 359, 365 (2d Cir. 1992)* ; *Polythane Sys. v. Marina Ventures Int'l, Ltd., 993 F.2d 1201, 1208 (5th Cir. 1993)* , *reh'g denied, 4 F.3d 992 (1993)* ; *La Crosse County v. Gershman, Brickner & Bratton, Inc., 982 F.2d 1171, 1175 (7th Cir. 1993)* ; *Glanzman v. Uniroyal, Inc., 892 F.2d 58, 61 (9th Cir. 1989)* ;

4. **The evidence that was excluded would have been cumulative.** *See Trademark Research Corp. v.*

Maxwell Online, Inc., 995 F.2d 326, 339 (2d Cir. 1994) ; *Sullivan v. Rowan Cos., 952 F.2d 141, 146 (5th Cir. 1992)* ; *Neace v. Laimans, 951 F.2d 139, 143 (7th Cir. 1991)* ; *Baker v. Delta Air Lines, 6 F.3d 632, 643 (9th Cir. 1993)* ;

5. **The excluded evidence on the issue of damages would not have affected the outcome due the jury's finding of no liability.** *See Schneider v. Revici, 817 F.2d 987, 991 (2d Cir. 1987)* ; *Guidry v. Bay Drilling Corp., 849 F.2d 138, 138-139 (5th Cir. 1988)* ; *Mraovic v. Elgin, J. & E. R. Co., 897 F.2d 268, 271 (7th Cir. 1990)* ; *Cooper v. Firestone Tire & Rubber Co., 945 F.2d 1103, 1106-1107 (9th Cir. 1991)* ; and

6. **The excluded evidence was admitted through other witnesses.** *See Trademark Research Corp. v. Maxwell Online, Inc., 995 F.2d 326, 339 (2d Cir. 1994) ; Peters v. Five Star Marine Service, 898 F.2d 448, 450 (5th Cir. 1990)* ; *Cook v. Navistar Int'l Transp. Corp., 940 F.2d 207, 213 (7th Cir. 1991)* .

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§ 12.20 Moving to Alter or Amend Judgment

Fed. R. Civ. P. 59(e), which authorizes a court to alter or amend a judgment, and *Fed. R. Civ. P. 60(a)*, which authorizes the court to correct clerical mistakes in a judgment, serve different purposes and produce different consequences. The only mistakes that are correctable under Rule 60(a) are true clerical mistakes or mistakes of oversight or omission, whereas a party may utilize a Rule 59(e) motion to obtain a substantial modification of the judgment.

Examples of common motions to alter or amend a judgment pursuant to *Fed. R. Civ. P. 59(e)* include the following:

1. Motion to include award of interest or to add prejudgment interest. *See Crowe v. Bolduc, 365 F.3d 86, 91-95 (1st Cir. 2004)* (proper vehicle for initial assessment of mandatory prejudgment interest, wholly omitted from earlier judgment, is Rule 59(e) motion, rather than motion to correct judgment pursuant to *Fed. R. Civ. P. 60(a)*; *but see Pogor v. Makita U.S.A., 135 F.3d 384, 386-388 (6th Cir. 1998)* (if judgment includes interest award but leaves actual calculations for later, subsequent motion to set actual amount of interest simply asks court to perform ministerial task of inserting omitted particulars of interest award and is properly brought under *Fed. R. Civ. P. 60(a)*; such motion is not considered motion to amend judgment and is not subject to Rule 59(e)'s 28-day period);

2. Motion to quantify an indefinite award of attorney's fees. *See Maristuen v. National States Ins. Co., 57 F.3d 673, 676-679 (8th Cir. 1995)* ;

3. Motion to delete reference to party improperly named in judgment. *See Davis v. West, 71 F. Supp. 377, 378 (W.D. Mo. 1947) , aff'd, 74 F. Supp. 495, 496 (W.D. Mo. 1947)* ;

4. Motion to add previously denied claim due to change in law. *See Atlantic States Legal Found. v. Karg Bros., 841 F. Supp. 51, 55 (N.D.N.Y. 1993)* ; *Database Am., Inc. v. Bellsouth Advertising & Publishing Corp., 825 F. Supp. 1216, 1220 (D.N.J. 1993)* ; *Quinones-Ruiz v. United States, 873 F. Supp. 359, 362 (N.D. Cal. 1995)* ; *Hicks v. Hudson, 390 F.2d 84, 87-88 (10th Cir. 1967)* ;

5. Motion to correct a misstatement of damages. *See Field v. Witt Tire Co., 200 F.2d 74, 78 (2d Cir.*

1952) ; and

6. Motion to modify a damage award if a comparative fault calculation by the jury is at variance with the jury's factual findings. *See Mumma v. Reading Co., 247 F. Supp. 252, 259-260 (E.D. Pa. 1965)* .

The Supreme Court, in *White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 450, 102 S. Ct. 1162, 71 L. Ed. 2d 325 (1982)* , ruled that a post-judgment request for attorney's fees in civil rights cases under *42 U.S.C. § 1988* are not the subject of a Rule 59(e) motion; thus, the moving party may bring a request for attorney's fees after Rule 59's 28-day period has expired. *See also, Buchanan v. Stanships, Inc., 485 U.S. 265, 268-269, 108 S. Ct. 1130, 99 L. Ed. 2d 289 (1988)* .

Warning:

The Supreme Court in *White* expressly addressed only § 1988 fee requests. It is unclear whether fees sought pursuant to other statutory provisions are likewise not subject to the time limit of *Fed. R. Civ. P. 59(e)*. Therefore, it would be prudent for a party to make any request for attorney's fees within the 28-day period provided by *Fed. R. Civ. P. 59(e)*.

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§ 12.21 Complying With Timing Requirements for Filing Motion for a New Trial

[1] Motion Must Be Filed Within 28 Days of Entry of Judgment

A party must file a motion for a new trial no later than 28 days after entry of judgment. *Fed. R. Civ. P. 59(b)*. The entry of the judgment occurs when the clerk notes the judgment in the official court docket. *See Fed. R. Civ. P. 58(c)*. A judgment is effective when "entered" in the civil docket. *Fed. R. Civ. P. 79(b)*. Lack of notice is not an excuse for failing to file a motion within the 28-day period. *See Feinstein v. Moses, 951 F.2d 16, 19 (1st Cir. 1991)* ; *Shults v. Henderson, 110 F.R.D. 102, 105 (W.D.N.Y. 1986)* (citing **Moore's**); *Vargas v. Gonzalez, 975 F.2d 916 (1st Cir. 1992)* .

Warning:

The three-day extension granted by *Fed. R. Civ. P. 6* does not apply to Rule 59 motions because the time commences on the date of the entry of the judgment and not on the date of service. *See Sonnenblick-Goldman Corp. v. Nowalk, 420 F.2d 858, 860 (3d Cir. 1970)* ; *Parker v. Board of Pub. Utils., 77 F.3d 1289, 1291 (10th Cir. 1996)* ; *Cavaliere v. Allstate Ins. Co., 996 F.2d 1111, 1113 (11th Cir. 1993)* ; *see also § 1.14 above*.

Timing:

Parties should bear in mind that the timely filing of a renewed Rule 50 motion for judgment or for a new trial under *Fed. R. Civ. P. 59* does not automatically satisfy the time requirements for the other. *See Rodick v. City of Schenectady, 1 F.3d 1341, 1347 (2d Cir. 1993)* ("Rule 50(b) and 59 time limitations are jurisdictional"); *GBS Meat Industry Pty., Ltd. v. Kress-Dobkin Co., 474 F. Supp. 1357, 1360 (W.D. Pa. 1979) , aff'd, 622 F.2d 578 (3d Cir. 1980)* ; *Bass v. Spitz, 522 F. Supp. 1343, 1346 (E.D. Mich. 1981)* ; *Hulson v. Atchison, T. & S. F. R. Co., 289 F.2d 726, 729 (7th Cir. 1961)* .

Furthermore, in a multi-party or multi-claim case, *Fed. R. Civ. P. 58(b)* governs when a judgment is final for purposes of the 28-day period for filing a motion for a new trial. *Fed. R. Civ. P. 58(b)* provides that if an order adjudicates fewer than all the parties' rights and claims, the decision is subject to revision, and therefore, the order is not a final judgment. *See McCroy v. Coastal Mart, Inc., 207 F. Supp. 2d 1265, 1269 (D. Kan. 2002) , rev'd on other grounds, 2004 U.S. App. LEXIS 4216 (10th Cir. 2004)* (unpublished opinion; court's order reflecting the jury's apportionment of liability and damages which

failed to resolve cross-claim for indemnity, was not a final judgment so as to start running of 10-day period).

[2] Court May Not Extend Time to File Motion for New Trial

A court may not extend the 28-day period following entry of judgment within which to file a motion for a new trial under *Fed. R. Civ. P. 59(b)*. Neither *Fed. R. Civ. P. 59* nor *Fed. R. Civ. P. 50* provides a mechanism for extending the prescribed 28-day filing deadline. Accordingly, requests for an extension of time to file are ineffective, even if the opposing party does not object. *See Rodick v. City of Schenectady, 1 F.3d 1341, 1346 (2d Cir. 1993)* .

A party's failure to make a timely motion divests the court of the power to modify the trial verdict. Accordingly, parties may not confer jurisdiction on the court by stipulating to an extension of the 28-day filing deadline. *See United States Leather v. H & W Partnership, 60 F.3d 222, 224 (5th Cir. 1995)* ; *Hulson v. Atchison, T. & S. F. R. Co., 289 F.2d 726, 730 (7th Cir. 1961)* .

[3] Amending Judgement After Expiration of 28-Day Period

The appellate courts are split as to whether a party may amend a timely motion for a new trial to assert additional grounds for a new trial after the applicable time period has expired. Some circuits have held that a district court may not order a new trial based on grounds raised after the period has run. *See Arkwright Mut. Ins. Co. v. Philadelphia Electric Co., 427 F.2d 1273, 1275 (3d Cir. 1970)* . By contrast, 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. *See Pate v. Seaboard R., Inc., 819 F.2d 1074, 1085 (11th Cir. 1987)* .

[4] Timing of Motion to Amend Judgment to Include Request for Rule 11 Sanctions

In *Divane v. Krull Elec. Co., 200 F.3d 1020, 1025-1027 (7th Cir. 1999)* , the Seventh Circuit held that a party may file a motion to amend a judgment to include sanctions pursuant to *Fed. R. Civ. P. 11* after the entry of judgment, even though *Fed. R. Civ. P. 11* contains a 21-day "safe harbor" provision stating that a party must file a Rule 11 motion for sanctions before the court rules on the pleadings, and in any event before the court enters judgment. In *Divan,* however, the Seventh Circuit noted that the trial judge made a specific finding that "the lack of evidentiary support for defendant's counterclaim could not have been determined until trial was completed" and that *Fed. R. Civ. P. 11(c)(1)(A)* does not specify any time period when a motion for sanctions must be filed. In addition, the court emphasized that the interest of deterring further frivolous post-judgment motions by the same litigants or deterring future litigants may be promoted by permitting post-judgment requests for sanctions. *Divane v. Krull Elec. Co., 200 F.3d 1020, 1025-1027 (7th Cir. 1999)* .

Warning:

Counsel should be sure to consult local court rules and individual judges' rules to determine any time limitations that apply to Rule 11 motions. *See Ortega v. Geelhaar, 914 F.2d 495, 497-498 (4th Cir. 1990)* (local rule that required filing of sanctions motion within 20 days after entry of judgment); *Kaplan v. Zenner, 956 F.2d 149, 151-152 (7th Cir. 1992)* . Counsel should consider filing any motion for Rule 11 sanctions along with a motion for costs or attorneys fees under *Fed. R. Civ. P. 54*. However, counsel also should comply with the provisions of *Fed. R. Civ. P. 11* requiring that a Rule 11 motion must be made separately from other motions. *Fed. R. Civ. P. 11(c)(2)*; *see also § 7.04[2] above*. For further discussion of Rule 11 sanction motions, see §§ *7.02-7.06 above*.

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 59.01 -59.55.*

- *Federal Litigation Guide PP 44.40 -44.46, 45.20 -45.60.*
- *Bender's Federal Practice Forms* Form Nos. 59:1-59:73.
- *Fed. R. Civ. P. 6(b)(2)* (extensions of time).
- *Fed. R. Civ. P. 11* (pleadings).
- *Fed. R. Civ. P. 50* (motion for judgment as matter of law).
- *Fed. R. Civ. P. 54* (motion for costs and attorneys fees).
- *Fed. R. Civ. P. 58* (entry of judgments).
- *Fed. R. Civ. P. 59* (motion for new trial).
- *Fed. R. Civ. P. 61* (harmless error).
- *Fed. R. Evid. 103(a)* (harmless errors).
- *Fed. R. Evid. 606(b)* (juror testimony of deliberations).
- *Fed. R. Evid. 614(c)* (judicial interrogation of witnesses).

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§ 12.22 Motions for Amended or Additional Findings of Fact and Law; Initial Considerations

Fed. R. Civ. P. 52 provides guidelines and standards for motions for amended or additional findings of fact and law. The court must enter judgment pursuant to *Fed. R. Civ. P. 58*, and *Fed. R. Civ. P. 52(a)* mandates that the trial court make findings of fact and state conclusions of law separately in any action tried on the facts without a jury or with an advisory jury.

Moreover, in cases tried before a master, the trial court must review the master's findings of fact *de novo*. *Fed. R. Civ. P. 53(f)(3)*, and if the trial court adopts the master's findings, they become the findings of the court. The findings and conclusions may be stated on the record after the close of the evidence or else they may appear in an opinion or a memorandum of decision filed by the court. The four primary purposes of this mandatory requirement are as follows:

1. **To provide appellate courts with a clear understanding of the basis of the trial court's decision.** *See Reich v. Newspapers of New England, 44 F.3d 1060, 1079 (1st Cir. 1995)* ;

2. **To aid the trial court in considering and adjudicating the facts.** *See Colorado Flying Academy, Inc. v. United States, 724 F.2d 871, 877 (10th Cir. 1984)* ; *Gupta v. East Texas State University, 654 F.2d 411, 415 (5th Cir. 1981)* ;

3. **To clarify the issues that have been decided in the case for the purpose of applying the doctrines of collateral estoppel and res judicata in future litigation.** *See Leighton v. One William Street Fund, Inc., 343 F.2d 565, 567 (2d Cir. 1965)* (citing **Moore's**); *In re Texas Extrusion Corp., 836 F.2d 217, 220 (5th Cir. 1988)* ; *Wattleton v. International Brotherhood of Boiler Makers, Local #1509, 686 F.2d 586, 591 (7th Cir. 1982)* ; and

4. **To enable a losing party to assess the appealability of the case.** *See Inverness Corp. v. Whitehall Laboratories, 819 F.2d 48, 50 (2d Cir. 1987)* .

After a judgment has been entered in a bench trial, either party may move the trial court to amend its findings or make additional findings of fact or law. *Fed. R. Civ. P. 52(b)* contemplates that this motion may accompany a motion for a new trial under *Fed. R. Civ. P. 59*. For a party seeking to modify findings of fact, a Rule 52(b) motion is a useful tool

because the "clearly erroneous" standard for appellate review imposed by *Fed. R. Civ. P. 52(a)* makes the likelihood of changing such findings on appeal substantially lower than the chance of changing the trial court's conclusions of law. Even if a party thinks that the court will probably deny its Rule 52(b) motion, this should not deter the movant, especially if it is objecting to the court's findings of fact. The reason for this is that a party may not raise on appeal any errors in a trial court's findings unless it has first challenged those errors under Rule 52(b), with the exception of errors due to the insufficiency of evidence to sustain the findings.

Parties may wish to consider bringing a Rule 52(b) motion simultaneously with a Rule 59(e) motion to amend the judgment. If none of these efforts prove successful, counsel may consider bringing a motion under *Fed. R. Civ. P. 60*, which allows the court to correct both factual and legal mistakes upon motions made after the 28-day time period provided by *Fed. R. Civ. P. 52* has expired. However, parties should bear in mind that they may not use Rule 52(b) motions to amend the findings to advance new theories or secure a rehearing on the merits. *See McNeil v. United States, 2006 U.S. Dist. LEXIS 12230, at *4 (W.D. Wash. 2006)* .

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§ 12.23 Differing Standards of Review for Amending Factual Findings and Legal Conclusions

After a judgment is rendered, either party may move the trial court to amend its findings or make additional findings of fact or law. *Fed. R. Civ. P. 52* expressly provides that the trial court must "find the facts specially and state its conclusions of law separately." *Fed. R. Civ. P. 52(a)(1).*

The distinction between law and fact is much more than just a question of semantics. The standards of review for findings of fact and conclusions of law are different. Findings of fact may not be reversed unless they are "clearly erroneous," but conclusions of law are subject to *de novo* review. If, upon review, an appellate court concludes that the trial court mislabeled a conclusion of law as a finding of fact, it may disregard the label and review the issue *de novo*. Conversely, a finding of fact incorrectly characterized by the trial court as a conclusion of law will be reviewed as if it had been properly labeled a finding of fact.

Fed. R. Civ. P. 52(a)(6) specifically provides that an appellate court may not set aside findings of fact unless they are "clearly erroneous," and "the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that the trial court has made a mistake in entering the judgment. *See, e.g., Henderson v. Norfolk S. Corp., 55 F.3d 1066, 1069 (5th Cir. 1995)* ; *Thornton v. Brown, 47 F.3d 194, 196 (7th Cir. 1995)* ; *Phoenix Eng'g & Supply v. Universal Elec. Co., 104 F.3d 1137, 1140 (9th Cir. 1997)* .

Fed. R. Civ. P. 52 requires the trial judge to explain adequately the subsidiary facts and methodology underlying its ultimate findings. *See Henry v. Champlain Enters., 445 F.3d 610, 622 & n.4 (2d Cir. 2006)* . Conclusory oral findings are insufficient to satisfy the fact finding requirement. *See Society for Good Will to Retarded Children, Inc. v. Cuomo, 902 F.2d 1085, 1088 (2d Cir. 1990)* .

Factual findings are deemed adequate if they are sufficiently comprehensive to disclose the steps by which the trial court reached its ultimate conclusion on factual issues. *Lodges 743 & 1746, Int'l Ass'n of Machinists v. United Aircraft Corp., 534 F.2d 422, 433 (2d Cir. 1975)* .

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§ 12.24 Understanding Grounds for Motions for Amended or Additional Findings of Fact and Law

The decision of whether to grant or deny a motion to amend or enlarge the findings is within the discretion of the trial court. The federal appellate courts have recognized several grounds for bringing a Rule 52(b) motion, including "manifest error of fact or law" by the trial court, "newly discovered evidence," or "a change in the law." *See National Metal Finishing Co. v. BarclaysAmerican/Commercial, Inc., 899 F.2d 119, 123 (1st Cir. 1990)* ; *Lyons v. Jefferson Bank & Trust, 793 F. Supp. 989, 991 (D. Colo. 1992)* , *aff'd in part, rev'd in part, 994 F.2d 716 (10th Cir. 1993)* ; *United States v. Carolina Eastern Chemical Co., 639 F. Supp. 1420, 1423 (D.S.C. 1986)* .

A party may bring a motion under *Fed. R. Civ. P. 52(b)* "even if the amended or additional findings would effectively reverse the judgment." *Lyons v. Jefferson Bank & Trust, 793 F. Supp. 989, 991 (D. Colo. 1992)* , *aff'd in part, rev'd in part, 994 F.2d 716 (10th Cir. 1993)* . In fact, *Fed. R. Civ. P. 52(b)* contemplates that a Rule 52(b) motion will accompany a motion for a new trial under *Fed. R. Civ. P. 59*.

Moreover, any party may move the court to amend or supplement the findings to correct obvious, manifest errors in the court's findings of fact or conclusions of law. *See National Metal Finishing Co. v. BarclaysAmerican/Commercial, Inc., 899 F.2d 119, 123 (1st Cir. 1990)* . Parties should bear in mind, however, that the trial court may only consider the evidence contained in the record to determine whether to amend the findings on the basis of manifest error. *See United States Gypsum Co. v. Schiavo Bros., Inc., 668 F.2d 172, 180 (3d Cir. 1981)* ; *Fontenot v. Mesa Petroleum Co., 791 F.2d 1207, 1220 (5th Cir. 1986)* ; *Dale & Selby Superette & Deli v. United States Dep't of Agric., 838 F. Supp. 1346, 1348 (D. Minn. 1993)* .

Strategic Point:

Counsel should also consider bringing a Rule 60(b) motion to correct factual errors as well as the application of the law, especially if the 28-day time limit to file a Rule 52 motion has expired. *See Meadows v. Cohen, 409 F.2d 750, 752 n. 4 (5th Cir. 1969)* . A court language allows a court to correct a "clearly erroneous" calculation of damages. *Hiatt v. United States, 910 F.2d 737, 742 (11th Cir. 1990)* ; *Meader v. United States, 881 F.2d 1056, 1060 (11th Cir. 1989)* .

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§ 12.25 Complying With Timing Requirements for Filing Motion for Amended or Additional Findings of Fact and Law

[1] Rule 52(b) Motion Must Be Filed No Later Than 28 Days After Judgment

Fed. R. Civ. P. 52(b) was amended in 2009 to require that motions to amend or add findings after a non-jury trial must be filed not later than 28 days after entry of judgment. The purpose of the amendment was to allow parties sufficient time to prepare a satisfactory post-judgment motion.

Entry of judgment occurs when the clerk makes the necessary notation of the judgment in the official court docket. *See Fed. R. Civ. P. 58(c)*. A judgment becomes effective when it is entered in the civil docket under *Fed. R. Civ. P. 79(a)*.

Warning:

Lack of notice is not an excuse for failing to file a motion within the 28-day period. *See McNeil v. United States, 2006 U.S. Dist. LEXIS 12230, at *4-*5 (W.D. Wash. 2006)* ; *Feinstein v. Moses, 951 F.2d 16, 19 (1st Cir. 1991)* ; *Shults v. Henderson, 110 F.R.D. 102, 105 (W.D.N.Y. 1986)* (citing **Moore's**). Furthermore, a party cannot rely upon *Fed. R. Civ. P. 6(e)* which allows an extra three days for filing in certain situations. *See FHC Equities, L.L.C. v. MBL Life Assur. Corp., 188 F.3d 678 (6th Cir. 1999)* ; *see also § 1.14[1] above*.

[2] Court May Not Extend 28-Day Period for Filing Rule 52(b) Motion

Parties should take note that the district court does not have the discretion to extend the 28-day period for filing motions to amend or make additional findings. *See Fed. R. Civ. P. 6(b)(2)*. This is because the court's jurisdiction to hear the motion terminates after the statutory period has run. *See, e.g., Gribble v. Harris, 625 F.2d 1173, 1174 (5th Cir. 1980)* ; *Cange v. Stotler & Co., 913 F.2d 1204, 1212 (7th Cir. 1990)* .

[3] Bringing Rule 60(b) Motion to Correct Errors in Lieu of Rule 52 Motion

A trial judge does have the discretion, however, to consider an untimely Rule 52 motion to amend factual findings as a Rule 60(b) motion for relief from a judgment to correct clerical errors. *Fed. R. Civ. P. 60* permits correction of clerical

and other errors made by district judges, including errors of both law and fact. *See Nisson v. Lundy, 975 F.2d 802, 806 (11th Cir. 1992)* (defendant's motion for modification of damages award, that was untimely under Rule 52(b), treated by trial judge as Rule 60(b) motion).

Although *Fed. R. Civ. P. 60* does not provide a specific time limit for correcting clerical errors, a party must bring a Rule 60(b) motion "within a reasonable time." *See Fed. R. Civ. P. 60(c)(1)*. However, a party seeking to correct errors made by mistake, inadvertence, newly discovered evidence, or fraud, must file a Rule 60(b) motion within one year after entry of the judgment. *See Oliver v. Home Indem. Co., 470 F.2d 329, 330 (5th Cir. 1972)* ; *Glass v. Seaboard C. L. R. Co., 714 F.2d 1107, 1109 (11th Cir. 1983)* ; *Butler v. Pearson, 636 F.2d 526, 529 (D.C. Cir. 1980)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 52.01 -52.63*.
- *Federal Litigation Guide PP 44.20 -44.26*,
- *Bender's Federal Practice Forms* Form Nos. 52:1-52:62.
- *Fed. R. Civ. P. 6(b)(2)* (extensions of time).
- *Fed. R. Civ. P. 48* (entry of judgments).
- *Fed. R. Civ. P. 52* (motion for additional findings of fact or law).
- *Fed. R. Civ. P. 59(e)* (motion for new trial).
- *Fed. R. Civ. P. 60* (relief from judgment).

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1-12 Moore's AnswerGuide: Fed Civil Motion Practice § 12.26

§ 12.26 Moving to Amend Pleadings to Conform to Evidence After Trial; Initial Considerations

Fed. R. Civ. P. 15(b) provides the guidelines and standard for motions to amend a pleading during and after judgment. Pursuant to *Fed. R. Civ. P. 15*, a party may move to conform the pleadings to the evidence at any time, even after judgment. *See Data Gen. Corp. v. Grumman Sys. Support Corp., 825 F. Supp. 340, 345 (D. Mass. 1993)* ; *Baker v. John Morrell & Co., 382 F.3d 816, 830-831 (8th Cir. 2004)* ; *Galindo v. Stoody Co., 793 F.2d 1502, 1513 (9th Cir. 1986)* . For a discussion of motions to amend the pleadings to conform to the evidence during the trial, *see § 11.64 above*.

Fed. R. Civ. P. 15(b) is designed to insure that the determination of claims is made on their merits rather than on procedural technicalities. *See Jimenez v. Tuna Vessel "Granada", 652 F.2d 415, 420 (5th Cir. 1981)* . The primary purpose of *Fed. R. Civ. P. 15(b)* is to avoid the necessity of new trials. *Falls Industries, Inc. v. Consolidated Chemical Industries, Inc., 258 F.2d 277, 285-286 (5th Cir. 1958)* (citing **Moore's**).

The appellate courts have repeatedly followed a liberal course in allowing amendments. *See Mineral Industries & Heavy Constr. Group v. Occupational Safety and Health Review Com., 639 F.2d 1289 (5th Cir. 1981)* (quoting *United States v. Stephen Bros. Line, 384 F.2d 118 (5th Cir. 1967)* ; *Cotton Bros. Baking Co., Inc. v. Industrial Risk Insurers, 690 F. Supp. 1541, 1548 (W.D. La. 1988)* .

Parties should keep in mind that *Fed. R. Civ. P. 15(b)(2)* is mandatory and not permissive, and issues tried but not raised in pleadings must be treated as if pleaded. *See Commerzanstalt v. Telewide Sys., 880 F.2d 642, 646 (2d Cir. 1989)* .

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1-12 Moore's AnswerGuide: Fed Civil Motion Practice § 12.27

§ 12.27 Scope of Motions to Amend Pleadings to Conform to the Proof After Trial

A party is not required to amend the pleadings in order to request that the court treat the issues as if they were raised in the pleadings. The last sentence of *Fed. R. Civ. P. 15(b)(2)* specifically states that a party's failure to amend does not affect the result of the trial of the unpleaded issues. *See Torry v. Northrop Grumman Corp., 399 F.3d 876, 878 (7th Cir. 2005)* ; *Madeja v. Olympic Packers, LLC, 310 F.3d 628, 636 (9th Cir. 2002)* .

An amendment to conform to the pleadings will result in having the pleadings mirror the actual issues tried in the case and will clarify the record for an appeal or in determining the preclusive effects to be given to the judgment based upon later claims of *res judicata* or collateral estoppel. Therefore, courts should be liberal in allowing amendments to the pleadings to conform them to the evidence, such as adding a plaintiff at the close of the evidence on damages. *See Commerzanstalt v. Telewide Sys., 880 F.2d 642, 646 (2d Cir. 1989)* .

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§ 12.28 Court May Consider Whether Opposing Party Consented to Introduction of Evidence

In determining whether to allow amendments to conform to the evidence, a court should first consider whether the opposing party consented, whether expressly or impliedly, to the introduction of evidence on the unpleaded issue or issues. Express consent, when it exists, is comparatively easy to identify. It may be found when a party has stipulated to the trial of an unpleaded issue or issues, or when an unpleaded issue or issues are listed as the issues set for trial in a pretrial order. *See Studiengesellschaft Kohle, m.b.H. v. Shell Oil Co., 112 F.3d 1561, 1566 (Fed. Cir. 1997)* (citing **Moore's**).

Implied consent may arise in two situations. First, the unpleaded issues may be found in the record or another pleading or document such as a response to a motion for summary judgment or a pretrial or trial memorandum. Some courts will look beyond the pretrial order entered in the case to determine the issues or will even consider the discovery conducted in the case to determine whether the objector should have known that the issue would have been raised at the trial. *See Hardin v. Manitowoc-Forsythe Corp., 691 F.2d 449, 457 (10th Cir. 1982)* (trial court allowed instructions apportioning fault to third parties). Second, consent may be implied if during the trial the party acquiesces or fails to object to the introduction of evidence that relates only to that issue. *See McLaurin v. Prater, 30 F.3d 982, 986 (8th Cir. 1994)* . Furthermore, implied consent is found where the parties recognized that the issue entered the case at trial and acquiesced in the introduction of evidence on that issue without objection. *See, e.g., Ellis v. Arkansas La. Gas Co., 609 F.2d 436, 439-440 (10th Cir. 1979)* .

Fed. R. Civ. P. 15(b) requires that the objection must be on the ground that the evidence is not within the issues raised by the pleadings. *Monod v. Futura, Inc., 415 F.2d 1170, 1174 (10th Cir. 1969)* . Because the purpose of *Fed. R. Civ. P. 15* is to bring the pleadings in line with the issues actually tried, it does not permit an amendment to include collateral issues that may find incidental support in the record. *See Ellis v. Arkansas La. Gas Co., 609 F.2d 436, 440 (10th Cir. 1979)* . Consent will, however, be found when the party opposing the amendment himself produces evidence on the new issue. *See Hicks v. United States, 486 F.2d 325, 329 (10th Cir. 1973)* . Whether the issue was tried by consent is a matter within the sound discretion of the trial court whose judgment will only be reversed for an abuse of discretion. *See Ellis v. Arkansas La. Gas Co., 609 F.2d 436 (10th Cir. 1979)* .

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§ 12.29 Opposing Party Bears Burden of Showing Prejudice

Even if a party refuses to consent and objects to the introduction of the evidence, *Fed. R. Civ. P. 15(b)(1)* specifically states "the court should freely permit an amendment when doing so will aid in presenting the merits..." The rule also provides in the conjunctive the phrase "and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits." This phrase has been interpreted to mean that the burden of proof of prejudice lies squarely with the objector. *See Cotton Bros. Baking Co. v. Industrial Risk Insurers, 690 F. Supp. 1541, 1548 (W.D. La. 1988)* ; *Green Country Food Mkt., Inc. v. Bottling Group, LLC, 371 F.3d 1275, 1280-1281 (10th Cir. 2004)* .

The appellate courts define prejudice as "whether [the party] had a fair opportunity to defend and whether [the party] could offer any additional evidence if the case were to be retried on a different theory." *See Royal American Managers, Inc. v. IRC Holding Corp., 885 F.2d 1011, 1017 (2d Cir. 1989)* ; *Browning Debenture Holders' Comm. v. DASA Corp., 560 F.2d 1078, 1086 (2d Cir. 1977)* (citing **Moore's**). The bare allegation of prejudice will not suffice. *See Crossland v. Canteen Corp., 711 F.2d 714 (5th Cir. 1983)* .

Unlike the other Circuits, the Eighth Circuit has taken an extremely liberal approach in allowing post-trial amendments. In *Baker v. John Morrell & Co., 382 F.3d 816, 830-831 (8th Cir. 2004)* , the court upheld a post-trial amendment adding claims under a state civil rights statute that paralleled the federal civil rights claims that were litigated, which allowed the plaintiff to avoid a damages cap under the federal statute. The Eighth Circuit relied upon the fact that evidence bearing on both claims and the defenses to those claims overlapped; thus, the standards and proof were the same under both statutes. The Seventh Circuit is more conservative, however, and held in *In re Prescott, 805 F.2d 719, 725 (7th Cir. 1986)* , that the test for implied consent is whether the defendant had a fair opportunity to defend and could have presented additional evidence.

Ultimately, the most important factor the court will consider is whether the opponent had a reasonable opportunity to defend the new issues being introduced. *See Grand Light & Supply Co., v. Honeywell, Inc., 771 F.2d 672, 680 (2d Cir. 1985)* ; *Foraker v. Chaffinch, 501 F.3d 231, 244 (3d Cir. 2007)* (principal consideration is whether opposing party was denied fair opportunity to defend and to offer additional evidence on that different theory); *Trinity Carton Co. v. Falstaff Brewing Corp., 767 F.2d 184, 193 (5th Cir. 1984)* ; *In re Prescott, 805 F.2d 719, 725 (7th Cir. 1986)* (test for implied consent is whether defendant had fair opportunity to defend and could have presented additional evidence).

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) § 15.18.*
- *Bender's Federal Practice Forms* Form Nos. 15:90-15:92.
- *Fed. R. Civ. P. 7(b)(1)* (required content of motion).
- *Fed. R. Civ. P. 15* (amended and supplemental pleadings).

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§ 12.30 Moving to Correct Clerical Oversights and Omissions; Initial Considerations

Fed. R. Civ. P. 60(a) provides the district courts with the authority to correct clerical errors, which are mistakes that arise from an oversight or omission in a judgment, order, or other part of the record. This rule provides the court with a tool to insure that its orders, judgments, and other parts of the record accurately reflect the court's true actions and intent.

A party may not use *Fed. R. Civ. P. 60(a)* to seek reconsideration of substantive legal errors, but rather, it may use *Fed. R. Civ. P. 60(a)* to correct those errors that simply misrepresent the court's original intention. A party may make substantive corrections pursuant to *Fed. R. Civ. P. 60(b)*, *Fed. R. Civ. P. 59*, or *Fed. R. Civ. P. 52*. *See Osterneck v. Ernst & Whinney, 489 U.S. 169, 109 S. Ct. 987, 103 L. Ed. 2d 146 (1989)* ; *Crowe v. Bolduc, 365 F.3d 86, 91-95 (1st Cir. 2004)* .

Another major difference between these rules is the time limitations for filing motions. There is no time limit for bringing a Rule 60(a) motion, but a Rule 60(b) motion must be filed within a reasonable time but not later than one year under some circumstances. Rule 59(e) and Rule 52 motions to alter or amend a judgment or findings of fact or law must be filed not later than 28 days after entry of a judgment.

Fed. R. Civ. P. 60(a) provides relief from a clerical mistake, but that does not mean that the mistake must be committed by the clerk or by the court. The rule may also be used to correct mistakes made by the jury or by a party. *See United States v. Kellogg (In re West Tex. Mktg. Corp)., 12 F.3d 497, 503-504 (5th Cir. 1994)* (mistakes by the parties); *Harcon Barge Co. v. D & G Boat Rentals, Inc., 784 F.2d 665, 668-669 (5th Cir. 1986)* (incorrect damages award due to an erroneous mathematical computation).

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§ 12.31 Checklist for Moving to Correct Clerical Mistakes, Oversights, and Omissions

☐ If moving to correct a clerical mistake, oversight, or omission:

- ○ Is the mistake or omission really clerical in nature? *See §§ 12.32, 12.33 below.*
- ○ Does the mistake or omission affects the court's expressed intent? *See § 12.33[2] below.*
- ○ Can the failure to include prejudgment interest be corrected? *See § 12.34 below.*
- ○ When can a Rule 60(a) motion be filed? *See § 12.35[1] below.*
- ○ When is an order from the appellate court necessary? *See § 12.35[2] below.*
- ○ Does a Rule 60(a) motion restart the running of the time to appeal? *See § 12.35[2] below.*
- ○ Can a Rule 60(a) motion be filed after an appeal? *See § 12.35[3] below.*

☐ **Search by Topic:** Civil Procedure > Judgments > Relief From Judgment > Excusable Neglect & Mistakes

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§ 12.32 Scope of Motion to Correct Clerical Errors Under Rule 60(a)

A mistake is considered clerical if it misrepresents the trial judge's actual intention. *Fed. R. Civ. P. 60(a)* applies when the record indicates that the trial judge intended one thing but as a result of a clerical mistake or oversight, another thing was done. *Fed. R. Civ. P. 60(a)* does not provide relief from substantive errors in judgment. The primary focus is on what that court originally intended. *See United States, IRS v. Craddock (In re Craddock), 149 F.3d 1249, 1254 n.4 (10th Cir. 1998)* .

The basic distinction between clerical mistakes and mistakes that cannot be corrected pursuant to *Fed. R. Civ. P. 60(a)* is that the former consists of "blunders in execution," whereas the latter consists of instances where the court changes its mind, either because of a legal or factual mistake in making its original determination, or because upon second thought, it is has decided to exercise its discretion in a manner different from the way it was exercised in the original determination. *See United States v. Griffin, 782 F.2d 1393, 1397 (7th Cir. 1986)* .

The mistakes that are correctable under *Fed. R. Civ. P. 60(a)* are not limited to errors of commission, i.e., that the court's intention was misstated or stated ambiguously. The language of *Fed. R. Civ. P. 60(a)* expressly states that the court has the power to correct a clerical or other mistake "arising from oversight or omission" as well as mistakes dealing with affirmative misstatements. *Fed. R. Civ. P. 60(a)*; *see Dura-Wood Treating Co. v. Century Forest Indus., 694 F.2d 112, 114 (5th Cir. 1982)* .

Fed. R. Civ. P. 60(a) is not the proper tool for correcting even the most obvious error if the error was what the court intended at the time it made the ruling. *See Warner v. Bay St. Louis, 526 F.2d 1211, 1212 (5th Cir. 1976)* (court overlooked a recent statutory change in the rate of judgment interest). Likewise, when a judgment wholly omits prejudgment interest, the proper tool to amend the judgment to include prejudgment interest is a Rule 59(e) motion to alter or amend the judgment, which has a 10-day filing limitation. *See Osterneck v. Ernst & Whinney, 489 U.S. 169, 175, 109 S. Ct. 987, 103 L. Ed. 2d 146 (1989)* ; *Crowe v. Bolduc, 365 F.3d 86, 91-93 (1st Cir. 2004)* .

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Chapter 12 POST-TRIAL MOTIONS
PART G: MOVING TO CORRECT CLERICAL MISTAKES, OVERSIGHTS, AND OMISSIONS

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§ 12.33 Understanding Grounds for Motion to Correct Clerical Errors, Oversights, or Omissions

[1] Transcription Errors and Mathematical Mistakes Grounds for Rule 60(a) Motion

The most common clerical mistake occurs in transcribing or computing the judgment. Computational errors are another classic example of a mechanical or clerical mistake. A damages award that is incorrect because it is based on an erroneous mathematical computation that does not involve the substantive rights of the parties may be corrected under *Fed. R. Civ. P. 60(a). See, e.g., United States v. Kellogg (In re West Tex. Mktg. Corp., 12 F.3d 497, 502-505 (5th Cir. 1994)* ; *Hale Container Line v. Houston Sea Packing Co., 137 F.3d 1455, 1474 (11th Cir. 1998)* .

Other examples of clerical mistakes that a party could correct by bringing a motion under *Fed. R. Civ. P. 60(a)* include:

1. A clerk inadvertently fills in the blank in a judgment order with the incorrect rate of interest, the legal rather than the intended contract rate of interest. *See United States v. Griffin, 782 F.2d 1393, 1396-1397 (7th Cir. 1986)* ;

2. An inaccurate description of the metes and bounds of property to which an easement applied. *See In re Village by Sea, Inc., 98 B.R. 93, 95 (Bkrtcy. S.D. Fla. 1989)* ;

3. Court fails to include an element of damages included in findings of fact. *See Rutherford v. Harris County, 197 F.3d 173, 190 (5th Cir. 1999)* (district court does not have power under *Fed. R. Civ. P. 60(a)* to amend judgment by adding award of back pay and prejudgment interest, where court had made no findings of fact or conclusions of law concerning those elements of recovery); and

4. Court fails to include post verdict interest. *See Tucker Leasing Capital Corp. v. Farber, 882 F. Supp. 1290, 1294 (E.D.N.Y. 1995)* (New York law provides for automatic entry of post-decision interest, clerk's failure to calculate and include that portion of the prejudgment interest in final judgment is clerical error).

[2] Court May Correct Ambiguities to Clarify Its Intent Pursuant to Rule 60(a)

Under *Fed. R. Civ. P. 60(a)*, a trial judge may also correct an ambiguity in its original order to more clearly reflect its

intent, including the issue as to prejudgment interest. Examples of ambiguous judgments, which a trial court may clarify pursuant to *Fed. R. Civ. P. 60(a)* include:

1. A judgment which includes an award of prejudgment interest "as allowable." *See Pogor v. Makita U.S.A., 135 F.3d 384, 386-388 (6th Cir. 1998)* (court can clarify award pursuant to *Fed. R. Civ. P. 60(a)* by specifying amount of interest awarded because motion to set amount of interest did not seek to alter or amend judgment, but simply asked court to perform ministerial task of inserting omitted particulars of interest); and

2. A judgment is too vague to permit enforcement. *See Robi v. Five Platters, Inc., 918 F.2d 1439, 1445 (9th Cir. 1990)* (court may reword the judgment as necessary to reflect its original intent to cancel all three trademarks).

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§ 12.34 Failing to Award Prejudgment Interest Pursuant to Rule 60(a)

There are many cases dealing with the problem of a court's failure to award prejudgment interest. When there is no indication in the record that the issue of prejudgment interest was discussed or that the court intended to award it to a successful plaintiff, a party may not bring a motion under *Fed. R. Civ. P. 60(a)* to correct the omission of prejudgment interest.

The Supreme Court in *Osterneck v. Ernst & Whinney, 489 U.S. 169, 175-176, 109 S. Ct. 987, 103 L. Ed. 2d 146 (1989)* , held that a post judgment motion for discretionary prejudgment interest was governed by *Fed. R. Civ. P. 59(e)* and in dictum stated the same rule would apply to a motion for mandatory prejudgment interest. Some Circuit Courts have extended the *Osterneck* rule to include "mandatory" pre-judgment interest. *See Crowe v. Bolduc, 365 F.3d 86, 91-93 (1st Cir. 2004)* ; *Capstick v. Allstate Ins. Co., 998 F.2d 810, 813 (10th Cir. 1993)* .

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§ 12.35 Complying With Timing Requirements for Filing Rule 60(a) Motion

[1] Court Is Free to Rule on Rule 60(a) Before an Appeal Is Filed

Fed. R. Civ. P. 60(a) specifically provides that relief from clerical mistakes may be afforded at any time, either on the motion of any party or on the court's own initiative. *See Jones & Guerrero Co. v. Sealift Pacific, 650 F.2d 1072, 1074 (9th Cir. 1981)* . The trial court may correct a clerical mistake whenever one is found in a judgment, order, or other part of the record. *See TDK Elecs. Corp. v. Draiman, 321 F.3d 677, 679-680 (7th Cir. 2003)* (trial court should have fixed clerical errors in the original judgment which came to light in post-judgment enforcement proceedings brought 17 years later).

Fed. R. Civ. P. 60(a) differs from the related provisions of *Fed. R. Civ. P. 60(b)*. Although *Fed. R. Civ. P. 60(b)* authorizes more relief from a judgment on broader grounds than *Fed. R. Civ. P. 60(a)*, it also requires that the moving party must bring a motion as soon as reasonable or within one year from entry of the judgment, under certain circumstances. *Fed. R. Civ. P. 60(a)* permits relief at any time, subject only to the exception that if an appeal is docketed and pending, the moving party must first request leave from the appellate court.

Warning:

The correction of a clerical error under *Fed. R. Civ. P. 60(a)* does not restart the running of the time for appeal, which will be measured from the entry of the original judgment, at least in the absence of a motion for relief under *Fed. R. Civ. P. 60(b)* that is filed no later than 28 days after the judgment is entered. However, if a motion for a *Fed. R. Civ. P. 60(a)* correction is filed within 28 days after the judgment is entered, the time for appeal will not start until the entry of the order disposing of the motion. *See Dudley v. Penn-America Ins. Co., 313 F.3d 662, 664-667 (2d Cir. 2002)* (plain language of *Fed. R. App. P. 4(a)(4)(A)(vi)* includes timely motion under *Fed. R. Civ. P. 60(a)* as one of post-judgment motions that toll time for appeal). If a notice of appeal has already been filed and the court makes a *Fed. R. Civ. P. 60(a)* correction, a new notice of appeal is not required. *See Gillis v. Hoechst Celanese Corp., 4 F.3d 1137, 1139 n.1 (3d Cir. 1993)* .

[2] After Appeal Is Docketed, Rule 60(a) Motion Must Be Filed in Appellate Court

The filing of an appeal does not affect the district court's powers to correct the record under *Fed. R. Civ. P. 60(a)* until the appeal is docketed. An appeal is docketed, or entered onto the docket of the court of appeals, only after the district court clerk transmits the notice of appeal and the district court docket entries. *Fed. R. App. P. 12(a)*.

After the appeal is docketed, and for the remainder of the time that the appeal is pending, the district court may correct clerical errors under *Fed. R. Civ. P. 60(a)* only with the permission of the appellate court. *See Kokomo Tube Co. v. Dayton Equip. Servs. Co., 123 F.3d 616, 623 (7th Cir. 1997)* ; *United States, IRS v. Craddock (In re Craddock), 149 F.3d 1249, 1253-1254 (10th Cir. 1998)* .

[3] Court May Rule on Rule 60(a) Motion After Appeal Has Concluded

The district court may correct a clerical mistake even after an appellate court has decided the case. Although *Fed. R. Civ. P. 60(a)* is silent on this issue, most courts have held that appellate review of a judgment does not preclude subsequent district court action pursuant to *Fed. R. Civ. P. 60(a)* as long as the correction is of the type envisioned by *Fed. R. Civ. P. 60(a)* and the appellate court has not ruled explicitly or implicitly on the issue that is the subject of the correction. *See, e.g., In re Marc Rich & Co. A.G., 739 F.2d 834, 837-838 (2d Cir. 1984)* (citing **Moore's**); *Panama Processes, S.A. v. Cities Service Co., 789 F.2d 991, 993-994 (2d Cir. 1986)* ; *Wallace v. Mulholland, 957 F.2d 333, 335 (7th Cir. 1992)* . However, in dictum, the Fifth Circuit noted that the power of district court to apply *Fed. R. Civ. P. 60(a)* after an appeal depends upon whether the appellate court remanded the case to the district court. *See Dura-Wood Treating Co. v. Century Forest Indus., 694 F.2d 112, 114 n.2 (5th Cir. 1982)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 60.10 -60.13.*
- *Federal Litigation Guide PP 44.60 -44.63.*
- *Bender's Federal Practice Forms* Form Nos. 60:1-60:5.
- *Fed. R. Civ. P. 52* (motion to amend or add findings of fact or law).
- *Fed. R. Civ. P. 59* (motion to alter or amend judgment).
- *Fed. R. Civ. P. 60* (motion to correct errors).
- *Fed. R. App. P. 4(a)(4)(A)(vi)* (time to commence appeal).
- *Fed. R. App. P. 12(a)* (docketing appeal).

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§ 12.36 Moving for Relief From Final Judgment; Initial Considerations

Fed. R. Civ. P. 60(b) authorizes the district court to provide a party with relief from a final judgment based upon specific reasons. *Fed. R. Civ. P. 60(b)* provides the court with the tool to correct several substantive errors in the judgment. The scope of the relief that may be obtained under *Fed. R. Civ. P. 60(b)* is strictly limited, however, and it should not be misused as a substitute for an appeal.

Moreover, a party may obtain relief under *Fed. R. Civ. P. 60(b)* in connection with a motion it has brought pursuant to other Federal Rules. For example, the court may treat an untimely Rule 52(b) motion to amend findings of fact or law as a Rule 60(b) motion if the movant's grounds for seeking amended or additional findings could also be a basis for Rule 60(b) relief. *See Nisson v. Lundy, 975 F.2d 802, 806 (11th Cir. 1992)* (citing **Moore's**).

In addition, both *Fed. R. Civ. P. 60(b)(2)* and *Fed. R. Civ. P. 59(a)* permit a party to seek relief from a judgment on the ground of newly discovered evidence. If the evidence comes to light after the expiration of the 28-day time limit of *Fed. R. Civ. P. 59* but within one year of entry of judgment, the party may seek relief under *Fed. R. Civ. P. 60(b)(2)*.

Furthermore, while *Fed. R. Civ. P. 55(c)* expressly gives the power to a district court to set aside the default of a party, *Fed. R. Civ. P. 55(c)* also states that, if a judgment has been entered as a result of a default, the court may set that judgment aside under *Fed. R. Civ. P. 60(b). Fed. R. Civ. P. 55(c)*; *see also United States v. Di Mucci, 879 F.2d 1488, 1495 (7th Cir. 1989)* ; *Jones v. Phipps, 39 F.3d 158, 162 (7th Cir. 1994)* .

The filing of a timely Rule 60(b) motion does not affect the finality of a judgment or suspend its operation; nor does it toll the running of the time for filing an appeal. Therefore, counsel should be sure consult the Federal Rules as well as local district court rules and individual judge's rules to determine the effect of the filing of a motion on the finality of the judgment and the permissible timeframe for filing an appeal from the judgment.

After a judgment is vacated under *Fed. R. Civ. P. 60(b)*, the court must apply the substantive law as it stands at that time, including any intervening precedents issued after entry of the original judgment. *See Ditto v. McCurdy, 510 F.3d 1070, 1076-1077 (9th Cir. 2007)* .

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§ 12.37 Checklist for Moving for Relief From Final Judgment

☐ If moving for relief from a final judgment:

- ○ Review grounds for a Rule 60(b) motion. *See § 12.38[1] -[6] below.*
- ○ Review factors court should consider for mistakes. *See § 12.38 below.*
- ○ Can the court consider a mistake by the jury? *See § 12.38 below.*
- ○ Can the court reconsider legal errors in a judgment? *See § 12.38[1] below.*
- ○ What will be considered "newly" discovered evidence? *See § 12.38[2] below.*
- ○ Is perjury of a witness sufficient to be fraud on the court? *See § 12.38[3] below.*
- ○ Be sure to comply with timing requirements and filing deadlines, including those set forth in the Federal Rules, district court rules, and individual judge's rules. *See § 12.39[1] -[4] below.*
- ○ Does the filing of a Rule 60(b) motion toll the time to file an appeal? *See § 12.39[2] below.*
- ○ Review options if appeal is already filed. *See § 12.39[3] below.*

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§ 12.38 Understanding Grounds for Rule 60(b) Motions for Relief From Final Judgment

Fed. R. Civ. P. 60(b) lists five specific reasons and one "catch-all" reason authorizing a district court to grant a party relief from a final judgment, including:

1. Mistake, inadvertence, surprise, or excusable neglect;

2. Newly discovered evidence that could not have been discovered in time to move for a new trial;

3. Fraud, misrepresentation, or misconduct by an opposing party;

4. The judgment is void;

5. The judgment has been satisfied, released, discharged, reversed, or vacated; and

6. Any other reason that justifies relief.

[1] Mistake, Inadvertence, Surprise, and Excusable Neglect May Be Grounds for Rule 60(b) Motion

The Supreme Court in *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 388-394, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993)* recognized four factors that the trial court should consider when determining whether or not to grant relief to a party under *Fed. R. Civ. P. 60(b)* due to mistake, inadvertence, surprise, or excusable neglect. The trial court should take account of all relevant circumstances, including: (1) the danger of prejudice to the adverse party; (2) the length of any delay caused by the neglect and its effect on the proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the moving party; and (4) whether the moving party acted in good faith.

The Supreme Court in *Pioneer* also clarified that clients must be held accountable for the acts or omissions of their attorneys and that the proper focus should be on whether the neglect of the moving party and of that party's counsel was excusable.

The only limit that the courts have imposed is that *Fed. R. Civ. P. 60(b)* does not permit relief from an alleged "mistake" of the jury; it can only be used to correct a mistake made by the court or by counsel and not by the jury. *See Branson v. Prins Ins., Inc., 79 F.R.D. 662, 664 (D.S.D. 1978)* (plaintiff could not use *Fed. R. Civ. P. 60* to claim that jury made "mistake" in finding one defendant liable and not another).

A party may move to amend mistakes of fact made by trial judges under *Fed. R. Civ. P. 60(b). See Meadows v. Cohen, 409 F.2d 750, 752 n. 4 (5th Cir. 1969)* . The broad language of *Fed. R. Civ. P. 60(b)* allows a court to correct a "clearly erroneous" calculation of damages. *See, e.g., Hiatt v. United States, 910 F.2d 737, 742 (11th Cir. 1990)* .

Circuit Split:

The circuits are split on the issue of whether a district court may reconsider a legal error it may have made in a judgment. The obvious policy issue is whether the more liberal time requirements of *Fed. R. Civ. P. 60* or the stricter time constraints of *Fed. R. Civ. P. 59* should apply.

The First, Third, and Seventh Circuits have held that legal error may be reviewed only by *Fed. R. Civ. P. 59* motions or by an appeal. *Hoult v. Hoult, 57 F.3d 1, 5 (1st Cir. 1995)* ; *Smith v. Evans, 853 F.2d 155, 156, 158-159 (3d Cir. 1988)* ; *Parke-Chapley Constr. Co. v. Cherrington, 865 F.2d 907, 914-915 & n.7 (7th Cir. 1989)* . The Second, Sixth, Eighth, Ninth, Tenth Circuits have held that *Fed. R. Civ. P. 60(b)(1)* may apply to legal errors when a party brings a *Fed. R. Civ. P. 60(b)(1)* motion within the time for an appeal. *See In re Texlon Corp., 596 F.2d 1092, 1100 (2d Cir. 1979)* ; *Okoro v. Hemingway, 481 F.3d 873, 874 (6th Cir. 2007)* ; *Sanders v. Clemco Industries, 862 F.2d 161, 169 (8th Cir. 1988)* ; *Gila River Ranch, Inc. v. United States, 368 F.2d 354, 357 (9th Cir. 1966)* (citing **Moore's**); *Orner v. Shalala, 30 F.3d 1307, 1309-1310 (10th Cir. 1994)* . The Eleventh Circuit has held that a Rule 60(b)(1) motion based on legal error made after the time for appeal has expired can proceed only if an appeal was timely filed. *See Parks v. U.S. Life & Credit Corp., 677 F.2d 838, 840-841 (11th Cir. 1982)* .

By contrast, the Fourth, Fifth, Ninth and Eleven Circuits have ruled that relief is available for clear and obvious fundamental legal errors. *See Compton v. Alton S.S. Co., 608 F.2d 96, 106 (4th Cir. 1979)* (*Fed. R. Civ. P. 60(b)(6)*is a "catch-all" provision, and a "grand reservoir of equitable power to do justice in a particular case") (citing **Moore's**); *Alvestad v. Monsanto Co., 671 F.2d 908, 912-913 (5th Cir. 1982)* ; *McDowell v. Calderon, 197 F.3d 1253, 1255 n.4 (9th Cir. 1999)* ; *Hiatt v. United States, 910 F.2d 737, 742 (11th Cir. 1990)* .

[2] Newly Discovered Evidence May Be Grounds for Rule 60(b) Motion

Both *Fed. R. Civ. P. 60(b)(2)* and *Fed. R. Civ. P. 59(a)* permit a party to seek relief from a judgment on the ground of newly discovered evidence. If the evidence comes to light after the expiration of the 10-day time limit of *Fed. R. Civ. P. 59* but within one year of entry of judgment, the party may seek relief under *Fed. R. Civ. P. 60(b)(2).*

Fed. R. Civ. P. 59 permits the granting of a new trial and *Fed. R. Civ. P. 60(b)* permits a court to set the judgment aside. The elements under both rules are so similar that courts have noted that parties may cite to *Fed. R. Civ. P. 60(b)(2)* in support of *Fed. R. Civ. P. 59* motions and vice versa. *See Jones v. Aero/Chem Corp., 921 F.2d 875, 878 (9th Cir. 1990)* (citing **Moore's**).

The Eighth Circuit uses a four-element test to determine if the court should consider "newly discovered" evidence: (1) the evidence must have been discovered after the trial; (2) the moving party must have exercised "due diligence" to try to discover the evidence earlier; (3) the newly discovered evidence must be material and not merely cumulative or impeaching; and (4) the evidence must be significant enough that it would probably produce a different result at trial.

Neither post-trial investigations nor post-trial testing will be considered "newly discovered" evidence, if the moving

party know if the existence of the evidence at the time of the trial. *See Rivera v. M/T Fossarina, 840 F.2d 152, 155 (1st Cir. 1988)* ; *Ryan v. United States Lines Co., 303 F.2d 430, 434 (2d Cir. 1962)* . In order for evidence to be "newly discovered," the moving party must have been unaware of the existence of the evidence before or during the trial. *United States v. 72.71 Acres of Land, 23 F.R.D. 635, 638 (D. Md. 1959)* , *aff'd 273 F.2d 416 (4th Cir. 1960)* . Thus, the party that lost at trial seldom can meet the "newly discovered" requirement because all too frequently, counsel knew of the existence of the witness and the substance of the witness' testimony, but thought that the witness was not needed at trial.

A party opposing a *Fed. R. Civ. P. 60(b)(2)* motion should be prepared to attack the moving party's "due diligence." In order to prevail, the moving party must show that the failure to produce the evidence at trial was not caused by the its lack of diligence. *See D. Federico Co. v. New Bedford Redevelopment Authority, 723 F.2d 122, 130 (1st Cir. 1983)* (citing **Moore's**); *Jay Edwards, Inc. v. New England Toyota Distributor, Inc., 708 F.2d 814, 825 (1st Cir. 1983)* .

The most challenging task the moving party faces, however, is convincing the trial court that the importance of the newly discovered evidence is of such magnitude that its production at trial would have likely changed the disposition of the case. *See Anderson v. Cryovac, Inc., 862 F.2d 910, 924 n.10 (1st Cir. 1988)* ; *Farm Credit Bank v. Guidry, 110 F.3d 1147, 1155 (5th Cir. 1997)* , *overruled in part on other grounds, Canfield v. Orso (In re Orso), 283 F.3d 686 (5th Cir. 2002)* ; *Harris v. Owens-Corning Fiberglas Corp., 102 F.3d 1429, 1434 (7th Cir. 1996)* .

[3] Fraud, Misrepresentation, or Misconduct May Be Grounds for Rule 60(b) Motion

Fraud, misrepresentation, or other misleading misconduct by an opposing party is a recognized ground for relief by means of a motion under *Fed. R. Civ. P. 60(b). Fed. R. Civ. P. 60(d)(3)* expressly states that the rule does not limit a district court's inherent power to set aside a judgment that is obtained by "fraud on the court." *See Fed. R. Civ. P. 60(d)(3).*

Fraud on the court is limited to fraud that seriously affects the integrity of the normal process of adjudication such as the obvious cases which would include the bribery of a judge or retaining counsel solely due to relationship with a judge and jury tampering. *Root Refining Co. v. Universal Oil Products Co., 169 F.2d 514, 517, 541 (3d Cir. 1948)* . Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court. *See Kupferman v. Consolidated Research & Mfg. Corp., 459 F.2d 1072 (2d Cir. 1972)* ; *England v. Doyle, 281 F.2d 304, 310 (9th Cir. 1960)* .

The leading case on this issue is *Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 240-244, 64 S. Ct. 997, 88 L. Ed. 1250 (1944)* , in which an attorney for the offending party helped fabricate and present fraudulent evidence. However, it is noteworthy, that the Supreme Court in *Hazel-Atlas* stated that alleged perjury by a witness is insufficient for a finding of "fraud upon the court." *Hazel-Atlas Gkass Co. v. Hartford-Empire Co., 322 U.S. 238, 245, 64 S. Ct. 997, 88 L. Ed. 1250 (1944)* . Subsequent appellate courts have interpreted this statement to mean that the participation of an attorney or other officer of the court in the fraud is either an essential element of fraud on the court or a key factor in finding fraud on the court. *See Demjanjuk v. Petrovsky, 10 F.3d 338, 348 (6th Cir. 1993)* (government attorneys failed to disclose exculpatory information in extradition proceeding); *In re Intermagnetics America, Inc., 926 F.2d 912, 916-917 (9th Cir. 1991)* .

[4] Void Judgment Is Grounds for Rule 60(b) Motion

A judgment must be "void," and not merely voidable, for *Fed. R. Civ. P. 60(b)(4)* to apply. A judgment is void only if the court lacks jurisdiction or the court's actions amount to a usurpation of power constituting a violation of due process. *See Wendt v. Leonard, 431 F.3d 410, 412-413 (4th Cir. 2005)* ; *O'Rourke Bros., Inc. v. Nesbitt Burns, Inc., 201 F.3d 948, 951-953 (7th Cir. 2000)* ; *Kocher v. Dow Chem. Co., 132 F.3d 1225, 1230 (8th Cir. 1997)* .

The courts have recognized a distinction between judgments that are void for lack of "subject-matter" jurisdiction and those that may be void for lack of "personal jurisdiction." Parties may not confer subject-matter jurisdiction upon a federal court, but a party may waive lack of personal jurisdiction by voluntarily submitting to the court's jurisdiction. Thus, a party bringing a Rule 60(b)(4) motion based on a lack of personal jurisdiction must show not only lack of personal jurisdiction, but also that there was no waiver. *See Covington Industries, Inc. v. Resintex A.G., 629 F.2d 730, 732, 734-737 & n.4 (2d Cir. 1980)* .

[5] Satisfaction, Release, or Discharge of Judgment Is Grounds for Rule 60(b) Motion

A motion for relief from a judgment pursuant to *Fed. R. Civ. P. 60(b)(5)* due to satisfaction of, release, or discharge of a judgment is a fairly straightforward proposition and seldom gives rise to disputes. However, problematic issues may arise in cases involving the taxing of payments, such as whether it is proper for a defendant to withhold income taxes from payments made on the judgment and whether a defendant has withheld the correct amount of taxes from payments made on the judgment. *See Redfield v. Insurance Co. of N. Am., 940 F.2d 542, 549 (9th Cir. 1991)* ; *Tungseth v. Mutual of Omaha Ins. Co., 43 F.3d 406, 409 (8th Cir. 1994)* .

[6] "Catch-All" Provision of Rule 60(b) Provides Other Grounds for Relief

A court may grant relief from a final judgment, order, or proceeding, even if the case does not fit into one of the other more specific provisions of *Fed. R. Civ. P. 60(b)* if there is any other reason that justifies relief. *See Klapprott v. United States, 335 U.S. 601, 615, 69 S. Ct. 384, 93 L. Ed. 266 (1949)* . If the reasons offered for relief from judgment could be considered under one of the more specific clauses of *Fed. R. Civ. P. 60(b)(1)-(5)*, the court will not grant relief under *Fed. R. Civ. P. 60(b)(6). See, e.g., Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 393, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993)* ; *Arrieta v. Battaglia, 461 F.3d 861, 864-865 (7th Cir. 2006)* .

The "other reason that justifies relief" propounded by a movant under *Fed. R. Civ. P. 60(b)(6)* must amount to "extraordinary circumstances" in order for the court to grant relief. *See, e.g., Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 863-864, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988)* (judge's failure to recuse himself was, under particular circumstances of case, "extraordinary circumstances").

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§ 12.39 Complying With Time Limitations for Filing Rule 60(b) Motion

[1] Rule 60(b) Motions Must Be Brought Within "Reasonable" Time

A party must file a motion under *Fed. R. Civ. P. 60(b)* "within a reasonable time." This requirement technically applies to motions under *Fed. R. Civ. P. 60(b)(4)*, but because of the unique considerations applicable to void judgments, under some circumstances, a party may file a motion many years after it obtains a judgment and the court will consider it timely. *See Carter v. Fenner, 136 F.3d 1000, 1006 (5th Cir. 1998)* ; *Meadows v. Dominican Republic, 817 F.2d 517, 521 (9th Cir. 1987)* .

What constitutes reasonable time depends upon the facts of each case. The facts the court will consider are: (1) whether the opposing party is prejudiced by the delay; and (2) whether the movant has a good reason for failing to take the action sooner. *See United States v. Holtzman, 762 F.2d 720, 725 (9th Cir. 1985)* ; *Three Boys Music Corp. v. Bolton, 212 F.3d 477, 488-489 (9th Cir. 2000)* (motion filed 14 days after the deadline for post-trial motions denied because newly discovered evidence was known prior to deadline).

[2] One-Year Maximum Filing Time Limit for Rule 60(b)(1), (b)(2), and (b)(3)

Rule 60(b) motions filed on account of "mistake, inadvertence, surprise, or excusable neglect" or "newly discovered evidence," or "fraud, misrepresentation, or misconduct by an opposing party," must be filed within one year of the entry of the judgment in addition to the requirement that the motion be made within a reasonable time. *See, e.g., Ackermann v. United States, 340 U.S. 193, 197, 71 S. Ct. 209, 95 L. Ed. 207 (1950)* . The one-year maximum time limit is, in addition to, not in lieu of, the requirement that the motion be made within a "reasonable" time. *See Sorbo v. UPS, 432 F.3d 1169, 1177-1178 (10th Cir. 2005)* .

Furthermore, the provisions of *Fed. R. Civ. P. 15* regarding relation back of amendments to pleadings have no application to motions for relief under *Fed. R. Civ. P. 60(b)*. A trial court will refuse to consider an amendment to a timely filed motion under *Fed. R. Civ. P. 60(b)(1)-(3)* if the amendment is filed more than a year after entry of the underlying judgment.

Warning:

The filing of a *Fed. R. Civ. P. 60(b)* motion does not toll the time to file an appeal unless it is filed with the 28-day period after the entry of the judgment. *Fed. R. Civ. P. 60(c)(2)*; *Fed. R. App. P. 4(a)(4)(A)(vi)*; *see Stone v. INS, 514 U.S. 386, 401-402, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995)* ; *Browder v. Director, Dep't of Corrections, 434 U.S. 257, 263 n.7, 98 S. Ct. 556, 54 L. Ed. 2d 521 (1978)* (citing **Moore's**).

[3] Appellate Court May Remand Case to District Court to Decide Rule 60(b) Motion

Generally, a timely notice of appeal will divest a district court of jurisdiction over a case. However, an appellate court may remand a case to the district court while an appeal is pending. Although the filing of an appeal deprives a district court of the jurisdiction to grant a Rule 60(b) motion, counsel should not simply wait until the appeal has concluded to seek Rule 60(b) relief because the days that a case is on appeal are counted in determining whether counsel filed its Rule 60(b) motion within a "reasonable" time. *See Nucor Corp. v. Nebraska Pub. Power Dist., 999 F.2d 372, 374 (8th Cir. 1993)* . Furthermore, if counsel delays too long, the absolute one-year time limitation on filing motions based on *Fed. R. Civ. P. 60(b)(1)*, *(2)*, or *(3)* could expire while the case is on appeal because the appeal will not toll the running of this time period.

Accordingly, it is critical for counsel representing a party seeking Rule 60(b) relief to act while an appeal is pending in order to preserve the party's rights, and counsel should therefore consider the following courses of action:

1. Do not file a Rule 60(b) motion and try to raise the issues in the appeal itself. If a party is concerned with matters of law, and the factual matters are fully developed in the district court record already, there may not be a reason to file a Rule 60(b) motion at all.

2. File the motion initially in district court to try to get the district court to either deny the motion or indicate that it is inclined to grant the motion, and if the district court will grant the motion, request remand from the appellate court. Most appellate courts accept this as a proper procedure for bringing Rule 60(b) motions while an appeal is pending, with the exception of the Ninth Circuit, which requires that the motion initially be filed in the appellate court. *See Shepherd v. Int'l Paper Co., 372 F.3d 326, 330-333 (5th Cir. 2004)* ; *Scott v. Younger, 739 F.2d 1464, 1466 (5th Cir. 1983)* .

3. File the motion initially in the appellate court and then request the court to remand the case so that district court may decide the motion; file the motion in the district court only if a remand is granted. Only the Ninth Circuit continues to follow a variant of this procedure. *See Scott v. Younger, 739 F.2d 1464, 1466 (9th Cir. 1984)* .

[4] Party May File Motion for Relief From Void Judgment or Fraud on Court at Any Time

Because a void judgment is a nullity, a party may file a motion under *Fed. R. Civ. P. 60(b)(4)* challenging a judgment as void at any time. *See United States v. Boch Oldsmobile, Inc., 909 F.2d 657, 661 (1st Cir. 1990)* . In rare circumstances, a party's conduct may constitute waiver of the right to challenge a judgment on voidness grounds. *See Trustees of Cent. Laborers' Welfare Fund v. Lowery, 924 F.2d 731, 734 (7th Cir. 1991)* .

Fed. R. Civ. P. 60(b) does not impose a time limit on motions asserting fraud "on the court" except for the "reasonably timely" test. *Bulloch v. United States, 721 F.2d 713, 719 (10th Cir. 1983)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 60.40 -60.48.*

- *Federal Litigation Guide PP 46.01 -46.100*.
- *Benders Federal Practice: Forms*, Form Nos. 60:20-60:43.
- *Fed. R. Civ. P. 6(b)(2)* (extensions of time).
- *Fed. R. Civ. P. 15* (amendments to pleadings).
- *Fed. R. Civ. P. 48* (entry of judgments).
- *Fed. R. Civ. P. 50* (motion for judgment as matter of law).
- *Fed. R. Civ. P. 59* (motion for new trial/alter/amend judgment).
- *Fed. R. Civ. P. 60* (motion for relief form judgment).

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§ 12.40 Moving to Recover Costs and Attorney's Fees; Initial Considerations

Fed. R. Civ. P. 54 provides the guidelines and standard for motions for costs and attorneys fees. The term "costs" as used in *Fed. R. Civ. P. 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. *Fed. R. Civ. P. 54(d)(1)* does not provide any authority for taxing items not specifically permitted by statute.

The discretion granted by *Fed. R. Civ. P. 54(d)* to the trial court is limited by specific congressional commands. The court's sole discretion is the power to decline to tax, as costs, the items enumerated in *28 U.S. C. § 1920*.

The issue of which expenses the court may award as costs incident to the judgment is a procedural issue under *Erie* and its progeny; thus, federal law governs the award of costs in diversity actions, irrespective of contrary state costs provisions. *See Cates v. Sears, Roebuck & Co., 928 F.2d 679, 688-689 (5th Cir. 1991)* (taxation of expert witness fees); *Aceves v. Allstate Ins. Co., 68 F.3d 1160, 1167-1168 (9th Cir. 1995)* (taxation of expert witness fees is issue of trial procedure governed by federal law).

By far the largest expense that a prevailing party must incur are the fees it paid to its attorneys, which are not taxable as "costs" and are generally not recoverable under the American Rule. However, under one of the numerous exceptions to the American Rule, a prevailing party may seek recovery of attorney's fees pursuant to *Fed. R. Civ. P. 54(d)(2)*. The court may also assess costs and attorney's fees against a party's attorney who causes the proceedings to be multiplied unreasonably or vexatiously pursuant to *28 U.S.C. § 1927*, or as a sanction under *Fed. R. Civ. P. 11* or *Fed. R. Civ. P. 37(b)(2)(E)*. *See* §§ *7.02, 7.10-7.14 above*.

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§ 12.41 Checklist for Moving to Recover Costs and Attorney's Fees

☐ If moving to recover costs and attorney's fees:

- ○ Review all applicable procedures for seeking recovery of costs. *See § 12.42 below*.
- ○ Determine which expenses are recoverable as costs. *See § 12.44[1] -[5] below*.
- ○ Be sure to consult local district court rules and individual judge's rules and standing orders to ensure compliance with timing and filing requirements. *See § 12.42[2] below*.
- ○ Determine whether it is necessary to request the court to extend the time file the motion for costs. *See § 12.42[2] below*.
- ○ Consider whether the filing of the motion will toll the time to file an appeal. *See § 12.42[2] below*.
- ○ Determine whether the case falls under one of the exceptions to the American Rule, and thus, attorney's fees are potentially recoverable. *See § 12.46[1] -[2] below*.
- ○ Be sure to file motion seeking costs and attorney's fees in timely fashion. *See § 12.47 below*.

☐ **Search by Topic:** Civil Procedure > Remedies > Costs & Attorney Fees > Costs

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§ 12.42 Complying With Procedural Requirements for Seeking Recovery of Costs and Fees

[1] Objecting to Bill of Costs; Party Must File Motion Within Seven Days of Receipt of Bill

The clerk of court is obligated to prepare the bill of costs and may tax costs on one day's notice. *Fed. R. Civ. P. 54(d)(1)*. Within seven days of receipt of the bill, a party may file and serve a motion for the court to review the costs taxed by the clerk. The opposing party must be given an opportunity to object to the clerk's determination of the costs. *See United States v. Carson, 52 F.3d 1173, 1190 (2d Cir. 1995)* .

Upon review, the district court should determine costs issues de novo. *See Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 233, 85 S. Ct. 411, 13 L. Ed. 2d 248 (1964)* ; *In re Paoli R.R. Yard PCB Litig., 221 F.3d 449, 460-462 (3d Cir. 2000)* (citing **Moore's**).

[2] Local Rules May Establish Timeframe for Filing Motion to Tax Costs

Fed. R. Civ. P. 54(d)(1) does not provide a specific time period for filing a motion to tax costs. Moreover, the appellate courts have held that the 28-day period for filing a motion under *Fed. R. Civ. P. 59* is not applicable to a motion for costs because the latter will not alter or amend the judgment itself. *See Buchanan v. Stanships, Inc., 485 U.S. 265, 268-269, 108 S. Ct. 1130, 99 L. Ed. 2d 289 (1988)* .

The Supreme Court, in *White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 453-454, 102 S. Ct. 1162, 71 L. Ed. 2d 325 (1982)* , noted that local district courts may promulgate rules to provide time limits for filing motions to tax costs. However, upon review, an appellate court may extend the time permitted by a local rule, or may consider a motion untimely because the time limit set forth in a local rule for filing a motion for costs is not jurisdictional. *See S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 60 F.3d 305, 308-309 (7th Cir. 1995)* (motion was not filed until 34 days after judgment); *Hernandez v. George, 793 F.2d 264, 267-268 (10th Cir. 1986)* . Furthermore, a local rule may not limit the time to file a motion for costs under *Fed. R. Civ. P. 68* (Offer of Judgment) or as provided by an applicable state statutory right of recovery of costs. *See S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 60 F.3d 305, 308-309 (7th Cir. 1995)* .

Warning:

The filing of a motion for costs does not toll the time to appeal a judgment on the merits, nor does it invalidate an earlier filed notice of appeal. *See Buchanan v. Stanships, Inc., 485 U.S. 265, 268-269, 108 S. Ct. 1130, 99 L. Ed. 2d 289 (1988)* . Since the costs issue is completely collateral to the merits of a case, the filing of a notice of appeal does not deprive the district court of jurisdiction to tax costs and there is no need to file a second notice of appeal. *See California Union Ins. Co. v. American Diversified Sav. Bank, 948 F.2d 556, 567 (9th Cir. 1991)* ; *Lorenz v. Valley Forge Ins. Co., 23 F.3d 1259, 1260 (7th Cir. 1994)* .

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§ 12.43 "Prevailing Party" May Generally Recover Costs

[1] Prevailing Party Is Presumed to Be Entitled to Costs

Fed. R. Civ. P. 54(d)(1) provides that costs "should be allowed to the prevailing party." The trial court has the discretion to limit or deny otherwise taxable costs to the prevailing party. However, the court should consider that *Fed. R. Civ. P. 54(d)(1)* creates a strong presumption that the prevailing party will recover costs. *See Teague v. Bakker, 35 F.3d 978, 995-996 (4th Cir. 1994)* ; *Salley v. E.I. Du Pont de Nemours & Co., 966 F.2d 1011, 1017 (5th Cir. 1992)* ; *SK Hand Tool Corp. v. Dresser Industries, Inc., 852 F.2d 936, 945 (7th Cir. 1988)* (citing **Moore's**); *Manor Healthcare Corp. v. Lomelo, 929 F.2d 633, 639 (11th Cir. 1991)* .

Because the prevailing party is presumptively entitled to an award of costs, the trial judge may not deny costs to the prevailing party without an explanation. *See Hall v. State Farm Fire & Casualty Co., 937 F.2d 210, 216-217 (5th Cir. 1991)* ; *Krocka v. City of Chicago, 203 F.3d 507, 518-519 (7th Cir. 2000)* .

[2] Limiting or Denying Costs to Prevailing Party

A court may deny or limit costs that it deems unnecessary or unreasonable. *Fed. R. Civ. P. 54(d)(1)* specifically provides that costs may be denied or limited by a court order, as well as by federal statute, or other Federal Rules. Many federal statutes which create a cause of action specifically address the issue of costs, while some prohibit costs against governmental agencies, and still others make the award of costs mandatory.

A court may deny or reduce costs for "equitable" reasons including the indigency of a party and the disparity of wealth between the parties. *See Whitfield v. Scully, 241 F.3d 264, 270 (2d Cir. 2001)* ; *In re Paoli R.R. Yard PCB Litig., 221 F.3d 449, 463-464 (3d Cir. 2000)* (citing **Moore's**); *Cherry v. Champion Int'l Corp., 186 F.3d 442, 446 (4th Cir. 1999)* ; *Rivera v. City of Chicago, 469 F.3d 631, 634-636 (7th Cir. 2006)* ; *Lampkins v. Thompson, 337 F.3d 1009, 1017 (8th Cir. 2003)* ; *Stanley v. University of S. California, 178 F.3d 1069, 1079-1080 (9th Cir. 1999)* .

In exercising its discretion under *Fed. R. Civ. P. 54(d)(1)*, the trial court may even require the prevailing party to pay some or all of the costs of the action, usually as a sanction for misconduct. *See Salley v. E.I. Du Pont de Nemours & Co., 966 F.2d 1011, 1013 (5th Cir. 1992)* ; *In re Paoli R.R. Yard PCB Litig., 221 F.3d 449, 463, 468 (3d Cir. 2000)* ; *Association of Mexican-American Educators v. Cal., 231 F.3d 572, 592-593 (9th Cir. 2000)* . In addition, the court has

the discretion to apportion the award of costs among the parties. *See In re Paoli R.R. Yard PCB Litig., 221 F.3d 449, 468-471 (3d Cir. 2000)* ; *contra*, *Anderson v. Griffin, 397 F.3d 515, 523-524 (7th Cir. 2005)* .

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§ 12.44 Determining Whether "Costs" Are Taxable, and Therefore Recoverable Pursuant to Rule 54(d)

[1] Only "Costs" Taxable Under 28 U.S.C. § 1920 Are Recoverable Pursuant to Rule 54(d)

The Supreme Court, in *Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 441-445, 107 S. Ct. 2494, 96 L. Ed. 2d 385 (1987)* , held that *Fed. R. Civ. P. 54(d)* does not give the trial court the discretion to tax costs as it sees fit, but only to tax those particular expenses that may be taxed under *28 U.S.C. § 1920*.

[2] Fees of Clerk and Marshal Are Recoverable Under Rule 54(d)

The clerk's fees are established by *28 U.S.C. § 1914*, include filing fees and docket fees paid under *28 U.S.C. § 1923*, and are taxable costs that a party may seek to recover under *Fed. R. Civ. P. 54(d)*. Also recoverable as taxable costs are the fees charged by the marshal, as established by *28 U.S.C. § 1921*, for the collection of fees and mileage for the service of process, writs of execution, or other papers, and fees for the seizure, custody, or sale of property.

There is a split of authority, however, as to whether the fees of a private process server may be taxed as costs. *See Roberts v. Homelite Div. of Textron, Inc., 117 F.R.D. 637, 641 (N.D. Ind. 1987)* ; *Alflex Corp. v. Underwriters Labs., Inc., 914 F.2d 175, 178 (9th Cir. 1990)* ; *contra, Crues v. KFC Corp., 768 F.2d 230, 234 (8th Cir. 1985)* .

[3] Deposition and Transcripts of Proceedings Expenses Are Recoverable Under Rule 54(d)

A court may tax costs related to depositions which are "necessarily obtained for use in the case," thereby permitting a prevailing party to seek recovery of these fees. *See 28 U.S.C. § 1920(2)*. If the deposition was actually used in the case, the necessity of taking it is established by that use, whether or not a party offered the deposition into evidence at trial. *See West Wind Africa Line, Ltd. v. Corpus Christi Marine Services Co., 834 F.2d 1232, 1237-1238 (5th Cir. 1988)* .

If the deposition was not actually used by the prevailing party, the issue is more complicated, but most courts will include these costs in the bill if the movant can show that the taking of the deposition appeared to be reasonably necessary at the time it was taken. *See Fogleman v. ARAMCO, 920 F.2d 278, 285 (5th Cir. 1991)* ; *Soler v. Waite, 989 F.2d 251, 254-255 (7th Cir. 1993)* .

Costs associated with depositions that are recoverable under *28 U.S.C. § 1920(2)* include:

1. The fees of the court reporter for any stenographic transcript, the fee paid to the recording officer, and the fee for the original transcript of the deposition. Some courts will allow the videotape or audiotape recording expenses as costs. *See Held v. Held, 137 F.3d 998, 1002 (7th Cir. 1998)* ; *cf. Coats v. Penrod Drilling Corp., 5 F.3d 877, 891 (5th Cir. 1993)* .

2. The attendance fees of witnesses as well as the mileage allowance set by *28 U.S.C. § 1821*. The fees for witnesses as set forth in *28 U.S.C. § 1821*, which include a daily attendance fee, travel expenses, and, in some circumstances, a subsistence allowance, are all properly taxable as costs under *28 U.S.C. § 1920(3)* and *Fed. R. Civ. P. 54(d)(1)*. *See Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 231-232, 85 S. Ct. 411, 13 L. Ed. 2d 248 (1964)* (district court has power to tax travel expenses of witnesses beyond subpoena power of the court including witness from Saudi Arabia); and

3. The expenses of copying a deposition may be taxed as costs only if the copies were "necessarily obtained for use in the case" under *28 U.S.C. § 1920(4)*.

[4] Fees of Court-Appointed Experts or Interpreters Are Recoverable Under Rule 54(d)

28 U.S.C. § 1920(6) authorizes the district courts to award costs for the fees of court-appointed experts or interpreters. Parties should bear in mind that an award of costs for a court-appointed expert is not subject to the statutory cap that is applicable to an expert witness retained by a party.

[5] Defendant's Costs Under Rule 68 (Offer of Judgment) Are Recoverable Under Rule 54(d)

Pursuant to *Fed. R. Civ. P. 68*, if the defendant makes an offer of judgment and the plaintiff rejects the offer and subsequently recovers a judgment that is "not more favorable than the unaccepted offer," the plaintiff must pay the costs incurred by the defendant following the offer. *Fed. R. Civ. P. 68(d)*. Moreover, the Supreme Court in *Marek v. Chesny, 473 U.S. 1, 9-10, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1985)* ruled that a civil rights plaintiff whose recovery is less than the offer it received from the defendant pursuant to *Fed. R. Civ. P. 68* is not entitled to post-offer attorney's fees because attorney's fees under *42 U.S.C. § 1988* are part of "costs" under *Fed. R. Civ. P. 68*.

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§ 12.45 Recovery of Attorney's Fees Generally Prohibited by "American Rule"

Under the "American Rule," the loser of a claim is not required to pay its opponent's attorney's fees. The Supreme Court in *Alyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 240, 255, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975)* , held that, with the exception of specific statutory authorization of attorney's fee awards, the American Rule limits an award of attorney's fees to the nominal amounts expressly provided for in the Judicial Code, *28 U.S.C. § 1923(a)*.

Fed. R. Civ. P. 54(d)(2)(D) specifically authorizes district courts to "establish special procedures by which issues relating to such fees may be resolved without extensive evidentiary hearings." Thus, many district courts have promulgated local rules addressing requests for attorney's fees, such as a rule requiring submissions by affidavit, or a rule providing for the issuance of proposed findings of fact by the court, which would become binding on the parties if not objected to within a specified period of time. For this reasons, a prevailing party should be especially careful to consult local district court rules and individual judge's rules before making a request for attorney's fees.

Courts can and frequently do assign the question of whether a particular request for attorney's fees is reasonable to a magistrate judge or to a master under *Fed. R. Civ. P. 53*. The normal preconditions for appointment of a master as set out in *Fed. R. Civ. P. 53(a)(1)* do not apply to the appointment of a master to hear and resolve the question of a proper award of attorney's fees. *See Fed. R. Civ. P. 54(d)(2)(D)*.

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§ 12.46 Common Exceptions to "American Rule" That Permit Recovery of Attorney's Fees

[1] Attorney's Fees Expressly Authorized by Contract Are Recoverable

The right to recover attorney's fees can be the subject of a contract; however, the enforceability of a fee-shifting agreement between parties is a matter to be resolved under state law, even if the jurisdictional basis of the action is a federal question and not diversity of citizenship. *See Travelers Cas. & Sur. Co. of Am. v. PG&E, 549 U.S. 443, 127 S. Ct. 1199, 167 L. Ed. 2d 178, 185-186 (2007)* .

[2] Attorney's Fees Placed in "Common Fund" Are Recoverable

The most common equitable exception to the American Rule is the common fund exception, which permits prevailing parties to recover attorney's fees from a fund created, enhanced, or otherwise affected by the litigation. In determining whether to award attorney's fees pursuant to the common fund exception, the court will generally consider the following factors:

1. Whether the fund created benefits for the prevailing party and other beneficiaries who are not named parties to the action; and

2. Whether a fee award against the fund would serve to spread the cost of the litigation among all the beneficiaries.

Although they may seek to recover fees under the common fund exception, prevailing parties in class action cases generally bring claims for attorney's fees under the statutory exception which expressly authorizes recovery of attorney's fees and costs from their opponent. *See Dennis v. Higgins, 498 U.S. 439, 442, 111 S. Ct. 865, 113 L. Ed. 2d 969 (1991)* .

Timing:
If seeking an award of attorney's fees under the common fund exception, a party must file a motion no later than 14 days after entry of judgment as provided in *Fed. R. Civ. P. 54(d)(2)(B)(i)*.

[3] Awarding Costs and Attorney's Fees as Sanctions Against Opposing Counsel

Parties should be aware that the court may also assess costs and attorney's fees against a party's counsel who causes the proceedings to be multiplied unreasonably or vexatiously, *28 U.S.C. § 1927*, or as a sanction under *Fed. R. Civ. P. 11* or *Fed. R. Civ. P. 37(b)(2)(E)*. *See* §§ *7.02-7.06*, *7.10-7.14 above*.

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§ 12.47 Complying With Timing Requirements for Filing Motion Requesting Costs or Fees

[1] Filing and Serving Motion Requesting Fees Within 14 Days of Judgment

As a general rule, a party should file and serve a motion requesting attorney's fees no later than 14 days after entry of a final judgment, unless a statute or a court order provides otherwise. *See Fed. R. Civ. P. 54(d)(2)(B)(i)*. However, the 14-day period does not begin to toll until resolution of post-judgment motions because a timely post-judgment motion negates finality of judgment. *See Shalala v. Schaefer, 509 U.S. 292, 295-297, 113 S. Ct. 2625, 125 L. Ed. 2d 239 (1993)* ; *Weyant v. Okst, 198 F.3d 311, 315-316 (2d Cir. 1999)* ; *Bailey v. County of Riverside, 414 F.3d 1023, 1025 (9th Cir. 2005)* ; *Members First Fed. Credit Union v. Members First Credit Union, 244 F.3d 806, 807 (11th Cir. 2001)* .

Exception:

A claim for attorney's fees as sanctions for violating of any of the Federal Rules of Civil Procedure, or a claim for attorney's fees under *28 U.S.C. § 1927* (counsel's liability for excessive costs), are not subject to the provisions of *Fed. R. Civ. P. 54(d)(2)*, including the 14-day filing period. *Fed. R. Civ. P. 54(d)(2)(E)*.

[2] Local Rules or Standing Orders May Provide Different Time Requirements for Filing Motion for Fees Under Rule 54

Counsel should be sure to consult local district court rules and standing orders which may set forth a specific timeframe for the filing of a motion for fees. Although *Fed. R. Civ. P. 54(d)(2)(B)* does not expressly state that a local rule may provide a different time period for fee motions, a local rule adopted after the promulgation of *Fed. R. Civ. P. 54(d)(2)* in 1993 constitutes a court order that supersedes the provisions of *Fed. R. Civ. P. 54(d)(2)*. *See Johnson v. Lafayette Fire Fighters Ass'n Local 472, 51 F.3d 726, 728-730 (7th Cir. 1995)* . The *Johnson* decision was based upon the reasoning that local rules are effectively standing "orders of the court" referred to in *Fed. R. Civ. P. 54* because local rules require the vote of a majority of the district's judges.

Even if no standing order exists, a party may move the court to enter an order extending the 14 day period for filing a motion under *Fed. R. Civ. P. 54*. Under *Fed. R. Civ. P. 6(b)*, a party should make the request for such an extension within the 14 days provided for filing the original fee motion. *See § 1.14 above*. It is possible that a court would not

grant an extension filed after that time unless it finds excusable neglect. *See Fed. R. Civ. P. 6(b)*; *Tancredi v. Metro. Life Ins. Co., 378 F.3d 220, 226-228 (2d Cir. 2004)* .

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 54.100 -54.191.*
- *Federal Litigation Guide PP 47.01 -47.116.*
- *Benders Federal Practice: Forms,* Form Nos. 54:10-54:47.
- *28 U.S.C. § 1920* (taxation of costs).
- *28 U.S.C. § 1923(a)* (judicial code).
- *28 U.S.C. § 1927* (counsel's liability for excessive costs).
- *42 U.S.C. § 1988* (attorney fees civil rights actions).
- *Fed. R. Civ. P. 6(b)* (extension of time).
- *Fed. R. Civ. P. 48* (entry of judgments).
- *Fed. R. Civ. P. 54* (costs).
- *Fed. R. Civ. P. 68(d)* (offer of judgment).

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Chapter 12 POST-TRIAL MOTIONS
PART J: MOTIONS FOR STAY PENDING POST-TRIAL MOTIONS AND APPEALS

1-12 Moore's AnswerGuide: Fed Civil Motion Practice § 12.48

§ 12.48 Moving for Stay Pending Post-Trial Motions and Appeals; Initial Considerations

Fed. R. Civ. P. 62 provides the guidelines and standard for motions for a stay order pending the court's ruling on post-trial motions or an appeal. *Fed. R. Civ. P. 62* is designed to provide a party with an appropriate period of time to pursue available post-judgment motions or to file an appeal.

Although *Fed. R. Civ. P. 62* provides for an automatic stay to give a party time to file post-trial motions or file an appeal, it does not apply to a final judgment in an action for an injunction.

Moreover, *Fed. R. Civ. P. 62(f)* provides a tool for a judgment debtor to obtain a stay of execution pending post-trial motions to the same extent that the judgment debtor would be entitled to a stay pursuant to state law.

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1-12 Moore's AnswerGuide: Fed Civil Motion Practice § 12.49

§ 12.49 Rule 62(a) Provides 14-Day Automatic Stay

Fed. R. Civ. P. 62(a) states that no action may be taken to execute or enforce a judgment until 14 days have passed after its entry. This rule is designed to provide a party with an appropriate period of time to pursue available post-judgment motions or to file an appeal.

The 14-day stay begins to run from the date of entry of the judgment. *Fed. R. Civ. P. 6(a)(1)* is applicable to counting the 14-day period of the stay, i.e., Saturdays, Sundays, and legal holidays are to be included, and if the last day falls on a Saturday, Sunday, or legal holiday, the period runs until the end of the next day that is not one of those days. *See KRW Sales v. Kristel Corp., 154 F.R.D. 186, 188 (N.D. Ill. 1994)* .

Fed. R. Civ. P. 62 specifically provides that the automatic stay does not apply to: (1) an interlocutory or final judgment in an action for an injunction or a receivership; or (2) a judgment or order that directs an accounting in an action for patent infringement. *See Fed. R. Civ. P. 62(a)(1)*. Cases involving an interlocutory or final judgment in an action for an injunction are specifically covered by *Fed. R. Civ. P. 62(c)* and are discussed in *§ 12.54 below*.

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§ 12.50 Moving for Stay Pursuant to State Law

Fed. R. Civ. P. 62(f) provides a tool for a judgment debtor to obtain a stay of execution pending post-trial motions to the same extent that the judgment debtor would be entitled to a stay pursuant to state law.

Most state statutes automatically stay execution for 30 days after a judgment is final and appealable and do not require governmental entities to post bonds. Whether the appealing party will be required to post a bond is determined by state law. *See Hoban v. Washington Metropolitan Area Transit Auth., 841 F.2d 1157, 1159 (D.C. Cir. 1988)* (citing **Moore's**).

However, the judgment debtor must make a motion in the district court to obtain the stay even if the stay is automatic in state court. *See Whitehead v. Food Max of Miss., Inc., 277 F.3d 791, 793-795 (5th Cir. 2002)* .

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§ 12.51 Granting Stay Pending Certain Post-Trial Motions Pursuant to Rule 62(b)

Fed. R. Civ. P. 62(b) provides the court with the authority to stay the execution of a judgment pending disposition of certain enumerated post-trial motions, including a Rule 50 motion for judgment as a matter of law, or a Rule 52(b) motion to amend the findings or for additional findings, a Rule 59 motion for a new trial or to alter or amend a judgment, or a Rule 60 motion for relief from a judgment. *See Fed. R. Civ. P. 62(b)(1)-(4)*. The decision to grant the stay is within the court's discretion and the court may require the requesting party to provide security pending the outcome of the motion. *See Fed. R. Civ. P. 62(b)*.

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§ 12.52 Granting Stay Pending Appeal Pursuant to Rule 62(d)

Pursuant to *Fed. R. Civ. P. 62(d)*, a party that files an appeal is entitled to an automatic stay of enforcement as a matter of right if a supersedeas bond is filed with the court. The rule does not set a specific time limitation within which the bond must be posted. However, a party should move to have the proposed bond approved during the federal 14-day period of stay or other time period proscribed by state law, because the stay under *Fed. R. Civ. P. 62(d)* does not take effect until the court approves the bond.

A party bringing a Rule 62 motion for stay pending appeal must first be brought in the district court. However, *Fed. R. Civ. P. 8* does provide that the motion may be made directly to the court of appeals when the petitioner can show that application to the district court for the relief sought is not practicable. Also, the petitioner may appeal a decision of the district court denying the relief requested when the district court has denied the application or failed to afford the relief which the applicant requested. *See Fed. R. App. P. 8(a)*.

Warning:

Fed. R. Civ. P. 62 is vague as to the amount or other qualities of a supersedeas bond that will be necessary to obtain court approval. Thus, counsel should be sure to consult the local rules and individual judge's rules because many courts do have specific local rules specifying the formula for calculating the exact amount of the supersedeas bond that should be posted. *See, e.g.*, D. Mass. L. R. 62.2 (supersedeas bond must be for full amount of judgment plus 10 percent to cover interest and delay damages, plus a $500 fee to cover estimated costs).

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1-12 Moore's AnswerGuide: Fed Civil Motion Practice § 12.53

§ 12.53 Court May Waive Posting of Bond Pending Appeal

The court may waive the posting of a bond pending appeal, particularly in cases involving a defendant whose financial stability is obvious. *See Arban v. West Publ'g Corp., 345 F.3d 390, 409 (6th Cir. 2003)* . The Seventh Circuit has noted that "an inflexible requirement of a bond would be inappropriate ... where the defendant's ability to pay the judgment is so plain that the cost of the bond would be a waste of money." *Olympia Equipment Leasing Co. v. Western Union Tel. Co., 786 F.2d 794, 796 (7th Cir. 1986)* . Another instance in which the posting of a bond will not be required is when the appealing party is the United States government or an agent of the government.

When determining whether to waive the posting of bond, the district court may look to several criteria enumerated by the Seventh Circuit: (1) the complexity of the collection process; (2) the amount of time required to obtain a judgment after it is affirmed on appeal; (3) the degree of confidence that the district court has in the availability of funds to pay the judgment; (4) whether the defendant's ability to pay the judgment is obvious; and (5) whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position. *See Dillon v. Chicago, 866 F.2d 902, 904-905 (7th Cir. 1989)* .

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1-12 Moore's AnswerGuide: Fed Civil Motion Practice § 12.54

§ 12.54 Suspending, Modifying or Granting Injunctions Pending Appeal

An injunction is exempted from the automatic 14-day stay period. Therefore, a district court judgment involving an injunction is immediately enforceable regardless of whether an appeal is being pursued by the losing party. *See § 5.24 above*.

However, under *Fed. R. Civ. P. 62(c)*, a district court has the power to suspend, modify, restore, or grant an injunction during the pendency of an appeal from an interlocutory or final judgment that grants, dissolves, or denies an injunction. The court, within its discretion, may require the posting of a bond or some other form of security to protect the opposing party's rights. *See Natural Res. Def. Council v. Southwest Marine, Inc., 242 F.3d 1163, 1166 (9th Cir. 2001)* ; *see also § 5.24 above*.

Most of the appellate courts agree that the district court should only take action pursuant to *Fed. R. Civ. P. 62(c)* in an effort to maintain the status quo of the parties pending the outcome of the appeal. *See Coastal Corp. v. Texas Eastern Corp., 869 F.2d 817, 820-821 (5th Cir. 1989)* ; *A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1099 (9th Cir. 2002)* . However, the Third Circuit has been willing to grant relief that alters the status quo if it protects the integrity of the appellate proceedings by ensuring that there will be a controversy for which some form of relief may be granted once the appeal is finally heard. *Ortho Pharmaceutical Corp. v. Amgen, Inc., 887 F.2d 460, 464 (3d Cir. 1989)* .

The courts have outlined a four-part test to determine whether to grant, amend, modify, or suspend an injunction pursuant to *Fed. R. Civ. P. 62(c). See Drummond v. Fulton County Dep't of Family & Children's Services, 532 F.2d 1001, 1002 (5th Cir. 1976)* ; *Grutter v. Bollinger, 247 F.3d 631, 632-633 (6th Cir. 2001)* .

The criteria are identical to those used in determining whether motions for injunctive relief of any nature will be granted. The four factors the petitioner must show are:

1. The likelihood of prevailing on the merits on appeal;

2. The likelihood of suffering irreparable injury if the stay is denied;

3. The other parties involved will not be substantially harmed by the granting of the stay; and

4. The granting of the stay will serve the public interest.

The moving party need only present a substantial case on the merits and show that the balance of equities weighs heavily in favor of granting the stay in order to be successful. *See Wildmon v. Berwick Universal Pictures, 983 F.2d 21, 24 (5th Cir. 1992) ; Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. 1981)* ; *Garcia-Mir v. Meese, 781 F.2d 1450, 1453 (11th Cir. 1986) . See § 5.06 above.*

PRACTICE RESOURCES:

- *Moore's Federal Practice (3d ed.) §§ 62.01 -62.32.*
- *Federal Litigation Guide PP 48.60 -48.61.*
- *Bender's Federal Practice Forms* Form Nos. 62:1-62:70.
- *Fed. R. Civ. P. 6(b)(3)* (calculating time).
- *Fed. R. Civ. P. 48* (entry of judgments).
- *Fed. R. Civ. P. 50* (motion for judgment as matter of law).
- *Fed. R. Civ. P. 52* (motion for additional findings of fact).
- *Fed. R. Civ. P. 59* (motion for hew trial, amend, alter judgment).
- *Fed. R. Civ. P. 60* (motion for relief form judgment).
- *Fed. R. Civ. P. 62* (stay of enforcement).
- *Fed. R. App. P. 8(a)* (stay pending appeal).